THE ARREST POWERS OF THE COMMISSIONER ON IMMIGRATION: SOME COMMENTS ON *HARVEY V. DEFENSOR-SANTIAGO* AND LAW INSTRUCTIONS NO. 39*

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I. Introduction

The legal issues raised before the Supreme Court in *Harvey v. Defensor-Santiago*,[1] particularly with respect to the question of the extent of the authority of the Immigration Commissioner to issue warrants of arrest under the Immigration Act,[2] cannot really be considered as problems of first impression. Jurisprudence on the matter is well developed: there is a long line of cases in which this issue has been passed upon by the Court[3] and, beginning with *Vivo v. Montesa*,[4] its consistent holding has been that the Commissioner has no such authority if the purpose of the warrant is merely for the determination of probable cause leading to an administrative investigation and that such authority is restricted to those instances where the grounds for the expulsion of the alien have been established and a final order of deportation has already been issued by the Board of Commissioners in accordance with the Immigration Act.[5]

As will be presently shown, the facts in *Harvey* do not differ in any material respect from the facts in the previous cases involving the

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[1]162 SCRA 840 (1988). Occasionally, references will be made to the records of the case in the Supreme Court. In such instances, the references will be cited in the following manner: Records, followed by a parenthetical reference to the particular document or pleading cited (e.g., Petition, Respondent's Return Of The Writ (or Return, for brevity), Traverse To The Return Of The Writ (or Traverse), and Respondent's Reply (or Reply)) and the page in which the reference is located in the Record.

[2]Com. Act No. 613 (1940), sec. 37 (a).

[3]*See* discussion *infra*.

[4]24 SCRA 155 (1968); more particularly discussed *infra*.

[5]24 SCRA at 162-163; more particularly discussed *infra*.

same issue. However, *Harvey* was resolved adversely to the petitioners, the Court holding that the doctrine laid down in the previous cases were not controlling in the petition before it.[6] How the Court managed to distinguish *Harvey* from those cases is the subject of the present inquiry.

In this regard, it also becomes necessary to inquire into the appropriateness of the procedure employed by the Commissioner to effect the apprehension and detention of the petitioners. That procedure will be described in some detail below. At this point, it would be important merely to point out that such a procedure conforms with that prescribed in Law Instructions No. 39,[7] the Deportation Rules of Procedure, promulgated by the Commission one week before the Supreme Court promulgated its decision in *Harvey*. It will be shown that the Court's denial of the petition in *Harvey* is practically acquiescence with the procedure prescribed in Law Instructions No. 39, said rules being premised on the same grounds as the respondent Commissioner's defense in the petition. And because the correctness of the Court's conclusions in *Harvey* is here put in question, the validity of the procedure outlined in Law Instructions No. 39 is likewise put in doubt.

A. The Case of Harvey v. Defensor-Santiago

The petitioners were two American citizens and a Dutch national who were apprehended with nineteen other suspected alien pedophiles in the early hours of February 27, 1988. The arresting officers, agents of the Commission, were not armed with either warrants of arrest or search warrants. What they showed the petitioners during the arrests were "mission orders" issued by the Commissioner, dated February 26, 1988.[8] The arresting officers conducted a search of the premises of the petitioners' respective residences, and seized personal properties consisting of rolls of negatives, photographs and posters, and other literature purportedly advertising child prostitution in the Philippines.

The petitioners were brought to the Commission's offices in Intramuros and there detained for investigation. On March 4, 1988, deportation proceedings were commenced against them, the formal charge sheet stating that petitioners, being pedophiles, were inimical

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[6]162 SCRA at 850.

[7]Commission On Immigration And Deportation (CID), Law Instructions No. 39 (1988).

[8]Records (Return) at 80, 114-116. It should be noted that only one of the three mission orders was actually signed by the respondent Commissioner. The two others bore the initials of allegedly duly authorized CID officers. Records (Reply) at 179.

to public morals, public health, and public safety as provided in section 69 of the Revised Administrative Code.[9] On March 7, 1988, the respondent Commissioner issued warrants for the arrest of the petitioners for violations of sections 37, 45, and 46 of the Immigration Act.[10] On that same date, formal proceedings before the Board of Special Inquiry III were commenced against the petitioners.

On April 14, 1988, the petitioners filed a petition for a writ of *habeas corpus*, assailing their arrest and contending substantially that their continued detention was illegal and without basis because:

(1) The arresting officers were not armed with valid warrants of arrest;

(2) Their arrest without warrant was illegal because the same was not based on probable cause but merely on confidential information coupled with the suspicion of the arresting officers and the petitioners' association with other suspected pedophiles; and

(3) The respondent Commissioner is not vested either with the authority to detain the petitioners during the period wherein the existence of probable cause was still being determined for purposes of administrative investigation or to issue a warrant of arrest during the pendency of the investigation.[11]

In effect, the petitioners contended that their arrest and detention were contrary to Article III, section 2 of the Constitution.[12]

The Second Division of the Supreme Court, speaking through Madame Justice Melencio-Herrera, denied the petition. It held that the petitioners' arrests were valid warrantless arrests authorized under the

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[9]162 SCRA at 845. *See* Records (Return) at 118 for a copy of the formal charge sheet against the petitioners.

[10]*See* Records (Return) at 119-121 for copies of the warrants of arrest issued by the respondent.

[11]Records (Petition) at 5-9.

[12]The cited provision reads:

> 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.

1985 Amendments to the Rules on Criminal Procedure,[13] and assuming *arguendo* that the arrests were not valid at their inception, whatever defects which may have attended the same were cured by the following supervening events: the subsequent filing of deportation charges against them on March 4, 1988, the issuance of warrants of arrest against them by the respondent Commissioner on March 7, 1988, the opening of the hearings before the Board of Special Inquiry III on the same date, and the filing by the petitioners of a petition to be released on bail on March 14, 1988.[14]

The Supreme Court also brushed aside the petitioners' reliance on *Vivo v. Montesa*[15] as authority for their contention that their detention was without legal basis. The Court said:

> The ruling in *Vivo v. Montesa* that "the issuance of warrants of arrest by the Commissioner of Immigration, solely for the purposes of investigation and before a final order of deportation is issued, conflicts with paragraph 3, Section 1 of Article III of the Constitution (referring to the 1935 Constitution)" *is not invocable herein.* Respondent Commissioner's Warrant of Arrest issued on March 7, 1988 did not order petitioners to appear and show cause why they should not be deported. They were issued specifically "for violations of Sections 37, 45, and 46 of the Immigration Act and Section 69 of the Revised Administrative Code." Before that, deportation proceedings had been commenced against them as undesirable aliens on 4 March 1988 and the arrest was a step preliminary to their possible deportation.[16]

Citing the case of *Tiu Chun Hai v. Commissioner of Immigration*,[17] the Supreme Court also held that "the requirement of probable cause to be determined by a Judge, does not extend to deportation proceedings."[18]

Before concluding, the Court categorically declared that the denial of the petition in *Harvey* was not a repudiation of their decision in *Qua Chee Gan v. Deportation Board*,[19] which case involved the power of the President of the Philippines to deport undesirable aliens under the 1917 Revised Administrative Code.[20] There, the Supreme Court entertained serious doubts as to whether the arrest of any individual may be ordered by any authority other than a judge if the

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[13]RULES OF COURT, Rule 113, sec. 5.
[14]162 SCRA at 847-848.
[15]24 SCRA 155 (1968).
[16]162 SCRA at 850 (citations omitted)(emphasis supplied).
[17]104 Phil. 949, 953 (1958); more particularly discussed *infra*.
[18]162 SCRA at 851.
[19]9 SCRA 27 (1963); more particularly discussed *infra*.
[20]Sec. 69.

purpose thereof is merely to determine the existence of probable cause preparatory to an administrative investigation.[21] In effect, the Court concluded that, probable cause having been shown to exist, there was already ample authority for the issuance of the warrants of arrest assailed by the petitioners.[22]

The Supreme Court's decision may thus be summarized in this wise:

(1) The petitioners' arrests were valid warrantless arrests authorized under the Rules of Court;

(2) Assuming that petitioners' arrests were invalid at its inception, the same were subsequently validated by the commencement of formal deportation proceedings against them, the issuance by the Commissioner of warrants of arrest against the petitioners, and the petitioners' filing of a petition to be released on bail;

(3) The ruling in *Vivo v. Montesa* is not applicable because the questioned warrants of arrest did not order the petitioners to show cause why they should not be deported, but were issued specifically for violations of the pertinent provisions of the Immigration Act and the Revised Administrative Code;

(4) The requirement of probable cause to be determined by a judge does not extend to deportation proceedings; and

(5) Because there had already been a determination of the existence of probable cause, there was already authority for the Commissioner to issue the assailed warrants of arrest.

It must be emphasized that the Supreme Court, in resolving the petition, appeared to have no intention of deviating from the established rulings, choosing instead to hold that these cases simply did not apply to the petitioners' cause.

B. Law Instructions No. 39

One week before the Supreme Court promulgated its decision in *Harvey*, the Commissioner on Immigration and Deportation issued Law Instructions No. 39, which outlined the procedure for the apprehension, detention, investigation, and deportation of aliens. While the general framework of Law Instructions No. 39 is here outlined, greater stress is

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[21] 9 SCRA at 36.
[22] 162 SCRA at 851.

given to its provisions respecting the arrest of suspected deportable aliens. The primary purpose for here giving the framework of the procedure is to show its similarity to the procedure adopted by the respondent Commissioner in effecting the arrest of the petitioners in *Harvey*.

It is conceded that the Commissioner has authority to promulgate rules and regulations concerning the enforcement of the Immigration Act.[23]

Law Instructions No. 39 provides, *inter alia*, that:

> 5. The Commissioner or any Associate Commissioner may issue a mission order, which authorizes a warrantless arrest of a suspected alien, pursuant to the 1985 Rules on Criminal Procedure, Rule 113, Section 5 (arrest without warrant; when lawful); Section 8 (method of arrest by officer without warrant); Section 11 (right of officer to break into building or enclosure); Section 13 (arrest after escape or rescue). The mission order shall be valid for 10 days from its date.
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> 6. Rule 113, Section 5 authorizes a warrantless arrest when, in the peace officer's presence the person to be arrested "is actually committing" an offense. Any alien who violates any limitation or condition under which he was admitted is "actually comitting an offense."[24]

These provisions seek to empower the Commissioner to order an arrest through the medium of "mission orders" prior to the issuance of a warrant of arrest. These orders are, in effect, orders of warrantless arrests, as expressly provided in the cited sections.

After the arrest, the alien is brought to the Intelligence Division headquarters for records and fingerprint check.[25] A telephone call is made to the alien's consulate, and the consul concerned is informed of the arrest. Thereafter, the team leader of the arresting officers files with the Commissioner a Post Operation Report, which shall specify

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[23]*See* CID Law Instructions No. 39 (1988), par. 1. Com. Act No. 613, sec. 37 (c) provides:

> No alien shall be deported without being informed of the specific grounds for deportation nor without being given a hearing under rules of procedure to be prescribed by the Commissioner of Immigration.

However, it may be argued that the authority of the Commissioner to promulgate rules respecting the enforcement of the Immigration Act is limited only to the enactment of rules of procedure governing formal deportation proceedings and does not extend to rules on the arrest or apprehension of suspected aliens. Nevertheless, for purposes of this paper, the latter authority is also conceded.

[24]CID Law Instructions No. 39 (1988), pars. 5-6.

[25]CID Law Instructions No. 39 (1988), par. 9.

the evidence seized from the alien.[26]

The alien is then subjected either to a "general inquiry" or to custodial interrogation.[27] If the alien is subjected to a "general inquiry," the investigator can take the alien's sworn statement; on the other hand, if he is subjected to custodial interrogation, the alien cannot be compelled to give a sworn statement.[28] During custodial interrogation, the alien has the right to remain silent and to counsel, which rights cannot be waived except in writing and in the presence of counsel.[29] All this time, the alien is kept under detention, during which he is entitled to one phone call each to his lawyer, his family, and his consulate.[30]

Thereafter, the team leader of the arresting officers shall execute an affidavit of arrest, make a file consisting of the mission order, post operation report, the aforesaid affidavit of arrest, and the alien's sworn statement, if any, and submit the said file to the Special Prosecutor's Office.[31] The chief prosecutor then conducts a summary preliminary investigation and, if he resolves to file the case, he then prepares the formal charge sheet and the warrant of arrest for the Commissioner's signature.[32] It must be emphasized that it is only at this point that the warrant of arrest is issued against the alien.

The charge sheet is filed with the executive chairman of the Board of Special Inquiry, who shall then assign the case to any of its three divisions.[33] The Board of Special Inquiry hears the case and receives the evidence of the parties, and then drafts the decision for the approval of the Board of Commissioners, which shall then, by majority vote, issue a decision thereon.[34] At this point, the final order of deportation, if warranted, is issued against the alien.

It is patent from the foregoing that the procedure followed by the respondent Commissioner in arresting and detaining the petitioners in *Harvey* is that which was subsequently promulgated as Law Instructions No. 39. Thus, the Commissioner issued mission orders for the

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[26]CID Law Instructions No. 39 (1988), par. 9. *See* Records (Return) at 81-82, 116-118.

[27]The issuance does not attempt to define what constitutes a "general inquiry" or a custodial interrogation, or to distinguish one from the other.

[28]CID Law Instructions No. 39 (1988), par. 11.

[29]CID Law Instructions No. 39 (1988), pars. 11, 13. *Cf.* CONST. art. III, sec. 12, par. 1.

[30]CID Law Instructions No. 39 (1988), par. 12.

[31]CID Law Instructions No. 39 (1988), par. 14.

[32]CID Law Instructions No. 39 (1988), par. 15.

[33]CID Law Instructions No. 39 (1988), par. 19.

[34]CID Law Instructions No. 39 (1988), pars. 24-25.

"warrantless" arrest of the petitioners on February 26, 1988.[35] These mission orders were executed in the early morning of the following day. The petitioners were brought to the Commission's headquarters and there detained and subjected to general inquiry or custodial interrogation.[36] On the date of the petitioners' arrests, an "After Mission Report" on the arrest of petitioner Van Del Elshout was submitted by the team leader of the arresting officers. On February 29, 1988, the CID agents concerned filed a similar report (denominated an "Operation Report") on the arrest of the petitioners Harvey and Sherman. On March 4, 1988, a formal charge sheet was filed against the petitioners and, three days later, warrants for their arrest were issued by the Commissioner. On the latter date, proceedings before the Special Board of Inquiry began, to be interrupted only by the filing of the *habeas corpus* proceedings before the Supreme Court.[37]

Particularly relevant to the present inquiry is the Court's holding in *Harvey* that the petitioners' arrests were authorized under the Rules on Criminal Procedure. There is then concurrence with the provisions of Law Instructions No. 39 to the effect that since an alien violating the conditions and limitations of his admission into the country is actually committing an offense, he may be arrested without a warrant as under Section 5 of Rule 113 of the Rules of Court. In effect, by denying the petition in *Harvey*, the Supreme Court gave its imprimatur to the procedure adopted by the Commissioner in effecting the arrest of the petitioners - a procedure subsequently promulgated by the Commission as Law Instructions No. 39.[38]

II. The *Harvey* Decision: A Maze of Legal Confusion

In resolving the *Harvey* petition, the Supreme Court made several pronouncements regarding the validity of the petitioners' initial arrests and detention, the applicability of the search and seizure provision of the Constitution to deportation proceedings, and the effect of *Harvey vis-a-vis* other related cases.

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[35]While the mission orders for the arrest of petitioners Harvey and Van Del Elshout were "valid until accomplished" and that for the arrest of petitioner Sherman was "valid for three (3) days" (*see* Records (Return) at 114-116), Law Instructions No. 39, par. 5 now provides that a mission order shall be valid for ten days from its date.

[36]It is not clear from the Record if the petitioners were subjected to a general inquiry or to a custodial interrogation, although it is known that they were investigated. 162 SCRA at 844-845. There is no indication that any sworn statement was taken from the petitioners.

[37]*See* 162 SCRA at 844-846; Records (Petition) at 3-5; Records (Return) at 79-80.

[38]Interestingly, the Commission has taken to making copies of Law Instructions No. 39 available to the public, appending thereto copies of the Supreme Court's decision in *Harvey*.

These pronouncements require serious inquiry and comment and will thus be discussed point by point.

A. The Validity of the Petitioners' Arrest

In *Harvey*, the petitioners' initial arrests were effected not on the strength of warrants of arrests issued either by judicial authority or by the Commissioner, but on the basis of certain "mission orders" issued by the respondent Commissioner. It was the contention of the petitioners that the lack of such a process tainted their arrest and rendered their continued detention illegal.[39]

The Court did not find merit in this contention, holding that:

> The 1985 Rules on Criminal Procedure also provide that an arrest without a warrant may be effected by a peace officer or even a private person (1) when such person has committed, actually committing (*sic*), or is attempting to commit an offense in his presence; and (2) when an offense has, in fact, been committed and he has personal knowledge of facts indicating that the person to be arrested has committed it.
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> In this case, the arrest of petitioners was based on probable cause determined after close surveillance during which period their activities were monitored. The existence of probable cause justified the arrest and the seizure of the photo negatives, photographs and posters without warrant.[40]

The Court concluded that "under those circumstances the CID agents had reasonable grounds to believe that petitioners had committed 'pedophilia'...," thus satisfying the requirements of the rule on warrantless arrests.[41]

It may be seen that in sustaining the legality of the petitioners' arrests, the Court relied entirely on the provisions of paragraphs (a) and (b) of section 5 of Rule 113 of the Rules of Court, as amended in 1985.[42] A sound refutation of these arguments may also be found in the same provisions. A reading of these provisions, as they have been construed by the Supreme Court, will show that mission orders as used by

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[39]Records (Petition) at 5-8; Records (Return) at 80.

[40]162 SCRA at 847-848 (citations omitted).

[41]162 SCRA at 848.

[42]These provisions find its origin in the Provisional Law for the Application of the Penal Code, Rules 27, 28, 29, and 30. See U.S. v. Fortaleza, 12 Phil. 472 (1909) where these provisions were discussed. In 1940, these rules were incorporated into the RULES OF COURT as Rule 109, section 6 and subsequently transposed to section 6 of Rule 113 when the RULES OF COURT were revised in 1964.

the Commissioner in *Harvey* and as subsequently defined in Law Instructions No. 39 are manifestly beyond the contemplation of the rule.

Rule 113, section 5, paragraph (a) provides that a peace officer or a private person may effect a warrantless arrest:

> When in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense.[43]

The antecedents of this particular provision have been scrutinized several times by the Supreme Court, and the phrase "in his presence" has been construed thus:

> An offense is committed in the presence or within the view of an officer, within the meaning of the rule authorizing an arrest without a warrant, when the officer sees the offense, although at a distance, or hears the disturbance created thereby and proceeds at once to the scene thereof; or the offense is continuing, or has not been consummated, at the time the arrest is made.[44]

It has also been said that an arrest under this provision requires probable cause, which was then defined as reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves as to warrant a reasonable man in believing the accused to be guilty.[45]

The acts must be known to the officer at the time of their commission through his sensory perceptions,[46] and American courts have held that knowledge of the commission of the offense may be acquired through any of the arresting officers' senses, including the sense of hearing or smell.[47] An arrest will not be justified where the officer only

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[43]The 1985 revision of this paragraph consisted of the deletion of the phrase "is about to commit an offense" from the 1964 provisions, which was substituted with the present "or is attempting to commit an offense." Said revision was preserved in the 1988 amendments to the RULES ON CRIMINAL PROCEDURE.

[44]U.S. v. Samonte, 16 Phil. 516 (1910) (citations omitted).

[45]U.S. v. Santos, 36 Phil. 853, 855 (1917).

[46]G. JACINTO, COMMENTARIES AND JURISPRUDENCE ON THE REVISED RULES OF COURT: CRIMINAL PROCEDURE 181 (1986) (citing Smith v. Hubbard, 253 Minn. 215, 91 N.W. 2d (1958)).

[47]People v. Bradley, 152 Cal. App. 2d 257, 314 P. 2d 108 (1957); Romans v. State, 178 Md. 588, 16 A. 2d 642 (1940), *cert. denied* 312 U.S. 695, 85 L. ed. 1131, 61 S. Ct. 732 (1941); Matthews v. State, 67 Okla. Crim. 203, 93 P. 2d 549 (1939); Miles v. State, 30 Okla. Crim. 302, 236 P. 57 (1925); State v. Rigsby, 124 W. Va. 344, 20 S.E. 2d 906 (1942); Bass v. State, 182 Md. 496, 35 A. 2d 155 (1943); U.S. v. Sam Chin, 24 F. Supp. 14 (1938); People v. Bock Leung Chew, 142 Cal. App. 2d 400, 298 P. 2d 118 (1956); Pegueno v. State, 85 So. 2d 600 (1956); State v. Duffy, 135 Or. 290, 295 P. 953 (1931); all cited in 5 Am. Jur. 722. *See also* People v. Claudio, 160 SCRA 646 (1988).

had information from other persons which led him to believe that an offense is being committed.[48] In other words, the officer arresting a person who has just committed, is committing, or is about to commit an offense must have personal knowledge of that fact.[49]

Moreover, this rule calls for the immediate exercise of independent judgment on the part of the person perceiving the commission or the attempt at the commission of the offense, i.e., that the person making the arrest "has reasonably sufficient grounds to believe the existence of an act having the characterization of a crime and the same grounds exist to believe that the person sought to be detained participated therein."[50]

It is seriously doubted if the petitioners' initial arrests in *Harvey* may be defended as valid warrantless arrests under this rule as it is above construed.

It is necessary at this point to determine the precise point in time when the arrest may be said to have taken place, that is, whether the arrest took place at the time the mission orders were issued against the petitioners, or at the time when the arresting officers entered the petitioners' respective residences to execute the mission orders. The Rules on Criminal Procedure provide that an arrest "is the taking of a person into custody in order that he may be bound to answer for the commission of an offense."[51] From a reading of this provision, it becomes apparent that the petitioners' arrests took place only after the arresting officers entered the petitioners' residences and executed their mission orders, because it is only at that time that it may be said that there was a "taking" of the persons of the petitioners. It also follows that, at that point, all the requisites for a valid arrest under Rule 113, section 5, paragraph (a) should have already been present, because if it were otherwise, then the arrest of the petitioners could not have been for the

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[48]G. JACINTO, *supra* note 46, at 181 (citing Murphy v. State, 194 Tenn. 698, 254 S.W. 2d 979 (1953)).

[49]People v. Burgos, 144 SCRA 1, 14 (1986) (citing Sayo v. Chief of Police, 80 Phil. 859 (1948)).

[50]4 M. MORAN, COMMENTS ON THE RULES OF COURT 136-137 (1980) (citing People v. Ancheta, 68 Phil 415 (1939) and Lava v. Gonzales, 11 SCRA 650 (1964)).

[51]Rule 113, sec. 1. American courts are more explicit in their definition of an arrest: an arrest is said to require (1) the intention to effect an arrest under a real or pretended authority; (2) an actual or constructive detention of the person to be arrested by a person having present power to control the person arrested; (3) a communication by the arresting officer to the person being arrested of his intention then and there to effect an arrest; and (4) an understanding by the person being arrested that it is the officer's intention then and there to arrest and detain him. Chance v. State, 202 So. 2d 825 (1968).

purpose of having them "answer for the commission of an offense" in accordance with the definition of an arrest.

The facts as recited in the decision preclude any justification of the petitioners' arrests as valid warrantless arrests. There is no pretense that the arresting officers were acting merely on the recitals of the mission orders issued by the respondent Commissioner and, therefore, they could not have exercised independent judgment based on their perceptions of the activities of the petitioners that could have justified the latter's warrantless arrests.[52] In other words, the arresting officers had no reasonable grounds, based on their personal knowledge, to believe that the petitioners had committed, were committing, or were attempting to commit an offense. Neither may it be said that the petitioners were committing acts constituting an offense or an attempt at the commission of an offense in the very presence of the arresting officers, as this phrase has been construed by the Supreme Court.

The Court also held that the fact that the petitioners were found in the company of young boys, some of whom were naked,[53] gave the CID officers reasonable grounds to believe that the petitioners had committed "pedophilia."[54] But these facts were discovered by the arresting officers only *after* they had entered the petitioners' residences and begun to execute the mission orders for the petitioners' arrest. Such logic only admits that the officers had no probable cause to arrest the petitioners until after they had gained entrance into the said residences. The initial intrusion itself remains unjustified, and American courts have held that an officer gaining access to private living quarters under color of his office and of the law which he personifies must have some valid basis in law for the intrusion.[55] There is no reason why the same rule should not apply in this jurisdiction.

Neither may the petitioners' initial arrests be authorized as valid warrantless arrests under the second paragraph of section 5 of Rule 113, which allows a warrantless arrest:

> When an offense had in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it.

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[52]In fact, the mission orders involved in the case are bereft of any indication as to the cause of the petitioners' arrests. All that is contained therein are the names of the petitioners, accompanied by specific instructions directed to the arresting officers, commanding them to apprehend the petitioners and to bring them to the Intelligence Division Headquarters for investigation. Records (Reply) at 114-116.

[53]162 SCRA at 848 (1988).

[54]162 SCRA at 848 (1988).

[55]Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. ed. 436 (1948).

This paragraph is a substantial revision of the counterpart provision in the 1964 Rules, which required merely that an offense be in fact committed and that the person making the arrest has reasonable grounds to believe that the person to be arrested has committed the offense.[56] The 1985 Rules had markedly enhanced the protection of persons against unlawful arrest by doing away with the standard of "reasonable ground to believe that the person to be arrested has committed" the offense as a ground for a warrantless arrest and requiring instead the person effecting a warrantless arrest to have "personal knowledge of facts indicating that the person to be arrested has committed" the offense.[57] The amendment consists of the insertion of the word "just" to qualify the time frame of the commission of the offense and the substitution of the phrase "personal knowledge" for "reasonable grounds" of belief to qualify the state of mind of the person effecting the arrest. Hence, under the old rule, it was possible for the police or private person making the arrest to act on reasonable grounds or suspicion rather than on the stricter standard of probable cause.[58] This is no longer possible as the present rule imposes more rigid standards than did the previous rule.[59]

As with the phrase "in his presence" in the first paragraph of Rule 113, section 5, the phrase "personal knowledge" in the second paragraph of the same Rule has likewise a technical meaning. It has been construed as equivalent to the phrase "facts which (a person) knows of his own knowledge,"[60] that is, "(knowledge) derived from his own perception."[61] The latter phrase has been adopted by the Supreme Court in its 1989 amendments to the Rules on Evidence.[62]

The requirement of "personal knowledge" has been construed by the Supreme Court in this wise:

> In arrests without a warrant under section 6 (b), however, it is not enough that there is reasonable ground to believe that the person to be

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[56]RULES OF COURT (1964), Rule 113, sec. 6 (b).

[57]Bautista, *The 1985 Rules On Criminal Procedure: An Effort At Law Reform*, 35 U.S.T. L. REV. 28 (1985).

[58]F. HERNANDEZ & E. HERNANDEZ, COMMENTARIES AND JURISPRUDENCE ON THE REVISED RULES OF COURT: CRIMINAL PROCEDURE 204 (1969).

[59]*See* 2 F. REGALADO, REMEDIAL LAW COMPENDIUM 265 (1988); J. NOLLEDO, HANDBOOK ON CRIMINAL PROCEDURE 177 (1989).

[60]5 M. MORAN, COMMENTS ON THE RULES OF COURT 135 (1980).

[61]*Cf.* RULES OF COURT (1964), Rule 130, sec. 30.

[62]RULES OF COURT, Rule 130, sec. 36, which provides that:

> A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these rules.

> arrested has committed a crime. A crime must in fact or actually have been committed first. That a crime has actually been committed is an essential precondition. It is not enough to suspect that a crime may have been committed. The fact of the commission of the offense must be undisputed. The test of reasonable ground applies only to the identity of the perpetrator.[63]

As with paragraph (a) of section 5, Rule 113, paragraph (b) of the same section requires "personal knowledge" based on the perceptions of the person effecting the warrantless arrest. As heretofore stated, this element was conspicuously absent at the time the petitioners in *Harvey* were arrested. It cannot be denied that the arresting officers who executed the assailed arrests were not acting on personal knowledge acquired through their perceptions, but merely on the basis of the mission orders issued by the respondent Commissioner.

Furthermore, paragraphs (a) and (b) of section 5, Rule 113 refer to cases when a suspect is caught in *flagrante delicto* or *immediately* thereafter.[64] It is for this reason that the rule requires an immediate arrest upon the perception of the commission or of the attempt at the commission of the offense in the presence of the officer.[65] The general rule is that an officer's power to arrest without a warrant for an offense committed in his presence under paragraph (a) does not extend to past offenses, the power being given in order to maintain the public peace, and it should therefore cease when the offense has already been committed and can no longer be prevented.[66] Of course, a warrantless arrest is permissible when the person to be arrested "has committed" an offense in the presence of the arresting officer, implying that even "past offenses" are subject to warrantless arrests. However, it is reasonable to think that the phrase "has committed" as it is used in paragraph (a) of section 5, Rule 113 refers to a situation where the arresting officer is able to perceive the consummation of the offense and acts immediately to effect the warrantless arrest, and not to a situation where the offense has long been consummated outside of the presence of an arresting officer and the latter simply comes by some information that the person to be arrested was the perpetrator of the offense. It is submitted that the latter case is what Jacinto refers to as "past offenses" not subject to warrantless arrests. The remedy in such an instance would be to secure a warrant of arrest following the regular procedure for its issuance. Hence,

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[63]People v. Burgos, 144 SCRA 1, 15 (1986).

[64]Ilagan v. Enrile, 139 SCRA 349, 366 (1985). Ironically, the *ponente* of this earlier decision was also Madame Justice Melencio-Herrera.

[65]M. MORAN, *supra* note 50, at 135 (citing U.S. v. Samonte, 16 Phil. 516 (1910)).

[66]G. JACINTO, *supra* note 46, at 181 (citing State v. Lewis, 50 Ohio St. 179, 33 N.E. 405 (1893)).

even if the agents of the Commission who executed the mission orders were the same agents who had taken part in the surveillance of the activities of the petitioners, such that it may reasonably be argued that these agents had "personal knowledge" of the fact that the petitioners were committing an offense, still, the authority to effect a warrantless arrest would have already ceased after they had desisted from making the arrest immediately upon their observation of the activities of the petitioners.

These exceptions to the Constitutional requirement of a warrant are recognized because the situations described in section 5 of Rule 113 would make the requirement for the procurement of a warrant absurd.[67] The urgency of the situation precludes resort to the usual means by which warrants of arrest are procured. Where there is no pressing and immediate need to effect an arrest, there can be no deviation from the warrant procedure.[68] The lack of urgency in the *Harvey* case is shown by the fact that the petitioners were allegedly under surveillance for three months by agents of the Commission. The very issuance of the mission orders shows that the Commission could have had resort to judicial intervention in effecting the arrest of the petitioners.[69]

Thus, there can be no basis for the Supreme Court's holding that the arrests of the petitioners in *Harvey* were authorized by the Rules on Criminal Procedure. Jurisprudence, both Philippine and American, as well as the opinions of noted commentators holds that in order for a warrantless arrest to be valid, three requisites must concur:

(1) The perception through organs of sense on the part of the person making the arrest of the fact of the commission or the attempt at the commission of an offense by the person to be arrested;

(2) The exercise of independent judgment on the basis of personal knowledge by the person making the arrest in determining whether an offense has been committed and whether the person to be arrested participated therein; and

(3) An immediate response to the commission or attempt at the commission of the offense necessitated by the urgency of the situation and precluding resort to the warrant procedure prescribed under the

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[67]A. TADIAR, A CRITICAL ANALYSES OF SUPREME COURT DECISIONS ON CRIMINAL PROCEDURE FROM 1983 TO MAY, 1989, at 6 (1989).

[68]People v. Amminudin, 163 SCRA 402 (1988).

[69]*Cf.* People v. Amminudin, 163 SCRA 402, 409 (1988) (the fact that the police had two days within which they could have obtained a warrant of arrest rendered the warrantless arrest illegal).

Constitution.

Not one of these requirements obtain in the factual circumstances of the *Harvey* case. The petitioners had not committed, were not committing, and were not attempting to commit an offense in the presence of either the Immigration Commissioner or the arresting officers at the time of their arrests. Neither the Commissioner nor the arresting officers had personal knowledge of the fact of the commission of any offense by the petitioners. The arresting officers were merely acting on the recitals of the mission orders issued by the Commissioner, making it impossible for them to exercise independent judgment in determining whether an offense has in fact been committed and whether the petitioners had participated therein. The arrest of the petitioners were effected only after three months of surveillance which precludes the contention that exigency justified the deviation from the warrant procedure in the Constitution.

It is for these same reasons that a mission order as defined in Law Instructions No. 39 cannot find justification in the Rules on Criminal Procedure. Under Law Instructions No. 39, the Commissioner of Immigration and Deportation is empowered to issue a mission order although he is not the person who actually perceived the illegal acts of another or the facts from which the illegal acts of the person to be arrested may be inferred. An alien is ordered arrested if in the Commissioner's judgment the former has committed an offense. The arrest by virtue of a mission order is not an immediate response to the commission of an offense. What is more, Law Instructions No. 39 prostitutes the definition of the extent of authority to effect a warrantless arrest by omitting the requirement that the offense be committed "in the presence" of the officer effecting the arrest.[70]

A mission order is really a warrant of arrest issued by the Commissioner on an authority, real or pretended, to determine probable cause. A warrantless arrest, by its very nature, simply cannot be ordered. This is implied from the requirement that the person making the arrest must have perceived the acts constituting an offense and exercised independent judgment in determining whether or not such acts do constitute an offense and that the person to be arrested has in fact participated therein.

Of course, it has been said that the search and seizure clause of the Constitution does not prohibit arrests, searches, and seizures without judicial warrant, but only those that are unreasonable.[71]

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[70]CID Law Instructions No. 39 (1988), pars. 5-6, quoted *infra*.

[71]People v. Kagui Malasugui, 63 Phil. 221, 227 (1936).

However, the Supreme Court has also gone on record to say that the right to make arrests without a warrant is usually regulated by express statutes, and except as authorized by such statutes, an arrest without a warrant is illegal and a statutory construction extending the right to make arrests without a warrant beyond the cases provided by law is derogatory of the right of the people to personal liberty.[72] The right to arrest a person without a warrant is an exception to the general rule and for such arrest to be legal, the conditions under which it is allowed must exist and the methods of making such arrest must be strictly followed.[73] It is for this reason that a statute or rule which allows exceptions to the requirement of warrants of arrest is strictly construed and any exception must clearly fall within the situations when securing a warrant would be absurd or is manifestly unnecessary as provided by the rule, for to extend the application of these exceptions beyond the cases specifically provided by law would be to infringe upon personal liberty and set back a basic right so often violated and so deserving of full protection.[74] Sadly, the Supreme Court has been less than exacting in its inquiry into the validity of the arrests of the petitioners in *Harvey*, choosing to hold the arrests valid under the Rules on Criminal Procedure, particularly the rules allowing arrests without a warrant, without serious examination of the requirements for those exceptions to the warrant procedure to operate. Certainly, the judicial construction given those exceptions does not support the finding of validity of the petitioners' arrest in *Harvey*.

As has been said, mission orders issued by the Commissioner under Law Instructions No. 39 are really warrants of arrest under a different name. They are apparently intended to circumvent the proscription laid down by the Supreme Court in *Vivo v. Montesa* to the effect that the Commissioner may not issue a warrant of arrest unless it is pursuant to a final order of deportation issued by the Board of Commissioners in accordance with the Immigration Act. Ironically, the Commissioner found no need to defend the issuance of these mission orders because the Supreme Court held that the doctrine in *Vivo v. Montesa* is not applicable to *Harvey*. The next inquiry, therefore, is whether or not the Court erred in so refusing to apply *Vivo v. Montesa*.

B. The Legality Of The Petitioners' Detention

The action before the Supreme Court was a petition for *habeas*

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[72]Sayo v. Chief of Police of Manila, 80 Phil. 859 (1948); Resolution on Motion for Reconsideration, 80 Phil. 875, 884-885 (1948) (citing 5 C.J. 395-396, 4 Am. Jur. 17).

[73]J. NOLLEDO, *supra* note 59, at 177.

[74]People v. Burgos, 144 SCRA 1, 14 (1986).

corpus, which is the proper remedy to test the legality of an alien's confinement and proposed expulsion.[75] The Court could have resolved the petition without entertaining the question of whether or not the petitioners' initial arrests were legal. The sole issue in *habeas corpus* proceedings is the legality of the detention,[76] which is independent of the question of the legality of the initial arrest.

The Supreme Court thought that the detention of the petitioners had become legal:

> But even assuming *arguendo* that the arrest of the petitioners was not valid at its inception, the records show that formal deportation charges have been filed against them, as undesirable aliens, on March 4, 1988. Warrants of arrest were issued against them on March 7, 1988 "for violation of Sections 37, 45, and 46 of the Immigration Act and Section 69 of the Administrative Code." A hearing is presently being conducted by a Board of Special Inquiry. The restraint against their persons, therefore, has become legal.[77]

It is clear from the foregoing that the Court's basis for concluding that the detention of the petitioners had become legal is the issuance of warrants of arrest by the Commissioner on March 7, 1988 and the commencement of deportation proceedings against the petitioners. What lends doubt to the Court's conclusion is its reference to cases in which it was held that a detention, admittedly illegal at its inception, becomes valid upon the issuance of a warrant of arrest by a judge.[78] This merely assumes that the Immigration Commissioner, like a judge, may issue warrants of arrest to cause the confinement of aliens being proceeded against in deportation cases and that the effect of the issuance of such warrants in those cases where the detention was initially illegal is to make valid the detention.

That the Immigration Act empowers the Commissioner of Immigration and Deportation to issue warrants of arrest is not disputed. Such a competence is lodged in the office by section 37 (a) thereof:

> The following aliens shall be arrested upon the warrant of the Commissioner of Immigration or of any other officer designated by him for the purpose and deported upon the warrant of the Commissioner of Immigration after a determination by the Board of Commissioners of the existence of the ground for deportation as charged against the alien.

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[75]De Bisschop v. Galang, 8 SCRA 244, 248 (1963).

[76]Abadilla v. Ramos, 156 SCRA 92, 100 (1987).

[77]162 SCRA at 847.

[78]162 SCRA at 847-848 (citing Beltran v. Garcia, 89 SCRA 717 (1979), Matsura v. Director of Prisons, 77 Phil. 1050 (1947)).

This is conceded by the petitioners.[79] They contend, however, in support of their prayer for the issuance of the writ, that such authority of the Commissioner is limited to those instances where a final determination of the existence of the ground for the expulsion of the alien has been made by the Board of Commissioners.[80] They cite the 1968 decision in *Vivo v. Montesa* as authority for their contention.

As noted earlier, the Supreme Court held that *Vivo v. Montesa* was not invocable in the *Harvey* case. The Court pointed out that the warrant issued by the Commissioner in the latter case did not direct the petitioners to show cause why they should not be deported; rather, it charged the latter with violations of various provisions of law. It would be important, at this point, to determine the precise ruling in *Vivo v. Montesa.*

1. *The Commissioner's Power to Issue Warrants of Arrest: Established Doctrines*

Vivo v. Montesa, however, was not the first instance that the Supreme Court was confronted with the question of whether or not the requirement of judicial determination of the existence of probable cause for the issuance of a warrant of arrest obtains in deportation proceedings which are admittedly administrative in character.

The first important case in which this question was raised is *Tiu Chun Hai v. Commissioner of Immigration.*[81] The appellees in that case were Chinese citizens who were admitted into the Philippines as temporary visitors. A warrant of arrest was issued against the appellee Tiu Chun Hai on the ground that his permit to stay as temporary visitor had already expired. The warrant explicitly ordered the appellee to show cause why he should not be deported under the provisions of the Immigration Act. In the proceedings in the lower court, the appellee contended that his continued detention was illegal on the ground that no deportation proceedings had as yet been instituted against him nor any investigation been conducted to show why he should be deported.[82] The lower court granted the writ prayed for by the appellee.

The Supreme Court reversed the trial court's judgment. Speaking through Mr. Justice Labrador, the Court said that the trial court erred in holding that the appellee's detention without charges having been filed with judicial authorities is illegal and that a warrant of arrest

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[79]Records (Petition) at 7-8.
[80]Records (Petition) at 7; Records (Traverse) at 155-163.
[81]104 Phil. 949 (1958).
[82]104 Phil. at 951.

issued by a judge is necessary to justify the continued detention of the appellee. It ruled that:

> Proceedings for the deportation of aliens are not criminal proceedings, and neither do they follow the rules established in criminal proceedings. Deportation proceedings are summary in nature and the proceedings prescribed in criminal cases for the protection of an accused are not present or followed in deportation proceedings.[83]

In other words, because deportation proceedings are administrative rather than criminal in nature, judicial intervention, in the form of court determination of probable cause and the subsequent issuance of a warrant of arrest by the judge, is unnecessary to validly cause the detention of an alien suspected of having violated the conditions of his stay in the country.

In holding that deportation proceedings are not criminal proceedings and that deportation is not a penalty as the word is understood in criminal statutes, the Supreme Court did no more than apply existing jurisprudence. In *U.S. v. Yap Kin Co*,[84] the Supreme Court had occasion to state that deportation proceedings are in no sense a trial of a crime, but simply the ascertainment of whether, under the existing law, an alien of a particular class might remain in the country; and that an order of deportation is not a punishment for a crime.[85] In *U.S. v. De los Santos*,[86] the Philippine Supreme Court, on appeal from deportation proceedings, refused to sustain an objection to the form of the complaint for the reason that no objection was made at the proper time during trial and because deportation proceedings were not criminal in nature; further holding that the defect in the form of the complaint did not amount to a deprivation of life, liberty, or property without due process of law.[87] In *Molden v. Collector of Customs*,[88] the Court refused to issue the writ of *habeas corpus* prayed for by the appellant because, even if the original administrative warrant issued against the appellant was not in the form prescribed by law, the proceedings against him were administrative in character and strict compliance with the requirements of criminal procedure was not called for.[89] In *Chua Go v. Collector of Customs*,[90] the Supreme Court held that the fact that the appellant was

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[83] 104 Phil. at 953 (citing Lao Tang Bun v. Fabre, 81 Phil. 682 (1948) and Ong Se Lun v. Board of Immigration Commissioners, 95 Phil. 785 (1954)).

[84] 22 Phil. 340 (1912).

[85] 22 Phil. at 342.

[86] 33 Phil. 397 (1916).

[87] 33 Phil. at 400.

[88] 34 Phil. 493 (1916).

[89] 34 Phil. at 493.

[90] 59 Phil. 523 (1934).

not informed of his right to be assisted by counsel and that the testimony of the principal witness against him was taken behind his back (thus depriving him of the opportunity to cross-examine the said witness) was immaterial, as these rights are recognized only in criminal proceedings.[91]

Tiu Chun Hai, however, was the first case wherein the Supreme Court held that the rule that the existence of probable cause (for the issuance of a warrant of arrest) may only be determined by a judge does not extend to proceedings of an administrative character. This ruling lost much of its authority when *Qua Chee Gan v. Deportation Board*[92] was decided. The case involved the question of the extent of the power of the President to deport aliens under the Administrative Code.[93] The appellants contended that the grant of such power did not include the power to order the arrest of the suspected alien. The Supreme Court declined to pass upon the specific question of whether the President did possess such a competence. It confined itself merely to a determination of whether or not such authority, if it did exist, may be delegated by the President to the Deportation Board.[94] The Court held that, because the power to determine probable cause involved the exercise of discretion on the part of the person in whom the authority is vested, the power cannot be delegated to another agency.[95] In resolving the petition, the Court also noted, significantly, that:

> (u)nder the express terms of our Constitution, it is, therefore, even doubtful whether the arrest of an individual may be ordered by any authority other than the judge if the purpose is merely to determine the existence of probable cause, leading to an administrative investigation. The Constitution does not distinguish between warrants in a criminal case and administrative warrants in administrative proceedings. And if one suspected of having committed a crime is entitled to a determination of the probable cause against him, by a judge, why should one suspected of a violation of an administrative nature deserve less guarantee? Of course it is different if the order of arrest is issued to carry out a final finding of a violation, either by an executive or legislative officer or agency duly authorized for the purpose, as then the warrant is not that mentioned in the Constitution which is issuable only to carry out a final order of deportation, or to effect compliance of an order of contempt.[96]

The Supreme Court declared illegal the Executive Order[97]

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[91]59 Phil. at 527-528.
[92]9 SCRA 27 (1963).
[93]REV. ADM. CODE (1917), sec. 69.
[94]9 SCRA at 37.
[95]*Id.*
[96]9 SCRA at 36.
[97]Exec. Order No. 398 (1951).

giving the Deportation Board authority to issue a warrant of arrest upon the filing of a complaint against an alien, in effect nullifying the warrant of arrest issued against the appellants.

One month later, the Supreme Court arrived at the same conclusion in *Dalamal v. Deportation Board*.[98] The petitioner there was charged with having committed violations of certain Central Bank rules and regulations. The Deportation Board later issued a warrant of arrest pursuant to the authority granted under Executive Order No. 398, the same Executive Order involved in the *Qua Chee Gan* case. The petitioner assailed the legality of the Executive Order, alleging that it violates the search and seizure clause of the 1935 Constitution. While some members of the Court were of the view that the cited provision in the Charter applied only to criminal proceedings where the judge is the sole arbiter, the majority of the Court felt that the resolution of that question was not necessary to the satisfactory resolution of the case.[99] However, the Court expressly held that the President did have the power to order the arrest of an alien as an incident of his power of deportation, but that this power may not be delegated by him to another agency because of the principle of *delegata potesta non potest delegare*.[100]

It must be emphasized that the Court noted that the President's power to order the arrest of an alien is merely incidental to his power to deport under the Administrative Code and that there is nothing in section 69 of the said Code which directly or indirectly vests such a competence in the President.[101] The Court did not discuss the precise limits of such authority nor the effect of the recognition of that power on its pronouncement in the *Qua Chee Gan* case to the effect that only a judge can order a person's arrest in view of the Constitutional provision vesting the authority to determine probable cause exclusively in judges.[102] Apparently, the Court forgot to make itself clear on this point and the result is that *Qua Chee Gan* remains authority for the proposition that only a judge may issue a warrant if the purpose thereof is merely to determine probable cause leading to an administrative investigation.

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[98]9 SCRA 382 (1963).

[99]9 SCRA at 385.

[100]9 SCRA at 386.

[101]9 SCRA at 384-385.

[102]Qua Chee Gan v. Deportation Board, 9 SCRA 27, 36 (1963). The Court's only reference to the latter case was limited to the holding that because the power to determine probable cause involves discretion on the part of the agency exercising the authority, the same cannot be delegated to another body. Dalamal v. Deportation Board, 9 SCRA 382, 386-387 (1963).

In *Ng Hua To v. Galang,*[103] the appellant questioned the Commissioner of Immigration's authority to effect his arrest, having been threatened with such action upon the Commissioner's finding that the appellant had violated the conditions of his extended stay in the country. It appears that among the conditions respecting the appellant's stay in the Philippines was that the appellant shall not be employed or engaged in any business enterprise incompatible with his status without the written consent of the Commissioner. It was found, after investigation, that the appellant was employed as manager of an iron grill shop. The Commissioner threatened the appellant with arrest if the latter should fail to file a new cash bond, the original bond having been confiscated in favor of the government upon the finding of the violation on the part of the appellant. One of the arguments raised by the latter was that the threatened arrest was without legal basis because the 1935 Constitution vested the authority to issue warrants of arrest solely in a judge and that, therefore, the pertinent provision of the Immigration Act granting such authority to the Commissioner is unconstitutional. The Court brushed aside this contention in a single paragraph:

> [T]he stay of appellant Ng Hua To as temporary visitor is subject to certain contractual stipulations as contained in the cash bond put up by him, among them, that in case of breach the Commissioner may require the commitment of the person in whose favor the bond has been filed. The Commissioner did nothing but to enforce such condition. Such a step is necessary to enable the Commissioner to prepare the ground for his deportation under Section 37 (a) of Commonwealth Act No. 613.[104]

The first case in which the Supreme Court finally elaborated on the extent of the Commissioner's powers to order the arrest of an alien under the Immigration Act is *Lao Alfonso v. Vivo.*[105] In that case, the warrants of arrest issued by the appellant Acting Commissioner of Immigration and Deportation stated that the appellees had gained admission into the country through the use of fraudulently or illegally obtained certificates of registration and ordered the appellees to appear before the Commission and show cause why they should not be deported under the provisions of the Immigration Act.[106] The Court held that the warrants assailed by the appellees were authorized by the pertinent provision of the cited statute:

> Clearly, the above-quoted section 37 (a) speaks of two warrants - one for the arrest and the other for the deportation of the alien. The warrant of

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[103]10 SCRA 411 (1964).
[104]10 SCRA at 415-416.
[105]16 SCRA 510 (1966).
[106]16 SCRA at 512.

> arrest is issued by the Commissioner of Immigration "upon a determination" by the Board of Commissioners of the existence of the ground for deportation as charged against the alien." Note that the concurrence of approval by the Board of Immigration Commissioners is not required for the issuance of a warrant of arrest. For in stating that the Commissioner of Immigration or any officer designated by him may thus issue a warrant, section 37 (a) authorizes the said Commissioner to apprehend undesirable aliens and initiate for their expulsion on any of the grounds enumerated thereunder.[107]

Thus, according to the Supreme Court, the Commissioner is allowed by the Act to issue two warrants of arrest: the first is a warrant to apprehend undesirable aliens, directing them to appear before the Commissioner and to show cause why they should not be deported, and which is issued by the Commissioner independently of any other agency; and the second is a warrant for the deportation of the alien upon the Board of Commissioners' findings that there are valid grounds for the expulsion of the alien in accordance with the provisions of the Immigration Act. The warrant complained of by the appellees in this case as being devoid of any legal basis falls within the first class of warrants of arrest.

The question of the validity of section 37 (a) of the Immigration Act was again before the Court in *Morano v. Vivo*.[108] The appellants' contention in the said case was that, because the Constitution limits to judges the authority to issue warrants of arrest, the legislative delegation of such authority to the Commissioner is violative of the pertinent provision of the Bill of Rights. Said the Court:

> Section 1 (3), Article III of the Constitution, we perceive, does not require judicial intervention in the execution of a *final order of deportation* issued in accordance with law. The constitutional limitation contemplates an order of arrest in the exercise of judicial power as a step preliminary or incidental to prosecution or proceedings for a given offense or *administrative action*, not as a measure indispensable to carry out a valid decision by a competent official, such as a legal order of deportation, issued by the Commissioner of Immigration, in pursuance of valid legislation.[109]

It is clear from the foregoing that the Supreme Court thought that the search and seizure clause of the 1935 Constitution operates in both criminal prosecutions and administrative proceedings, as in the case of deportation proceedings. In effect, the Court in *Morano v. Vivo* adopted the ruling in the *Qua Chee Gan* case that the search and seizure clause is applicable in administrative cases because the Constitution

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[107] 16 SCRA at 515.

[108] 20 SCRA 562 (1967).

[109] 20 SCRA at 568 (emphasis supplied).

does not make any distinction between criminal and administrative actions.[110] (The exception to this rule was held to be orders issued to carry out a final finding of a violation, such as a final order of deportation.) However, several paragraphs later, the Court reiterated its ruling in *Tiu Chun Hai*, holding that the constitutional guarantee in the search and seizure clause does not extend to deportation proceedings.[111] Further, the Court affirmed its ruling in the *Ng Hua To* case, holding that the latter case was directly in point as far as the question of the validity of section 37 (a) of the Immigration Act was concerned.[112] By affirming *Tiu Chun Hai* and *Ng Hua To*, the Court in effect declared that the search and seizure clause of the 1935 Constitution cannot be invoked to assail a warrant of arrest issued by the Commissioner on the ground that only a judge is competent to determine the existence of probable cause for the issuance of a warrant of arrest. The reason for the non-applicability of the said Constitutional limitation is that deportation proceedings are administrative proceedings and, consequently, not subject to the same rigid rules applied in criminal prosecutions.

Thus, the Supreme Court ended up with a confusing conclusion. The patent consequence of this confusion is to make the *Morano* ruling practically useless as authority either for the proposition that the protection against unreasonable searches and seizures is applicable to deportation proceedings or for the converse proposition that such limitation does not operate in administrative actions.[113] And yet, it was *Morano* which finally provided the Supreme Court with the authority it needed to break away from the ruling in *Tiu Chun Hai* - a process which began when it decided *Qua Chee Gan* in 1963. That opportunity came when *Vivo v. Montesa*[114] was raised before the Court.

In *Vivo v. Montesa*, the Commissioner of Immigration issued warrants of arrest against the appellees, stating that the latter had procured their admission into the country by means of false and misleading statements, and directing any Immigration officer to apprehend the appellees and to bring them before the Commissioner for them to show why they should not be deported.[115] The appellees

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[110]However, the Court did not make any express reference to the *Qua Chee Gan* case.

[111]20 SCRA at 569.

[112]20 SCRA at 570.

[113]*See* I. CORTES, PHILIPPINE ADMINISTRATIVE LAW: CASES AND MATERIALS 217-218 (1984) (The Supreme Court's approach to the challenge of constitutionality directed at sec. 37 (a) of the Immigration Law was far from clear in Morano v. Vivo).

[114]24 SCRA 155 (1968).

[115]24 SCRA at 157.

assailed the warrants of arrest in a petition for prohibition before the regular courts, which granted the writ.

While the Supreme Court agreed with appellant Commissioner's contention that the trial court was without jurisdiction to enjoin the deportation proceedings against the appellees, it held that the warrants issued by the Commissioner were null and void, the same having been issued solely for purposes of investigation and before a final order of deportation was issued.[116] The Court cited the relevant provision of the 1935 Constitution and pointed out that "the power to determine probable cause for warrants of arrest is limited . . .to judges exclusively, unlike in previous organic laws and the Federal Constitution of the United States that left undetermined which public officials could determine the existence of probable cause."[117] There was much quotation from both the *Qua Chee Gan* and *Morano* decisions in support of this holding,[118] while there was no mention at all of the *Tiu Chun Hai, Ng Hua To,* or *Lao Alfonso* rulings. Admittedly, the Supreme Court did not go as far as to expressly declare that the latter cases were thereby overruled. However, the disparity between the former and the latter group of cases is so manifest that it may be successfully argued that the Court intended to establish *Vivo v. Montesa* as doctrine with respect to the question of the extent of the authority of the Immigration Commissioner to order the arrest of an alien. This is clear from the Court's conclusion that "as long as the illegal entry or offense of the respondents . . . has not yet been established and their expulsion finally decided upon, *their arrest upon administrative warrant violates the provisions of our Bill of Rights.*"[119] The Commissioner's authority to issue warrants of arrest was therefore severely restricted to those instances where a final order of deportation has been issued by the Board of Commissioners in accordance with the provisions of the Immigration Act.[120]

To be sure, the Court's reliance on the *Qua Chee Gan* case in resolving *Vivo v. Montesa* compounded the problem earlier adverted to in the discussion of the *Dalamal* case. It must be remembered that in the latter case, which involved the Deportation Board, the Court categorically held that the President had authority to order the arrest of an alien as an incident of his power to deport undesirable aliens under

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[116]24 SCRA at 161.

[117]*Id.*

[118]24 SCRA at 161-162.

[119]24 SCRA at 162-163 (emphasis supplied).

[120]The *Morano* case is authority for this proposition. However, as has been pointed out, the Court's reliance on *Tiu Chun Hai* and *Ng Hua To* in *Morano* precludes a categorical conclusion that the latter case is truly decisive of the question.

section 69 of the Administrative Code — a question which it did not pursue in the *Qua Chee Gan* case.[121] Did the holding in *Vivo v. Montesa* to the effect that prior to the determination of cause sufficient to effect the deportation of an alien, the Commissioner of Immigration may not issue a warrant of arrest to detain such alien have the effect of withdrawing from the President the "incidental" power to order the arrest of an alien - an authority recognized by the Supreme Court in the *Dalamal* case? Section 69 of the Administrative Code, according to the Supreme Court, merely impliedly conferred the President with the power to arrest an alien, whereas section 37 (a) of the Immigration Act expressly granted the Commissioner such authority. If an express grant of power may be limited by the search and seizure clause of the Constitution, will not the same argument hold true with respect to a power which is merely incidental? Again, the Court appears to have neglected to confront this question squarely. It appears that it was not even cognizant of the problem.

In any event, the pronouncement in *Vivo v. Montesa* gained authority when it found affirmance in subsequent Supreme Court decisions involving the same issue. In *Neria v. Vivo*,[122] the Court declared that "no warrant of arrest can be issued by immigration authorities before a final order of deportation is made. For until it is established that an alien lawfully admitted gained entry into the country through illegal means and his expulsion is finally decreed, his arrest cannot be ordered."[123]

In *Contemprate v. Acting Commissioner of Immigration*,[124] it was held that "the rule now established in this jurisdiction circumscribes the authority to issue [warrants of arrest] only to judges, where the purpose of the warrant is merely the determination of the existence of probable cause in a given case, with the power of the Immigration Commissioner to issue similar warrants being confined to those necessary for the execution of a final deportation order."[125]

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[121] *See* the discussion in text accompanying footnotes 98-102, *infra*.

[122] 29 SCRA 701 (1969).

[123] 29 SCRA at 701.

[124] 35 SCRA 623 (1970).

[125] 35 SCRA 623 at 631. *See also* Tiu v. Vivo, 47 SCRA 23, 28 (1972) (holding that "...on the issue as to whether or not the issuance of warrants for the arrest of aliens by the Immigration Commissioner under Section 37 (a) of the Immigration Law trenches upon the constitutional mandate in Section 1(3), Article III of the Constitution, suffice it to state that the same has been settled in previous decisions, wherein we held that such power is not violative of the Constitution as it is confined to warrants issued for the execution of a final deportation order").

Po Siok Pin v. Vivo[126] made it clear that "it is the judge who should issue the warrant of arrest where the proceeding is for the determination of a probable cause in a given case. On the other hand, the Commissioner of Immigration can issue a warrant of arrest for the execution of a final deportation order. The Commissioner cannot issue a warrant of arrest solely for the purposes of investigation and before a final order of deportation is issued."[127]

This then was the state of the law respecting the authority of the Commissioner of Immigration and Deportation to issue warrants of arrest under the Immigration Act when the *Harvey* case was decided. It is based on the premise that the protection afforded by the search and seizure clause of the 1935 Charter applies equally to administrative proceedings as it does to criminal prosecutions. Notably, all the cases discussed above involved the interpretation of section 37(a) of the Immigration Act under the 1935 Constitution. There is no decided case involving the same issue and the same provision of the Immigration Act under the 1973 Constitution which contained a very important amendment in the search and seizure clause of the Bill of Rights.[128] In the *Santos* case, the Court intimated that such amendment was reason enough for the Court to review the *Vivo v. Montesa* doctrine, noting that "under the present [1973] Constitution, a warrant of arrest may issue on a showing of `probable cause to be determined by the judge, or such other responsible officer as may be authorized by law,' . . . however, [this case] is governed by the former Constitution."[129] It was only the latter circumstance which prevented the Court from inquiring into the changes necessitated by the amendment of the search and seizure provision of the Constitution, particularly with respect to the Immigration Commissioner's authority to issue warrants of arrest.

Whatever confusion may have been engendered by the troubling conclusion made by the Court in *Morano* or by the effect of the decision in *Vivo v. Montesa* on the *Dalamal* and the *Qua Chee Gan* cases may be said to have been set to rest by the fact that *Vivo v. Montesa* was affirmed in all the other cases decided subsequently by the Court.[130] It

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[126]62 SCRA 363 (1975).

[127]62 SCRA at 368. *See also* Ang Ngo Chiong v. Galang, 67 SCRA 338, 342-343 (1975); Santos v. Commissioner, Bureau of Immigration, 74 SCRA 96, 99 (1976).

[128]The 1973 Constitution inserted the phrase "or such other responsible officer as may be authorized by law" to designate the officials authorized to issue warrants of arrest and search warrants. CONST. (1973) art. IV, sec. 3.

[129]Santos v. Commissioner, Bureau of Immigration, 74 SCRA 96, 99 (1976). *See also* Go Tek v. Deportation Board, 79 SCRA 17, 20-21 (1977).

[130]*See* I. CORTES, *supra* note 113, at 218 ("Not until *Vivo v. Montesa* did the

now becomes necessary to ask whether or not there is justification for the Court's holding in *Harvey* that *Vivo v. Montesa* is not invocable in therein.

2. *Vivo v. Montesa and Harvey: The Supreme Court's Non-existent Distinction*

The Supreme Court refused to apply the doctrine laid down in the case of *Vivo v. Montesa* on the ground that the latter case may be distinguished from *Harvey*. It pointed out that the warrants in *Vivo v. Montesa* ordered the appellees therein to appear before the Commission and show cause why they should not be deported, while the warrants involved in the *Harvey* case charged the petitioners with specific violations of various provisions of the Immigration Act and the Revised Administrative Code. The Court noted that deportation proceedings had been commenced against the petitioners in *Harvey* prior to the issuance of the warrants and that their arrest was a step preliminary to their possible deportation.[131]

It would be well to remember that both cases involved the very same issue: whether or not the Commissioner of Immigration may issue a warrant of arrest for the purpose of determining cause sufficient to effect the expulsion of an alien.[132] The Supreme Court answered this question in the negative in *Vivo v. Montesa*. In *Harvey*, the Court replied in the affirmative, citing the *Tiu Chun Hai* case as support for its conclusion without, however, declaring that it was thereby discarding the ruling in *Vivo v. Montesa*. It merely stated that the latter case may not be relied upon by the petitioners in *Harvey*. The question, therefore, is whether or not the Court validly distinguished one case from the other.

Certainly, the Court could not have founded the distinction that it made solely on the wording or the contents of the warrants involved in the two cases, although it seems to have been partly the basis for the distinction. A cursory reading of the two cases would reveal that such a

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Supreme Court end the ambiguities attending the application of section 37 (a) of the Immigration Act"). *But see* Mendoza, *The Supreme Court on the Supreme Law: An Annual Survey*, 62 PHIL. L. J. 407, 435-437 (1987) (opining that *Vivo v. Montesa* gave rise to a "doctrinal confusion" with respect to the question of whether or not administrative officials can order the arrest of aliens).

[131]Harvey v. Defensor-Santiago, 162 SCRA 840, 850 (1988) (citing Morano v. Vivo, 20 SCRA 562 (1967)).

[132]Actually, in *Vivo v. Montesa*, the issue raised by the appellees in the lower court was whether or not the Commissioner of Immigration can summarily order the arrest and deportation of the appellees without giving them a chance to be heard as Filipino citizens. Vivo v. Montesa, 24 SCRA 155, 158 (1968). It was only the Supreme Court which framed the issue in the manner it is phrased above.

distinction would be absurd or, at the very least, artificial, and upon a closer examination thereof, any distinction based on that ground may be dismissed as non-existent. The warrants assailed by the appellees in *Vivo v. Montesa* directed them to show cause why they should not be deported, it appearing that they gained admission into the country "by means of false and misleading statements and that they were not lawfully admissible at the time of entry, not being properly documented for admission."[133] In other words, there was a specification of the charges against the appellees in the same way that the warrants in *Harvey* issued by the respondent Commissioner on March 7, 1988 contained an enumeration of the charges against the petitioners. While the warrants of arrest involved in *Harvey* may not have directed the petitioners to appear before the Commission and show cause why they should not be deported,[134] it is reasonable to think that when the Commissioner ordered the petitioners' arrests in order to deal with them in the manner provided by law, the petitioners were expected to present evidence in their defense and show cause why they should not be deported. An alien is charged with alleged violations of the Immigration Act for the purpose of having him expelled from the country, and the suspected alien is required to meet those charges and may prove that he cannot be deported on the basis thereof.

It would seem that the Court's real purpose in basing the distinction on the above grounds is to show that in the *Harvey* case, an investigation had already been conducted, thus taking the case out of the operation of the rule that "the issuance of warrants of arrest by the Commissioners of Immigration, ***solely for the purposes of investigation*** and before a final order of deportation is issued" is illegal. The Court must have thought that because the warrants in *Harvey* already contained a specification of the charges against the petitioners, then an investigation must have already been conducted against the latter. The Court may have inferred the conclusion that the proceedings against the petitioners had already passed the stage of investigation from its observation that formal deportation proceedings against the petitioners had been commenced on March 4, 1988. Obviously, the Court misapplied the rule enunciated in *Vivo v. Montesa* respecting the authority of the Commissioner to issue a warrant of arrest for purposes of investigation. It did not know to which "investigation" that rule referred.

The investigation referred to in *Vivo v. Montesa* (for the

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[133]Vivo v. Montesa, 24 SCRA 155, 157 (1968).

[134]The warrants involved in the *Harvey* case commanded any officer of the Commission to arrest the petitioners for violations of the statutes already cited and to "bring [them] before the [Commissioner] as soon as possible to be dealt with in accordance with law." Records (Return) at 119-121.

purposes of which the Commissioner may not issue a warrant of arrest) must be the investigation before the Board of Special Inquiry or the Commission, constituting the formal deportation proceedings against the alien, and not the investigation conducted by the Commissioner for the purpose of determining whether the alien should be made to appear before the Commission to show cause why he should not be deported. Necessarily, the Commissioner must first conduct some kind of initial *ex parte* investigation to determine whether the alien has committed some offense for which he ought to be deported. This stage terminates upon the issuance of an order by the Commissioner directing the alien to appear before the Board of Special Inquiry or the Commission for purposes of further investigation, which constitutes formal deportation proceedings, where the said alien is expected to show cause why he should not be deported on the grounds earlier provisionally determined by the Commissioner. In *Vivo v. Montesa*, such an order was issued in the form of a warrant of arrest ordering the appellees "to show cause, if any there be, why they should not be deported from the Philippines."[135] This was the warrant assailed by the appellees in the action before the Supreme Court and which the latter declared to be contrary to the search and seizure clause of the 1935 Charter. According to the Court, if the purpose of the Commissioner in issuing the warrant is merely to secure the appearance of the appellees in the deportation proceedings, the same end may be achieved by requiring the respondent aliens to post a cautionary bond, as was suggested by the Court in *Qua Chee Gan* respecting proceedings before the Deportation Board.[136]

What complicates matters in *Harvey* is the fact that the Commissioner did not proceed in the manner above-described. After conducting a three-month surveillance of the activities of the petitioners, the Commissioner did not issue an order requiring the said petitioners to appear before her or the Commission and show cause why they should not be deported. Instead, she issued mission orders directing the arrest of the petitioners. With the latter under detention, she proceeded to conduct further investigation which led to the filing of a formal charge sheet, the issuance of warrants of arrest, and the commencement of the formal deportation proceedings against the petitioners.

While the mission orders in *Harvey* were not in the same form as the warrants involved in *Vivo v. Montesa*, it is obvious that they served the same purpose. They were issued for the purpose of hailing the suspected aliens before the Board of Special Inquiry in order to answer the specific charges against them. The warrants subsequently

[135] 24 SCRA 155, 160 (1963).
[136] 24 SCRA at 162.

issued by the Commissioner on March 7, 1988 went no further than to specify the charges against the petitioners. They served no purpose insofar as apprehending the petitioners is concerned because the latter were already in the custody of the Commission. That purpose had already been served by the mission orders.

The Supreme Court simply overlooked the question of the validity of the mission orders issued by the respondent Commissioner. As submitted in the foregoing discussion on the validity of the petitioners' initial arrests, the mission orders were really warrants of arrest issued by the Immigration Commissioner on a real or pretended authority to determine probable cause. This is obvious from the fact that the orders were issued only after a three-month surveillance of the activities of the petitioners. It is patent that the Commissioner had to resort to the so-called mission orders in order to avoid the proscription in *Vivo v. Montesa* against the issuance by the Commissioner of warrants of arrest for the purpose of securing the appearance of the suspected alien in the deportation proceedings against him. The Supreme Court simply missed the whole point. In *Harvey*, the Commissioner actually issued two warrants of arrest: one in the guise of a mission order, and another charging the petitioners with violations of certain provisions of the Immigration Act and the Administrative Code. Even assuming that the subsequent warrants of arrest issued by the Commissioner on March 7, 1988 legalized the detention of the petitioners -- and it is submitted that they could not have made valid such detention for the reason that their issuance was in violation of the rule enunciated in *Vivo v. Montesa* -- the Commissioner had already circumvented the *Vivo v. Montesa* rule when she issued the mission orders. The Court should have expended more effort in the determination of the validity of the initial arrests on the basis of the mission orders because it is these mission orders which *Vivo v. Montesa* disallows. Such mission orders, being in the nature of warrants of arrest, ought to fall within the parameters set by the Supreme Court in the latter case, circumscribing the extent of the authority of the Immigration Commissioner to issue warrants of arrest.

Also, the Court forgot that *Vivo v. Montesa* set down two proscriptions in regard to the power of the Commissioner to issue a warrant of arrest: one, it prohibited the Commissioner of Immigration from issuing a warrant of arrest solely for the purposes of investigation, and two, it also proscribed him from issuing a warrant where the grounds for the expulsion of the alien have not yet been finally decided upon and a final order of deportation has not yet been issued by the Board of Commissioners. It is clear that in *Harvey*, no such order of deportation has yet been issued and none may yet issue because the proceedings against the petitioners before the Board of Special Inquiry had just commenced. The Board of Special Inquiry III had not yet made its

findings when the petition for a writ of *habeas corpus* was filed with the Supreme Court. The Board of Commissioners had not yet made any determination as to whether or not there were valid grounds to cause the expulsion of the petitioners from the country, and it could not have issued any order of deportation then. Applying the doctrine in *Vivo v. Montesa,* the Commissioner of Immigration could not have issued a valid warrant of arrest and the warrant that she did issue could not have legalized the detention of the petitioners.

With a more critical analysis of the facts and the case law on the matter, the Supreme Court would have seen through the scheme perpetrated by the Immigration Commissioner and discovered that it was effected merely for the purpose of going around the rigid proscription laid down in *Vivo v. Montesa.* With a more serious examination of the case, it would have discovered that there is really no substantial distinction between the present petition and *Vivo v. Montesa.*

C. *The Applicability Of The Search And Seizure Clause To Deportation Proceedings.*

The Court in *Harvey* also took the occasion to affirm the authority of the Immigration Commissioner to issue a warrant of arrest under the Immigration Act and to hold that the requirement of probable cause to be determined by a judge, as provided in the Constitution, did not apply to deportation proceedings.[137] In so holding, without any express declaration that it was thereby discarding the *Vivo v. Montesa* decision, the Supreme Court only further worsened the situation. It must be remembered that the authority of the *Tiu Chun Hai* and *Morano* decisions,[138] upon which the Court relied in support of the above proposition, has been considerably weakened, if not completely done away with, by the subsequent decision in the case of *Vivo v. Montesa.* It is difficult to see how those two lines of decisions could possibly stand together. While *Tiu Chun Hai* held that the requirement of probable cause to be determined by a judge does not apply to deportation proceedings, the later case of *Vivo v. Montesa* expressly declared that the issuance of a warrant by the Commissioner prior to the determination of the grounds for the deportation of an alien contravenes the search and seizure clause of the Bill of Rights. Again, it must be stressed that in *Harvey,* the Supreme Court did not appear to be

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[137]162 SCRA at 849 (citing Tiu Chun Hai v. Commissioner of Immigration, 104 Phil. 949 (1958)).

[138]That is, insofar as the *Morano* decision appears to be ambiguous in its declaration with respect to the authority of the Commissioner to issue a warrant of arrest.

amenable to any suggestion that the doctrine in *Vivo v. Montesa* be discarded. In fact, it is seriously doubted if the Second Division of the Court could have abandoned the doctrine in this particular instance in view of the Constitutional provision mandating that any doctrine or principle of law laid down by the Supreme Court may not be modified or reversed except by the Supreme Court sitting *en banc*.[139]

The result of the simultaneous reference to those two lines of cases is to resurrect a question which has long been settled by the Supreme Court beginning with *Vivo v. Montesa*. The latter case has been consistently cited as authority in the cases subsequently decided by the Supreme Court.[140] It is admitted that *Tiu Chun Hai* has never been expressly abandoned by the Court, but the fact that it never found favor in any of the later decisions of the Court tends to support the argument that insofar as the question of the extent of the authority of the Immigration Commissioner to issue warrants of arrest is concerned, the doctrine laid down in *Vivo v. Montesa* controls.

As was earlier urged, the Supreme Court could have treated the petition in *Harvey* as an opportunity to review its decision in *Vivo v. Montesa*, in the light of the modifications introduced in the Bill of Rights by both the 1973 and 1987 Constitutions. The opportunity was first presented when the Court decided *Santos* in 1976.[141] However, the Court decided against such an approach and ended up with an impossible complication. The result was to turn the present state of jurisprudence back to the pre-*Tiu Chun Hai* situation in 1958 when there was no clear ruling on the question of whether or not section 37(a) of the Immigration Act contravenes the Bill of Rights insofar as it authorizes the Commissioner to issue a warrant of arrest and order the detention of an alien being proceeded against in deportation proceedings.

D. The Harvey Decision Does Not Conflict With Qua Chee Gan.

Before concluding, the Supreme Court sought to distinguish *Harvey* from the *Qua Chee Gan* case in this wise:

> The foregoing does not deviate from the ruling in *Qua Chee Gan v. Deportation Board*, reiterated in *Vivo V. Montesa*, that "under the express terms of our Constitution (the 1935 Constitution), it is therefore even doubtful whether the arrest of an individual may be

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[139]CONST. art. VIII, sec. 4, par. 3. Vivo v. Montesa was decided by the Supreme Court *en banc*. The more relevant question, though not necessary for the purposes of this paper, is whether or not that limitation applies to decisions rendered under the 1935 Constitution which did not contain a similar provision.

[140]*See* discussion in text accompanying footnotes 81-130, *infra*.

[141]*See* text accompanying footnote 129, *infra*.

> ordered by any authority other than a judge if the purpose is merely to determine the existence of probable cause, leading to an administrative investigation." For, as heretofore stated, probable cause had already been shown to exist before the warrants of arrest were issued.[142]

The Court further reasoned that all that is essential is that there be a specific charge against the alien to be arrested and deported, that a fair hearing be conducted with the assistance of counsel, if desired, and that the charge be substantiated by competent evidence, citing as authority for this proposition the provisions of section 69 of the Revised Administrative Code.[143]

Again, the reasoning of the Supreme Court is markedly flawed. In the first place, when it held that the *Harvey* decision does not deviate from the *Qua Chee Gan* case in that in the former case there has already been a determination of the existence of probable cause prior to the issuance of the assailed warrants of arrest, the Court did not make clear what it meant by "probable cause" in this instance. It could have referred to the probable cause required of an officer in the field in ascertaining that an offense has been committed and that the person to be arrested without a warrant committed the offense,[144] or it could have referred to the probable cause that must be determined by a judge prior to the issuance of a warrant of arrest or search warrant.[145]

If the Court was referring to the probable cause required in making warrantless arrests, then its logic becomes highly suspect. In so holding, the Court could have relied only on its erroneous position that the arresting officers, on the basis of the recitals contained in the mission orders and the alleged three-month surveillance of the activities of the petitioners, had sufficient basis to cause the warrantless arrests of the latter.[146] As submitted in the foregoing discussion on the validity of the initial arrests of the petitioners, there is no way by which the arrests of the petitioners may ever be justified as valid warrantless arrests. This is because the agents who executed the mission orders issued by the Commissioner did not have personal

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[142]162 SCRA at 851.

[143]162 SCRA at 851.

[144]U.S. v. Santos, 36 Phil. 853, 855 (1988).

[145]CONST. art. III, sec. 2.

[146]This argument relies on the view that a warrantless arrest still requires the existence of probable cause, defined as reasonable ground of suspicion supported by circumstances sufficiently strong in themselves as to warrant a reasonable man to believe the accused to be guilty (U.S. v. Santos, 36 Phil. 853, 855 (1917), *see* discussion *infra*). This simply means that the officer in the field cannot act on pure whim or caprice and that his actions must rest on some objective basis in the physical environment from which he may draw the inference that an offense has been committed and that the person to be arrested participated therein.

knowledge of facts that would warrant the belief that the petitioners had committed, were committing, or were attempting to commit an offense in their presence. How then could it be said that probable cause existed prior to the issuance of the warrant when the requisite personal knowledge in effecting a warrantless arrest is not present in the first place?

If, on the other hand, by probable cause the Court was referring to the probable cause to be determined by a judge prior to the issuance of a warrant, then the Court's argument begs the question. It simply assumes that the Commissioner of Immigration did have the authority to determine the existence of probable cause for the issuance of a valid warrant of arrest. Precisely, the petitioners' main contention in the *habeas corpus* proceedings was that the respondent Commissioner did not have such authority, thus making their detention illegal. This contention applies with equal force to the mission orders dated February 26, 1988, characterized above as warrants of arrest under a different name, as well as to the subsequent warrants of arrest issued on March 7, 1988. Both were intended to effect the apprehension of the petitioners and have them appear before the Commission to show cause why they should not be deported. An investigation preceded their respective issuance.[147] In either case, the procedure runs contrary to the doctrine in *Vivo v. Montesa* which disallows the issuance of a warrant of arrest — even if it be denominated as a mission order — if the purpose thereof is to secure the appearance of the alien in deportation proceedings.

In the second place, the Court's reference to the provisions of section 69 of the Revised Administrative Code was both unnecessary and unavailing. It was unnecessary because it merely enumerated the minimum requirements of due process guaranteed to a party appearing in administrative proceedings.[148] The petitioners in *Harvey* were entitled to those rights even without the Supreme Court having to declare them anew. The question of whether or not they were accorded procedural due process is independent of the question of whether or not their initial arrest and subsequent detention were valid. It was unavailing because

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[147]That there was an investigation prior to the issuance of the mission orders on February 26, 1988 is presumed from the fact that a three-month surveillance of the activities of the petitioners was conducted prior to such issuance. On the other hand, that an investigation was conducted prior to the issuance of the warrants of arrest on March 7, 1988 is verified by paragraphs 11 and 15 of Law Instructions No. 39, assuming that indeed Law Instructions No. 39 incorporated the procedure earlier followed by the Commissioner in Harvey. Said provisions prescribe a general inquiry or custodial interrogation of the arrested alien, as well as a preliminary investigation conducted by the Chief Prosecutor of the Commission.

[148]*See* Ang Tibay v. Court of Industrial Relations, 69 Phil. 635, 641-642 (1940); Air Manila, Inc. v. Balatbat, 38 SCRA 489 (1971).

the subject provision refers to the procedure to be followed in deportation proceedings before the President, acting through the Deportation Board, a procedure which is distinct from that which is prescribed under the Immigration Act as the latter has been construed by the Court in *Vivo v. Montesa*.[149]

III. The Case For The *Harvey* Petitioners

The resolution of the issue before the Supreme Court actually redounds into a choice between the rule enunciated in *Vivo v. Montesa* on the one hand and *Tiu Chun Hai* as well as the related decisions holding a contrary rule on the other. In other words, the real issue before the Court in *Harvey* was the very same issue which confronted the Supreme Court in 1958 when it decided *Tiu Chun Hai*, and again in 1968 in *Vivo v. Montesa*. Thus, before the Court was an opportunity to review the long line of decisions on the same question and to examine those cases in the light of the many amendments to the search and seizure clause of the Constitution, as well as the other principles already well entrenched in our legal system. Some of the arguments which might support the petitioners' position, and which the Supreme Court could have explored in disposing of the petition, are briefly touched upon below.

A. The Nature Of The Function Of Determining Probable Cause For The Issuance Of Warrants

Vivo v. Montesa is the controlling doctrine insofar as the question of the validity of warrants issued by the Immigration Commissioner for purposes of investigation is concerned. As previously shown in some detail, since its promulgation in 1968, the *Vivo* doctrine has never been subjected to serious challenge in any of the cases involving the same question subsequently raised before the Supreme Court. Its value lies in its confirmation of the observation made by the Court in *Qua Chee Gan* to the effect that the search and seizure clause of the 1935 Charter does not distinguish between warrants in criminal actions and those in administrative proceedings and that, therefore, there is no reason why the constitutional proscription cannot be applied in deportation proceedings. The only other time that the Court hinted at the possible abandonment of the doctrine was when it decided *Santos* in 1976, and only because of the amendment to the search and seizure provision of the Constitution allowing the determination of the existence of probable cause for the issuance of warrants by an officer other than a judge.[150] Is *Vivo v. Montesa* still good law, considering the

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[149]Qua Chee Gan v. Deportation Board, 9 SCRA 27, 33 (1963); Go Tek v. Deportation Board, 79 SCRA 17, 21 (1977).

[150]*See* Santos v. Commissioner, Bureau of Immigration, 74 SCRA 96, 99 (1976);

deletion of that phrase in the 1987 Constitution?

In this jurisdiction, it has always been the rule that the determination of probable cause for the issuance of a warrant of arrest or a search warrant is a judicial function. This rule was first enunciated in the early case of *U.S. v. Ocampo,*[151] reiterated in *Amarga v. Abbas,*[152] and again affirmed in *Placer v. Villanueva.*[153] What entitles the rule to a great degree of respect is that it has consistently weathered every amendment and revision of the search and seizure provision of the various Organic Acts which have been in force in this country. *Ocampo* was concerned with the pertinent provision of the Philippine Bill of 1902.[154] *Amarga* dealt with the corresponding provision in the 1935 Constitution,[155] which is actually a combination of two paragraphs of section 5 of the Philippine Bill of 1902,[156] later recast as section 3 of the Philippine Autonomy Act,[157] also known as the Jones Law of 1916. On the other hand, *Placer* involved a construction of the counterpart provision in the 1973 Constitution.[158]

A reading of the cited provisions will reveal that while, on the whole, they have substantial similarities, they likewise share differences in certain respects. While the pertinent provision of the Philippine Bill of 1902 and the Jones Law, which was merely transposed from the American Charter,[159] did not specify the officers or agencies authorized to determine the existence of probable cause or to issue warrants, the 1935 Constitution clearly lodged that function in judges. On the other hand, the 1973 Constitution extended that function to "such other responsible officer as may be authorized by law" and expanded the right against unreasonable searches and seizures to all cases of

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CONST. (1973) art. IV, sec. 3.

[151]18 Phil. 1, 41-42 (1910).

[152]98 Phil. 739, 741-742 (1956) (where the Court relied heavily on the *Ocampo* decision).

[153]126 SCRA 463, 469 (1983) (the Court holding that the issuance of a warrant is not a mere ministerial function; it calls for the exercise of judicial discretion on the part of the issuing magistrate).

[154]Sec. 5, par. 18 thereof provides "that . . . no warrant 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."

[155]Art. III, sec. 1, par. 3.

[156]Pars. 11 and 18.

[157]*See* Amarga v. Abbas, 98 Phil. 739, 747 (1956).

[158]Art. IV, sec. 3.

[159]U.S. CONST. amend. IV, which provides that "[t]he 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."

government intrusion by the insertion of the phrase "of whatever nature and for any purpose."[160] It also extended the requirement of probable cause for the issuance of both warrants of arrest and search warrants. Of the last modification, it should be noted that the 1935 Constitution simply stated that "no warrants shall issue but upon probable cause" without making any express distinction between search warrants and warrants of arrest.

This last point is significant if only because it neatly disposed of the contentions raised in Justice Montemayor's dissenting opinion in *Amarga v. Abbas*.[161] The whole point of the dissent was that the requirement of the determination of probable cause by a judge did not apply to the issuance of a warrant of arrest because such was the intention of the framers of the (1935) Constitution who were said to be satisfied with the procedure respecting the issuance of warrants of arrest and were more concerned with possible abuses which may attend the issuance of search warrants.[162] He persuasively argued that with respect to the issuance of a warrant of arrest, the determination of probable cause need not be made by a judge and that the same function may be validly delegated to some other officer which, in *Amarga*, happened to be the Provincial Fiscal. He also decried the majority's citation of the *Ocampo* case in support of its opinion, pointing out that the Federal Supreme Court of the United States *reversed* the Philippine Supreme Court on the specific issue of whether or not the determination of probable cause with respect to warrants of arrest was a judicial function and held instead that there was no definite adjudication on that point and that the determination of the existence of probable cause by an officer other than a judge was a practice recognized in common law.[163] With the amendment of the provision in the 1973 version of the Charter, this argument was rendered moot.

Neither is there much to be said of the intention of the 1971 Constitutional Convention respecting the insertion of the phrase "or such other responsible officer as may be authorized by law" in the

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[160]Actually, for reasons to be made clear *infra*, there is no official explanation for the insertion of this phrase, although in J. BERNAS, THE 1987 CONSTITUTION: A REVIEWER - PRIMER 51-52 (1987), it is opined that the phrase extends the protection afforded by the guarantee to the issuance of a *subpoena duces tecum* under Rule 27 of the RULES OF COURT and building inspections by administrative officers.

[161]98 Phil. 739, 744-763 (1956).

[162]98 Phil. at 748-754 (citing 1 J. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 149-150, 160 (n.d.) and 6 S. ARANETA, THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 3006-3008, 3014-3015 (n.d.)). *See generally*, J. LAUREL, PROCEEDINGS OF THE PHILIPPINE CONSTITUTIONAL CONVENTION 749-767 (1966) and 6 CONSTITUTIONAL CONVENTION RECORD 40-61 (Journal No. 190) (1966).

[163]Citing Ocampo v. U.S., 234 U.S. 91, 58 L. ed. 1231 (1913).

provision.[164] According to Bernas:

> When the amendment was being discussed by the 166-Man Special Committee charged with preparing the final working draft of the convention, Delegate de la Serna asked who these officers were who may be authorized by law to issue search warrants. The answer of Delegate R. Ortiz was that the provision contemplates a situation where the law may authorize the fiscals to issue search warrants or warrants of arrest. When the provision came to the convention floor on November 27, 1972, Delegate Suarez moved for its deletion insisting that the issuance of warrants is an essential judicial function. He feared the dire consequences that could follow from authorizing local chiefs of police to issue warrants. The Convention approved the motion of Suarez. Before the day's session was over, however, on motion of Delegate Gualberto Duavit, the provision was restored.
>
> It is thus clear from the little there is of Convention discussions that it was the intention of some proponents of the provision to make it possible for the legislature to authorize prosecution or law enforcement officers to issue search warrants or warrants of arrest. Could this have been the intent of the Convention as a body when it approved the extension of the power to "such other responsible officer as may be authorized by law?"[165]

From all indications, it would appear that the amendment of the provision was intended to extend the function merely to prosecution and law enforcement officers. However, there is nothing in the little that Bernas has managed to uncover to indicate who are the prosecution and law enforcement officers referred to by the Convention, although mention is made of the fiscals and the local chiefs of police. Seemingly, the Convention wanted to limit the application of the amendment to those officers forming part of the criminal justice system. There is no mention made of administrative agencies and officers who play no part in the prosecution and enforcement of the criminal laws.

The 1987 Constitution practically adopted the wording of the search and seizure clause of the previous Charter, the only modifications being the insertion of the word "personally" (between the phrases "to be determined" and "by the judge") and the deletion of the phrase "or such other responsible officer as may be authorized by law."[166]

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[164]The College of Law, University of the Philippines does not have any record of the official proceedings of the 1971 Constitutional Convention. There are only the unofficial, private records of individual delegates which are currently in a disorganized state.

[165]2 J. BERNAS, 1973 PHILIPPINE CONSTITUTION: NOTES AND CASES 198 (1974) (citing the Meeting of the 166-Man Special Committee, November 16, 1972).

[166]There is also a minor revision consisting of the substitution of the phrase "shall not be violated" in the 1973 Constitution with the phrase "shall be inviolable."

Explaining these revisions, Fr. Joaquin Bernas averred that the elimination of the clause "or such other responsible officer as may be authorized by law" was meant to effect a reversion to the formula in the 1935 Constitution where only a judge may issue a warrant.[167] He further opined that once the Constitution was ratified, the Presidential Commission on Good Government will no longer have the authority to issue warrants and search and seizure orders on the theory that that agency is not a judicial body.[168] Additionally, the inclusion of the word "personally" was meant to refer to the judge who must himself conduct the examination required under the provision.[169] Hence, if anything may be gleaned from the foregoing discussion, it is simply that the rule first enunciated in *Ocampo* to the effect that the determination of probable cause for the issuance of warrants is a judicial function - admittedly a judge-made rule - now forms an integral part of the Constitution.

To be sure, the Supreme Court's interpretation of this provision is not consistent with the intent of the drafters of the present Constitution. In 1987, the Supreme Court issued a circular providing that in the determination of the existence of probable cause, the judge may rely on the certification of the fiscal of the existence of probable cause and only when the judge finds, on the face of the information filed by the fiscal, that no probable cause exists is he allowed to direct the submission of supporting affidavits to aid him in arriving at a conclusion respecting the existence of probable cause.[170] Since 1910, when *Ocampo* was decided, the Court has uniformly interpreted the provision in this manner.[171] According to the Court's Circular, the provision merely requires that the judge "personally" determine the existence of probable cause, although he need not "personally" conduct the examination of the complainant and the witnesses that the latter may produce. This was the construction applied by the Supreme Court in the recent case of *Soliven v. Makasiar*.[172] Nonetheless, insofar as it would still require that probable cause be determined by the judge, the determination made by the fiscal being at best provisional, this construction still adheres to the view first laid down in *Ocampo*.[173]

Otherwise, the provision, as it was framed in 1973, subsists in the 1987 Constitution.

[167] 1 JOURNALS OF THE CONSTITUTIONAL COMMISSION 295-296 (July 17, 1986) (1986) [hereinafter JOURNALS].

[168] *Id.*

[169] JOURNALS, *supra* note 167, at 308.

[170] Supreme Court Circular No. 12 (1987), par. 4 (citing U.S. v. Ocampo, 18 Phil. 1 (1910), Hashim v. Boncan, 71 Phil. 216 (1931), Amarga v. Abbas, 98 Phil. 739 (1956), and Placer v. Villanueva, 126 SCRA 463 (1983)).

[171] 18 Phil. 1, 42 (1910).

[172] 167 SCRA 399 (1988).

[173] For a comprehensive historical overview of the requirements in the issuance of

The search and seizure clause of the 1987 Constitution appears closer in both language and spirit to the counterpart provision in the 1935 Constitution under which *Vivo v. Montesa* was decided. This view finds support in the intent of the framers, the Constitutional Commission of 1986, to return to the formula in the 1935 Constitution, which limited the authority to determine the existence of probable cause for the issuance of warrants to judges, by eliminating from the provision the phrase "such other responsible officer as may be authorized by law." Further support may be drawn from Bernas's opinion that after the present Constitution shall have taken effect, the Presidential Commission on Good Government would have lost its authority to issue search warrants or warrants of arrest. There is thus sufficient ground to insist that the ruling laid down in *Vivo v. Montesa* is still valid under the 1987 Constitution.

The fact that *Vivo* was decided under the provisions of the 1935 Constitution, standing alone, is not sufficient to dilute its authoritativeness. The *Vivo* decision was based on the consideration that the Constitution did not make a distinction between warrants of arrest in criminal prosecutions and those in administrative proceedings. The present Constitution does not make such a distinction either. Following the reasoning of the Court in *Vivo*, it is submitted that the deletion from the 1987 Constitution of the troublesome phrase "or such other responsible officer as may be authorized by law" found in the 1973 Charter, coupled with the intent of the 1986 Constitutional Commission to return to the formula in the 1935 Constitution, supports the contention that, at the time the *Harvey* petition was before the Supreme Court, *Vivo v. Montesa* was still good law. And there being no material distinction between the factual circumstances in the two cases, the *Harvey* petitioners could validly invoke the *Vivo* case in favor of the issuance of the writ.

Moreover, if the Presidential Commission on Good Government has lost all authority to issue warrants upon the effectivity of the 1987 Constitution on the theory that it is not a judicial body, then there seems to be no reason why the same restriction should not apply to the Commission on Immigration and Deportation considering that the said Commission is not a judicial body and the Commissioner is not a judge. Any claim to the effect that the Commissioner may be considered a "judge" within the provisions of the Constitution for purposes of the Immigration Law because he performs quasi-judicial functions is without merit.[174] Again, following the logic of the opinion of Bernas, there is no

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warrants of arrest, see Annotation, *Requirements in the Issuance of Warrants of Arrest*, 167 SCRA 405 (1988).

[174] I. CORTES, *supra* note 113, at 218-219.

reason why *Vivo v. Montesa* cannot be applied to the *Harvey* case.

Indeed, the question of whether or not the determination of probable cause for the issuance of warrants is a judicial function is crucial to the resolution of the *Harvey* petition. The Supreme Court has consistently adhered to the affirmative view.[175] Its present holding that the rule that only a judge may determine probable cause for the issuance of a warrant does not apply to deportation proceedings, thereby implying that officers other than judges may make such a determination, effectively lends doubt to the proposition. At the very least, it should have explored the consequences of this ruling.

B. The Search And Seizure Clause In Administrative Actions

Does the protection of the search and seizure provision of the Constitution extend to deportation proceedings? *Vivo v. Montesa* holds the affirmative position. In *Harvey*, the Court did not express a categorical opinion on this point. While it did make reference to the *Tiu Chun Hai* decision, its hesitation to finally discard the ruling in *Vivo v. Montesa* lends doubt to the assertion that the guarantees of the search and seizure clause of the Constitution do not extend to deportation proceedings.

As stated previously, the issue posed before the Supreme Court in the *Harvey* petition really boils down to a choice between *Vivo v. Montesa* and *Tiu Chun Hai.*

1. Reasserting Vivo v. Montesa

Apparent from the foregoing discussion on the nature of the function of determining the existence of probable cause is the fact that the various Conventions appear to have never considered the question of the applicability of the search and seizure clause to administrative proceedings. It has been shown, through the discussion of Justice Montemayor's dissent in *Amarga*, that when the search and seizure provision was first discussed in the 1934 Convention, foremost in the minds of the delegates was the extension of greater protection to the citizenry against illegal searches and seizures, and not against illegal or arbitrary arrests. Nothing was said of warrants of arrest or search warrants issued by administrative agencies. The little that Bernas offers, by way of comment, on the proceedings of the 1971 Convention,

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[175] *Cf.* Mendoza, *supra* note 130, at 437 ("There seems to me no warrant for the view that the determination of probable cause is exclusively the function of a judge, simply because the Constitution does not explicitly distinguish between warrants in a criminal case and those issued in administrative proceedings.").

shows that the inclusion of the phrase "or such other responsible officer as may be authorized by law" in the search and seizure provision had nothing to do with the extension of the function of determining the existence of probable cause to administrative agencies and officers. There is really nothing to show that the 1971 Convention was aware of the Supreme Court's ruling in *Vivo v. Montesa* and that the amendment of the provision was meant to repudiate that doctrine. While the proceedings of the 1986 Constitutional Commission show that the deletion of the above phrase meant a return to the formula in the 1935 Constitution where only a judge may issue a warrant, it is not known if it also indicated a reaffirmation of the *Vivo v. Montesa* doctrine.[176] Thus, the only conclusion that can be drawn from these findings is that *Vivo v. Montesa* evolved largely from judicial construction rather than express legislative intention. What is certain is that *Vivo v. Montesa* did enjoy doctrinal authority, as shown by the fact that it was subsequently affirmed and reaffirmed by the Supreme Court in later decisions on the same point.

The Supreme Court impliedly admitted as much when it declined from overruling the doctrine when it was expressly relied upon by the petitioners in *Harvey*. For if the Court was indeed convinced that *Vivo v. Montesa* was no longer good law, it would have found very little difficulty in denying the petition and expressly repudiating the doctrine. Instead, it held that *Vivo v. Montesa* did not apply squarely to *Harvey*.

That the search and seizure clause in both the 1935 and 1987 Constitutions share substantial similarities - and that, therefore, *Vivo v. Montesa* continues to carry doctrinal authority - is admitted even by the respondent Commissioner.[177] This appears to be the reason why, in resisting the petition, she did not base her arguments simply on the contention that the decision in *Vivo v. Montesa* cannot be invoked by the petitioners in *Harvey*. The Commissioner used the very similarity of the two provisions as the starting point of her defense and then challenged the only obstacle to a successful defense of the detention of the petitioners - *Vivo v. Montesa*.

The Commissioner's main contention was that the *Vivo* decision is not an accurate interpretation of section 37 (a) of the Immigration Act.[178] She contended that the section 37(a) clearly vests in her office

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[176]*Cf.* J. BERNAS, *supra* note 160, at 48 (posits the view that the deletion of the said phrase was born of the experience under the Marcos government when the grant of the authority to non-judicial officers was used as a "tool of oppression").

[177]Records (Return) at 91-92.

[178]Records (Return) at 99.

the authority to issue two warrants of arrest - a warrant for the arrest of an alien prior to deportation proceedings and another warrant for the purpose of executing a final order of deportation issued by the Board of Commissioners.[179] It was also contended that the limitation prescribed in the search and seizure clause does not apply to administrative actions such as deportation proceedings because a reading of that clause will show that it was meant to apply only to criminal prosecutions.[180] On this score, the respondent Commissioner contended that the Bill of Rights makes explicit reference to a complainant and his witnesses, which is true only of criminal prosecutions but not of deportation proceedings.[181] Further, the Commissioner argued that the power to order the arrest of an alien even before the commencement of deportation proceedings ought to be conceded to the office in order that there may be effective enforcement of the Immigration Act, for to hold otherwise would be to render nugatory the Commissioner's power to deport.[182] The respondent also attacked the suggestion in *Vivo v. Montesa* that instead of ordering the arrest of an alien before the commencement of deportation proceedings to secure the latter's appearance therein, the Commissioner need only require the posting of bond, without prejudice to more drastic measures in case of recalcitrant witnesses.[183] She argued that such a suggestion tended towards naivete, as a stubborn alien bent on evading the proceedings against him will never file the bond proposed by the Court.[184] In short, what was clearly being urged by the respondent Commissioner was the abandonment of *Vivo v. Montesa* and the return to the doctrines enunciated in the *Tiu Chun Hai, Ng Hua To,* and *Lao Alfonso* cases. By challenging the very foundation of *Vivo v. Montesa,* the Commissioner acknowledged the doctrinal authority of that case.

In fine, both the Immigration Commissioner and the Supreme Court thought that *Vivo v. Montesa* controlled the *Harvey* petition. While the majority of commentators and textwriters are silent on the matter, others, including one incumbent member of the Supreme Court,[185]

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[179]Records (Return) at 100-101 (citing the *Lao Alfonso* case discussed in the text accompanying footnotes 105-107, *infra*).

[180]Records (Return) at 101-102.

[181]*Id.*

[182]Records (Return) at 102-103 (making explicit reference to *Ng Hua To, Lao Alfonso,* and *Morano*).

[183]24 SCRA 155, 162 (1968). The suggestion was actually first raised in the *Qua Chee Gan* and *Dalamal* cases where the Court declared null and void an Executive Order empowering the Deportation Board to order the arrest of an alien and upheld an earlier Executive Order requiring merely the posting of bond on the part of the suspected alien.

[184]Records (Return) at 103-104.

[185]I. CRUZ, CONSTITUTIONAL LAW 132 (1987) (stating the general rule "that

acknowledge this proposition.[186]

There is really nothing inherently objectionable about this proposition because it merely extends the right against unreasonable searches and seizures to aliens in deportation proceedings. It is not as if all the rights enumerated in Article III of the Constitution apply only to criminal prosecutions, for in fact the right to a speedy disposition of cases is expressly extended to administrative proceedings.[187] It has also been suggested that in the conduct of investigations as part of the adjudicative process, the rights to privacy,[188] to information on matters of public concern,[189] and to the privilege of the writ of habeas corpus[190] may be invoked.[191] In one case, the Supreme Court extended the guarantee against self- incrimination to an administrative action for the revocation of a license to practice medicine on the theory that such withdrawal of a license, if made effective, would amount to a forfeiture of property rights.[192] There seems to be no reason why the same consideration may not be made the basis for the extension of the right against unreasonable searches and seizures to deportation proceedings. An alien who has established legitimate residence and is engaged in lucrative commerce in the Philippines and who is subjected to an action for his expulsion from the country would likewise be deprived of certain rights if such deportation is made effective. Viewed in this context, the argument that deportation proceedings are not criminal in nature and that deportation is not a penalty as the word is understood in criminal law seems to be purely an academic distinction not based on real and substantial differences.

It is true that the search and seizure clause of the Constitution speaks of a "complainant and his witnesses." This, however, does not strongly argue for the respondent Commissioner's position that the

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warrants of arrest may be issued by other administrative authorities only for the purpose of carrying out a final finding of a violation of law, like an order of deportation or an order of contempt, and not for the sole purpose of investigation or prosecution").

[186]*See* A. PADILLA, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES 191 (1987).

[187]CONST. art. III, sec. 16.

[188]CONST. art. III, sec. 3(1).

[189]CONST. art. III, sec. 7.

[190]CONST. art. III, sec. 13.

[191]I. CORTES, *supra* note 113, at 268. In fact, Justice Cortes includes the guarantees against unreasonable searches and seizures among the rights which may be invoked in administrative proceedings. *Id.* The inclusion of this right in the enumeration was made precisely because of the decision in *Vivo v. Montesa. Id.* at 269. It would be interesting to note her present view on the matter in the light of the decision in *Harvey*.

[192]Pascual v. Board of Medical Examiners, 28 SCRA 344 (1969).

clause covers only criminal prosecutions. For it can be reasonably asked: cannot the Commissioner in applying for a warrant be considered a complainant within the context of the provision? Other than the implied exclusive reference to criminal prosecutions that the respondent Commissioner would want to be read into the phrase "complainant and his witnesses," she cites no firmer support for her contention.

As to the contention that extending the right against unreasonable searches and seizures to administrative actions would unduly restrict the deportation powers of the Commission, it must be noted that there was no specific showing that the Commission experienced any particular difficulty in effecting the expulsion of deportable aliens from the country as a result of the ruling in *Vivo v. Montesa.*[193] The same may be said of the Commissioner's argument that merely requiring an alien to post a cautionary bond to guarantee his appearance before the Commission, instead of procuring his arrest, would not be sufficient for the purpose. If the alien refuses to post the required bond, there is no reason why the Commission cannot proceed with the hearings against such alien, so long as he had received notice of the proceedings against him. The right to a hearing or to particular elements of a fair trial before administrative agencies may be waived, and the failure to attend a hearing, notice of which has been served on a party, amounts to a waiver of his right to be heard.[194] If the Board of Commissioners decides in favor of the deportation of the alien concerned, the Commissioner, consistent with the Supreme Court's decision in *Vivo v. Montesa,* may issue a warrant for the arrest of the alien. In such instance, the alien would have no cause to complain of any denial of procedural due process. Indeed, the argument propounded by the Commissioner is really more an expression of concern for, or a fear of, the inability of the Commission to enforce the Immigration Laws. While concern ought to be shown for the inability of the agencies of the government to comply with official duties, it does not deserve to be given precedence over fundamental rights guaranteed by the Constitution.

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[193]It is doubted that any such showing could be made in view of the fact that before an appreciable length of time could elapse after the promulgation of *Vivo v. Montesa* in 1968, the 1973 Constitution came into force with the amendment in art. IV, sec, 3 allowing officers other than judges to determine probable cause for the issuance of warrants. That amendment might explain the absence of cases decided by the Supreme Court on the question of the authority of the Immigration Commissioner to issue warrants of arrest under the Immigration Act after the case of *Santos v. Commissioner, Board of Immigration,* 74 SCRA 96 (1976), decided under the 1935 Constitution.

[194]H. DE LEON AND H. DE LEON, JR., ADMINISTRATIVE LAW: TEXT AND CASES 185-186 (1989) (citing Asprec v. Itchon, 16 SCRA 921 (1966)).

2. Reviving Tiu Chun Hai

Against the suggestion that the doctrine in *Vivo v. Montesa* ought to have been reasserted by the Supreme Court in resolving the *Harvey* petition stands the contrary suggestion that the Court should have revived its decision in *Tiu Chun Hai* that the requirement that probable cause shall be determined by a judge does not obtain in deportation proceedings. Although the *Tiu Chun Hai* decision was never expressly abandoned by the Supreme Court, the decision in *Vivo v. Montesa* effectively resolved all doubts that the guarantees of the search and seizure clause applied equally to deportation proceedings.

As has been explained, *Tiu Chun Hai* was based on the premise that deportation proceedings are administrative and not criminal in nature and that an order of deportation is not a penalty as the word is commonly understood in criminal statutes. It has also been shown that such a doctrine has long been recognized in this jurisdiction, except that not one of the decisions discussed relate to the problem of whether the requirement that a warrant of arrest should issue only upon the determination of probable cause by a judge applied as well to deportation proceedings.[195] It is in this light that *Tiu Chun Hai* was considered a precedent because it was the first time that the Supreme Court restricted the right against unreasonable searches and seizures on the premise that deportation proceedings are not criminal in nature.

In resolving the issues raised in *Tiu Chun Hai,* the Court relied mainly on the decision in *Lao Tang Bun v. Fabre,*[196] which was in turn based on American case law. Not one of the cases cited in *Lao Tang Bun,* however, involved the specific issue of whether or not the search and seizure clause of the Federal Constitution controlled the procedure in deportation proceedings. *Murdoch v. Clark,*[197] cited in *Lao,* concerned the sufficiency of the evidence in a deportation hearing to support the expulsion of an alien. In *Mahler v. Eby,*[198] the principal problem which confronted the Federal Supreme Court was whether or not the prohibition against the passage of ex-post facto laws applied equally to deportation laws. More specifically, the question there was whether or not the petitioners may be expelled under the deportation act (defining certain classes of aliens subject to deportation which include those who have been convicted for violations of specified Federal statutes) enacted

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[195]U.S. v. Yap Kin Co, 22 Phil. 340 (1912); U.S. v. De los Santos, 33 Phil. 397 (1916); Molden v. Collector of Customs, 34 Phil. 493 (1916); and Chua Go v. Collector of Customs, 59 Phil. 523 (1934) - all discussed *infra.*

[196]81 Phil. 682 (1948).

[197]53 F. 2d 155 (1931).

[198]264 U.S. 32 (1923).

subsequent to the petitioners' conviction for violation of a Federal Statute which, in the meantime, had been repealed by the Congress.[199] *Kessler v. Strecker*[200] also did not involve the problem that the Philippine Supreme Court faced either in *Lao Tang Bun* or in *Tiu Chun Hai*. That case dealt with the issue of whether or not the respondent alien fell within a particular class of deportable aliens. There is thus no specific support for the holding in *Tiu Chun Hai* that the protection of the search and seizure provision is not available to an alien being proceeded against in a deportation proceeding.

Moreover, it is doubted if reliance on American jurisprudence would support the *Tiu Chun Hai* decision. Although the Philippine Immigration Act was patterned after the various immigration laws of the United States,[201] courts ought to be cautioned against strict adherence to the construction given by the courts of the United States to the provisions of these acts. It must be pointed out that the search and seizure clause of the U.S. Federal Constitution does not specify the particular officers or agents who may issue warrants of arrest or search warrants.[202] Since 1935, the Philippine Constitution has defined the officer who may determine the existence of probable cause for the issuance of a warrant of arrest - and that is the judge. This was the whole point of the decision in *Vivo v. Montesa*:

> It will be noted that the power to determine the probable cause for warrants of arrest is limited by the Philippine Constitution to judges exclusively, unlike in previous organic laws and the Federal Constitution of the United States that left undetermined which public officials could determine the existence of probable cause.[203]

Whatever may be said by American courts about the applicability or inapplicability in that jurisdiction of specific rights and guarantees in the fundamental law to deportation proceedings should be taken with great caution in this jurisdiction in view of the aforesaid distinction. There is more reason to keep this warning in mind when one is dealing with a statute that has its origin in the United States, such as

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[199] Admittedly, this case comes closest to the question in *Tiu Chun Hai*, as it involves the application of a specific constitutional guarantee to deportation proceedings.

[200] 307 U.S. 22 (1938).

[201] Singh v. Board of Commissioners, 1 SCRA 543, 549 (1961) (wherein specific mention is made of the Act of February 5, 1917 (39 Stat. 874 (1917)) and the Act of May 26, 1924).

[202] *Cf.* Lozano v. Martinez, 146 SCRA 323 (1986) (where the Supreme Court warned against strict reliance on American cases holding statutes similar to the Philippine Bouncing Checks Law void because the environmental circumstances between the two jurisdictions are different).

[203] 24 SCRA 155, 161 (1968); *see* discussion *infra*.

the Philippine Immigration Act. In such an instance, the possibility that there may have been an indiscriminate transplanting of American laws to this jurisdiction without regard to distinctions between the two constitutions concerned, such as the one cited above, cannot be ignored.

In this regard, it must also be pointed out that, over two decades ago, the United States Supreme Court extended the protection afforded by the guarantee against unreasonable searches and seizures to the area of administrative searches, such as inspections of residences and business establishments to ensure compliance with housing, building, health and sanitation regulations. *Camara v. Municipal Court*[204] and *See v. City of Seattle*[205] both held that administrative searches are significant intrusions upon the interests protected by the Fourth Amendment of the Federal Constitution and searches conducted without a warrant disregard the traditional safeguards which the said Amendment guarantees to the individual.[206] Although the Fourth Amendment is silent as regards the officers who may determine probable cause for the issuance of warrants, the Court insisted that an impartial magistrate determine probable cause to warrant the intrusion into either private residences or commercial establishments by officers of the state.[207] Considering the explicit wording of the counterpart provision in the 1987 Philippine Constitution, there is more reason for the Philippine Supreme Court to impose a similar requirement with respect to administrative arrests, searches and seizures in this jurisdiction.

If *Tiu Chun Hai* is to be reaffirmed, it must be based on grounds other than the Supreme Court's decision in *Lao Tang Bun*. The latter case is not sufficient basis to support the proposition that the protection of the search and seizure provision does not extend to deportation proceedings. The case made analogies between Philippine and American jurisprudence, which analogies are highly suspect. The substantive laws under which the American cases were decided, particularly with regard to the provisions of the Federal Constitution, differ greatly from those which obtain in this jurisdiction. In addition, the bulk of the old Philippine decisions relied upon were promulgated at a time when American law was controlling in this jurisdiction.

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[204]387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), *overruling* Frank v. Maryland, 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959). *Camara* involved inspection of dwelling units for possible violations of the city's building code.

[205]387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967) (involving inspection by officers of the city's fire department of the appellant's warehouse to ensure compliance with the fire code).

[206]387 U.S. at 534. For a more detailed discussion of the implications of these two cases, see I. CORTES, *supra* note 113, at 210-215.

[207]387 U.S. at 532.

IV. The Problem with the *Harvey* Decision

The problem with the Supreme Court's decision in *Harvey* is that it neither effectively repudiates *Vivo v. Montesa* nor amply affirms the same. The *Harvey* Court declined to overrule the *Vivo* decision and held instead that *Vivo* may not be invoked insofar as the petition before it was concerned. Yet, it maintained that certain decisions, which run counter to the doctrine in *Vivo v. Montesa,* control certain issues raised in the petition. *Harvey* neither affirms nor rejects *Vivo v. Montesa,* but neither does it uphold or set aside the ruling laid down in *Tiu Chun Hai.* The result is a confusing situation where two clashing lines of cases are melded into an illogical whole, making up a decision which stands as the unwanted offspring of incompatible, warring progenitors.

There is even very little expectation that *Harvey* might be viewed as an exception to the rule laid down in *Vivo v. Montesa.* The confusion of legal precepts and the misapplication of case law in *Harvey* simply make it extremely difficult, and perhaps dangerous, to cite the case as authority for either of the two contradictory propositions raised by the parties to the petition. The result is that the case contributes nothing to the jurisprudence on the issue raised. On the contrary, it effectively rendered ambiguous the doctrine in *Vivo v. Montesa* and it can only be hoped that when the same issue is raised in a future petition, the Court will scrutinize the facts more closely and act more judiciously in resolving the petition.

Harvey not only disturbed a well-settled question; it also drew into perspective the problem of defining the limits of the application of rules of criminal procedure to administrative proceedings. The petitioners invoked the guarantee against unreasonable searches and seizures in assailing their arrest and detention, but the Court, on questionable grounds, held that the rule laid down in the particular case cited by them was not applicable to their cause. It further held that the requirement that probable cause may be determined only by a judge does not apply to deportation proceedings. But the Court did not hesitate to invoke rules consistently applied to criminal prosecutions to counter the petitioners' arguments in support of the issuance of the writ.

As was previously discussed, the Court held that the petitioners' arrests were valid warrantless arrests under paragraphs (a) and (b) of Rule 113, section 5 of the Rules on Criminal Procedure.[208] In holding that the petitioners' detention had become legal due to the

[208] 162 SCRA at 847.

subsequent issuance of a warrant of arrest by the Immigration Commissioner, the Court relied on the familiar rule that a subsequent judicial order cures the initial illegality of the detention of a person and renders the petition for *habeas corpus* moot.[209] The Court further buttressed its position that the petitioners' detention was legal by citing the rule that the filing of a petition to be released on bail amounts to a waiver of the right to question any defect attending the arrest.[210]

It seems inconsistent for the *Harvey* Court to apply all these rules strictly against the petitioners and yet refuse application of the one rule that the latter invoked in their favor - that laid down by the Supreme Court in *Vivo v. Montesa* when it construed the search and seizure clause: that the issuance of a warrant of arrest by the Immigration Commissioner solely for the purposes of investigation and before a final order of deportation violates the Bill of Rights. There can be little doubt that the search and seizure clause of the Constitution primarily outlines a rule of procedure as shown by the fact that the matter of arrests, searches, and seizures is governed primarily by the Rules of Court.[211]

It is difficult to see how the Court could choose to apply or not to apply the various rules of procedure to administrative actions guided solely by its unfettered discretion. There has to be some standard by which courts and other tribunals are to be guided on this matter. At the very least, the *Harvey* Court could have used the opportunity to draw the precise parameters of the application of rules of criminal procedure to administrative actions. The unfairness that will result from the variable application of those rules must be avoided.

V. Conclusion

The *Harvey* decision stands out in Philippine jurisprudence mainly on account of its many failures. Issues already well-settled are confused and conclusions are arrived at on the basis of inadequately supported arguments. The case was potentially precedent-setting, having presented an opportunity for the Supreme Court to reexamine existing jurisprudence on the particular question before it. Instead, the Court came up with a poorly written, generally illogical and

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[209] 162 SCRA at 847-848 (1988) (citing Beltran v. Garcia, 89 SCRA 717 (1979) and Matsura v. Director of Prisons, 77 Phil. 1050 (1947)).

[210] 162 SCRA at 848 (1988) (citing Callanta v. Villanueva, 77 SCRA 377 (1977) and Bagcal v. Villaraza, 120 SCRA 525 (1983)).

[211] Rule 113, 126. *Cf.* Magtoto v. Manguera, 63 SCRA 4 (1975) (where the Supreme Court characterized the exclusionary rule in CONST. (1973) art. IV, sec. 20 as a rule of evidence).

controversial decision.

1. The Supreme Court incorrectly held that the warrantless arrests of the petitioners were valid under the Rules on Criminal Procedure. Decisional law, both Philippine and American, as well as the opinions of commentators and textwriters, considers a warrantless arrest valid only where the person making the arrest (1) perceives, through organs of sense, the acts complained of as constituting the commission of an offense or an attempt at the commission of an offense; (2) exercises independent judgment on the basis of personal knowledge in determining whether or not an offense has been committed and the person to be arrested is guilty thereof; and (3) is precluded from resorting to the warrant procedure due to the exigencies of the situation. Not one of these circumstances obtain in the *Harvey* case.

It is for the same reason that an arrest by virtue of a mission order cannot be considered valid under the Rules. Under Law Instructions No. 39, the Commissioner issues a mission order although he is not the person who perceived the illegal acts of another. A person is ordered arrested based solely on the Commissioner's judgment that an offense has been committed by the former. Moreover, there can never be a situation where exigency will justify deviation from the warrant procedure as the very issuance of a mission order means that resort to the judicial authorities was possible. Hence, there are serious doubts as to the validity of mission orders and Law Instructions No. 39 pursuant to which the orders are issued.

2. The Supreme Court refused to apply *Vivo v. Montesa* to the case of the petitioners. It sought to distinguish the two cases by pointing out that the warrants involved in the *Vivo* were different from those issued by the respondent Commissioner against the petitioners. A close examination of the two cases would reveal that the distinction made by the Court is artificial and baseless. The Court pointed out that an investigation had already been conducted in *Harvey* , thus taking it out of the rule that the Immigration Commissioner may not issue a warrant of arrest if the purpose thereof is merely for the investigation of the alien concerned. It has been shown, however, that the only investigation conducted in *Harvey* was the three-month surveillance of the petitioners, while the investigation contemplated in *Vivo v. Montesa* (for which the Commissioner may not issue a warrant) referred to formal deportation proceedings before the Board of Commissioners. In *Harvey,* the formal deportation proceedings against the petitioners had just been commenced. If *Vivo v. Montesa* were to be applied strictly, the warrants issued by the respondent Commissioner should have been declared null and void.

Moreover, *Vivo v. Montesa* laid down a two-pronged rule: the Commissioner may not issue a warrant for the arrest of an alien if the warrant is for the purpose of investigation and before a final order of deportation is issued by the Board of Commissioners. In *Harvey*, the proceedings against the petitioners had just been commenced and no final order of deportation had yet been issued against them. The Court simply ignored the second branch of the rule.

3. The Supreme Court should have inquired into the validity of the mission orders issued by the respondent Commissioner. As with the warrants of arrest assailed in *Vivo v. Montesa*, the mission orders in *Harvey* were issued to bring the petitioners before the Commission in order that they may be investigated and, if warranted, deported. The mission orders were in the nature of warrants of arrest which *Vivo v. Montesa* expressly prohibited the Commissioner from issuing except under the two conditions already stated above.

4. Contrary to the Court's opinion, the *Harvey* decision does conflict with the ruling enunciated in *Qua Chee Gan*. It sought to distinguish the latter case from *Harvey* by arguing that in *Harvey*, probable cause had already been determined and, therefore, there was no room for the application of the rule that the arrest of an individual may not be ordered by an officer other than a judge who has the exclusive authority to determine the existence of probable cause for the issuance of a warrant. In holding that there has already been a determination of probable cause, the Court simply *assumed* that the Commissioner had authority to make such a determination. Said authority was precisely questioned by the petitioners.

Neither can it be said that the arresting officers had probable cause to effect the arrest of the petitioners. To sustain this view, one must first concede that the warrantless arrests of the petitioners were valid. It has been shown that such argument is patently untenable.

5. The Court did not expressly abandon *Vivo v. Montesa*, and yet it made references to other cases with contrary holdings in order to support its denial of the petition. The result of the simultaneous reliance on these two opposing lines of decisions is to confuse a question already well settled in jurisprudence.

The fundamental issue in *Harvey* was whether or not the protection of the search and seizure clause of the Constitution may be extended to deportation proceedings. It has been shown that an affirmative answer is not entirely inappropriate, considering that the Constitution provides that only a judge may determine probable cause for the issuance of a warrant. Moreover, the consistent holding of our

courts has been that the determination of probable cause is a judicial function. Finally, there is no showing that an affirmative answer will result in any undue restriction of the deportation powers of the Commission. On the other hand, the denial of the right can be based solely on the fact that deportation proceedings are not criminal in nature and that, therefore, there need not be a strict compliance with the rigid requirements applied in criminal prosecutions. This rule was merely culled from American cases decided under a Constitution which is substantially different from the Philippine Constitution.

6. It is impossible to situate *Harvey* in the long line of decisions on the question of whether the search and seizure clause applies to administrative proceedings. It neither affirms nor rejects the rule laid down in *Vivo v. Montesa,* nor that set forth in *Tiu Chun Hai.* The conclusions arrived at in *Harvey* are a hopeless confusion of legal concepts and jurisprudential rules that it would be very dangerous to invoke *Harvey* in support of either the *Vivo* or the *Tiu Chun Hai* rule. At the very least, it might be construed as a narrow exception to *Vivo v. Montesa.* It is hoped that when a similar question is raised before the Supreme Court, greater care is taken in disposing of the question in order that the *Harvey* confusion is not repeated and a single rule is formulated.

7. The Supreme Court could have used the *Harvey* petition as an opportunity to determine the extent of the application of rules of criminal procedure to administrative proceedings. Instead, it chose to take an inconsistent approach to the *Harvey* issue: it refused to apply the one rule invoked by the petitioners in support of the issuance of the writ but at the same time used other procedural rules to justify the denial of the petition. By its failure to expound on the precise limits of the application of rules of criminal procedure to administrative actions, the High Tribunal would have courts use their unfettered discretion in deciding whether to apply or not the said rules to administrative proceedings.