G.R. No. 171396 (Prof. Randolf S. David, Lorenzo Tañada III, Ronald Llamas, H. Harry L. Roque, Jr., Joel Ruiz Butuyan, Roger R. Rayel, Gary S. Mallari, Romel Regalado Bagares, Christopher F.C. Bolastig, petitioners, v. Gloria Macapagal-Arroyo, as President and Commander-in-Chief, Executive Secretary Eduardo Ermita, Hon. Avelino Cruz II, Secretary of National Defense, General Generoso Senga, Chief of Staff, Armed Forces of the Philippines, Director General Arturo Lomibao, Chief, Philippine National Police, respondents.)

G.R. No. 171409 (Niñez Cacho-Olivares and Tribune Publishing Co., Inc., petitioner, v. Honorable Secretary Eduardo Ermita and Honorable Director General Arturo Lomibao, respondents.)

G.R. No. 171485 (Francis Joseph G. Escudero, Joseph A. Santiago, Teodoro A. Casino, Agapito A. Aquino, Mario G. Aguja, Satur C. Ocampo, Mujiv S. Hataman, Juan Edgardo Angara, Teofisto DL. Guingona III, Emmanuel Josel J. Villanueva, Liza L. Maza, Imee R. Marcos, Renato B. Magtubo, Justin Marc SB. Chipeco, Roilo Golez, Darlene Antonio-Custudio, Loretta Ann P. Rosales, Josel G. Virador, Rafael V. Mariano, Gilbert C. Remulla, Florencio G. Noel, Ana Theresa Hontiveros-Baraquel, Imelda C. Nicolas, Marvic M.V.F. Leonenen, Neri Javier Colmenares, Movement of Concerned Citizens for Civil Liberties, represented by Amado Gat Inciong, petitioners, v. Eduardo R. Ermita, Executive Secretary, Avelino J. Cruz, Jr., Secretary, DND Ronaldo V. Puno, Secretary, DILG, Generoso Senga, AFP Chief of Staff, Arturo Lumibao, Chief PNP, respondents.)

G.R. No. 171483 (Kilusang Mayo Uno, represented by its Chairperson Elmer C. Labog and Secretary General Joel Maglunsod, National Federation of Labor Unions-Kilusang Mayo Uno (NAFLU-KMU), represented by its National President, Joselito v. Ustarez, Antonio C. Pascual, Salvador t. Carranza, Emilia P. Dapulang, Martin Custodio, Jr., and Roque M. Tan, petitioners, v. Her Excellency, President Gloria Macapagal-Arroyo, The Honorable Executive Secretary, Eduardo Ermita, The Chief of Staff, Armed Forces of the Philippines, Generoso Senga, and the PNP Director General, Arturo Lomibao, respondents.)

G.R. No. 171400 (Alternative Law Groups, Inc. v. (ALG), petitioner, v. Executive Secretary Eduardo L. Ermita. Lt. Gen. Generoso Senga, and Director General Arturo Lomibao, respondents.)

G.R. No. 171489 (Jose Anselmo I. Cadiz, Feliciano M. Bautista, Romulo R. Rivera, Jose Amor M. Amorado, Alicia A. Risos-Vidal, Felimon C. Abelita III, Manuel P. Legaspi, J.B., Jovy C. Bernabe, Bernard L. Dagcuta, Rogelio V. Garcia and Integrated Bar of the Philippines (IBP), petitioners, v. Hon. Executive Secretary Eduardo Ermita, General Generoso Senga, in his capacity as AFP Chief of Staff, and Direcotr General Arturo Lomibao, in his capacity as PNP Chief, respondents.)

G.R. No. 171424 (Loren B. Legarda, petitioner, v. Gloria Macapagal-Arroyo, in her capacity as President and Commander-in-Chief; Arturo Lomibao, in his capacity as Director-General of the Philippine National

Police (PNP); Generoso Senga, in his capacity as Chief of Staff of the Armed Forces of the Philippine (AFP); and Eduardo Ermita, in his capacity as Executive Secretary, respondents.)

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DISSENTING OPINION

TINGA, *J*:

I regret to say that the majority, by its ruling today, has imprudently placed the Court in the business of defanging paper tigers. The immodest show of brawn unfortunately comes at the expense of an exhibition by the Court of a fundamental but sophisticated understanding of the extent and limits of executive powers and prerogatives, as well as those assigned to the judicial branch. I agree with the majority on some points, but I cannot join the majority opinion, as it proceeds to rule on non-justiciable issues based on fears that have not materialized, departing as they do from the plain language of the challenged issuances to the extent of second-guessing the Chief Executive. I respectfully dissent.

The key perspective from which I view these present petitions is my own *ponencia* in *Sanlakas v. Executive Secretary,*[1] which centered on Presidential Proclamation No. 427 (PP 427), declaring a "state of rebellion" in 2003. The Court therein concluded that while the declaration was constitutional, such declaration should be regarded as both regarded as "an utter superfluity", which "only gives notice to the nation that such a state exists and that the armed forces may be called to prevent or suppress it", and "devoid of any legal significance", and "cannot diminish or violate constitutionally protected rights." I submit that the same conclusions should be reached as to Proclamation No. 1017 (PP 1017). Following the cardinal precept that the acts of the executive are presumed constitutional is the equally important doctrine that to warrant unconstitutionality, there must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication.[2] Also well-settled as a rule of construction is that

[1] G.R. Nos. 159085, 159103, 159185, 159196, 3 February 2004, 421 SCRA 656.

[2]

where thee are two possible constructions of law or executive issuance one of which is in harmony with the Constitution, that construction should be preferred.[3] The concerns raised by the majority relating to PP 1017 and General Order Nos. 5 can be easily disquieted by applying this well-settled principle.

I.
PP 1017Has No Legal Binding Effect; Creates No Rights and Obligations; and Cannot Be Enforced or Invoked in a Court Of Law

First, the fundamentals. The President is the Chief of State and Foreign Relations, the chief of the Executive Branch,[4] and the Commander-in-Chief of the Armed Forces.[5] The Constitution vests on the President the executive power.[6] The President derives these constitutional mandates from direct election from the people. The President stands as the most recognizable representative symbol of government and of the Philippine state, to the extent that foreign leaders who speak with the President do so with the understanding that they are speaking to the Philippine state.

Yet no matter the powers and prestige of the presidency, there are significant limitations to the office of the President. The President does not have the power to make or legislate laws,[7] or disobey those laws passed by Congress.[8] Neither does the President have to power to create rights and obligations with binding legal effect on the Filipino citizens, except in the

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[3] R. Agpalo, Statutory Construction, 3rd.ed. (1995), at 21.

"When a statute is reasonably susceptible of two constructions, one constitutional and the other unconstitutional, that construction in favor of its constitutionality shall be adopted and the construction that will render it invalid rejected." See R. Agpalo, id., at 266; citing Mutuc v. COMELEC, G.R. No. 32717, Nov. 26, 1970, 36 SCRA 228; J.M. Tuason & Co., Inc. v. Land Tenure Adm., G.R. No. 21064, Feb. 18, 1970, 31 SCRA 413; American Bible Society v. City of Manila, 101 Phil. 386 (1957); Alba v. Evangelista, 100 Phil. 683 (1957); Maddumba v. Ozaeta, 82 Phil. 345 (1948); Benguet Exploration, Inc. v. Department of Agriculture and Natural Resources, G.R. No. 29534, Fe. 28, 1977, 75 SCRA 285 (1977); De la Cruz v. Paras, G.R. No. 42591, July 25, 1983, 123 SCRA 569.

[4] See Constitution, Section 17, Article VII.

[5] See Constitution, Section 18, Article VII.

[6] See Constitution, Section 1, Article VII.

[7] The plenary legislative power being vested in Congress. See Constitution, Section 1, Article VI.

[8] "[The President] shall ensure that the laws be faithfully executed." See Constitution, Section 17, Article VII.

context of entering into contractual or treaty obligations by virtue of his/her position as the head of State. The Constitution likewise imposes limitations on certain powers of the President that are normally inherent in the office. For example, even though the President is the administrative head of the Executive Department and maintains executive control thereof,[9] the President is precluded from arbitrarily terminating the vast majority of employees in the civil service whose right to security of tenure is guaranteed by the Constitution.[10]

The President has inherent powers,[11] powers expressly vested by the Constitution, and powers expressly conferred by statutes. The power of the President to make proclamations, while confirmed by statutory grant, is nonetheless rooted in an inherent power of the presidency and not expressly subjected to constitutional limitations. But proclamations, as they are, are a species of issuances of extremely limited efficacy. As defined in the Administrative Code, proclamations are merely "acts of the President fixing a date or declaring a status or condition of public moment or interest upon the existence of which the operation of a specific law or regulation is made to depend".[12] A proclamation, on its own, cannot create or suspend any constitutional or statutory rights or obligations. There would be need of a complementing law or regulation referred to in the proclamation should such act indeed put into operation any law or regulation by fixing a date or declaring a status or condition of a public moment or interest related to such law or regulation. And should the proclamation allow the operationalization of such law or regulation, all subsequent resultant acts cannot exceed or supersede the law or regulation that was put into effect.

Under Section 18, Article VII of the Constitution, among the constitutional powers of the President, as Commander-in-Chief, is to "call

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[9] Supra note 4.

[10] "No officer or employee of the civil service shall be removed or suspended except for cause provided by law." See Constitution, Section 2(3), Article IX-B.

[11] See, e.g., Marcos v. Manglapus, G.R. No. 88211, 27 October 1989, 178 SCRA 760, 763.

[12] See Administrative Code, Section 4, Chapter 2, Book III.

out such armed forces to prevent or suppress lawless violence, invasion or rebellion".[13] The existence of invasion or rebellion could allow the President to either suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law, but there is a fairly elaborate constitutional procedure to be observed in such a case, including congressional affirmation or revocation of such suspension or declaration, as well as the availability of judicial review. However, the existence of lawless violence, invasion or rebellion does not *ipso facto* cause the "calling out" of the armed forces, the suspension of *habeas corpus* or the declaration of martial law ─ it remains within the discretion of the President to engage in any of these three acts should said conditions arise.

Sanlakas involved PP 427, which declared the existence of a "state of rebellion." Such declaration could ostensibly predicate the suspension of the privilege of the writ of *habeas corpus* or the declaration of martial law, but the President did not do so. Instead, PP 427, and the accompanying General Order No. 4, invoked the "calling out" of the Armed Forces to prevent lawless violence, invasion and rebellion. Appreciably, a state of lawless violence, invasion or rebellion could be variable in scope, magnitude and gravity; and Section 18, Article VII allows for the President to respond with the appropriate measured and proportional response.

Indeed, the diminution of any constitutional rights through the suspension of the privilege of the writ or the declaration of martial law is deemed as "strong medicine" to be used sparingly and only as a last resort, and for as long as only truly necessary. Thus, the mere invocation of the "calling out" power stands as a balanced means of enabling a heightened alertness in dealing with the armed threat, but without having to suspend any constitutional or statutory rights or cause the creation of any new obligations. For the utilization of the "calling out" power alone cannot vest unto the President any new constitutional or statutory powers, such as the enactment of new laws. At most, it can only renew emphasis on the duty of the President to execute already existing laws without extending a

[13] See Section 18, Article VII, Constitution.

corresponding mandate to proceed extra-constitutionally or extra-legally. Indeed, the "calling out" power does not authorize the President or the members of the Armed Forces to break the law.

These were the premises that ultimately informed the Court's decision in *Sanlakas*, which affirmed the declaration of a "state of rebellion" as within the "calling out" power of the President, but which emphasized that for legal intents and purposes, it should be both regarded as "an utter superfluity", which "only gives notice to the nation that such a state exists and that the armed forces may be called to prevent or suppress it," and "devoid of any legal significance," as it could not "cannot diminish or violate constitutionally protected rights." The same premises apply as to PP 1017.

A comparative analysis of PP 427 and PP 1017, particularly their operative clauses, is in order.

PP 427	PP 1017
NOW, THEREFORE, I, GLORIA MACAPAGAL-ARROYO, by virtue of the powers vested in me by law, hereby confirm the existence of an actual and on-going rebellion, compelling me to declare a state of rebellion. In view of the foregoing, I am issuing General Order No. 4 in accordance with Section 18, Article VII of the Constitution, calling out the Armed Forces of the Philippines and the Philippine National Police to immediately carry out the necessary actions and measures to suppress and quell the rebellion with due regard to constitutional rights.	NOW, THEREFORE, I Gloria Macapagal-Arroyo, President of the Republic of the Philippines and Commander-in-Chief of the Armed Forces of the Philippines, by virtue of the powers vested upon me by Section 18, Article 7 of the Philippine Constitution which states that: "The President. . . whenever it becomes necessary, . . . may call out (the) armed forces to prevent or suppress. . . rebellion. . .," and in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well any act of insurrection or rebellion and to enforce obedience to all the laws and to all decrees, orders and regulations promulgated by me personally or upon my direction; and as provided in Section 17, Article 12 of the Constitution do hereby declare a State of National Emergency.

Let us begin with the similarities. Both PP 427 and PP 1017 are characterized by two distinct phases. The first is the declaration itself of a status or condition, a "state of rebellion" in PP 437, and a "state of national emergency" under PP 1017. Both "state of rebellion" and "state of national emergency" are terms within constitutional contemplation. Under Section 18, Article VII, the existence of a "state of rebellion" is sufficient premise for either the suspension of the privilege of the writ of habeas corpus or the declaration of martial law, though in accordance with the strict guidelines under the same provision. Under Section 17, Article XII, the existence of a state of national emergency is sufficient ground for the State, during the emergency, under reasonable terms prescribed by it, and when the public interest so requires, to temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest. Under Section 23(2), Article VI, the existence of a state of national emergency may also allow Congress to authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy.

Certainly, the declaration could stand as the first step towards constitutional authorization for the exercise by the President, the Congress or the State of extraordinary powers and prerogatives. However, the declaration alone cannot put into operation these extraordinary powers and prerogatives, as the declaration must be followed through with a separate act providing for the actual utilization of such powers. In the case of the "state of rebellion," such act involves the suspension of the writ or declaration of martial law. In the case of the "state of national emergency," such act involves either an order for the takeover or actual takeover by the State of public utilities or businesses imbued with public interest or the authorization by Congress for the President to exercise emergency powers.

In PP 427, the declaration of a "state of rebellion" did not lead to the suspension of the writ or the declaration of martial law. In PP 1017, the declaration of a "state of national emergency" did not lead to an authorization for the takeover or actual takeover of any utility or business, or

the grant by Congress to the President of emergency powers. Instead, both declarations led to the invocation of the calling out power of the President under Section 18, Article VII, which the majority correctly characterizes as involving only "ordinary police action."

I agree with the *ponencia*'s holding that PP 1017 involves the exercise by the President of the "calling out" power under Section 18, Article VII. In *Integrated Bar v. Zamora,*[14] the Court was beseeched upon to review an order of President Estrada commanding the deployment of the Marines in patrols around Metro Manila, in view of an increase in crime.[15] The Court, speaking through Justice Santiago Kapunan, affirmed the President's order, asserting that "it is the unclouded intent of the Constitution to vest upon the President, as Commander-in-Chief of the Armed Forces, full discretion to call forth the military when in his judgment it is necessary to do so in order to prevent or suppress lawless violence, invasion or rebellion. Unless the petitioner can show that the exercise of such discretion was gravely abused, the President's exercise of judgment deserves to be accorded respect from this Court."[16] Tellingly, the order of deployment by President Estrada was affirmed by the Court even though we held the view that the power then involved was not the "calling out" power, but "the power involved may be no more than the maintenance of peace and order and promotion of the general welfare."[17]

It was also maintained in *Integrated Bar* that while Section 18, Article VII mandated two conditions ─ actual rebellion or invasion and the requirement of public safety ─ before the suspension of the privilege of the writ of *habeas corpus* or the declaration of martial law could be declared, "these conditions are not required in the case of the power to call out the armed forces. The only criterion is that 'whenever it becomes necessary', the President may call the armed forces 'to suppress lawless violence, invasion

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[14] 392 Phil. 618 (2000)

[15] Id. at 627.

[16] Id. at 644.

[17] Id. at 636.

or rebellion."[18] The Court concluded that the implication was "that the President is given full discretion and wide latitude in the exercise of the power to call as compared to the two other powers."[19]

These propositions were affirmed in *Sanlakas*, wherein the invocation of the calling out power was expressly made by President Arroyo. The Court noted that for the purpose of exercising the calling out power, the Constitution did not require the President to make a declaration of a state of rebellion.[20] At the same time, the Court in *Sanlakas* acknowledged that "the President's authority to declare a state of rebellion springs in the main from her powers as chief executive **and, at the same time, draws strength from her Commander-in-Chief powers**."[21]

For still unclear reasons, the majority attempts to draw a distinction between *Sanlakas* and the present petitions by that the statutory authority to declare a "state of rebellion" emanates from the Administrative Code of 1987, particularly the provision authorizing the President to make proclamations. As such, the declaration of a "state of rebellion," pursuant to statutory authority, "was merely an act declaring a status or condition of public moment or interest." The majority grossly misreads *Sanlakas*, which expressly roots the declaration of a state of rebellion from the wedded powers of the Chief Executive, under Section 1, Article VII, and as Commander-in-Chief, under Section 18, Article VII.

Insofar as PP 1017 is concerned, the calling out power is definitely involved, in view of the directive to the Armed Forces of the Philippines to "suppress all forms of lawless violence". But there are nuances to the calling out power invoked in PP 1017 which the majority does not discuss. The directive "to suppress all forms of lawless violence" is addressed not only to the Armed Forces but to the police as well. The "calling out" of the police

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[18] Id. at 643.

[19] Id.

[20] *Sanlakas v. Executive Secretary*, *supra* note 1, at 668.

[21] Id. at 677.

does not derive from Section 17, Article VII, or the commander-in-chief clause, our national police being civilian in character. Instead, the calling out of the police is sourced from the power of the President as Chief Executive under Section 1, Article VII, and the power of executive control under Section 18, Article VII. Moreover, while the permissible scope of military action is limited to acts in furtherance of suppressing lawless violence, rebellion, invasion, the police can be commanded by the President to execute all laws without distinction in light of the presidential duty to execute all laws.[22]

Still, insofar as Section 17, Article VII is concerned, wide latitude is accorded to the discretion of the Chief Executive in the exercise of the "calling out" power due to a recognition that the said power is of limited import, directed only to the Armed Forces of the Philippines, and incapable of imposing any binding legal effect on the citizens and other branches of the Philippines. Indeed, PP 1017 does not purport otherwise. Nothing in its operative provisions authorize the President, the Armed Forces of the Philippines, or any officer of the law, to perform any extra-constitutional or extra-legal acts. PP 1017 does not dictate the suspension of any of the people's guarantees under the Bill of Rights.

If it cannot be made more clear, neither the declaration of a state of emergency under PP 1017 nor the invocation of the calling out power therein authorizes warrantless arrests, searches or seizures; the infringement of the right to free expression, peaceable assembly and association and other constitutional or statutory rights. Any public officer who nonetheless engaged or is engaging in such extra-constitutional or extra-legal acts in the name of PP 1017 may be subjected to the appropriate civil, criminal or administrative liability.

To prove this point, let us now compare PP 1017 with a different presidential issuance, one that was intended to diminish constitutional and civil rights of the people. The said issuance, Presidential Proclamation No.

[22]Supra note 8.

1081, was issued by President Marcos in 1972 as the instrument of declaring martial law. The operative provisions read:

PD. 1081	PP 1017
Now, thereof, I, Ferdinand E. Marcos, President Of the Philippines, by virtue of the powers vested upon me by article VII, Section 10, Paragraph (2) of the Constitution, do hereby **place the entire Philippines** as defined in the article I, Section 1, of the Constitution **under martial law**, and in my capacity as their commander-in-chief, do hereby command the arned forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and decrees, orders and regulations promulgated by me personally or upon my direction. **In addition, I do hereby order that all persons presently detained, as well as others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes, against the fundamental laws of the state, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in Orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction shall be kept under detention until otherwise ordered released by me or by my duly designated representative.** (emphasis supplied)	NOW, THEREFORE, I Gloria Macapagal-Arroyo, President of the Republic of the Philippines and Commander-in-Chief of the Armed Forces of the Philippines, by virtue of the powers vested upon me by Section 18, Article 7 of the Philippine Constitution which states that: "The President. . . whenever it becomes necessary, . . . may call out (the) armed forces to prevent or suppress. . . rebellion. . .," and in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well any act of insurrection or rebellion and to enforce obedience to all the laws and to all decrees, orders and regulations promulgated by me personally or upon my direction; and as provided in Section 17, Article 12 of the Constitution do hereby declare a State of National Emergency.

Let us examine the differences between PP No. 1081 and PP 1017. First, while PP 1017 merely declared the existence of a state of rebellion, an

act ultimately observational in character, PP 1081 "placed the entire Philippines under martial law," an active implement[23] that, by itself, substituted civilian governmental authority with military authority. Unlike in the 1986 Constitution, which was appropriately crafted with an aversion to the excesses of Marcosian martial rule, the 1935 Constitution under which PP 1081 was issued left no intervening safeguards that tempered or limited the declaration of martial law. Even the contrast in the verbs used, "place" as opposed to "declare," betrays some significance. To declare may be simply to acknowledge the existence of a particular condition, while to place ineluctably goes beyond mere acknowledgement, and signifies the imposition of the actual condition even if it did not exist before.

Both PP 1081 and PP 1017 expressly invoke the calling out power. However, the contexts of such power are wildly distaff in light of PP 1081's accompanying declaration of martial law. Since martial law involves the substitution of the military in the civilian functions of government, the calling out power involved in PP 1081 is significantly greater than the one involved in PP 1017, which could only contemplate the enforcement of existing laws in relation to the suppression of lawless violence, rebellion or invasion and the maintenance of general peace and order.

Further proof that PP 1081 intended a wholesale suspension of civil liberties in the manner that PP 1017 does not even ponder upon is the subsequent paragraph cited, which authorizes the detention and continued detention of persons for a plethora of crimes not only directly related to the rebellion or lawless violence, but of broader range such as those "against national security," or "public order." The order of detention under PP 1081 arguably includes every crime in the statute book. And most alarmingly, any person detained by virtue of PP 1081 could remain in perpetual detention unless otherwise released upon order of President Marcos or his duly authorized representative.

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[23] The declaration of martial law then within the President to make under authority of Section 10(2), Article VII of the 1935 Constitution.

Another worthy point of contrast concerns how the Supreme Court, during the martial law era, dealt with the challenges raised before it to martial law rule and its effects on civil liberties. While martial law stood as a valid presidential prerogative under the 1935 Constitution, a ruling committed to safeguard civil rights and liberties could have stood ground against even the most fundamental of human rights abuses ostensibly protected under the 1935 and 1973 constitutions and under international declarations and conventions. Yet a perusal of *Aquino v. Enrile,*[24] the case that decisively affirmed the validity of martial law rule, shows that most of the Justices then sitting exhibited diffidence guised though as deference towards the declaration of martial law. Note these few excerpts from the several opinions submitted in that case which stand as typical for those times:

> The present state of martial law in the Philippines is peculiarly Filipino and fits into no traditional patterns or judicial precedents. xxx In the first place I am convinced (as are the other Justices), without need of receiving evidence as in an ordinary adversary court proceeding, that a state of rebellion existed in the country when Proclamation No. 1081 was issued. It was a matter of contemporary history within the cognizance not only of the courts but of all observant people residing here at that time. xxx The state of rebellion continues up to the present. The argument that while armed hostilities go on in several provinces in Mindanao there are none in other regions except in isolated pockets in Luzon, and that therefore there is no need to maintain martial law all over the country, ignores the sophisticated nature and ramifications of rebellion in a modern setting. It does not consist simply of armed clashes between organized and identifiable groups on fields of their own choosing. It includes subversion of the most subtle kind, necessarily clandestine and operating precisely where there is no actual fighting. Underground propaganda, through printed newssheets or rumors disseminated in whispers; recruiting of armed and ideological adherents, raising of funds, procurement of arms and materiel, fifth-column activities including sabotage and intelligence ─ all these are part of the rebellion which by their nature are usually conducted far from the battle fronts. They cannot be counteracted effectively unless recognized and dealt with in that context.[25]
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> [T]he fact that courts are open cannot be accepted as proof that the rebellion and insurrection, which compellingly called for the declaration of martial law, no longer imperil the public safety. Nor are the many surface indicia adverted to by the petitioners (the increase in the number of tourists, the choice of Manila as the site of international conferences and

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[24] No. L-35546, 17 September 1974, 59 SCRA 183.

[25] Aquino, Jr. v. Enrile, id. at 240-241.

of an international beauty contest) to be regarded as evidence that the threat to public safety has abated. There is actual armed combat, attended by the somber panoply of war, raging in Sulu and Cotabato, not to mention the Bicol region and Cagayan Valley. I am hard put to say, therefore, that the Government's claim is baseless.

I am not insensitive to the plea made here in the name of individual liberty. But to paraphrase *Ex parte Moyer*, if it were the liberty alone of the petitioner Diokno that is in issue we would probably resolve the doubt in his favor and grant his application. But the Solicitor General, who must be deemed to represent the President and the Executive Department in this case, has manifested that in the President's judgment peace and tranquility cannot be speedily restored in the country unless the petitioners and others like them meantime remain in military custody. For, indeed, the central matter involved is not merely the liberty of isolated individuals, but the collective peace, tranquility and security of the entire nation.[26]

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It may be that the existence or non-existence or imminence of a rebellion of the magnitude that would justify the imposition of martial law is an objective fact capable of judicial notice, for a rebellion that is not of general knowledge to the public cannot conceivably be dangerous to public safety. But precisely because it is capable of judicial notice, no inquiry is needed to determine the propriety of the Executive's action.

Again, while the existence of a rebellion may be widely known, its real extent and the dangers it may actually pose to the public safety are not always easily perceptible to the unpracticed eye. In the present day practices of rebellion, its inseparable subversion aspect has proven to be more effective and important than "the rising (of persons) publicly and taking arms against the Government" by which the Revised Penal Code characterizes rebellion as a crime under its sanction. Subversion is such a covert kind of anti-government activity that it is very difficult even for army intelligence to determine its exact area of influence and effect, not ot mention the details of its forces and resources. By subversion, the rebels can extend their field of action unnoticed even up to the highest levels of the government, where no one can always be certain of the political complexion of the man next to him, and this does not exclude the courts. Arms, ammunition and all kinds of war equipment travel and are transferred in deep secrecy to strategic locations, which can be one's neighborhood without him having any idea of what is going on. There are so many insidious ways in which subversives act, in fact too many to enumerate, but the point that immediately suggests itself is that they are mostly incapable of being proven in court, so how are We to make a judicial inquiry about them that can satisfy our judicial conscience.

The Constitution definitely commits it to the Executive to determine the factual bases and to forthwith act as promptly as possible to meet the emergencies of rebellion and invasion which may be crucial to the life of the nation. He must do this with unwavering conviction, or any hesitancy or indecision on his part will surely detract from the needed precision in his choice of the means he would employ to repel the aggression. The apprehension that his decision might be held by the Supreme Court to be a transgression of the fundamental law he has sworn to 'defend and preserve' would deter him from acting when precisely it is

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26 Aquino, Jr. v. Enrile, id. at 262-263, Castro, J., Separate Opinion.

most urgent and critical that he should act, since the enemy is about to strike the mortal blow.[27]

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To start with, Congress was not unaware of the worsening conditions of peace and order and of, at least, evident insurgency, what with the numerous easily verifiable reports of open rebellious activities in different parts of the country and the series of rallies and demonstrations, often bloody, in Manila itself and other centers of population, including those that reached not only the portals but even the session hall of the legislature, but the legislators seemed not to be sufficiently alarmed or they either were indifferent or did not know what to do under the circumstances. Instead of taking immediate measures to alleviate the conditions denounced and decried by the rebels and the activists, they debated and argued long on palliatives without coming out with anything substantial much less satisfactory in the eyes of those who were seditiously shouting for reforms. In any event, in the face of the inability of Congress to meet the situation, and prompted by his appraisal of a critical situation that urgently called for immediate action, the only alternative open to the President was to resort to the other constitutional source of extraordinary powers, the Constitution itself.[28]

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Proclamation 1081 is in no sense any more constitutionally offensive. In fact, in ordering detention of persons, the Proclamation pointedly limits arrests and detention only to those "presently detained, as well as others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offences committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of nations, crimes, against the fundamental laws of the state, crimes against public order, crimes involving usurpation of authority, rank, title and improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in Orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally or promulgated upon my direction." Indeed, even in the affected areas, the Constitution has not been really suspended much less discarded. As contemplated in the fundamental law itself, it is merely in a state of anaesthesia, to the end that the much needed major surgery to save the nation's life may be successfully undertaken.[29]

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The quoted lines of reasoning can no longer be sustained, on many levels, in these more enlightened times. For one, as a direct reaction to the philosophy of judicial inhibition so frequently exhibited during the Marcos

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[27] Id. at 398-399, Barredo, J., concurring.

[28] Id. at 405-406, Barredo, J., concurring.

[29] Id. at 423, Barredo, J., concurring.

dictatorship, our present Constitution has explicitly mandated judicial review of the acts of government as part of the judicial function. As if to rebuff *Aquino*, the 1987 Constitution expressly allows the Supreme Court to review the sufficiency of the factual basis of the proclamation of martial law and decide the same within 30 days from the filing of the appropriate case.[30] The Constitution also emphasizes that a state of martial law did not suspend the operation of the Constitution or supplant the functioning of the judicial and legislative branches.[31] The expediency of hiding behind the political question doctrine can no longer be resorted to.

For another, the renewed emphasis within domestic and international society on the rights of people, as can be seen in worldwide democratic movements beginning with our own in 1986, makes it more difficult for a government established and governed under a democratic constitution, to engage in official acts that run contrary to the basic tenets of democracy and civil rights. If a government insists on proceeding otherwise, the courts will stand in defense of the basic constitutional rights of the people.

Still, the restoration of rule under law, the establishment of national governmental instrumentalities, and the principle of republicanism all ensure that the constitutional government retains significant powers and prerogatives, for it is through such measures that it can exercise sovereign will in behalf of the people. Concession to those presidential privileges and prerogatives should be made if due. The abuses of past executive governments should not detract from these basic governmental powers, even as they may warrant a greater degree of wariness from those institutions that balance power and the people themselves. And the rule of law should prevail above all. The damage done by martial rule was not merely personal but institutional, and the proper rebuke to the caprices and whims of the iniquitous past is to respect the confines of the restored rule of law.[32]

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[30] Constitution, Section 18, Article VII.

[31] Constitution, Section 18, Article VII.

[32] See Mijares v. Hon. Ranada, G.R. No. 139325, 12 April 2005.

Nothing in PP 1017, or any issuance by any President since Aquino, comes even close to matching PP 1081. **It is a rank insult to those of us who suffered or stood by those oppressed under PP 1081 to even suggest that the innocuous PP 1017 is of equivalent import.**

PP 1017 Does Not Purport or Pretend that the President Has The Power to Issue Decrees

There is one seeming similarity though in the language of PP 1017 and PP 1081, harped upon by some of the petitioners and alluded to by the majority. PP 1017 contains a command to the Armed Forces "to enforce obedience to all the laws and to all decrees, orders and regulations by [the President]". A similar command was made under PP 1081. That in itself should not be a cause of surprise, since both PP 1017 and PP 1081 expressly invoked the "calling out" power, albeit in different contexts.

The majority however considers that since the President does not have the power to issue decrees, PP 1017 is unconstitutional insofar as it enforces obedience "to all decrees." For one, it should be made clear that the President currently has no power to issue decrees, and PP 1017 by no measure seeks to restore such power to the President. Certainly, not even a single decree was issued by President Arroyo during the several days PP 1017 was in effect, or during her term thus far for that matter.

At the same time, such power did once belong to the President during the Marcos era and was extensively utilized by President Marcos. It has to be remembered that chafed as we may have under some of the Marcos decrees, per the 1987 Constitution they still remain as part of the law of the land unless particularly stricken down or repealed by subsequent enactments. Indeed, when the President calls upon the Armed Forces to enforce the laws, those subsisting presidential decrees issued by President Marcos in the exercise of his legislative powers are included in the equation.

This view is supported by the rules of statutory construction. The particular passage in PP 1017 reads ""to enforce obedience to all the laws and to all decrees, orders and regulations," with the phrases "all the laws and to all decrees" separated by a comma from "orders and regulations promulgated by me." Inherently, laws and those decrees issued by President Marcos in the exercise of his legislative powers, and even those executive issuances of President Aquino in the exercise of her legislative powers, belong to the same class, superior in the hierarchy of laws than "orders and regulations." The use of the conjunction "and" denotes a joinder or union, "relating the one to the other."[33] The use of "and" establishes an association between laws and decrees distinct from orders and regulations, thus permitting the application of the doctrine of *noscitur a sociis* to construe "decrees" as those decrees which at present have the force of law. The dividing comma further signifies the segregation of concepts between "laws and decrees" on one hand, and "orders and regulations" on the other.

Further proof that "laws and decrees" stand as a class distinct from "orders and regulations" is the qualifying phrase "promulgated by me," which necessarily refers only to orders and regulations. Otherwise, PP 1017 would be ridiculous in the sense that the obedience to be enforced only relates to laws promulgated by President Arroyo since she assumed office in 2001. "Laws and decrees" do not relate only to those promulgated by President Arroyo, but other laws enacted by past sovereigns, whether they be in the form of the Marcos presidential decrees, or acts enacted by the American Governor-General such as the Revised Penal Code. Certainly then, such a qualification sufficiently addresses the fears of the majority that PP 1017 somehow empowers or recognizes the ability of the current President to promulgate decrees. Instead, the majority pushes an interpretation that, if pursued to its logical end, suggests that the President by virtue of PP 1017 is also arrogating unto herself, the power to promulgate laws, which are in the mold of enactments from Congress. Again, in this respect, the grouping of "laws" and "decrees" separately from "orders" and

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[33] See R. Agpalo, Statutory Construction, p. 206.

"regulations" signifies that the President has not arrogated unto herself the power to issue decrees in the mold of the infamous Marcos decrees.

Moreover, even assuming that PP 1017 was intended to apply to decrees which the current President could not very well issue, such intention is of no consequence, since the proclamation does not intend or pretend to grant the President such power in the first place. By no measure of contemplation could PP 1017 be interpreted as reinstating to the President the power to issue decrees.

I cannot see how the phrase "enforce obedience to decrees" can be the source of constitutional mischief, since the implementation of PP 1017 will not vest on the President the power to issue such decrees. If the Court truly feels the need to clarify this point, it can do so with the expediency of one sentence or even a footnote. A solemn declaration that the phrase is unconstitutional would be like killing a flea with dynamite when insect powder would do.

PP 1017 A Valid Exercise of Prerogatives Inherent and Traditional in the Office of The Presidency

Thus far, I have dwelt on the legal effects of PP 1017, non-existent as they may be in relation to the citizenry, the courts or on Congress. Still, there is another purpose and dimension behind PP 1017 that fall within the valid prerogatives of the President.

The President, as head of state, is cast in a unique role in our polity matched by no other individual or institution. Apart from the constitutional powers vested on the President lie those powers rooted in the symbolic functions of the office. There is the common expectation that the President should stand as the political, moral and social leader of the nation, an expectation not referred to in of the oath of office, but expected as a matter of tradition. In fact, a President may be cast in crisis even if the Chief Executive has broken no law, and faithfully executed those laws that exist, simply because the President has failed to win over the hearts and minds of

the citizens. As a Princeton academic, Woodrow Wilson once observed that with the People, the President is everything, and without them nothing, and the sad decline of his own eventual presidency is no better proof of the maxim. Such are among the vagaries of the political office, and generally beyond judicial relief or remedy.

Justice Robert Jackson's astute observation in *Youngstown Sheet & Tube Co. v. Sawyer*[34] on the unique nature of the presidency, has been widely quoted:

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude, and finality, his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.[35]

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

Many times, the President exercises such prerogative as a responsive measure, as after a mass tragedy or calamity. Indeed, when the President issues a declaration or proclamation of a state of national mourning after a disaster with massive casualties, while perhaps *de rigeur*, is not the

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[34] 343 U.S. 579, 653-654, J. Jackson, concurring.

[35] Ibid.

formalistic exercise of tradition, but a statement that the President, as the representative of the Filipino people, grieves over the loss of life and extends condolences in behalf of the people to the bereaved. This is leadership at its most solemn.

Yet the President is not precluded, in the exercise of such role, to be merely responsive. The popular expectation in fact is of a pro-active, dynamic chief executive with an ability to identify problems or concerns at their incipience and to respond to them with all legal means at the earliest possible time. The President, as head of state, very well has the capacity to use the office to garner support for those great national quests that define a civilization, as President Kennedy did when by a mere congressional address, he put America on track to the goal of placing a man on the moon. Those memorable presidential speeches memorized by schoolchildren may have not, by themselves, made operative any law, but they served not only merely symbolic functions, but help profoundly influence towards the right direction, the public opinion in the discourse of the times. Perhaps there was no more dramatic example of the use of the "bully pulpit" for such noble purposes than in 1964, when an American President from Texas stood before a Congress populated by many powerful bigots, and fully committed himself as no other President before to the cause of civil rights with his intonation of those lines from the civil rights anthem, "we shall overcome."

From an earlier era in American history, Lincoln's Emancipation Proclamation stands out as a presidential declaration which clearly staked American polity on the side of the democratic ideal, even though the proclamation itself was of dubitable legal value. The proclamation, in short form, "freed the slaves", but was not itself free of legal questions. For one, the notion that the President could, by himself, alter the civil and legal status of an entire class of persons was dubious then and now, although President Lincoln did justify his action as in the exercise of his powers as commander-in-chief during wartime, "as a fit and necessary war measure for suppressing [the] rebellion." Moreover, it has been pointed out that the Proclamation only freed those slaves in those states which were then in rebellion, and it

eventually took the enactment of the Thirteenth Amendment of the U.S. Constitution to legally abolish involuntary servitude.[36] Notwithstanding the legal haze surrounding it, the Emancipation Proclamation still stands as a defining example not only of the Lincoln Presidency, but of American democratic principles. It may be remembered to this day not exactly as an operational means by which slaves were actually freed, but as a clear rhetorical statement that slavery could no longer thenceforth stand.

The President as Chief Government Spokesperson of the democratic ideals is entrusted with a heady but comfortable pursuit. But no less vital, if somewhat graver, is the role of the President as the Chief Defender of the democratic way of life. The "calling out" power assures the President such capability to a great extent, yet it will not fully suffice as a defense of democracy. There is a need for the President to rally the people to defend the Constitution which guarantees the democratic way of life, through means other than coercive. I assert that the declaration of a state of emergency, on premises of a looming armed threat which have hardly been disputed, falls within such proper functions of the President as the defender of the Constitution. It was designed to inform the people of the existence of such a threat, with the expectation that the citizenry would not aid or abet those who would overturn through force the democratic government. At the same time, the Proclamation itself does not violate the Constitution as it does not call for or put into operation the suspension or withdrawal of any constitutional rights, or even create or diminish any substantive rights.

I submit that it would be proper for the Court to recognize that PP 1017 strikes a commendable balance between the Constitution, the "calling out" power, and the inherent function of the Presidency as defender of the democratic constitution. PP 1017 keeps within the scope and limitations of these three standards. It asserts the primacy of the democratic order, civilian control over the armed forces, yet respects constitutional and statutory guarantees of the people.

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[36]See George Fort Milton, The Use of Presidential Power: 1789-1943, 1980 ed., at 119-120.

II.
Section 17, Article XII
of the Constitution
In Relation to PP 1017

My next issue with the majority pertains to the assertion that the President does not have the power to take over public utilities or businesses impressed with public interest under Section 17, Article XII of the Constitution without prior congressional authorization. I agree that the power of the State to take over such utilities and businesses is highly limited, and should be viewed with suspicion if actually enforced.

Yet qualifications are in order with regard to how Section 17, Article XII actually relates of PP 1017.

I agree with the majority that a distinction should be asserted as between the power of the President to declare a state of emergency, and the exercise of emergency powers under Section 17, Article XII. The President would have the power to declare a state of emergency even without Section 17, Article XII.

At the same time, it should be recognized that PP 1017, on its face and as applied, did not involve the actual takeover of any public utility or business impressed with public interest. To some minds, the police action in relation to the Daily Tribune may have flirted with such power, yet ultimately the newspaper was able to independently publish without police interference or court injunction. It may be so that since PP 1017 did make express reference to Section 17, Article XII, but it should be remembered that the constitutional provision refers to a two-fold power of the State to declare a national emergency and to take over such utilities and enterprises. The first power under Section 17, Article XII is not distinct from the power of the President, derived from other constitutional sources, to declare a state of national emergency. Reference to Section 17, Article XII in relation to the power to declare a state of national emergency is ultimately superfluous. A

different situation would obtain though if PP 1017 were invoked in the actual takeover of a utility or business, and in such case, full consideration of the import of Section 17, Article XII would be warranted. But no such situation obtains in this case, and any discussion relating to the power of the State to take over a utility or business under Section 17, Article XII would ultimately be *obiter dictum*.

I respectfully submit that the Court, in these petitions, need not have engaged this potentially contentious issue, especially as it extends to whether under constitutional contemplation, the President may act in behalf of the State in exercising the powers under Section 17, Article XII. Nonetheless, considering that the majority has chosen to speak out anyway, I will express agreement that as a general rule, the President may exercise such powers under Section 17, Article XII only under the grant of congressional approval. Certainly, the notion that congressional authority is required under Section 17, Article XII is not evident from the provision. Even Fr. Bernas notes that Section 17 does not require, as does Article VI, Section 23(2), that the authorization be "by law", thus leaving the impression that the authorization can come from the President.[37]

After the 1989 *coup d'etat*, President Aquino issued issued Proclamation No. 503 on 6 December 1989, declaring a state of national emergency, and referring therein to Section 17, Article XII by citing the entire provision. The declaration was subsequently reaffirmed by Congress when two weeks after, it enacted Republic Act No. 6826. Notably, Section 3(3) of the law authorized the President "to temporarily takeover or direct the operation of any privately-owned public utility or business affected with public interest that violates the herein declared national policy". Tellingly, however, such authority was granted by Congress expressly "pursuant to Article VI, Section 23(2) of the Constitution", and not the take-over provision in Section 17, Article XII. Evidently, the view that Section 17, Article XII requires prior congressional authority has some novelty to it.

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[37] See J. Bernas, S.J., The 1987 Constitution of the Republic of the Philippines: A Commentary, 2003 ed., at 1183.

Still, I concede that it is fundamentally sound to construe Section 17 as requiring congressional authority or approval before the takeover under the provision may be effected. After all, the taking over of a privately owned public utility or business affected with public interest would involve an infringement on the right of private enterprise to profit; or perhaps even expropriation for a limited period. Constitutionally, the taking of property can only be accomplished with due process of law,[38] and the enactment of appropriate legislation prescribing the terms and conditions under which the President may exercise the powers of the State under Section 17 stands as the best assurance that due process of law would be observed.

The fact that Section 17 is purposely ambivalent as to whether the President may exercise the power therein with or without congressional approval leads me to conclude that it is constitutionally permissible to recognize exceptions, such as in extreme situations wherein obtention of congressional authority is impossible or inexpedient considering the emergency. I thus dissent to any proposition that such requirement is absolute under all circumstances. I maintain that in such extreme situations, the President may exercise such authority subject to judicial review.

It should be admitted that some emergencies are graver and more imminent than others. It is not within the realm of impossibility that by reason of a particularly sudden and grave emergency, Congress may not be able to convene to grant the necessary congressional authority to the President. Certainly, if bombs from a foreign invader are falling over Manila skies, it may be difficult, not to mention unnecessarily onerous, to require convening Congress before the President may exercise the functions under Section 17, Article XII. The proposition of the majority may be desirable as the general rule, but the correct rule that should be adopted by the Court should not be so absolute so as to preclude the exercise by the President of such power under extreme situations.

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38 See Section 1, Article III, CONSTITUTION.

In response to this argument, the majority cites portions of *Araneta v. Dinglasan,*[39] most pertinent of which reads: "The point is, under this framework of government, legislation is preserved for Congress all the time, not excepting periods of crisis no matter how serious."

For one, *Araneta* did not involve a situation wherein the President attempted to exercise emergency powers without congressional authority; concerning as it did the exercise by President Quirino of those emergency powers conferred several years earlier by Congress to President Quezon at the onset of the Pacific phase of World War II. The Court therein ruled that the emergency that justified then the extraordinary grant of powers had since expired, and that there no longer existed any authority on the part of the President to exercise such powers, notwithstanding that the law, Commonwealth Act No. 671, "did not in term fix the duration of its effectiveness".

Clearly, the context in which the Court made that observation in *Araneta* is not the same context within which my own observations oscillate. My own submission is premised on the extreme situation wherein Congress may be physically unable to convene, an exceptional circumstance which the hard-line stance of the majority makes no concessions for.

Indeed, even the factual milieu recounted in *Araneta* conceded that such extreme circumstance could occur, when it noted President Quezon's claim that he was impelled to call for a special session of the National Assembly after foreseeing that "it was most unlikely that the Philippine Legislature would hold its next regular session which was to open on January 1, 1942."[40] That the National Assembly then was able to convene and pass Commonwealth Act No. 671 was fortunate, but somewhat a luxury nonetheless. Indeed, it is not beyond the realm of possibility that the emergency contemplated would be so grave that a sufficient number of

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[39] 84 Phil. 368 (1949).

[40] Id. at 379.

members of Congress would be physically unable to convene and meet the quorum requirement.

Ultimately though, considering that the authorized or actual takeover under Section 17, Article XII, is not presented as a properly justiciable issue. Nonetheless, and consistent with the general tenor, the majority has undertaken to decide this non-justiciable issue, and to even place their view in the dispositive portion in a bid to enshrine it as doctrine. In truth, the Court's pronouncement on this point is actually *obiter.* It is hoped that should the issue become ripe for adjudication before this Court, the *obiter* is not adopted as a precedent without the qualification that in extreme situations wherein congressional approval is impossible or highly impractical to obtain, the powers under Section 17, Article XII may be authorized by the President.

III.
Overbreadth and "Void for Vagueness"
Doctrines Applicable Not Only To
Free Speech Cases

The majority states that "the overbreadth doctrine is an analytical tool developed for testing 'on their faces' statutes in free speech cases"[41], and may thus be entertained "in cases involving statutes which, by their terms, seek to regulate only 'spoken words', and not conduct. A similar characterization is made as to the "void for vagueness" doctrine, which according to the majority, is "subject to the same principles governing overbreadth doctrine … also an analytical tool for testing 'on their faces' statutes in free speech cases."[42]

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[41] Decision, *infra*.

[42] Id.

As I noted in my Separate Opinion in *Romualdez v. Sandiganbayan,*[43] citing Justice Kapunan, there is a viable distinction between "void for vagueness" and "overbreadth" which the majority sadly ignores.

> A view has been proferred that "vagueness and overbreadth doctrines are not applicable to penal laws." These two concepts, while related, are distinct from each other. **On one hand, the doctrine of overbreadth applies generally to statutes that infringe upon freedom of speech. On the other hand, the "void-for-vagueness" doctrine applies to criminal laws, not merely those that regulate speech or other fundamental constitutional right. (not merely those that regulate speech or other fundamental constitutional rights**.) The fact that a particular criminal statute does not infringe upon free speech does not mean that a facial challenge to the statute on vagueness grounds cannot succeed.[44]

The distinction may prove especially crucial since there has been a long line of cases in American Supreme Court jurisprudence wherein penal statutes have been invalidated on the ground that they were "void for vagueness." As I cited in *Romualdez v. Sandiganbayan,*[45] these cases are *Connally v. General Construction Co,.*[46] *Lanzetta v. State of New Jersey,*[47] *Bouie v. City of Columbia,*[48] *Papachristou v. City of Jacksonville,*[49] *Kolender v. Lawson,*[50] and *City of Chicago v. Morales*.[51]

Granting that perhaps as a general rule, overbreadth may find application only in "free speech"[52] cases, it is on the other hand very settled doctrine that a penal statute regulating conduct, not speech, may be

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[43] G.R. No. 152259, 29 July 2004, 435 SCRA 371, 395-406.

[44] Id., at 398, citing *Estrada v. Sandiganbayan,* 421 Phil. 290, *J.* Kapunan, dissenting, at pp. 382-384.

[45] Id., at 398-401.

[46] 269 U.S. 385, 393 (1926).

[47] 306 U.S. 451 (1939).

[48] 378 U.S. 347 (1964).

[49] 405 U.S. 156 (1972).

[50] 461 U.S. 352 (1983).

[51] Case No. 97-1121, 10 June 1999.

[52] But see *United States v. Robel*, 389 U.S. 258 (1967), wherein the U.S. Supreme Court invalidated a portion of the Subversive Control Activities Act on the ground of overbreadth as it sought to proscribe the exercise the right of free association, also within the First Amendment of the United States Constitution but a distinct right altogether from free expression.

invalidated on the ground of "void for vagueness". In *Romualdez*, I decried the elevation of the suspect and radical new doctrine that the "void for vagueness" challenge cannot apply other than in free speech cases. My view on this point has not changed, and insofar as the *ponencia* would hold otherwise, **I thus dissent.**

Moreover, even though the argument that an overbreadth challenge can be maintained only in free speech cases has more jurisprudential moorings, the rejection of the challenge on that basis alone may prove unnecessarily simplistic. **I maintain that there is an even stronger ground on which the overbreadth and "void for vagueness" arguments can be refuted ─ that Presidential Proclamation 1017 (PP 1017) neither creates nor diminishes any rights or obligations whatsoever. In fact, I submit again that this proposition is the key perspective from which the petitions should be examined.**

IV.
General Order No. 5
Suffers No Constitutional Infirmity

The majority correctly concludes that General Order No. 5 is generally constitutional. However, they make an unnecessary distinction with regard to "acts of terrorism", pointing out that Congress has not yet passed a law defining and punishing terrorism or acts of terrorism.

That may be the case, but does the majority seriously suggest that the President or the State is powerless to suppress acts of terrorism until the word "terrorism" is defined by law? Terrorism has a widely accepted meaning that encompasses many acts already punishable by our general penal laws. There are several United Nations and multilateral conventions on terrorism[53], as well as declarations made by the United Nations General

[53]To name a few, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); the International Convention for the Suppression of Acts of Nuclear Terrorism (2005). See "United Nations Treaty Collection – Conventions on Terrorism", http://untreaty.un.org/English/Terrorism.asp (last visited, 30 April 2006).

Assembly denouncing and seeking to combat terrorism.[54] There is a general sense in international law as to what constitutes terrorism, even if no precise definition has been adopted as binding on all nations. Even without an operative law specifically defining terrorism, the State already has the power to suppress and punish such acts of terrorism, insofar as such acts are already punishable, as they almost always are, in our extant general penal laws. The President, tasked with the execution of all existing laws, already has a sufficient mandate to order the Armed Forces to combat those acts of terrorism that are already punishable in our Revised Penal Code, such as rebellion, *coup d'etat*, murder, homicide, arson, physical injuries, grave threats, and the like. Indeed, those acts which under normal contemplation would constitute terrorism are associated anyway with or subsumed under lawless violence, which is a term found in the Constitution itself. Thus long ago, the State has already seen it fit to punish such acts.

Moreover, General Order No. 5 cannot redefine statutory crimes or create new penal acts, since such power belongs to the legislative alone. Fortunately, General Order No. 5 does not assume to make such redefinitions. It may have been a different matter had General Order No. 5 attempted to define "acts of terrorism" in a manner that would include such acts that are not punished under our statute books, but the order is not comported in such a way. The proper course of action should be to construe "terrorism" not in any legally defined sense, but in its general sense. So long as it is understood that "acts of terrorism" encompasses only those acts which are already punishable under our laws, the reference is not constitutionally infirm.

The majority cites a theoretical example wherein a group of persons engaged in a drinking spree may be arrested by the military or police in the belief that they were committing acts of terrorism pursuant to General Order No. 5. Under the same logical framework that group of persons engaged in a drinking spree could very well be arrested by the military or police in the

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[54] See, e.g., Resolution No. 49/60, Adopted by the United Nations General Assembly on 17 February 1995.

belief that they are committing acts of lawless violence pursuant to General Order No. 5, instead of acts of terrorism. Obviously such act would be "abuse and oppression" on the part of the military and the police, whether justified under "lawless violence" or "acts of terrorism". Yet following the logic of the majority, the directive to prevent acts of "lawless violence" should be nullified as well.

If the point of the majority is that there are no justiciable standards on what constitutes acts of terrorism, it should be pointed out that only the following scenarios could ensue. For one, a person would actually be arrested and charged with "acts of terrorism", and such arrest or charge would be thrown out of the courts, since our statute books do not criminalize the specific crime of terrorism. More probably, a person will be arrested and charged for acts that may under the layperson's contemplation constitutes acts of terrorism, but would be categorized in the information and charge sheet as actual crimes under our Revised Penal Code. I simply cannot see how General Order No. 5 could validate arrests and convictions for non-existent crimes.

Interestingly, the majority, by taking issue with the lack of definition and possible broad context of "acts of terrorism", seems to be positively applying the arguments of "overbreadth" or "void for vagueness", arguments which they earlier rejected as applicable only in the context of free expression cases. The inconsistency is breath-taking. While I disagree with the majority-imposed limitations on the applicability of the "overbreadth" or "void for vagueness" doctrines, I likewise cannot accede to the application of those doctrines in the context of General Order No. 5, for the same reason that they should not apply to PP 1017. Neither General Order No. 5 nor PP 1017 is a penal statute, or have an operative legal effect of infringing upon liberty, expression or property. As such, neither General Order No. 5 nor PP 1017 can cause the deprivation of life, liberty or property, thus divorcing those issuances from the context of the due process clause. The same absence of any binding legal effect of these two issuances correspondingly

disassociates them from the constitutional infringement of free expression or association. Neither "void for vagueness" nor "overbreadth" therefore lie.

Another point. The majority concludes from General Order No. 5 that the military or police is limited in authority to perform those acts that are "necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence," and such acts committed beyond such authority are considered illegal. I do not dispute such conclusion, but it must be emphasized that "necessary and appropriate actions and measures" precisely do not authorize the military or police to commit unlawful and unconstitutional acts themselves, even if they be geared towards suppressing acts of terrorism or lawless violence. **Indeed, with the emphasis that PP 1017 does not create new rights or obligations, or diminish existing ones, it necessarily follows that General Order No. 5, even if premised on a state of emergency, cannot authorize the military or police to ignore or violate constitutional or statutory rights, or enforce laws completely alien to the suppression of lawless violence.** Again, following the cardinal principle of legal hermeneutics earlier adverted to, General Order No. 5 should be viewed in harmony with the Constitution, and only if it the Order irreconcilably deviates from the fundamental law should it be struck down.

V.
Court Should Refrain Making Any
Further Declaration, For Now,
Relating to the Individual Grievances
Raised by the Petitioners in Relation
To PP 1017

I respectfully disagree with the manner by which the majority would treat the "void as applied" argument presented by the petitioners. The majority adopts the tack of citing three particular injuries alleged by the petitioners as inflicted with the implementation of PP 1017. The majority analyzes the alleged injuries, correlates them to particular violations of the Bill of Rights, and ultimately concludes that such violations were illegal.

The problem with this approach is that it would forever deem the Court as a trier or reviewer at first instance over questions involving the validity of warrantless arrests, searches, seizures and the dispersal of rallies, all of which entail a substantial level of factual determination. I agree that PP 1017 does not expand the grounds for warrantless arrests, searches and seizures or dispersal of rallies, and that the proclamation cannot be invoked before any court to assert the validity of such unauthorized actions. Yet the problem with directly adjudicating that the injuries inflicted on David, et al., as illegal, would be that such would have been done with undue haste, through an improper legal avenue, without the appropriate trial of facts, and without even impleading the particular officers who effected the arrests/searches/seizures.

I understand that the injurious acts complained of by the petitioners upon the implementation of PP 1017 are a source of grave concern. Indubitably, any person whose statutory or constitutional rights were violated in the name of PP 1017 or General Order No. 5 deserves redress in the appropriate civil or criminal proceeding, and even the minority wishes to makes this point as emphatically clear, if not moreso, as the majority. **Yet a ruling from this Court, without the proper factual basis or prayer for remuneration for the injury sustained, would ultimately be merely symbolic. While the Court will not be harmed by a symbolic reaffirmation of commitment to the principles in the Bill of Rights, it will be harmed by a ruling that unduly and inappropriately expands the very limited function of the Court as a trier of facts on first instance.**

In my dissent in *Teves v. Sandiganbayan,*[55] I alluded to the fact that our legal system may run counter-intuitive in the sense that the seemingly or obviously guilty may still, after trial, be properly acquitted or exonerated; to the extent that even an accused who murders another person in front of live television cameras broadcast to millions of sets is not yet necessarily guilty of the crime of murder or homicide.[56] Hence, the necessity of a proper trial

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[55] G.R. No. 154182, 17 December 2004, 447 SCRA 309, 335-348. *J.* Tinga, dissenting.

[56] Id. at 345.

so as to allow the entire factual milieu to be presented, tested and evaluated before the court. In my theoretical example, the said accused should nonetheless be acquitted if the presence of exempting circumstances is established. The same principle applies in these cases. Certainly, we in the Court can all agree that PP 1017 cannot be invoked to justify acts by the police or military officers that go beyond the Constitution and the laws. But the course of prudence dictates that the pronouncement of such a doctrine, while enforceable in a court of law, should not yet extend itself to specific examples that have not yet been properly litigated. **The function of this Court is to make legal pronouncements not based on "obvious" facts, but on proven facts.**

A haphazard declaration by the Court that the arrests or seizures were "illegal" would likewise preclude any meaningful review or reevaluation of pertinent legal doctrines that otherwise could have been reexamined had these acts been properly challenged in regular order. For example, the matter of the warrantless arrests in these cases could have most certainly compelled the Court to again consider the doctrine laid down in *Umil v. Ramos* on warrantless arrests and rebellion as a continuing crime, a doctrine that may merit renewed evaluation. Yet any healthy reexamination of *Umil*, or other precedents for that matter, require the presentation and trial of the proper factual predicates, a course which the majority unfortunately "short-cuts" in this present decision.

Of course, despite the grandiloquent pronouncement by the majority that the acts complained of by the petitioners and implemented pursuant to General Order No. 5 are illegal, it could nonetheless impose civil, criminal or administrative sanctions on the individual police officers concerned, as these officers had not been "individually identified and given their day in court". Of course, the Court would be left with pie on its face if these persons, once "given their day in court", would be able to indubitably establish that their acts were actually justified under law. Perhaps worse, the pronouncement of the majority would have had the effect of prejudging these cases, if ever lodged, even before trial on the merits.

Certainly, a declaration by the majority that PP 1017 or General Order No. 5 cannot justify violation of statutory or constitutional rights (a declaration which the minority would have no qualms assenting to) would sufficiently arm those petitioners and other persons whose rights may have been injured in the implementation of PP 1017, with an impeccable cause of action which they could pursue against the violators before the appropriate courts. At the same time, if the officers or officials concerned have basis to contend that no such rights were violated, for justifications independent of PP 1017 or General Order No. 5, such claims could receive due consideration before the courts. Such a declaration would squarely entrench the Court as a defender of the Bill of Rights, foster enforceable means by which the injured could seek actual redress for the injury sustained, and preserve the integrity and order of our procedural law.

VI.
Conclusion

The country-wide attention that the instant petitions have drawn should not make the Court lose focus on its principal mission, which is to settle the law of the case. On the contrary, the highly political nature of these petitions should serve as forewarning for the Court to proceed *ex abundante cautelam,* lest the institution be unduly dragged into the partisan mud. The credibility of the Court is ensured by making decisions in accordance with the Constitution without regard to the individual personalities involved; with sights set on posterity, oblivious of the popular flavor of the day.

By deciding non-justiciable issues and prejudging cases and controversies without a proper trial on the merits, the majority has diminished the potency of this Court's constitutional power in favor of rhetorical statements that afford no quantifiable relief. It is for the poet and the politician to pen beautiful paeans to the people's rights and liberties, it is for the Court to provide for viable legal means to enforce and safeguard these rights and liberties. When the passions of these times die down, and

sober retrospect accedes, the decision of this Court in these cases will be looked upon as an extended advisory opinion.

Yes, PP 1017 and General Order No. 5 warrant circumspect scrutiny from those interested and tasked with preserving our civil liberties. They may even stand, in the appropriate contexts, as viable partisan political issues. But the plain fact remains that, under legal contemplation, these issuances are valid on their face, and should result in no constitutional or statutory breaches if applied according to their letter.

I vote to DISMISS all the petitions.

DANTE O. TINGA
Associate Justice