

**SHEATHING THE SWORD:
RE-EXAMINING THE BREADTH AND BOUNDARIES
OF THE MILITARY POWERS OF THE PRESIDENT**

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*Power tends to corrupt, and absolute power
corrupts absolutely.
Great men are almost always bad men.*
— Lord Acton

*None are so hopelessly enslaved as those
who falsely believe they are free.*
— Goethe

Eternal vigilance is the price of liberty.
— Wendell Phillips
(frequently misattributed
to Thomas Jefferson)

I. INTRODUCTION

Many may look on with chagrin as they realize that this will be another study of presidential powers, particularly, the military powers of the president. Indeed, many articles, research papers, theses, dissertations have been written concerning Presidents, personalities and their powers. We had our initial apprehensions in choosing to embark on this study. Yet the topic interested us greatly, just as much as it continues to interest many others. We cannot ignore the fact that the subject has not lost its relevance, despite the numerous studies

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spanning decades and despite the Philippines' seeming exhaustive treatment of the subject stemming from our country's first-hand experience with dictatorship.

The Philippines' experience with the extreme exercise of this aspect of presidential power continues to affect the popular imagination and emotions. It was only twenty years ago that President Ferdinand E. Marcos had run off into exile in another country, and into disgrace in our history books, as his long and overbearing regime came to an end. In a reactionary stance, the 1987 Constitution was formulated in such a manner as to shore up any possible adventurism by like- or worse-minded megalomaniacs. Nevertheless, nearly every president subsequent to Marcos has been suspected or accused of desiring to initiate martial law, and their every action making use of some measure of force has been denigrated and at once summed up as an attempt to bring the country under the strong hand of dictatorship once again. The administration of the incumbent Philippine President Gloria Macapagal-Arroyo is no stranger to these accusations. In fact, her administration has gotten it worse – seemingly year on year, she has been belabored by these very suspicions and calls for her resignation have not ceased, and if some are to be believed, have only swelled and continues to grow.

Perhaps what makes this study relevant for every time and every generation is the undeniable fact that governments have not been hesitant in asserting their military powers; resort to these “unusual powers” has been recurrent and unceasing. More disconcerting is the fact that any exercise of unusual governmental power has undoubtedly been invasive of the rights and liberties, and the normal lives of citizens. The United States has not been immune to such accusations. Although their constitution makes no express mention of the military powers of the President, and although their highest court has declared that neither does it recognize any implied presidential power to suspend the constitution, this palpable lack of statutory or constitutional authority has not prevented its leaders from adopting measures reminiscent of a militarized or authoritarian government.³

Often cited is the principle that “the Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances... emergency does not increase constitutional power nor diminish constitutional restriction”.⁴ Our own Constitution presently provides in explicit terms that “a state of martial law does not suspend the operation of the Constitution”.⁵ However, one author noted a fundamental inconsistency in practice, observing that “the trouble with this view of course, is that it is inaccurate”.⁶ Fact must necessarily prevail over fiction. William J. Quirk relied upon Clinton Rossiter's work, which he

³ See William J. Quirk, *Introduction to the Transaction Edition* in CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES*, x (2002).

⁴ *Ex parte Milligan*, 4 Wallace 2, 120-121

⁵ CONST. art. VII, sec. 18, par. 4

⁶ Quirk, *supra* note 1, at x.

believes has proven this claim in his analysis of presidential action during various crises in four different countries.⁷ During times of crisis, upon which governments assume greater powers, what typically follow are “arrests without probable cause, searches without warrants, detentions without charges, and detentions without speedy trial”.⁸ The President has exercised these powers, “even if we choose not to recognize he is doing it”.⁹ There is also the troubling development of governments around the world becoming more aggressive in their policies, assuming a hard line as terrorism became a forefront issue. This particular power has been repeatedly invoked in order to shield or justify recent incursions into civil liberties. In the Philippines’ case, the government alternated between terrorism and rebellion as a ready excuse for its more meddling and aggressive approach of late. Quirk notes that the War on Terror has affected the way governments have wielded its military powers. It is distinctive “from any of the emergencies analyzed by Rossiter”, being “open-ended” in nature.¹⁰ The danger, he stresses, is:

... that the government by default, rather than design, may lose the *will* to resume its normal constitutional responsibilities, “that the people along with the rulers will fall into the habits of authoritarian government and fail to insist upon a reestablishment of democratic ways”. After all, the goal is “not survival alone but survival as a free people”. We do not mean to end up as a garrison state.¹¹

It is laudable, and only right, that the people remain vigilant even twenty or so years after the depose of a dictator. This paper seeks to play its own part in the sovereign’s exercise of vigilance. A clinical study of the claim that the Philippines is under “martial law *de facto*” is necessary, not only to rouse the people into heightened awareness and continued vigilance, but also to determine with greater certainty the propriety of actions recently undertaken by the government under the guise of necessity by delineating the proper legal bounds of the exercise of military powers by the President. We hope to be able to identify certain factors and criteria by which we can determine whether, indeed, the Filipino has effectively been placed under a form of government reminiscent of martial law albeit surreptitiously, on the one hand, or whether we merely labor under a paranoia which resultantly overly constricts the powers of the President so as to enfeeble his attempts to simply maintain peace and order, on the other.

II. CONCEPTUAL FRAMEWORK

⁷ *Ibid*, at x.

⁸ *Ibid*, at xiv.

⁹ *Ibid*, at xiv.

¹⁰ Quirk, *supra* note 1, at xii.

¹¹ *Ibid*, at xii.

This paper initially adopts a legal-historical approach, tracing the concept of dictatorship and the roots of the military powers of the President. We will then adopt a factual and legal critical approach, as we embark upon a cross-country analysis of the legal bases and exercise of the military powers of the President. For purposes of this study, we will examine the legal source and practice of military powers in continental and common law countries, concentrating on two countries representative of these two forms of legal heritage. In the later part of this paper, we will analyze the Philippine setting, discussing the historical origins of the military powers of the President, the manner in which it has been exercised, and the limitations that have been placed by the drafters of the present constitution in its implementation.

In sum, this study hopes to re-examine the practice that has accompanied any invocation of the military powers of the president, and assess the effectiveness of the limitations and restrictions that currently bound its exercise as provided in the relevant legal sources. We shall delineate certain factors and criteria by which to evaluate government actions and responses, allowing us to hazard a deduction as to whether indeed the Philippines effectively labors under a martial law *de facto*. What this paper is not, we wish to emphasize, is an advocacy for stronger government. What we do wish to stimulate is greater awareness and vigilance, and to inspire, ultimately the preservation of democracy, factual and authentic in character.

III. THE POWERS OF THE PRESIDENT

There are several powers traditionally situated in the President. Primary of all these powers is the *executive power*, lodged singularly with the President.¹² The executive power is the power to enforce and administer the laws. Corollary to this power is his duty to ensure that the laws be faithfully executed.¹³ The executive power comprises several other powers. Among these is the *power of appointment*.¹⁴ The President thus, has the power to select the individuals who will exercise the functions of certain offices in the government. The exercise of this power sometimes requires the confirmation of the Legislature. In the Philippines, the Commission on Appointments of Congress exercises this mechanism of checks-and-balances with respect to certain positions enumerated in the Constitution.¹⁵ The *pardonning power* of the President¹⁶ allows him to grant clemency in situations where he deems the law has been too harsh in its treatment of individual cases, or

¹² CONST. art. VII, sec. 1

¹³ CONST. art. VII, sec. 17

¹⁴ CONST. art. VII, sec. 16

¹⁵ CONST. art. VII, sec. 16

¹⁶ CONST. art. VII, sec. 19

where mistakes in the administration of justice have been made.¹⁷ This power is discretionary in nature and generally lies within the President's exclusive prerogative. In the Philippines, it includes pardon, commutation, reprieve, parole and the remission of fines and forfeitures.¹⁸ He also has the power to grant amnesty, which however, requires the concurrence of the legislature¹⁹. The *borrowing power* of the President allows him to contract and guarantee foreign loans on behalf of the Republic, albeit with the prior concurrence of the Monetary Board.²⁰ The *diplomatic power* of the President proffers upon him the authority to enter into treaties and other international agreements with other states and nations. In the Philippines, this requires the concurrence of at least two-thirds (2/3) of all members of the Senate.²¹ The President's *budgetary power* authorizes him to propose the annual budget for the operations of government. In the Philippines, the Constitution obliges him to regularly submit to Congress a budget showing the government expenditures and sources of financing, which will form the basis of the annual general appropriations act.²² The *informing power* of the President requires him to address Congress at the opening of its regular session, and authorizes him to appear before them at any other time.²³ The president has *other powers*, including: the power to approve or veto bills²⁴; to call Congress to a special session²⁵; to consent to the deputation of government personnel by the Commission on Elections²⁶; to discipline such deputies²⁷; general supervision over local governments and autonomous regional governments²⁸, as well as *tariff powers*²⁹ by delegation from Congress.³⁰

The more controversial of the powers of the President lie in those which he exercises in times of war or other national emergency. Particularly, we refer to what has been interchangeably called the *war power*, *emergency power*, and in broad sum, his *military powers*. The more extraordinary among them are usually not assumed nor exercised by him alone. A primary example of the wariness against the use of military or emergency powers is the present Philippine Constitution, which has guardedly delimited the manner in which they may be assumed and exercised. The Constitution bestows upon the Legislature the sole responsibility of declaring the existence of a state of war by a vote of two-thirds (2/3) of both Houses in joint session assembled. In such times of war or other national emergency, the

¹⁷ See ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW, 229-230 (2002)

¹⁸ CONST. art. VII, sec. 19, par. 1

¹⁹ CONST. art. VII, sec. 19, par. 2

²⁰ CONST. art. VII, sec. 20

²¹ CONST. art. VII, sec. 21

²² CONST. art. VII, sec. 22

²³ CONST. art. VII, sec. 23

²⁴ CONST. art. VI, sec. 27

²⁵ CONST. art. VI, sec. 15

²⁶ CONST. art. IX-C, sec. 2(4)

²⁷ CONST. art. IX-C, sec. 2(8)

²⁸ CONST. art. X

²⁹ CONST. art. VI, sec. 28(2)

³⁰ CRUZ, *supra note* 15, at 242 (2002)

Legislature may then delegate *emergency powers* to the President, which is likewise subject to certain limitations.³¹ The *military powers* of the President are likewise expressly laid down in the Philippine Constitution, setting down a gradation of powers, in accordance with the intensity and degree of incursion into the normal lives of citizens. First, his powers as Commander-in-Chief allow him to *call out the armed forces* of the Philippines, whenever it becomes necessary to prevent or suppress lawless violence, invasion or rebellion.³² This power lies within his sole discretion and is exercised alone. Second, the President may *suspend the privilege of the writ of habeas corpus*. Third, the President may also place the Philippines or any part thereof under *martial law*. These latter two powers are subject to numerous limitations explicitly set forth in the Constitution. Although initially within the sole discretion of the President to declare, it is subject to certain checks and balances by the other branches of government, both the Legislature and the Judiciary. As if to emphasize the suspect stance upon the assumption of these powers, every citizen is explicitly confirmed to have the right to question the resort to such powers by inquiring into the sufficiency of the factual basis for its proclamation.³³

These enumerated powers are more or less the same powers found in every President or head of state or chief executive of various nations. This paper intends to focus only on the last of these aforementioned powers of the President – specifically, the military powers. We refer to the concept of military power in a general, and less technical sense. *Military power* for purposes of this paper, encompasses all the extraordinary powers assumed, and measures adopted, by the executive branch in times of crisis or emergency. Thus, it includes what has been specifically referred to above as *emergency power*, as well as the specific meaning of *military power* under which is subsumed the power of the President as commander-in-chief to call out the armed forces, to suspend the privilege of the writ of habeas corpus, as well as his power to place the country under martial law. These four powers are of specific interest because they allow the President to assume extraordinary powers, corollary to which is a contraction of individual liberties. Military power as conceived in this study bears resemblance to the concept of *constitutional dictatorship* as used by Clinton Rossiter, as well as the *state of exception* discussed by Giorgio Agamben.

IV. CONSTITUTIONAL DICTATORSHIP/STATE OF EXCEPTION

The people's first intention is that

³¹ CONST. art. VI, sec. 23(2)

³² CONST. art. VII, sec. 18, first sentence

³³ CONST. art. VII, sec. 18, par. 3

the State shall not perish.
— Rousseau

*Those republics which in time of danger cannot resort
to a dictatorship will generally be ruined
when grave occasions occur.*
— Machiavelli

*No form of government can survive that excludes
dictatorship when the life of the nation is at stake.*
— Cited by Clinton Rossiter

The concept leaves a bad taste in the mouth. The country's recent experience with martial law obliges us to revile it and to prevent its re-imposition at any cost.³⁴ But some authors beg to disagree. These authors believe that conditions of necessity require a form of government un-beleaguered by the typical delays of democratic processes, and that dictatorship, without departing from constitutionalism, would be necessary in order to save government and country. In 1948, Rossiter used the word "constitutional dictatorship" in his book. He unabashedly declared that it was "about dictatorship and democracy", and that he believes "a government can be constitutional without being democratic".³⁵ "Instead of setting one against the other", he proposed "to demonstrate how the institutions and methods of dictatorship have been used by the free men of modern democracies during periods of severe national emergency".³⁶

First, we will dissect the term "constitutional dictatorship". The concept of dictatorship typically evokes fear and alarm. "Dictatorship, even when softened by a popular adjective like constitutional, is a very nasty word".³⁷ The word *dictatorship* refers to "the office of dictator", or "autocratic rule, control, or leadership". It is "a form of government in which absolute power is concentrated in a dictator or small clique" or "a government organization or group in which absolute power is concentrated". In sum, it refers to a "despotic state".³⁸ We underscored three words which have appeared in the foregoing definitions. What has captured our attention is how these words evoke nearly the same meaning. We

³⁴ This may be debatable at this point in time considering the ambivalent, if not benevolent attitude of a large portion of the population as regards GMA's actions

³⁵ CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at xx (2002)

³⁶ *Ibid*, at xix.

³⁷ *Ibid*, at 13.

³⁸ Merriam-Webster Online, at <http://www.merriam-webster.com/dictionary/dictatorship>, last viewed on 14 March 2008

will thus further define these concepts. The word *dictator* originates from the Latin word “dictare”. It refers to “one holding complete autocratic control” or “one ruling absolutely and often oppressively”.³⁹ It is also defined as “a person granted absolute emergency power, especially: one appointed by the senate of ancient Rome”. *Autocracy* refers to “government by one person with unlimited power and authority” or to “unlimited monarchy”.⁴⁰ A *despot* refers to a “tyrant” or “a ruler with absolute power and authority”⁴¹ or “a person exercising power tyrannically”.⁴² With reference to the original sense of the word, it refers to “a Byzantine emperor or prince” or “a bishop or patriarch of the Eastern Orthodox Church” or “an Italian hereditary prince or military leader during the Renaissance”. The word observably has its origin in Western Europe dating back to the Middle Ages (1585 according to one source⁴³), “despote” in French. In Greek, it originates from the word “despotēs”, from “des-“ or “akin to domos house” and “-potēs” or “akin to posis husband”. The word is akin to the Sanskrit word “dampati” or “lord of the house”.⁴⁴ *Despotism* refers to a “government by a ruler with absolute unchecked power” or “total power or controlling influence”.⁴⁵ It refers to “a system of government in which the ruler has unlimited power” or “absolutism”.⁴⁶

Constitutional is used herein as an adjective, qualifying the word dictatorship. It is easy to fall into tautological definitions for this word, but we will nevertheless make the attempt, if only for purposes of clarity. Going back to its root word, a *constitution* refers to “an established law or custom: ordinance”, or “the structure, composition, physical makeup, or nature of something”. More particularly, it refers to “the mode in which a state or society is organized; especially: the manner in which sovereign power is distributed”. It refers to “the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it”, or “a written instrument embodying the rules of a political or social organization”.⁴⁷ It is “the fundamental and organic law of a nation or state, establishing the conception, character, and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise” or “the written instrument embodying this fundamental law”.⁴⁸ When qualifying another word or action, it generally means something “being in accordance with or authorized by the constitution of a state or society”, or something “regulated by or ruling according to a constitution”, or something “loyal to or supporting an established constitution or form of government”. Thus it has been used in such phrases as “constitutional government”, “constitutional monarchy”, “constitutional crisis”, and the more basic

³⁹ Merriam-Webster Online, *supra* note 36.

⁴⁰ BRYAN A. GARNER, BLACK’S LAW DICTIONARY: SECOND POCKET EDITION, 54 (2001).

⁴¹ *Ibid.*, at 200.

⁴² Merriam-Webster Online, *supra* note 36.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ GARNER, *supra* note 38, at 200.

⁴⁶ Merriam-Webster Online, *supra* note 36.

⁴⁷ Merriam-Webster Online, *supra* note 36.

⁴⁸ GARNER, *supra* note 38, at 134.

“constitutional law”.⁴⁹ It means “of or relating to a constitution” or “proper under a constitution”.⁵⁰

Some words stand out in our attempt to define these concepts. *Dictatorship* ultimately refers to a form of government wherein absolute power is concentrated in one person or group who exercises such power without or with little if any, limitations. A *constitution*, on the other hand, refers to the fundamental law embodying the basic principles and established rules of a state or social group. Thus, *constitutional dictatorship* refers to a state of government wherein absolute power is concentrated in one person or group, with the authorization or in support of the fundamental laws of a state, during which basic principles and established rules are temporarily sacrificed and governmental power is exercised without or with little limitation, for the purpose of defending or maintaining the established form of government.

Rossiter presumes that all constitutional countries have made use of constitutional dictatorship. He, however, distinguishes “constitutional dictatorship”, and divorces it from the general concept of dictatorship, by alluding to its alleged sole and primary duty or aim: the complete restoration of the *status quo ante bellum*, i.e. to end the crisis and restore normal times.⁵¹ He states:

All the dictatorial actions in the recent war were carried on in the name of freedom. The absolutist pattern was followed and absolutist institutions were employed for one great and sufficient reason: that constitutional democracy should not perish from the earth. The democracies fought fire with fire, destroyed autocracy with autocracy, crushed the dictators with dictatorship – all that they might live again under their complex institutions of freedom and constitutionalism. The wide gulf between constitutional and fascist dictatorship should need no demonstration. Like the Grand Canyon, it is there for anyone to see. It was and is a difference of kind as well as degree. However, there is one feature of constitutional dictatorship which sets it off most sharply from the Hitler variety: it is temporary and self-destructive. The only reason for its existence is a serious crisis; its purpose is to dispense with the crisis; when the crisis goes, it goes. The distinction between Lincoln and Stalin or Churchill and Hitler should be obvious.

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... The striking power of autocracy has many times been used to preserve democracy, and more than one constitution has been suspended so that it might not be permanently destroyed. All constitutional countries have made use of constitutional dictatorship, none to any greater extent or with more significant results than the democracies of the twentieth century.⁵²

⁴⁹ Merriam-Webster Online, *supra* note 36

⁵⁰ GARNER, *supra* note 38, at 134.

⁵¹ ROSSITER, *supra* note 33, at 7.

⁵² ROSSITER, *supra* note 33, at 7-8.

Rossiter identifies two categories in which all techniques of constitutional dictatorship may fall: first, emergency action of an executive nature, and; second, emergency action of a legislative nature. The first he calls *martial rule*. The concept varies in different jurisdictions. In the common law countries such as the British Empire and the United States, it is known as *martial law*, which is now quite familiar to Filipinos. The civil law countries of Continental Europe and Latin America pertain to the same idea as *the state of siege*. Martial rule, according to him, is an emergency device designed for use in the crises of invasion or rebellion. It is an extension of military government to the civilian population, the substitution of the will of a military commander for the will of the people's elected government. The result is the transfer of all effective powers of government from the civil authorities to the military, or often merely the assumption of such powers by the latter when the regular government has ceased to function. In sum, it means military dictatorship – government by the army, courts-martial, suspension of civil liberties, and the whole range of dictatorial action of an executive nature.⁵³

The second emergency action of a legislative nature Rossiter pertains to *the delegation of legislative power*. It refers to the voluntary transfer of lawmaking authority from the nation's representative assembly to the nation's executive.⁵⁴ This is in recognition of the fact that in many kinds of crisis, the legislature is unequal to the task of day-to-day emergency lawmaking, and that it must therefore hand over its functions to someone better qualified to enact arbitrary crisis laws. The delegation of power may either be *temporary*, that is limited in time, made in and for a particular crisis, or *permanent*, to be exercised by the executive in the event of some future crisis or based on some identified contingency or circumstance. Permanent delegations for emergency purposes may be cast in the form of *statutes* enacted by the legislature, or in the *constitution* itself, as has been the practice in some countries, including the Philippines. Rossiter additionally identifies *the enabling act* to describe a delegation as a large-scale proposition, when the executive is empowered to make emergency laws for the solution of some or all of the nation's major problems.⁵⁵

Rossiter identifies other devices and techniques of constitutional dictatorship – those which a constitutional government may resort to in time of emergency: the cabinet dictatorship, the presidential dictatorship, the wartime expansion of administration, the peacetime emergency planning agency, the “war cabinet”, the congressional investigating committee, the executive dominance of the legislative process, among others. These devices overlap one another, and some crisis governments have made use of some or all of them simultaneously.⁵⁶

⁵³ *Ibid*, at 9.

⁵⁴ This is to be distinguished from the delegation of lawmaking powers to administrative bodies, in recognition of their greater technical knowledge and expertise.

⁵⁵ ROSSITER, *supra* note 33, at 10.

⁵⁶ *Ibid*, at 10-11.

This phenomenon of constitutional dictatorship and emergency or military government is similar to the “state of exception” described by Giorgio Agamben.⁵⁷ In his attempt to define the *state of exception*, Agamben took pains in distinguishing it from the typical concept of dictatorship, analogizing it more to the institution of *instiitium* of Ancient Rome.⁵⁸ He made references to the various institutions of emergency or military government in different countries, distinguishing the state of exception from the institutions of *l'état de siège* of France, Article 48 of the Weimar Constitution of Germany, and *martial law* and *emergency powers* of England in Anglo-Saxon theory. Agamben demarcated some of the essential characteristics of this state of exception, including “the provisional abolition of the distinction among legislative, executive, and judicial powers”⁵⁹, and the “suspension of the constitution”⁶⁰. In sum, when Agamben speaks of the state of exception, he refers to the provisional and exceptional measure adopted by governments as an “immediate response to the most extreme internal conflicts”⁶¹ characterized by a “suspension of the juridical order” itself⁶². Agamben cites the general view identifying the concept of necessity as the “foundation of the state of exception”⁶³. He goes further in his analysis by disentangling the concept of necessity from the view that it constitutes a ground for resorting to a “legal” measure. He clarifies that “the theory of necessity is none other than a theory of exception... by virtue of which a particular case is released from the obligation to observe the law” and that “necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm”.⁶⁴ Emphasizing the extra-legal character of the state of exception, consisting as it is of the suspension of the constitution or of the juridical order itself, he surmises, therefore, that actions taken pursuant thereto are “entirely removed from law”.⁶⁵

Rossiter’s concept of *constitutional dictatorship* serves as “the general descriptive term for the whole gamut of emergency powers and procedures in periodical use in all constitutional countries”.⁶⁶ He refers to the condition in which the basic principles and established rules of a state are temporarily sacrificed and governmental power is expanded, during times of crisis or other emergency, for the purpose of defending or maintaining the established form of government. On the other hand, the *state of exception* refers to the provisional measure of government characterized by the suspension of the constitution and the juridical order, in response to extreme internal conflicts or perceived necessity. Thus, *constitutional dictatorship* as conceived by Rossiter, and the *state of exception* as conceived by Agamben, actually bear close resemblance to each other, and to the concepts which

⁵⁷ GIORGIO AGAMBEN, STATE OF EXCEPTION (2005)

⁵⁸ *Ibid*, at 41-51

⁵⁹ AGAMBEN, *supra* note 55, at 7

⁶⁰ *Ibid*, at 4-5, 11

⁶¹ *Ibid*, at 2

⁶² *Ibid*, at 2-3

⁶³ *Ibid*, at 24

⁶⁴ *Ibid*, at 24-25

⁶⁵ *Ibid*, at 11

⁶⁶ ROSSITER, *supra* note 33, at 5.

form the subject matter of study for this paper. This paper aims to analyze these phenomena referred to by Rossiter and Agamben. More particularly, we hope to embark upon an analysis of those crisis institutions of government, in which the military and emergency powers of the executive branch of government are invoked and used, pursuant to which, powers greater and more extraordinary in character than those exercised in normal times are assumed by a single person or group of persons, for the primary purpose of defending or maintaining the constitution and the established form of government and the restoration of normal conditions. We will refer to these crisis institutions alternatively and interchangeably as “constitutional dictatorship”, “state of exception”, “state of necessity”, “crisis government” or “military or emergency government”, all of which are defined by the essential characteristic of being founded upon the President or other head of state’s invocation and assumption of the military and emergency powers of government during times of war, crisis, or other emergency.

V. CHARACTERISTICS OF CRISIS GOVERNMENT

For purposes of this study, we have ascertained three characteristics common to all recourses to the military and emergency powers of the President, some of which have been expressly identified by Rossiter. The first is that this extraordinary power of government has its basis in the *law of necessity*. The concept is familiar as it has also been used in principles justifying certain acts which would normally be considered as criminal, such as self-defense. Thus,

The fact remains that there have been instances in the history of every free state when its rulers were forced by the intolerable exigencies of some grave national crisis to proceed to emergency actions for which there was no sanction in law, constitution, or custom, and which indeed were directly contrary to all three of these foundations of constitutional democracy.⁶⁷

Rossiter identifies three types of crisis in the life of a democratic nation which can justify a governmental resort to dictatorial institutions: war (or invasion)⁶⁸, rebellion, and economic depression.⁶⁹ Economic depression, as a ground for the assumption of extraordinary governmental power, is of recent vintage, having been adopted only in modern times, possibly in the 1930s. Moreover, Rossiter specifies three “fundamental facts” which function as the rationale for constitutional dictatorship:

⁶⁷ ROSSITER, *supra* note 33, at 11.

⁶⁸ War has been renounced by the Philippines as an instrument of national policy. Many other countries since 1945 have pursued the same policy. The US War on Terrorism appears to be a deviation from recent practice or custom.

⁶⁹ ROSSITER, *supra* note 33, at 6.

- 1) The complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis.
- 2) Therefore, in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions. The alteration invariably involves government of a stronger character; that is, the government will have more power and the people fewer rights.
- 3) Finally, this strong government, which in some instances might become an outright dictatorship, can have no other purposes than the preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.⁷⁰

The second distinctive trait of constitutional dictatorship is that *crisis government is primarily and often exclusively the business of presidents and prime ministers*.⁷¹ It is always the executive branch of government which possesses and wields the extraordinary powers of self-preservation of any democratic, constitutional state. To the President is traditionally assigned the decision of whether to initiate war, to declare martial law, to suspend the privilege of the writ of habeas corpus, or to call out the armed forces. It is the executive branch that possesses the extraordinary authority and responsibility for prosecuting the purposes of the constitutional dictatorship.⁷² Whether the selection has been expressly made as found in some legal and constitutional basis, or whether by nature and expediency given the resources available to it, it has always been the executive branch “which must shoulder the burden and deal with the emergency under the law of necessity”.⁷³

The third and inexorable characteristic of constitutional dictatorship is *the governmental invasion of political or economic liberties*.⁷⁴ The government meets the crisis by assuming more powers and respecting fewer rights.⁷⁵ “The crisis expansion of power is generally matched by a crisis contraction of liberty”.⁷⁶ The question that naturally follows is whether the people are willing to tolerate these resultant invasions of liberty, for the preservation of the state and the permanent freedom of citizens.

VI. THE ORIGINS OF MILITARY POWER

⁷⁰ *Ibid*, at 5-7.

⁷¹ *Ibid*, at 12.

⁷² ROSSITER, *supra* note 33, at 12.

⁷³ *Ibid*.

⁷⁴ *Ibid*, at 10.

⁷⁵ *Ibid*, at 7.

⁷⁶ *Ibid*, at 10.

A. THE ANCIENT ORIGINS OF CONSTITUTIONAL DICTATORSHIP

The lessons that Rome has taught the world have been many and significant, but none is of more present consequence than the pregnant truth imparted by the history of the famed dictatorship: that in a free state blessed by a high constitutional morality and led by men of good sense and good will, the forms of despotism can be successfully used in time of crisis to preserve and advance the cause of liberty.
— Clinton Rossiter⁷⁷

And truly, of all the institutions of Rome, this one deserves to be counted amongst those to which she was most indebted for her greatness and dominion.
— Machiavelli: Discourses I, 34

Constitutional dictatorship, or the use of military powers, can be traced back to nations of antiquity. Grecian history makes use of the institution of *aesymetes*, and Aristotle mentions of an elective tyranny designed to restore law and order in a state which has been weakened by factional strife or invasions.⁷⁸ The early Republican Rome had likewise been “continually beset by desperate wars without and bitter class struggles within” and “the Roman governmental scheme was unusually vulnerable to the impact of temporary emergencies.”⁷⁹ Thus, Rome and its cherished republican institutions found itself extremely vulnerable and unable to cope with such crises. According to Rossiter, it therefore found “its *natural* counterpart in an instrument of emergency government equally extreme and unparalleled.”⁸⁰

How such an emergency device was first used is the subject of some controversy. Most authorities hold that in 500 B.C., Rome designated Larcus Flaccus as its first dictator for the purposes of war. Some claim that the mechanism

⁷⁷ ROSSITER, *supra* note 33, at 28.

⁷⁸ Aristotle, IV Politics 10 cited in CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 15 (2002).

⁷⁹ ROSSITER, *supra* note 33, at 18.

⁸⁰ *Ibid.*, at 19; emphasis added

of dictatorship had been incorporated as an original part of the republican constitution introduced in 509 B.C. and was used by Larcus Flaccus only ten years later. A number of authors noted that the dictatorship was regarded as “an integral part of the republican institution”.⁸¹ Still others regard as highly suspect the theory that the Romans would expressly provide for such a mechanism in their constitution, considering that they had just then divested themselves of the monarchical system. They believe that the dictatorship was not provided for in the constitution and had only been instituted “under the compulsion of events by a *lex de dictatore creando*”.⁸² What seems certain however was that Ancient Rome resorted to dictatorship not many years after the establishment of the Republic, and had available or regular recourse to it in times of crisis or emergency, in years following. Moreover, the majority of historians agree that Ancient Rome had included in its fundamental laws an “emergency institution”⁸³, which institutionalized periodic dictatorship as a mechanism for maintaining their republican institutions, recognizing it “as a regular instrument of government”.⁸⁴ Through this “emergency institution”, an eminent citizen in times of crisis was called upon by the officials of the constitutional republic, temporarily granting him absolute power for the sole purpose of defending the republic, its constitution, and its independence.

In normal times in Ancient Rome, executive authority lies in two consuls, assisted by magistracies. The consulate possessed *Imperium*, in which concept “ran the gamut of the recognized types of political power – executive, judicial, legislative, administrative, military, and priestly”, although the majority of his duties were executive in nature.⁸⁵ However, when the *Senate* was convinced that the Republic was in grave danger and that the ordinary hierarchy of administrative officials was not competent to secure its safety, it could initiate a proposal that the consuls appoint a dictator. The *consuls* themselves could also propose that dictatorship be employed, but the approval of the Senate remained necessary. Either way, the power of appointment of the dictator resided constitutionally in the two consuls, acting separately or jointly. They typically chose well-known public figures for the office of the dictator, “one who had prosecuted a successful career and was known for both his ability and his devotion to the Republic”.⁸⁶ The selection of the dictator was followed by “peculiar religious rites” which safeguarded the process. A *lex curiata* then conferred upon the citizen selected as dictator his *Imperium*, his sacred and absolute power, a procedure which gave the dictatorship its stamp of legality. The whole process usually took no more than two or three days.⁸⁷ Rossiter notes only one instance in which this method was not followed. About 217 B.C., a

⁸¹ *Ibid*, at 17.

⁸² ROSSITER, *supra* note 33, at 18.

⁸³ *Ibid*, at 16.

⁸⁴ *Ibid*, at 15.

⁸⁵ Apparently, Rome found it advisable to place even the executive power in multiple individuals, two to be precise, and beside or beneath whom operated a number of other single or collegial magistracies. See CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 16-19 (2002).

⁸⁶ ROSSITER, *supra* note 33, at 21.

⁸⁷ ROSSITER, *supra* note 33, at 19-21.

spontaneous assembly of citizens meeting under the leadership of a praetor authorized the appointment of Q. Fabius Maximus as dictator, following a disaster at Lake Traseminus.⁸⁸ By any of these methods, an appointment as dictator was considered to be “the highest honor which the Republic could confer”.⁸⁹

The purposes of the institution of dictatorship were defined, namely by the *lex curiata*. There were two purposes for which dictatorship was commonly called upon in Rome: the *dictatura rei gerundae causa* (literally, “the dictatorship for getting things done”) and the *dictatura seditionis sedandae et rei gerundae causa* (literally, “the dictatorship for suppressing civil insurrection”). Most of the periods of dictatorship instituted in Rome had been for the first purpose, i.e. *rei gerundae causa*, to save the state from the threat of total defeat in war. The second was rarely used, and Rossiter could only conclude that dictatorship could thus be used “as can all devices of constitutional emergency government, as an instrument of class warfare”. The dictatorship had been instituted for several purposes other than some grave national emergency, including the conduct of important elections in the absence or incapacity of the ordinary magistrates (*comitiorum habendorum*), the conduct of religious festivals (*ferarium latinorum constituendarum causa*), the holding of public games (*ludorum celebrandorum causa*), special trials (*quaestionum exercendarum*), and choosing the senate (*senatus legendi causa*).⁹⁰ The latter however were merely isolated instances in the history of the republic, and the two earliest mentioned were the main purposes for which dictatorship had been used.

Once the *Imperium* had been conferred on him, the dictator became absolute ruler. He then possesses all the powers which might contribute to the successful pursuit of his assignment and has the authority to take any measure he might consider necessary to the preservation of the constitution.⁹¹ Nevertheless, there were certain restrictions or limitations placed upon the Roman dictator. The first pertains to *time limits*. The dictator has only a six-month term of office. Rossiter notes that this restriction had never been transgressed. The dictator was bound to abdicate his office immediately after his particular piece of business had been successfully terminated. The tribunes could force him to resign if the emergency had clearly terminated. If he failed to do so, he might, after having finally resigned, be prosecuted on a charge of having illegally prolonged his tenure of office. Moreover, no dictator could stay in office beyond the term of the magistrates who had named him. There could only be one dictator in a single year. The second set of limitations pertains to the *nature of the office* he was called upon to fulfill. “His sacred trust it was to maintain the constitutional order, and although to this end he was competent to resort to almost any measure, the Republic which he was chosen to defend could not be altered or subverted”.⁹² The third limitation pertains to *finances*. The dictator was entirely dependent upon the Senate in financial

⁸⁸ *Ibid*, at 20.

⁸⁹ *Ibid*, at 21.

⁹⁰ *Ibid*, at 21-23.

⁹¹ ROSSITER, *supra* note 33, at 23.

⁹² *Ibid*, at 24.

matters. The constitutional requirement that there be no withdrawal from the public treasury except by consent of the Senate was not relaxed. Fourth, the right of the people to decide on offensive wars was never conveyed to any dictator. Fifth, the dictator as judge had no civil jurisdiction.

These were the only limitations upon his office, but “in all other directions his competence was without restriction, and only the forbearance of his fellow citizens and the character of his trust acted as obstructions to the free play of his will”.⁹³ The dictator possessed full powers for the *defense* of the Republic. Concomitantly, the advisory control of the Senate was sharply decreased and the rights of the citizen underwent a sizeable curtailment, as did the competence of the ordinary magistrates. As *military* commander, his discretion was extreme. He could call every man in Rome into the ranks. His decisions as to strategy and the general conduct of campaigns prevailed without any guidance from the Senate. His command over the *civil* life of Rome was no less absolute. He could convoke assemblies and preside over them. In the realm of *judicial* power, his jurisdiction extended to all criminal cases affecting the safety of the state. He possessed the power to execute summarily and without appeal, as well as to fix fines. His power of arrest overrode the intercession of the sacrosanct tribune. He could coin money, and freely dispose of booty honors. According to Roman constitutional law, the dictator could not legislate, that is, initiate and promulgate a *lex*; but he had the *ius edicendi*, and his decrees were as good as laws and were published as such, at least for the duration of his power. As described by Rossiter, “the dictatorship was primarily a military office, instituted to save the state from the threat of foreign or rebellious arms, but the power of the dictator extended out from the army and its camp and embraced the entire state... This was martial law with a vengeance, the state of siege in its aboriginal form”.⁹⁴

The emergency institution of dictatorship however later experienced a decline. Over time, brought about by fear and suspicion, more restraints against the dictatorship were introduced, including the right of appeal from the dictator’s sentences, and the power of the tribune to interpose his sacred veto. Moreover, the institution came to be used more and more frequently for purposes other than the abatement of a severe crisis, and came to be no longer initiated exclusively by the Senate. The last constitutional dictator left office in 202 B.C., and according to Rossiter, these dictators were “in truth no dictators at all”. Rossiter claimed that although Sulla and Caesar assumed the title of dictator, it had no similarity to the dictatorships of those under the old Republic, except in name. These two were dictators in today’s accepted sense of the word, “with all powers and no restraints, and without any externally imposed limit on their term of office”.⁹⁵ Rossiter also believes that the decline had been brought about by the fact that the office had simply “outlived its usefulness”, as invaders retreated and the threat of alien assault vanished. He noted that, for the next few centuries, Rome’s wars were not

⁹³ *Ibid.*

⁹⁴ ROSSITER, *supra* note 33, at 25.

⁹⁵ ROSSITER, *supra* note 33, at 26-27.

defensive in character, and crisis war “was a thing of the past”. Rome was then embarking on wars of aggression for the purpose of maintaining its dominance, which had nothing to do with the maintenance of a republican constitution in a free state, “the true purpose of the dictatorship”. Significantly, and rather oddly enough, Rossiter attributed this trend to the contemporaneous decline of the republican constitution. The Senate had grown to be the dominant power. They became more interested in protecting their own interest and ascendancy, than in safeguarding the constitutional order. He observed:

It is a remarkable and instructive paradox that the Republic and the dictatorship reached the peak of their development side by side, and that the decline of the former was matched in time and degree by the decline of the latter... Constitutional government had passed into history; so too had the constitutional dictator. Emergency government of a legal nature had been replaced by emergency government in behalf of absolutism.⁹⁶

B. CROSS-COUNTRY COMPARISONS

1. Civil Law Tradition/Continental Europe: Germany/Deutschland

Not kennt kein Gebot.
(“necessity knows no law”)
— Josef Kohler⁹⁷

The German legal institution with respect to “constitutional dictatorship” is actually very much like the Philippines. It is one of the few countries which expressly provides for, and attempts to delimit, the military powers of the president in its Constitution. The legal text and historical experience of Germany in the use of military and emergency powers is very instructive and provides invaluable insight for academics and practitioners alike. Germany, unfortunately or otherwise, has given us a view of the possible destructive effects of military powers, if used unhindered and unchecked, while wielded by misguided leaders.

⁹⁶ *Ibid*, at 27.

⁹⁷ Cited in CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 12 (2002).

Article 48 of the Weimar Constitution or the German Constitution of 1919 contains what has been dubbed as the “dictatorship article”:

If a state does not fulfill the duties incumbent upon it under the national Constitution or laws, the President of the Reich may compel it to do so with the aid of the armed forces.

If the public safety and order in the German Reich are seriously disturbed or endangered, the President of the Reich may take the measures necessary to the restoration of the public safety and order, and may if necessary intervene with the armed forces. To this end he may temporarily suspend in whole or in part the fundamental rights established in Article 114 (inviolability of person), 115 (inviolability of domicile), 117 (secrecy of communication), 118 (freedom of opinion and expression thereof), 123 (freedom of assembly), 124 (freedom of association), and 153 (inviolability of property).

The President of the Reich must immediately inform the Reichstag of all measures taken in conformity with sections 1 or 2 of this Article. The measures are to be revoked upon the demand of the Reichstag.

In cases where delay would be dangerous, the state government may take for its territory temporary measures of the nature described in section 2. The measures are to be revoked upon the demand of the President of the Reich or the Reichstag.

A national law shall prescribe the details.

Article 48 functioned as the instrument of emergency government in Germany since 1919 until 1949 when the current German Constitution was adopted. It was the provision long relied upon for measures undertaken pursuant to extraordinary presidential powers. The provision makes reference to two powers. First, the power of the President to seek the aid of the armed forces when the state does not fulfill the duties incumbent upon it. Second, if public safety and order is “seriously disturbed or endangered”, the President is conferred the power “to take the measures necessary to the restoration of the public safety and order” and “may if necessary intervene with the armed forces”. He may, for the same purpose, suspend certain fundamental rights expressly enumerated therein.

a. Comparison to the Philippine Constitution

Its similarity to the Philippine legal system essentially lies in the effort to limit the military powers of the President through express provisions in their basic or fundamental laws. For instance, the Weimar Constitution expressly provided for the conditions justifying resort to the military powers of their President. Moreover, the legislative branch was assigned as the primary safeguard against its abuse. It

required the President to report to the Reichstag the measures taken pursuant to this provision, and proffered upon them the power to revoke such measures upon demand. On the other hand, this provision varies from its Philippine counterpart in two aspects. First, unlike the Philippine Constitution, the Weimar Constitution explicitly enumerates the rights that will be affected or diminished during the time that these powers are in force. This is significant in that it limits the rights that may be affected or suspended during periods of crisis government. Moreover, in its last paragraph, it provides that “a national law shall prescribe the details”.

b. Criticisms

Rossiter critically observes that Article 48 laid in broad terms the conditions which permit the assumption emergency powers, with the unfortunate consequence that it “became the foundation for all sorts and degrees of constitutional dictatorship”.⁹⁸ There were two types of crisis possibly comprehended by the provision: 1) the state of political disturbance (civil insurrection), for which Article 48 served as authority for measures reminiscent of the imperial or Prussian state of siege; and, 2) the state of economic disturbance (inflation, depression), for which it provided an emergency executive lawmaking power. Nevertheless, the determination of what would constitute sufficient grounds for resort to this power was left entirely to the President and his Cabinet. Article 48 thus provided “an inexhaustible reservoir of emergency power”.⁹⁹ Moreover, although a supplementary law passed in accordance with the last sentence of the article would have provided an invaluable safeguard in the exercise of military or emergency powers by the President by providing clearer limitations, such a statute had never been enacted and the clause was for all purposes a dead-letter provision.

Rossiter observed that the wording and content of the Weimar Constitution may have been “influenced by the circumstances of 1919”, and by German history.¹⁰⁰ The Constitution was meant to replace the old imperial regime with more democratic institutions. However, the drafters of the Constitution noted the “hazardous state of the times, and therewith the necessity of government not only democratic, but strong”, in a powerful executive.¹⁰¹ The provision may have been copied from the *Kriegszustand* or state of war, “the chief emergency institution of imperial Germany”¹⁰², albeit with certain alterations.¹⁰³ Following the departure

⁹⁸ ROSSITER, *supra* note 33, at 32.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, at 33.

¹⁰¹ *Ibid.*, at 34.

¹⁰² *Ibid.*, at 35.

¹⁰³ Rossiter argued that the emergency powers under the imperial constitution was effectively more limited and qualified in view of the Prussian law of 1851 which carefully regulated the form of the proclamation, the suspension of certain rights, and the various other effects of the state of

of the imperial government, crisis situations forced succeeding leaders to exercise dictatorial powers in an attempt to fill the political vacuum. Drafters of the Constitution thus saw a need to provide a legal basis for expedient action and stronger measures for such situations, akin to the powers exercised during the German Empire. Thus crisis dictatorship of a legal nature was instituted albeit “on behalf of democracy” this time.¹⁰⁴

c. Limitations

On a positive note, Rossiter enumerated some restrictions or limitations with regard to this power. Primarily, he noted that there were *limits found expressly in the Constitution* or the express limitations: 1) Counter signature – the required countersignature by the Cabinet; 2) Reichstag disapproval – the duty of the President to “immediately inform the Reichstag of all measures taken in conformity... with this article”, and the corollary power of the Reichstag to demand that such measures be revoked. This proved to be ineffective as a safeguard in practice, considering the vast powers that had been lodged with the President. Germany’s history shows that the President himself could dissolve, as some of them had done, the Reichstag itself. Any dissent expressed by its membership as regards the policies and measures of the President would have been rendered moot by this extraordinary power; 3) Presidential responsibility – the President of the Reich was liable to removal from office for abuse of power and trust, with regard to his actions under the dictatorship under Article 48. Other provisions of the constitution allow his removal by popular vote upon the proposal of two-thirds of the Reichstag. He could also be impeached before the *Staatsgerichtshof* by two-thirds of the Reichstag “for having culpably violated the Constitution or a law of the Reich. Finally he could be prosecuted criminally with the consent of the Reichstag. As observed above, all these safeguards point to one thing: the Reichstag was the chief, if not the only barrier provided by the Constitution against the misuse of Article 48. These representatives of the people constituted the foremost limitation on the employment of emergency powers in the Weimar Republic.¹⁰⁵

The second set of limitations refers to those *arising from the nature of the Constitution* or the inherent limitations, specifically: 1) The nature of the dictatorship restricted the President to actions designed to restore normal conditions. The operation of the German dictatorship was conditioned by its purpose, which is to reestablish public safety and order, and the executive was limited to measures directed to this end; 2) The unwritten but acknowledged principle that measures taken under Article 48 should be repealed as soon as possible, and should not extend beyond the restoration of public safety and order for which they had been

war. See CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, 36-37 (2002)

¹⁰⁴ ROSSITER, *supra* note 33, at 32.

¹⁰⁵ ROSSITER, *supra* note 33, at 65-66.

adopted. The President was bound to repeal all measures whose purposes had been fulfilled; 3) The President was bound by solemn oath to observe and defend the provisions of the Constitution. For instance, as noted above, Article 48 permitted him to abridge seven of the articles in the charter, but no others.¹⁰⁶

Rossiter noted a third possible limitation on this extraordinary power and that is in *the courts*. Rossiter however admits that the German courts afforded practically no protection in this regard, as the German judiciary maintained its strong reliance on the political question doctrine, saying that “nothing even closely approximating American judicial review was ever established”. In the tradition of Civil Law, the framers of the Weimar Constitution chose to solely rely upon the Legislature as the primary safeguard against the abuse of emergency powers, and judicial review was hardly considered in this connection. Continental courts continued to accept as final the findings of the government on questions of fact, even if supported only by a bare minimum of evidence. The courts invariably held that “the existence of those conditions presupposed for the institution of any particular measure under Article 48 was a matter for the decision of the President of the Reich alone, or of the Reichstag”.¹⁰⁷

d. Praxis and Application

As will be seen in the following discussion, Article 48 became the ready excuse for all extraordinary actions and measures of government, eventually even for those clearly not within the contemplation of its framers. It came to be abused, in spite of the aforementioned limitations.

In a span of about thirteen years following its enactment, Germany resorted to this provision more than 250 times.¹⁰⁸ Between 1919 and 1924, it was used frequently and successfully, mostly *to suppress insurrection* against the new Republic.¹⁰⁹ To highlight the frequency of its use, merely five years after its passage, it was used more than 130 times. The invocation of Article 48 and the assumption of military powers typically resulted in the suspension of fundamental rights, including the prohibition of public assemblies, the rigid censorship or abatement of newspapers and leaflets inciting rebellion, summary arrests and detentions, and other arbitrary police measures designed to aid in the forcible maintenance of or restoration of public order. Courts-martial were established for the trial of certain crimes against the state. Other general measures adopted were the issuance of emergency decrees with the force of law, the temporary abeyance of the regular laws, and the use of troops in areas racked or threatened by

¹⁰⁶ *Ibid*, at 67-68.

¹⁰⁷ ROSSITER, *supra* note 33, at 69-70.

¹⁰⁸ *Ibid*, at 33.

¹⁰⁹ *Ibid*, at 59.

insurrection.¹¹⁰ “In short, the government of the Reich made use of a constitutional power to wage war on its own rebellious citizens”.¹¹¹

In 1922, a new aspect was introduced into the broad powers already granted under Article 48. The President’s emergency powers were then used *as an economic tool*. “For the first time the President’s emergency powers were employed not as the basis for stringent executive measures against civil insurrection, but for a decree dealing with an economic problem demanding a legislative rather than an executive solution”.¹¹² Article 48 made no reference to any legislative powers being granted to the President in times of crisis. But legal basis for these emergency decrees could also be found in a series of enabling acts whereby the Reichstag expressly authorized the executive to issue ordinances having the force of regular laws.¹¹³ Nevertheless, Rossiter observed that “there was no logical reason why... this flexible grant of power bestowed in Article 48 should not have been adequate to provide legal authority for executive legislation in severe crises of any sort, political or economic”.¹¹⁴

In 1930, Germany was again forced to resort to Article 48 in view of the economic distress and social unrest plaguing the country. Moreover, the legislative branch was experiencing problems of its own, the reigning party having nearly lost its hold in the legislature as the elections brought in more extremist parties, such as the Nazis and Communists, to the Reichstag. The Reichstag failed to function, and the then President was forced to assume the entire legislative function. Little by little, the *decree power based on Article 48 encroached upon and finally encompassed the entire field of ordinary legislation*: finances, taxes, customs, justice, governmental organization, and commerce.¹¹⁵ National economy, social welfare, and private business were sustained only by executive legislation, akin to the New Deal legislation of 1933-1936 in the United States. As observed by Rossiter, “the vacuum left by the abdication of Germany’s irresponsible Reichstag was filled completely by Article 48”.¹¹⁶ By 1932, the newly-appointed Chancellor dissolved the Reich and proceeded to govern with his cabinet through the dictatorship article.¹¹⁷ The provision was abused in its operation, the decrees ostensibly issued pursuant thereto, used to justify the suspension of certain fundamental rights and the transfer of executive and police power to one person. An action was brought against the government. However, out of fear and lack of the established power of judicial review as was the case in American and Philippine courts at present, the highest German court could do little more than follow the facts advanced by the Reich government and thus validate the decrees and the actions undertaken thereunder. In 1933, Adolf Hitler came to power. He dissolved the reinstated Reichstag and

¹¹⁰ *Ibid*, at 38.

¹¹¹ *Ibid*.

¹¹² ROSSITER, *supra* note 33, at 39.

¹¹³ *Ibid*, at 44.

¹¹⁴ *Ibid*, at 42.

¹¹⁵ *Ibid*, at 52.

¹¹⁶ *Ibid*, at 53.

¹¹⁷ ROSSITER, *supra* note 33, at 55.

governed on the basis of Article 48. The years that followed is now of common knowledge to most countries of the world. The government evolved into totalitarianism, repressive methods and genocide were adopted as a matter of policy, and many countries were engulfed in the Second World War.

As had been earlier noted, the German Republic was unique in that there was present in the Constitution itself a specific provision for emergency powers in emergency situations. “A weapon of reaction from Germany’s imperial past had been republicanized and converted into a weapon of democracy”.¹¹⁸ It was intended for dire times and emergency conditions. However, as Germany’s history had shown, it had been the subject of much use and abuse. Despite the expressed limitations, they proved futile in the face of one with selfish and absolutist or totalitarian tendencies.

Fortunately, the constitution of Germany has already been revised. In 1949, Germany adopted a new Constitution¹¹⁹, which is its most liberal constitution to date, even when compared to the organic laws of other nations. It deleted the infamous Article 48, and provided for a version of military powers which significantly departed from its original conception and most benign in character. Seemingly not satisfied, numerous limitations with respect to its initiation and exercise were added, scattered all throughout the basic law. Here is the most apposite provision as it now reads:

Xa. State of Defense

Article 115a [Definition and declaration of a state of defense]

(1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defense) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag.

(2) If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the Bundestag or the Bundestag cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members.

(3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit.

¹¹⁸ *Ibid.*, at 61.

¹¹⁹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY) or GG in German legal shorthand

(4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit.

(5) If the determination of a state of defense has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the Bundestag, may issue declarations under international law respecting the existence of the state of defense. Under the conditions specified in paragraph (2) of this Article, the Joint Committee shall act in place of the Bundestag.¹²⁰

2. Common Law Tradition/Anglo-Saxon: USA/United States of America

*The Constitution of the United States is a law
for rulers and people, equally in war and in peace,
and covers with the shield of its protection all classes of men,
at all times, and under all circumstances.
No doctrine involving more pernicious consequences
was ever invented by the wit of man than that any
of its provisions can be suspended during any of the great exigencies of government.
Such a doctrine leads directly to anarchy or despotism,
but the theory on which it is based is false;
for the government, within the Constitution,
has all the powers granted to it which are necessary
to preserve its existence...*
— Justice David Davis, in *Ex Parte Milligan*, 1866¹²¹

*Emergency does not create power.
Emergency does not increase granted power
or remove or diminish the restrictions imposed upon power granted or reserved.
The Constitution was adopted in a period of grave emergency.
Its grants of power to the Federal Government...
were determined in the light of emergency and
they are not altered by emergency.*
— Chief Justice Charles Evans Hughes,
in *Home Building and Loan Association v. Blaisdell* (1934)¹²²

¹²⁰ GER. FED. REP. BASIC LAW, art. 115a

¹²¹ 4 Wallace 2, 120-121

¹²² 290 U.S. 398, 425

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section 9.

x x x

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

x x x

Article II

Section 1. The executive power shall be vested in the President of the United States of America...

x x x

Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States; and will, to the best of my ability, preserve, protect and defend, the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States...

x x x

Section 3. He shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them... he shall take care that the laws be faithfully executed...

Article IV

Section 4. The United States shall guarantee, to every State in this Union, a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

The foregoing provisions sufficiently show that the war powers of government have been retained by Congress. It is the legislature which has the

power to declare war.¹²⁶ Moreover, Congress was affirmed to have the sole power to raise and support armies, to provide and maintain a navy, and to make rules for their government and regulation.¹²⁷ These powers, even in the Philippines, are traditionally located in the legislature. However, in contrast to our own fundamental law, the American Constitution clearly bestows upon the legislature the power to provide for calling forth the militia to execute the laws of the country, suppress insurrection, and repel invasions, despite the express designation of the President as Commander-in-Chief of the army and navy of the United States.¹²⁸ In relation to the foregoing, the Constitution enjoins Congress to make all laws which shall be necessary and proper for carrying into execution the aforesaid powers.¹²⁹ More significantly, even the power of suspending the privilege of the writ of habeas corpus has been clearly granted to the legislature, as well, and only when public safety requires it during times of rebellion or invasion.¹³⁰ This is in stark contrast to the German Constitution, and the Philippine Constitution, as will be later on shown. Both the fundamental laws of Germany and the Philippines confer on the President a gradation of powers to meet crisis situations in cases of insurrection, invasion and rebellion. On the other hand, to reiterate, the American Constitution explicitly retained with the legislature the primary power and responsibility of calling forth the militia, and of suspending the privilege of the writ of habeas corpus, in dealing with the same circumstances.

As regards the President, the Constitution ambiguously confers upon him “the executive power”.¹³¹ This broad grant of powers has often been declared as the primary source of his powers in times of emergency. Such a broad reading of the provision is not really conclusive and may be the subject of contention, although many may find it satisfactorily acceptable. The President’s military powers can also be considered as having been obliquely referred to in other provisions in the Constitution. For instance, the oath traditionally delivered by every newly-elected President, prior to the execution of his office, impliedly confers such a power upon his office, when he states that he shall “to the best of [his] ability, preserve, protect and defend, the Constitution of the United States”.¹³² Second, the Constitution designates him as the Commander in Chief of the army and navy of the United States, as well as of the militia of the various states. It must be noted however, that this is qualified in that they should have first been “called into the actual service of the United States”.¹³³ Third, on extraordinary occasions, the President is given the discretion to convene both Houses, or either of them. Fourth, the Constitution makes it his duty to “take care that the laws be faithfully executed”,¹³⁴ very much akin to the Philippines’ own “take-care clause”.¹³⁵ Finally,

¹²⁶ U.S. CONST. art. I, sec. 8

¹²⁷ U.S. CONST. art. I, sec. 8

¹²⁸ U.S. CONST. art. I, sec. 8 in relation to art. II, sec. 2

¹²⁹ U.S. CONST. art. I, sec. 8

¹³⁰ U.S. CONST. art. I, sec. 9

¹³¹ U.S. CONST. art. II, sec. 1

¹³² U.S. CONST. art. II, sec. 1

¹³³ U.S. CONST. art. II, sec. 2

¹³⁴ U.S. CONST. art. II, sec. 3

the Constitution expresses a promise of protection against invasion and against domestic violence. In the latter case, protection is conferred only after application by the legislature, or the executive if the legislature cannot be convened.¹³⁶

The most that can be said about the military powers of the American president, is that it can be implied from the several provisions in the Constitution based on his promise to “preserve, protect and defend the Constitution of the United States”, his designation as Commander in Chief of the army and navy, and the express constitutional guarantee of protection for each of the states of the Union. No provision explicitly governs the conferment of any power, extraordinary in character, upon the Chief Executive, in times of crisis or emergency, much less the form or manner, the scope or limitations and restrictions, of any power of such or similar nature. This perhaps only shows an entrenched abhorrence for abnormal forms of government. Rossiter thus notes three leading characteristics of American crisis government: “the adherence to normality, the lack of conscious institutionalization, and the selection of the President, who operates through his personality as much as through recognized institutions and procedures, as the focal point of such government”.¹³⁷

This dearth in “dictatorship provisions” constrained Rossiter to adopt a historical approach, focusing on the personalities of certain presidents of the United States, noted for the extraordinary measures they have undertaken in times of crises during their tenure, despite the lack of express legal or constitutional authority therefor. Rossiter finds that a study of American legal and political history has “singled out the chief executive as the chief instrument of crisis authority”¹³⁸ in the United States. These presidents correspond to the periods of the Civil War, the First World War, the Depression of 1933, and the Second World War, “when the government at Washington was forced to make use of highly irregular powers and procedures in the presence of a pronounced national emergency”.¹³⁹ Rossiter in sum states:

... An institution like the state of siege or Article 48 has always been (and continues to be) a practical and constitutional impossibility in the United States.

Crisis government in this country has therefore been a matter of personalities rather than of institutions. Indeed, the one consistent instrument of emergency government has been the Presidency itself, a fact never more apparent than in the recent war. The study of constitutional dictatorship in the United States is not so much an analysis of institutions

¹³⁵ CONST. art. VII, sec. 17, second clause

¹³⁶ U.S. CONST. art. IV, sec. 4

¹³⁷ ROSSITER, *supra* note 33, at 211.

¹³⁸ ROSSITER, *supra* note 33, at 211.

¹³⁹ *Ibid*, at 209.

like martial law and the delegating statute as it is a history of Abraham Lincoln, Woodrow Wilson, and Franklin D. Roosevelt.¹⁴⁰

Abraham Lincoln's first recorded action reminiscent of military powers was the issuance of an executive proclamation on April 15, 1861, in which he declared that, inasmuch as the execution of the laws of the United States was being forcibly obstructed in the seven southernmost states, he was compelled to resort to his constitutional and statutory powers to call forth “the militia of the several States of the Union to the aggregate number of 75,000” in order to suppress the rebellion and guarantee the execution of the laws. Moreover, he put out a call to the Houses of Congress to convene in special session on July 4 “to consider and determine such measures as, in their wisdom, the public safety and interest may seem to demand”.¹⁴¹ Pursuant to and following the issuance of this proclamation, Lincoln undertook measures which either traditionally resided in the legislature, or which plainly violated constitutional or international law principles. He initiated a blockade of the ports of the seceded territories. He suspended the privilege of the writ of habeas corpus in States of the Union, which under the American Constitution, only the legislature had the power to declare. The mails were monitored for “treasonable correspondence”. Persons suspected of disloyalty and treason were summarily arrested. He directed the Secretary of the Treasury to advance millions of dollars of un-appropriated funds to certain individuals who were completely un-authorized to receive it “to be used by them in meeting such requisitions as should be directly consequent upon the military and naval measures necessary for the defense and support of the Government”.¹⁴² Rossiter recounted, “by the time Congress had come together, he had set on foot a complete program – executive, military, legislative, and judicial – for the suppression of the insurrection”.¹⁴³ Congress approved Lincoln’s actions and measures in an act. The Supreme Court yielded and gave direct sanction to Lincoln’s extraordinary exercise of the war power, and even went so far as to effectively hold that subsequent congressional ratification of these actions was unnecessary.¹⁴⁴ “In the interval between April 12 and July 4, 1861 a new principle thus appeared in the constitutional system of the United States, namely, that of a temporary dictatorship”.¹⁴⁵

After Congress had been reconvened and re-assembled, normal government institutions and processes were restored, and the principle of separation of powers once again prevailed.¹⁴⁶ Lincoln generally respected the

¹⁴⁰ *Ibid*, at 210.

¹⁴¹ ROSSITER, *supra* note 33, at 225.

¹⁴² *Ibid*, at 225-228.

¹⁴³ *Ibid*, at 228.

¹⁴⁴ Prize Cases, 2 Black 635 cited in CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 230 (2002).

¹⁴⁵ W.A. Dunning, *Essays on the Civil War and Reconstruction*, 20 (New York, 1898) cited in CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 230 (2002).

¹⁴⁶ ROSSITER, *supra* note 33, at 230-231.

powers of the legislature and many of his acts thereafter were merely executory of the will of Congress. However, he never retreated from his novel and broad interpretation of the war powers he believed the Constitution bestowed upon him, in continuing the prosecution of the civil war. Thus, in many of his other actions, Lincoln “continued to exercise unprecedented authority, based on his latitudinarian interpretation of his war powers under the Constitution”.¹⁴⁷ Rossiter described,

Not only did he do things that were regarded by most people as within the exclusive field of Congress’s power, but he went further and asserted his competence to do things in an emergency that Congress could never do at all, maintaining that his designation as Commander in Chief allowed him to adopt measures that in normal times could only be effected by an amendment to the Constitution.¹⁴⁸

Pursuant to this broad reading of his war powers as commander in chief, Lincoln embarked upon one of the actions for which he has become famous – he issued the Emancipation Proclamation of September 22, 1862. In this instrument, he declared the freedom of all slaves without compensation to their owners, if such a step were regarded as indispensable to the prosecution of the war.¹⁴⁹

How these measures have affected other civil liberties of citizens should be discussed. Arrests without warrant, detention without trial, release without punishment constituted the majority of the violations of the rights of citizens. Lincoln claimed that “his whole purpose was precautionary and preventive, not punitive or vindictive”, which Rossiter acquiescently affirms to be “an exercise of arbitrary power there can be no doubt, and yet little injustice resulted”.¹⁵⁰ Lincoln’s administration also intervened to a certain extent in the area of business and industry, particularly in matters of transportation and communications, by taking over railroads and telegraph lines on the basis of congressional authorization.¹⁵¹ “In other respects the relations between the people and their government were equally normal”.¹⁵² Observably, freedom of speech and press flourished almost unchecked. Lincoln tolerated the media, despite their disapproving remarks regarding his actions, save for certain exceptional cases.¹⁵³ As Rossiter described, “although the individual faced stiffer and more comprehensive taxes, and although a young man who lacked \$300 might be conscripted to fight in the army, otherwise he went about his business saying and doing what he pleased, and need hardly have known that a fateful war was in progress”. The Supreme Court generally acquiesced to his policies as well,¹⁵⁴ except for a number of instances which were

¹⁴⁷ *Ibid*, at 233.

¹⁴⁸ *Ibid*, at 234.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*, at 236.

¹⁵¹ ROSSITER, *supra* note 33, at 238.

¹⁵² *Ibid*, at 238.

¹⁵³ *Ibid*, at 236-237.

¹⁵⁴ See Prize Cases, 2 Black 635

exceptional in nature.¹⁵⁵ In sum, Rossiter characterized the leadership of Lincoln thus,

What Lincoln did, not what the Supreme Court said, is the precedent of the Constitution in the matter of presidential emergency power. Lincoln's actions form history's most illustrious precedent for constitutional dictatorship. There is, however, this disturbing fact to remember: he set a precedent for bad men as well as good... If Lincoln could calmly assert: "I conceive that I may, in any emergency, do things on a military ground which cannot constitutionally be done by Congress," then some future President less democratic and less patriotic might assert the same thing. The only check upon such a man would be the normal constitutional and popular limitations of the American system.¹⁵⁶

Although the First World War did not affect Americans as much as it had ravaged European countries, the United States under *Woodrow Wilson* experienced another expansion of presidential power. The President by then had Lincoln's experience and broad interpretation of presidential powers as Commander in Chief to rely upon, in order to justify extraordinary measures in conditions of emergency. Additionally, under his term, Wilson acquired vast crisis powers through statutory delegations by Congress. Unlike Lincoln, he sought prior legislative authority for many of his actions. Nevertheless, the effects were ultimately the same, as it conferred upon him powers just as extensive as the powers of his predecessor, and even exceeding the limits set by them. For instance, some of these delegations expressly allowed him to take over and operate certain public interest businesses or public utilities, such as railroads and water systems.¹⁵⁷ Some of such laws granted him the power to regulate the manufacture, importation and distribution of food, coal and other necessities as well as the power to take over and operate factories, mines, pipe lines and other similar industrial institutions important to national defense.¹⁵⁸ Indeed, Rossiter stated that "the most important alteration in the federal government was the expansion of its administrative branch to fight the war of production".¹⁵⁹ The government dominated the economic and business life of the nation, through administrative control and direction of privately owned and operated industry by means of a myriad of new agencies.¹⁶⁰

Another significant feature of his term was Wilson's "technique of legislative leadership".¹⁶¹ Wilson effectively acted as prime minister in relation to Congress, and he was able to influence, as he often and actively did, the subjects and the processes of legislation.¹⁶² Rossiter reminds us that,

¹⁵⁵ See *Ex Parte Milligan*, 4 Wallace 2, 120-121

¹⁵⁶ ROSSITER, *supra* note 33, at 239.

¹⁵⁷ ROSSITER, *supra* note 33, at 242-243.

¹⁵⁸ *Ibid*, at 243.

¹⁵⁹ *Ibid*, at 241.

¹⁶⁰ *Ibid*, at 248.

¹⁶¹ *Ibid*, at 243.

¹⁶² *Ibid*, at 244.

Executive control and direction of the lawmaking process is an extremely important factor in any constitutional dictatorship which extends over a period of time, particularly one in which the executive branch must be delegated broad emergency powers. The separation of executive and legislature ordained in the Constitution presents a distinct obstruction to efficient crisis government, and it is primarily the President's job to bridge the gap, by leading Congress to the enactment of his emergency program.¹⁶³

This is not to say that there was total abdication of legislative power by Congress. On the contrary, other than his influence in the areas of legislation and the voluntary abbreviation of legislative proceedings, Congress operated in the same way during the war as it operated in peacetime.¹⁶⁴ What in sum occurred was a partnership between the executive and the legislature, and an increased delegation of powers upon the President, cognizant of his authoritative position in directing the war and the crucial role of the nation's economy in assisting its prosecution during such times.¹⁶⁵ Wilson "demonstrated beyond a doubt that not only the business of actual war, but also the job of preparation, production, and mobilization for war is fundamentally a problem for the President to solve. He is the man who will be praised for success and blamed for failure, whether in the battles waged in the actual theater of war or in the equally important battles waged by America's instruments of production".¹⁶⁶ It is as regards this aspect that Congress acquiesced, with the aforesaid statutory delegations.¹⁶⁷

During his term, the civil liberties and rights of the people were subject to only some degree of control or suppression. Actually, the constrictive effects of the crisis conditions were largely felt by the nation's economic sector, in view of greater administrative control and intervention in this aspect. As earlier mentioned, some of these constraints include, heavier taxation, governmental administration of privately owned businesses and industries especially railroads and telephone and telegraph systems, governmental entrance into the field of private business such as in shipbuilding, and the direction of privately owned and operated industries for purposes of the war.¹⁶⁸ Freedoms of speech and of the press were subject to greater restrictions during this period. These rights were controlled to a certain extent through laws duly enacted by the legislature albeit upon the initiative of Wilson, and violations thereof were concomitantly enforced through legal and judicial channels. Some of these measures include the Espionage Act of June 15, 1917, the Sedition law amendment of May 16, 1918, as well as certain provisions of the Selective Service Act, and the Trading with the Enemy Act.¹⁶⁹ These statutes

¹⁶³ ROSSITER, *supra* note 33, at 243.

¹⁶⁴ *Ibid.*, at 246.

¹⁶⁵ *Ibid.*, at 244-245, 249.

¹⁶⁶ *Ibid.*, at 249.

¹⁶⁷ *Ibid.*

¹⁶⁸ ROSSITER, *supra* note 33, at 248,250.

¹⁶⁹ These statutes are respectively: XL *Stat.* 217, 553, 76, 411 cited in CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 252 (2002)

were actively enforced by the Department of Justice. “More than two thousand indictments were presented to the courts for oral or printed violations of the above acts, and about half of these, convictions were obtained. In many instances the convictions and penalties went far beyond the necessities of the case”.¹⁷⁰ Nevertheless, censorship remained taboo, and control of the media was effected mainly through ostensibly legal channels, and even voluntarily on the part of the media through self-censorship and in cooperation with the appropriate government agency.¹⁷¹ Moreover, “rights such as those of public assembly and inviolable domicile remained untouched by federal action”.¹⁷² People continued to freely enjoy and exercise the right to strike and the right to work when and where they pleased. In any event, after the war, most of these wartime measures were repealed by Congress.

During the period of the most serious economic emergency in the United States, *Franklin D. Roosevelt* led the country through the crisis. His administration sought to impede the depression through direct governmental action. Economic depression has been a recognized ground for resort to emergency government, and the United States during this period assumed similar remedial measures, despite the abovementioned lack of express legal basis. Roosevelt made full use of the historical repository of presidential military and emergency powers, employing recognized “crisis techniques – executive initiative, executive leadership of legislation, an abbreviated legislative process, the delegation of powers by statute, and an expansion of the administrative branch” to lead the economy through the depression.¹⁷³ In March 1933, he declared the existence of a “national emergency” and decreed a bank holiday, forbidding the export of gold and silver, and prohibiting transactions in foreign exchange. He based this proclamation on a law passed during the period of the First World War, namely the Trading with the Enemy Act of 1917.¹⁷⁴ Recognizing its doubtful legal authority, he asked Congress to ratify the same. A few days later, Congress passed the Emergency Banking Act, which validated the proclamation and all other acts of the President and Treasury, reenacting in amended form the pertinent provision of the Trading with the Enemy Act. The President was given authority to take similar action “during time of war or during any other period of national emergency” and extended the bank holiday “until further proclamation by the President”.¹⁷⁵

Roosevelt, similar to Wilson, maintained close relations with the legislature throughout the emergency and galvanized its members to speedier enactment of laws. He proposed to Congress a complete and detailed program of emergency legislation which entailed grants of legislative and administrative power, which they granted. The legislative mill worked faster, and just as hard as it had during the

¹⁷⁰ ROSSITER, *supra* note 33, at 252.

¹⁷¹ *Ibid.*, at 252-253.

¹⁷² *Ibid.*, at 250.

¹⁷³ ROSSITER, *supra* note 33, at 256.

¹⁷⁴ *Ibid.*, at 257.

¹⁷⁵ *Ibid.*, at 258.

period of the war, allowing the passage of several emergency statutes delegating enormous powers to the President in allowing him to deal with the economic depression.¹⁷⁶ The President directed the trade practices and labor policies of American business and industry. In describing the nature of the delegation of emergency powers to the American President, Rossiter clarified that “this unprecedented emergency delegation was not as complete as the French enabling acts of the 1930’s. The President was not actually making laws, that is, statutes of the United States; he was merely filling out in an administrative manner the emergency statutes already enacted by Congress”.¹⁷⁷ Numerous agencies were established by the President based on some of such laws.¹⁷⁸ This characterized Roosevelt’s New Deal Government. During this period, there was no suppression of rights, no complete abdication by the legislature of their powers. The government was clearly operating on the basis of emergency powers, yet it appeared to be self-limiting, there was no dictatorship in fact.¹⁷⁹ The measures carried out during the New Deal government wrought lasting changes in the constitutional structure and government. The same trend was perceptible in Philippine jurisdiction, as exemplified in one case.¹⁸⁰

Roosevelt also led the United States through the Second World War. It was during this period that he assumed vast emergency powers. He adopted Lincoln’s broad reading of his constitutional war powers and made full use of existing delegations of power. He issued two proclamations of emergency. Rossiter surmised that “in each of these proclamations the President was untying his own hands and giving himself permission to make use of the large arsenal of presidential emergency powers which had been accumulated during the crises of the past”.¹⁸¹ In any event, these proclamations enabled him to make use of various emergency statutes, including those allowing him to expand the peacetime army and navy.¹⁸² He also led the effort to assist the Allies in the war, such as the Atlantic Charter, the initiation of American convoys, as well as the destroyer deal of September 1940 wherein he swapped fifty overage destroyers for some Atlantic bases.¹⁸³ New delegations of power were made by Congress during the period of the war, including: 1) The Lend-Lease Act of March 11, 1941, which was a broad delegation of the spending power of Congress. It gave him the authority to turn over billions of dollars worth of goods, or credits, to any country whose defense he should deem vital to the defense of the United States¹⁸⁴; 2) The First and Second War Powers Acts of December 18, 1941 and March 27, 1942, which dealt with various emergency problems such as administrative reorganization for war,

¹⁷⁶ *Ibid*, at 259-260.

¹⁷⁷ ROSSITER, *supra* note 33, at 262.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*, at 263.

¹⁸⁰ *Calalang v. Williams*, 70 Phil. 727; *Pangasinan Transportation v. Public Service Commission*, 70 Phil. 22

¹⁸¹ ROSSITER, *supra* note 33, at 267.

¹⁸² *Ibid*, at 267.

¹⁸³ ROSSITER, *supra* note 33, at 268.

¹⁸⁴ *Ibid*, at 269-270.

ensorship of overseas communications, alien property, defense contracts, trading with the enemy, governmental acquisition of property, and free postage for the armed forces, among others. It also served as the statutory basis for the war administration's "government by decree" of the nation's essential business and industry¹⁸⁵; 3) the Emergency Price Control Act of January 30, 1942.¹⁸⁶ Thus pursuant to these and other pertinent laws, Roosevelt was able to create and reorganize a vast war administration. He went beyond this, however, and entered more controversial zones in the exercise of his emergency powers. For instance, it was during his administration and upon his orders that about 70,000 Japanese-American citizens and 40,000 Japanese aliens were uprooted from their homes and relocated to designated military areas. He registered his unqualified approval of the declaration and maintenance of martial law in Hawaii. He created a military commission to try Nazi saboteurs apprehended by the FBI in June 1942. He adopted "indirect sanctions" such as seizures of businesses and industries.

The war effort was led largely by the President alone. His relations with Congress were not as pacific as in the prior years or in previous administrations. They were probably rebuffed by some of the measures Roosevelt had taken which had never been given congressional authorization. This circumstance hardly affected his actions though, and he continued the business of the war relying on his broadly interpreted emergency powers.

"The political liberties of the American people – the freedoms of person, speech, press, and assembly, suffered less invasion in this war than in either the Civil War or the World War", Rossiter observed, "with one major exception".¹⁸⁷ Two statutes continued to regulate free speech and press: the Espionage Act of 1917 and the Alien Registration Act of June 1940. The latter made it unlawful to advise or urge insubordination, disloyalty, or refusal of duty in the armed forces, or to distribute any printed or written matter advising such disaffection; and to advise, advocate, or teach the desirability of overthrowing or destroying any government in the United States by word or print; or to organize or affiliate with any group or society advocating the overthrow of lawful government.¹⁸⁸ Enemy agents were proceeded against. There was censorship of the media and of the mails, as regards correspondences and communications relating to the war and military strategy.¹⁸⁹ On the economic front, the rights of labor suffered no restrictions, including the right to strike or to picket, or as to the choice of one's occupation.¹⁹⁰ The national economy, however, was subject to strict regulation by the government, and

¹⁸⁵ *Ibid.*, at 270.

¹⁸⁶ *Ibid.*, at 269.

¹⁸⁷ ROSSITER, *supra* note 33, at 269.

¹⁸⁸ *Ibid.*, at 276.

¹⁸⁹ *Ibid.*, at 277.

¹⁹⁰ *Ibid.*, at 278.

measures such as price-fixing, rationing, and government control of industry were initiated.¹⁹¹

The more sorrowful, and dictatorial, aspect of the administration's policies pertained to their treatment of the Japanese-Americans, and the state of martial law declared upon Hawaii. On December 7, 1941, following the attacks on Pearl Harbor, the governor of Hawaii suspended the writ of habeas corpus and declared martial law throughout the islands. He then turned over to the Commanding General, Hawaiian Department, the exercise of all his normal powers "during the present emergency and until the danger of invasion is removed".¹⁹² The action was approved by Roosevelt and the regime lasted for a number of years, ending only in October 1944. The Supreme Court evaded judicial review of the constitutionality of the extension of martial law, although it ordered the release of two detained civilians based on its affirmance of the constitutional principle that military courts have no jurisdiction over civilians in areas where no imminent danger threatens and the regular courts are able to discharge their duties.¹⁹³

On February 19, 1942, Roosevelt signed Executive Order 9066, which endowed the Secretary of War and "the military commanders whom he may from time to time designate" with broad discretionary authority to establish military areas in the United States "from which any or all persons" might be excluded in order to prevent espionage and sabotage. This executive order became the authority for their subsequent program of moving every person of Japanese ancestry to two designated "military areas" in the three westernmost states and part of Arizona.¹⁹⁴ About 110,000 persons were evacuated and moved to the military areas, even though a majority of them were full-fledged citizens of the United States. The enforced mass evacuation was allegedly "a matter of military necessity", the summary manner of its execution allegedly warranted by perceived time constraints, in order to avert the possibility of a Japanese assault.¹⁹⁵ These actions were upheld by the Supreme Court as having been made by the President in good faith, and on proper appraisal of the circumstances.¹⁹⁶ Congress moreover ratified Executive Order 9066 by the Act of March 21, 1942 by making violations of the restrictions laid down therein punishable.¹⁹⁷ Even after the war, and long after its initial implementation, the Supreme Court refused to question the validity of the evacuation. In *Hirabayashi v. U.S.*, the Supreme Court upheld a curfew order under which a student had been convicted, and evaded judicial examination of the validity of the general evacuation order.¹⁹⁸ In *Korematsu v. U.S.*, the Court affirmed its

¹⁹¹ *Ibid.*, at 279.

¹⁹² ROSSITER, *supra* note 33, at 284.

¹⁹³ *Ibid.*, at 284-285.

¹⁹⁴ *Ibid.*, at 280-281.

¹⁹⁵ *Ibid.* at 281.

¹⁹⁶ *Moyer v. Peabody*, 212 U.S. 78 cited in CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 281 (2002)

¹⁹⁷ *LVI Stat.* 173 cited in CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 282 (2002)

¹⁹⁸ 320 U.S. 81

favorable posture as regards the measure and accepted as final the General's judgment that the necessities of the moment demanded the complete evacuation of all persons of Japanese ancestry, and that there was no time in early 1942 to examine the suspected members of the Japanese-American community on an individual basis.¹⁹⁹ In *Ex Parte Endo*, the Supreme Court held that a Japanese-American citizen of proven loyalty was entitled to unconditional release from the camp, but the court again evaded the constitutional question.²⁰⁰ The foregoing led Rossiter to conclude that "wherever the truth of this matter may rest, this cold fact stands forth undisputed: the government of the United States, in a case of military necessity, can be just as much a dictatorship as any government on earth".²⁰¹

These facts show that the absence of an express constitutional or legal basis provides no guarantee that military or emergency powers would not be assumed by the President, or that a state will be free from dictatorial methods of government. With great apprehension, Rossiter concludes that the United States offers "a striking example of a potent crisis institution: the independent President".²⁰² He continues:

... the fact is that the Presidency today, when properly handled, is as powerful an instrument of constitutional dictatorship as the office of the Prime Minister of Great Britain. Its power is the boundless grant of executive authority found in the Constitution, supplemented by broad delegations of discretionary competence from the national legislature; its limitations are the political sense of the incumbent and the patience of the American people; its effectiveness rests in the personality and energy of the President himself and the circumstances with which he has to deal.

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Because it is so ideal a matrix for constitutional dictatorship, the Presidency does present a serious potential danger to the American people. It is for them to be eternally vigilant, to demand that this vast display of power be wielded in their behalf, as hitherto it always has been, and not against them...²⁰³

VII. THE PHILIPPINE (PH) HABIT

In this section, the authors will outline Philippine historical experience with respect to the use of the military powers of the President. Notable among the various gradations of military powers are the emergency powers assumed by

¹⁹⁹ 323 U.S. 214

²⁰⁰ 323 U.S. 283

²⁰¹ ROSSITER, *supra* note 33, at 283.

²⁰² *Ibid.*, at 286.

²⁰³ ROSSITER, *supra* note 33, at 286-287.

national heads as well as the numerous martial law declarations, blotting our political history. We will find that the number of occasions, as well as the grounds justifying resort to extraordinary governmental, or presidential powers, are not that different from the circumstances abounding in the different jurisdictions we have just described in the preceding pages. There are remarkable similarities across different countries and recurrent incidences of its use across successive generations, leading one to surmise either that the phenomenon is of universal practice, or that their origins are common.

In this section, our purpose is for the reader to have a bird's eye-view of the Philippines' historical legal and factual experience as regards the military and emergency powers of the President. This will not only supply the basis for a cross-country and cross-temporal or historical examination of its use, but will also provide a springboard for critical analysis of current events and for the re-evaluation of existing legislation on the matter. It is our hope that this will influence national policy and legislation, perhaps even future revisions of the constitution.

A. THE FIRST CONSTITUTION

The first fundamental law instituted for the government of the Philippines was the Malolos Constitution, or the 1899 Constitution of the Republic of the Philippines. Following centuries of Spanish rule, the Philippines sought independence and this legal text was hoped to establish the first Philippine Republic.²⁰⁴ Notably, the Malolos Constitution did not have any provision for emergency or military powers as we conceive it today. However, there are provisions regulating situations of emergency, military powers in its generic, non-technical sense:

Article 27. All Filipinos are obliged to defend his country with arms when called upon by law, and to contribute to the expenses of the State in proportion to his means.

Article 30. The guarantees provided for in Articles 7, 8, 9, 10, and 11 and paragraphs 1 and 2 of Article 20 shall not be suspended, partially or wholly, in any part of the Republic, except temporarily and by authority of law, when the security of the State in extraordinary circumstances so demands.

When promulgated in any territory where the suspension applies, there shall be a special law which shall govern during the period of the suspension, according to the circumstances prevailing.

²⁰⁴ CONST. (1899), title I, art. 1

The law of suspension as well as the special law to govern shall be approved by the National Assembly, and in case the latter is in recess, the Government shall have the power to decree the same jointly with the Permanent Commission, without prejudice to convoking the Assembly without the least delay and report to it what had been done.

However, any suspension made shall not affect more rights than those mentioned in the first paragraph of this article nor authorize the Government to banish or deport from the Philippines any Filipino

Article 31. In the Republic of the Philippines, no one shall be judged by a special law nor by special tribunals. No person or corporation may enjoy privileges or emoluments which are not in compensation for public service rendered and authorized by law. War and marine laws shall apply only for crimes and delicts which have intimate relation to military or naval discipline.²⁰⁵

A significant characteristic of this Constitution is that it does not provide for any of the military and emergency powers of the president as we so conceive them now. Indeed, what it does provide is a suspension of certain guarantees under the Constitution “when the security of the State in extraordinary circumstances so demands”.²⁰⁶ The Malolos Constitution expressly enumerates those “guarantees” that may be suspended during extraordinary circumstances, which correspond roughly to rights relating to criminal procedure such as the search and seizure clause, and delivery to the proper judicial authorities, and the liberty of abode, freedoms of speech, press and of association.²⁰⁷ Moreover, it requires the passage of a “special law which shall govern during the period of the suspension, according to the circumstances prevailing” in those times when such a suspension is declared.²⁰⁸ This bears greater resemblance to the *iusitium* of Ancient Rome that Giorgio Agamben spoke of²⁰⁹, or even the present Basic Law of Germany (present German Constitution), rather than the concept of martial law as now provided in the Philippine Constitution, among others.

Notably, emergency powers resided solely in the Legislature. The text does not provide for the transfer of any power, extraordinary or otherwise, to any single person. Military and emergency powers in the general sense in which it is used in this paper, is bestowed, not upon the President, but upon a Permanent Commission. In fact, the law provides a stricture against the conferment of two or more of these powers upon any individual or group, and expressly prohibited as well the conferment of the legislative power, by itself, to any one person. It provides that “the government of the Republic is popular, representative, alternative, and responsible, and shall exercise three distinct powers: namely, the

²⁰⁵ CONST. (1899), title IV, art. 27, 30-31

²⁰⁶ CONST. (1899), title IV, art. 30, par. 1

²⁰⁷ CONST. (1899), title IV, art. 7-11, 20, par. 1 and 2

²⁰⁸ CONST. (1899), title IV, art. 30, par. 2

²⁰⁹ see AGAMBEN, *supra* note 55

legislative, the executive, and the judicial. Any two or more of these three powers shall never be united in one person or cooperation, nor the legislative power vested in one single individual".²¹⁰

The Malolos Constitution now provides "more of a historical interest" as it was ineffectual as it had been short-lived. Barely two months after its adoption, the Philippines fell to the Americans, and the First Philippine Republic collapsed.

B. AMERICAN ORIGIN OF THE MILITARY POWERS OF THE PHILIPPINE PRESIDENT

The Americans established a system of government in the country, reminiscent of present-day institutions and introduced the first of the organic laws for the government of the country while it remained under their auspices. These organic acts formed the basis of the successive fundamental laws drafted throughout our history. The focus of our study, however, will be those provisions relating to the military and emergency powers of the President. We will discuss its development as it evolved into its present form under Section 18, Article VII and Section 23, Article VI of the 1987 Constitution. These provisions comprise the present formulation of the military and emergency powers, respectively, of government, including the delegated emergency powers, as well as the power to call out the armed forces, to suspend the privilege of the writ of habeas corpus, and to declare martial law. We shall examine their legal-historical roots, comparing the relevant provisions of previous organic acts and constitutions with the present Constitution. This section will also take into account some of the rulings of the Supreme Court interpreting such provisions.

The Philippines came under the control of the Americans in 1899, and the territory was formally ceded to the United States by the Treaty of Paris on April 11 of the same year. The Treaty of Paris is generally regarded as establishing the foundation of the constitution of the country.²¹¹ However, the Philippines remained "unincorporated territory" of the United States, administered from afar by the President of the United States, in his capacity as Commander-in-Chief of the army of occupation, and later by U.S. Congress. The organic laws of the Philippines were "derived from the formally and legally expressed will of the President and Congress, instead of the popular sovereign constituency, which lies back of the American constitutions".²¹² From 1900 to 1935, these organic acts served as the constitution of the Philippines, and were "in the nature of charters, by

²¹⁰ CONST. (1899), title II, art. 4

²¹¹ VICENTE V. MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS ON THE PHILIPPINE CONSTITUTIONAL SYSTEM, 2 (1978)

²¹² United States v. Bull, 15 Phil. 7, 27 (1910)

means of which the United States governed the Philippine Islands.²¹³ The principal organic acts of the Philippines were: President McKinley's Instructions to the Second Philippine Commission on April 7, 1900; the Act of Congress of July 1, 1902, otherwise known as the Philippine Bill; and the Act of Congress of August 29, 1916, otherwise known as the Jones Law.

1. President McKinley's Instructions

Upon the occupation of the Philippines by the American forces in 1898, a military government was set up, headed by a Military Governor. The Military Governor derived his authority from the President of the United States as Commander-in-Chief²¹⁴ and exercised all powers of government. He was Chief Executive and exercised legislative powers in the form of decrees, general orders and regulations with the force of law.²¹⁵ He reestablished civil courts and at the same time set up military commissions and provost courts.

The powers of government were parceled out to different departments. On April 7, 1900, President William McKinley appointed a commission to be headed by William H. Taft, which came to be known as the Second Philippine Commission.²¹⁶ President McKinley then issued his "Instructions" for their guidance. The military government was gradually dismantled. On September 1, 1900, legislative power was transferred from the Military Governor to the United States Philippine Commission.²¹⁷ On July 4 1901, the executive powers of the Military Governor were transferred to the President of the Philippine Commission, and the position of Military Governor was abolished, pursuant to the enactment of the Spooner Amendment to the Army Appropriation Bill.²¹⁸ The Spooner amendment thus transformed the military government to a civil one, marking this date as the "commencement of civil government" in the Philippines. Nevertheless, despite this commendable move, the Philippine government continued to function under the President of the United States.²¹⁹ Moreover, the executive and legislative powers of government were once again united, in a Civil Governor acting simultaneously as a member of the legislative branch.²²⁰

²¹³ MENDOZA, *supra* note 209, at 5.

²¹⁴ *Ibid.*

²¹⁵ MENDOZA, *supra* note 209, at 5.

²¹⁶ *Ibid.*, at 6; An earlier commission had been "sent" to the Philippine Islands with Jacob Schurman as chairman.

²¹⁷ *Ibid.*, at 7.

²¹⁸ *Ibid.*, at 8.

²¹⁹ *Ibid.*, at 9, also citing *Severino v. Governor-General*, 16 Phil. 366, 382 (1910)

²²⁰ *Ibid.*, at 8-9.

It was in this context that the Philippines first came under a “constitutional” form of government, which we can only claim with some irony. The provisions relevant to this study read as follows:

As long as the insurrection continues the military arm must necessarily be supreme...²²¹

x x x

It is probable that the transfer of authority from military commanders to civil officers will be gradual and will occupy a considerable period. Its successful accomplishment and the maintenance of peace and order in the meantime will require the most perfect cooperation between the civil and military authorities in the Islands, and both should be directed during the transition period by the same executive department. The Commission will therefore report to the Secretary of War, and all their actions will be subject to your (William Taft, President of the Philippine Commission) approval and control.²²²

x x x

...In the meantime the municipal and departmental governments will continue to report to the Military Governor, and be subject to his administrative supervision and control...²²³

x x x

Wherever civil governments are constituted under the direction of the Commission, such military posts, garrisons, and forces will be continued for the suppression of insurrection and brigandage and the maintenance of law and order as the military commander shall deem requisite, and the military forces shall be at all times subject under his orders to the call of the civil authorities for the maintenance of law and order and the enforcement of their authority...²²⁴

x x x

As can be gleaned from the aforecited provisions, the military powers of government were necessarily “supreme” during the early period of American occupation, “as long as the insurrection continues”.²²⁵ It acknowledged that the “transfer of authority from military commanders to civil officers will be gradual and will occupy a considerable period”.²²⁶ It thus declared that “its successful accomplishment and the maintenance of peace and order in the meantime will require the most perfect cooperation between the civil and military authorities” in

²²¹ President McKinley’s Instructions, par. 1

²²² President McKinley’s Instructions, par. 3

²²³ President McKinley’s Instructions, par. 6

²²⁴ President McKinley’s Instructions, par. 7

²²⁵ President McKinley’s Instructions, par. 1

²²⁶ President McKinley’s Instructions, par. 3

the Philippines, and “both should be directed during the transition period by the same executive department”.²²⁷ The Commission was required to report to the Secretary of War²²⁸ and the municipal and departmental governments were also required to continue reporting to the Military Governor and be subject to his administrative supervision and control.²²⁹ The military arm of government thus notably played a dominant role at the time. Significantly, the foregoing provisions make reference to insurrection and the maintenance of law and order as specific grounds for the continued supremacy of the military arm of government, the maintenance of military facilities and infrastructures, as well as for the calling out of the “military forces”.²³⁰

2. The Philippine Bill of 1902

By means of the Act of July 1, 1902, the U.S. Congress assumed from the President of the United States the administration and government of the Philippines.²³¹ The Philippine Bill of 1902 functioned as the organic act of the Philippine government for fourteen years until 1916.²³² It preserved the governmental structure created pursuant to the earlier McKinley’s Instructions. However, the Philippine Bill of 1902 inaugurated a significant shift in policy, allowing Filipinos to participate in the government of their own country. Following the completion and publication of a census, the Philippine Commission shall call for a general election “for the choice of delegates to a popular assembly of the people of said territory in the Philippine Islands, which shall be known as the Philippine Assembly”.²³³ After the organization of the Philippine Assembly, the Philippines would then have a dual-chamber legislature, consisting of the Philippine Commission and the Philippine Assembly.²³⁴ The Philippine Assembly will consist of elective members, Filipino, although the Bill expressly provided as a further qualification, allegiance to the United States. In sum, the President of the Philippine Commission, in his capacity as Civil Governor, retained and continued to exercise executive power, and the Philippine Commission acted as the legislative branch, subject to the eventual organization of a Philippine Assembly as a lower house of the legislative branch, upon the satisfaction of certain conditions.

²²⁷ President McKinley’s Instructions, par. 3

²²⁸ President McKinley’s Instructions, par. 3

²²⁹ President McKinley’s Instructions, par. 6

²³⁰ President McKinley’s Instructions, par. 1, 7

²³¹ MENDOZA, *supra* note 209, at 10.

²³² *Ibid.*, at 10-14.

²³³ The Philippine Bill of 1902, sec. 7

²³⁴ The Philippine Bill of 1902, sec. 7

Although the Philippine Bill of 1902 did not contain any martial law provision, it provided for the suspension of the privilege of the Writ of Habeas Corpus. Section 5 thereof stated:

That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.²³⁵

The wording of the provision quoted above is similar to the military powers provision of the 1987 Constitution, namely Section 18, Article VII and Section 15, Article III thereof. In the Philippine Bill of 1902 as in the 1987 Constitution, the general rule is that the privilege of the writ of the habeas corpus “shall not be suspended”, unless there are conditions calling for such suspension.²³⁶ The strong words of prohibition also appear in the present Constitution under Section 15 of Article III. Moreover, the conditions for the suspension of the privilege of the writ of habeas corpus and the declaration of martial law provided for in the present Constitution are nearly the same, except for the reference to insurrection.²³⁷ Thus, in both circumstances, there should be invasion or rebellion and public safety must require such suspension or declaration. Insurrection is included here as a response to the prevailing situation at the time. Third, under the Philippine Bill of 1902, the power to suspend the privilege of the writ of habeas corpus is lodged with the Governor, albeit with the approval of the Philippine Commission. The present Constitution places with the Chief Executive the power to suspend the privilege of the writ of habeas corpus and to declare martial law, which however, may be revoked by Congress, which revocation the President cannot set aside.

It is significant to note that the Philippine Bill of 1902 does not expressly mention any calling out power of the Civil Governor. Nevertheless, it made reference to President McKinley’s Instructions, ratifying the acts of the American President therein pertaining to the Philippines, including the creation of the Commission and the offices of Civil Governor and Vice Governor. It declared that the “Islands shall continue to be governed as thereby and herein provided”.²³⁸ The Philippine Bill of 1902 thus retained the vast powers vested upon the Civil Governor, as well as the close relations between the civil departments and the military arm of government. Considering these facts, a specific provision for the calling-out power would have been a mere superfluity. Notably, the powers of the Civil Governor under these early organic acts are obviously much greater than those bestowed upon the President under the 1987 Constitution.

²³⁵ The Philippine Bill of 1902, sec. 5, par. 7

²³⁶ The Philippine Bill of 1902, sec. 5, par. 7

²³⁷ see CONST. art. III, sec. 15 and art. VII, sec. 18

²³⁸ The Philippine Bill of 1902, sec. 1

3. The Jones Law

The Jones Law, officially known as the Philippine Autonomy Act of 1916 was passed by Congress on August 29, 1916. It was by this enactment that the United States formally announced its intention to withdraw from the Islands, and provided for a genuine separation of the powers of government. The Jones Law vested the “supreme executive power” upon the Governor General, whose office was now made separate and distinct from that of the Legislature. The Governor General was appointed by the President of the United States, by and with the consent of the U.S. Congress. The position was held more often than not by Americans, and this became the practice for the years that followed.²³⁹ Judicial power was retained by existing courts.²⁴⁰ The “general legislative power, except as otherwise provided” was expressly granted to “the Philippine Legislature”.²⁴¹ The Jones Law thus confirmed the policy of participation by Filipinos in the affairs of government, and it was by this act that the process of Filipinizing the legislative branch had been completed. The Philippine Legislature consisted of two houses, now designated as the Senate and the House of Representatives, all members of which were to be chosen by popular election.²⁴² Their enactments however, remained subject to the approval of the U.S. President and the U.S. Congress which reserved the power and authority to annul the same.²⁴³

As can be gleaned from the foregoing discussion, it was only in the Jones Law that “a real separation of powers, with its corollary feature of checks and balances obtained”.²⁴⁴ There was a distribution of executive, legislative, and judicial powers among separate and independent branches of government.²⁴⁵ V.V. Mendoza noted a *caveat*, observing that “the main feature of this separation of powers was the heavy concentration of power in the Governor General”²⁴⁶:

But the doctrine of separation of powers, designed to prevent the concentration of powers in any one man or group of men and thereby protect individual liberty, was yet utilized for a different purpose. For though the three branches of government were separate and independent now, they were not, either in practice or in theory, equal. The American Governor General was the supreme authority. The doctrine of separation of powers was used to the preserve that authority by confining the Filipino-controlled Legislature to strict lawmaking.

²³⁹ MENDOZA, *supra* note 209, at 14.

²⁴⁰ *Ibid.*, at 16.

²⁴¹ The Philippine Autonomy Act, sec. 8

²⁴² The Philippine Autonomy Act, sec. 12-15

²⁴³ The Philippine Autonomy Act, sec. 19, par. 2

²⁴⁴ MENDOZA, *supra* note 209, at 16.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

There was thus inaugurated a tradition of strong executive which was to become a feature of the constitutional system of the nation even after independence.²⁴⁷

Indeed, the Governor General retained, and even assumed broader, military powers under the Jones Law. The Governor General was Commander-in-Chief of all locally created armed forces and militia. Moreover, he had the power to suspend the privilege of the writ of habeas corpus or to place the Islands under martial law, in case of rebellion or invasion or imminent danger thereof, when in his opinion the public safety required it.²⁴⁸ The relevant portions of this organic act states:

SEC. 3. That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor-General, wherever during such period the necessity for such suspension shall exist.²⁴⁹

SEC. 21. That the supreme executive power shall be vested in an executive officer, whose official title shall be "The Governor-General of the Philippine Islands". He shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and hold his office at the pleasure of the President and until his successor is chosen and qualified... He shall have general supervision and control of all of the Departments and Bureaus of the Government in the Philippine Islands as far as is not inconsistent with the provisions of this Act, and shall be commander in chief of all locally created armed forces and militia... He shall be responsible for the faithful execution of the laws of the Philippine Islands and the United States operative within the Philippine Islands, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Islands, or summon the posse comitatus, or call out the militia or other locally created armed forces, to prevent or suppress lawless violence, invasion, insurrection, or rebellion; and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of habeas corpus, or place the Islands, or any part thereof, under martial law: Provided, That whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have power to modify or vacate the action of the Governor-General...²⁵⁰

We will discuss the provision and its various aspects one by one. As regards the suspension of the privilege of the writ of habeas corpus, Section 3 of the Jones Law states:

SEC. 3. That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the

²⁴⁷ MENDOZA, *supra* note 209, at 17.

²⁴⁸ *Ibid.*, at 15.

²⁴⁹ The Philippine Autonomy Act, sec. 3, par. 7.

²⁵⁰ The Philippine Autonomy Act, sec. 21.

President shall have power modify or vacate the action of the Governor-General.

x

x

x²⁵³

Such notification requirement is similar to the report requirement provided for in the 1987 Constitution in the sense that the President's power of suspension and declaration is not absolute as it is subject to the modification or revocation of another government body or officer. The only difference is that under the Jones Law, it is the President of the United States who can modify or override the decision of the Governor-General, while under the present Constitution, Congress can revoke such suspension or declaration, which revocation cannot be set aside by the President.

Moreover, it can also be said that the Jones Law is the first organic act to provide for the calling-out power of the Chief Executive and Commander-in-Chief, then the Governor-General. Section 21 of the Jones Law provided that:

x

x

x

... and whenever it becomes necessary he (governor-general) may call upon the commanders of the military and naval forces of the United States in the Islands, or summon the posse comitatus, or call out the militia or other locally created armed forces, to prevent or suppress lawless violence, invasion, insurrection, or rebellion;

x

x

x²⁵⁴

However, the Governor-General is not required to notify the President of the United States in exercising this calling-out power, unlike in the suspension of the privilege of the writ of habeas corpus and in the declaration of martial law. This is perhaps because such calling-out power is considered to be inherent in his position as the Governor General upon whom the "supreme executive power" had been vested by the Jones Law. This calling out power is similar to that presently provided in the present 1987 Constitution, which vests upon a civilian authority in the person of the Governor General, an immense well of powers by virtue of his position as "commander in chief of all locally created armed forces and militia".²⁵⁵ This is the same principle underlying the powers of our present Chief Executive under the 1987 Constitution. Notice that even under the present Constitution, there is similarly no requirement for the President to notify or make a report to any other government body with respect to the calling-out power.

4. The 1935 Constitution

²⁵³ The Philippine Autonomy Act, sec. 21

²⁵⁴ The Philippine Autonomy Act, sec. 21

²⁵⁵ The Philippine Autonomy Act, sec. 21

Contrary to prevailing thought, the Philippine Constitution was not patterned after the American Constitution. “The governmental structure provided in the Philippine Autonomy Act (the Jones Law), rather than that set up in the U.S. Constitution, was the model for the 1935 Constitution”.²⁵⁶ The 1935 Constitution retained the structure of government formulated in that organic act. Executive power was vested in a President²⁵⁷, legislative power in a unicameral National Assembly composed of not more than 120 members²⁵⁸, and judicial power in a Supreme Court and such inferior courts as may be established by law²⁵⁹. V.V. Mendoza noted however, that it retained the vast powers of the Chief Executive, observing:

But, as in the Philippine Autonomy Act (the Jones Law), the three departments were not even nearly equal. The vast powers of the Governor General already noted were conferred on the President of the Philippines. It was the Presidential type of government that was set up.²⁶⁰

What was sorely overlooked was that the Jones Law was crafted for the government of a colony, characterized by pockets of resistance, intermittent bouts of “insurrection” and violence, and generally a culture and territory unfamiliar to the foreign sovereign at the time. The transplant of vast military powers upon the civilian Philippine President was therefore ill-advised, particularly if the intention were to create a democratic government hewing closely to the American constitutional system. As noted by V.V. Mendoza, this was probably an outcome of practical politics, the Constitution’s passage largely depending upon its approval by the President of the United States.²⁶¹

The military powers found under the 1935 Constitution encompassed those provided in the Jones Law, which are likewise similar to those presently found in the 1987 Constitution, including the calling-out power, the power to suspend the privilege of the writ of habeas corpus, as well as the power to declare martial law, all of which were lodged with the President. As has been previously noted, the 1935 Constitution retained the wordings of the Philippine Autonomy Act with respect to such powers. Section 21 of the Jones Law became clause 2, Section 10, of Article VII (Executive Department) of the 1935 Constitution, to wit:

(2) The President shall be commander-in-chief of all armed forces of the Philippines, and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it, he may suspend the

²⁵⁶ MENDOZA, *supra* note 209, at 25, 115-116.

²⁵⁷ CONST. (1935), art. VII, sec. 1

²⁵⁸ CONST. (1935), art. VI, sec. 1

²⁵⁹ CONST. (1935), art. VIII, sec. 1

²⁶⁰ MENDOZA, *supra* note 209, at 23.

²⁶¹ *Ibid*, at 25.

privilege of the writ of habeas corpus, or place the Philippines or any part thereof under Martial Law.²⁶²

While paragraph 7, section 3 of the Jones Law pertaining to the conditions for the suspension of the privilege of the Writ of Habeas Corpus became clause 14, section 1, Article III (Bill of Rights) of the 1935 Constitution, to wit:

The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, or rebellion, when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist.²⁶³

The strong words of prohibition against the suspension of the privilege of the writ of habeas corpus, stated in the Philippine Bill of 1902, the Jones Law, and in the 1935 Constitution, also appear in the present Constitution, under Section 15 of Article III (Bill of Rights), to wit: “The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion, when the public safety requires it.”

The President has the power and discretion to suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law, in case of invasion, insurrection, or rebellion or imminent danger thereof, when the public safety requires it. Public safety must concur with the other grounds in order to justify the resort to these military powers. The 1987 Constitution deleted “insurrection” and imminent danger of rebellion, invasion or insurrection as grounds for the suspension of the writ or the imposition of martial law, and added a definite period for the subsistence of such powers. The 1935 Constitution provided no other safeguards in the use of these measures, as well as in the duration of its existence. It must be noted that, unlike the Jones Law and the 1987 Constitution, the 1935 Constitution provides no requirement of notification (to the US President) or report (to Congress) to any other person, branch or body, in the event that he decides to exercise the expansive military powers granted in these provisions, i.e. the suspension of the privilege of the writ of habeas corpus and the declaration of martial law. The 1935 Constitution thus made it purely discretionary on the part of the President to take the extraordinary measures provided in these provisions. In fact, this was the very provision which enabled then-President Marcos to declare Martial Law and suspend the privilege of the writ of habeas corpus in the 1970s, as our history tells us.

The 1935 Constitution retained the calling out power of the Chief Executive, which was first introduced in an express manner in the Jones Law. In the 1935 Constitution, such power was to be exercised with respect to the armed forces. The Jones Law was more detailed in that it provided that such power will be exercised with respect to commanders of the military and naval forces of the United States in the Islands, the posse comitatus, and the militia or other locally

²⁶² CONST. (1935), art. VII, sec. 10(2)

²⁶³ CONST. (1935), art. III, sec. 1

created armed forces. In the 1935 Constitution, the power to call out the armed forces was predicated upon the necessity for preventing or suppressing lawless violence, invasion, insurrection, or rebellion. The 1987 Constitution deleted the reference to “insurrection” as a ground for the invocation of the calling out power, retaining only three grounds, rebellion, invasion and lawless violence.

Two other significant institutions employed during times of crisis, emergency, and war were added to the Constitution. Congress has the sole power to declare war. Moreover, in times of war and other national emergency, emergency powers may be delegated to the President by law. The 1935 Constitution provides,

SECTION 25. The Congress, shall, with the concurrence of two-thirds of all the Members of each House, have the sole power to declare war.

SECTION 26. In times of war and other national emergency, the Congress may by law authorize the President, for a limited period, and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy.²⁶⁴

These authors found no similar device in the earlier organic acts of the Philippines. It thus appears that the 1935 Constitution is the first among the organic laws to have introduced this measure to our jurisdiction. The origins of the provisions on the suspension of the privilege of the writ of habeas corpus, as well as the calling out power, can be traced to the organic acts of the Philippines and ultimately the U.S. Constitution. The provisions on martial law can at least also be traced to the Jones Law, but not in the U.S. Constitution. In stark contrast to the aforementioned military powers, the “emergency device” just cited, finds no parallel in the U.S. Constitution nor in any of the organic acts enforced in the Philippine jurisdiction.

Strangely enough, our provisions on martial law and emergency powers, are more analogous to the emergency devices or institutions used in certain European countries, namely the “*Pétat de siège*” of France or the “Defence of the Realm Act (DORA)” and the “Emergency Powers Act” of England. In fact, “the institution known as martial law is the classic and characteristic device of constitutional dictatorship within the realm of England”.²⁶⁵ The concepts of “martial law” and “emergency powers” are more known to common law, originating in the “common law right and duty of the Crown”.²⁶⁶ In sum, these devices conclusively find no express basis in the American constitution. A future revision of this study by these authors will take into consideration these English “emergency” institutions. For the moment, it is well to bear in mind the probable origin of these concepts, how they reached American legal-political thought, and how and why they were eventually transplanted to our own country’s constitutional and legal system.

²⁶⁴ CONST. (1935), art. VI, sec. 25 and 26

²⁶⁵ ROSSITER, *supra* note 33, at 139.

²⁶⁶ *Ibid*, at 142.

5. The 1943 Constitution

The 1943 Constitution was effective during the Japanese Occupation. Although probably only of historical value, we chose to include it in this study in view of its express retention of the "military power provision" of the 1935 Constitution, to wit:

The President shall be commander-in-chief of all armed forces of the Republic of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawlessness, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, or when the public safety so requires, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law.

Section 8 of Article VII (Duties and Rights of Citizens) additionally provides for the suspension of the privilege of the writ of habeas corpus, to wit: "The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, rebellion, or when the public safety so requires." The 1943 Constitution thus retained the military powers of the President as provided in the 1935 Constitution, namely, the calling out power, the power to suspend the privilege of the writ of habeas corpus, and the power to declare martial law.

The 1943 Constitution did not, however, provide for the period in which suspension or martial law shall remain effective, unlike the 1935 Constitution which provides that the suspension will continue as long as there is the necessity for it. Moreover, the conditions for the suspension of the privilege of the writ of habeas corpus and the declaration of martial law are fundamentally different from the 1935 Constitution. The two factors, rebellion, for example, and public safety on the other do not require concurrence, before these measures may be imposed. Thus, under the 1943 Constitution, the public safety condition becomes just one of the circumstances specified in the first requisite, that is, it loses its importance as a second concurring requisite by the use of the word "or" immediately after the other first circumstance. Unlike the 1935 Constitution, in which there are two concurring conditions (the enumerated circumstances such as invasion, rebellion, insurrection or imminent danger thereof, on the one hand, and the public safety necessity, on the other), the 1943 Constitution in effect has only one requisite, that is the presence of one of the enumerated circumstances. This conclusion is based on the fact that the 1943 Constitution makes the public safety condition merely one among the circumstances specified in which there can be a valid suspension or declaration.

Hence, under the 1943 Constitution, the President can suspend the privilege of the writ of habeas corpus and can declare martial law even if the public safety does not require it, as long as one of the circumstances enumerated, such as

rebellion, invasion, insurrection or imminent danger thereof, is present. In the same vein, the President can also order such suspension or declaration even if there is no invasion or rebellion as long as public safety requires it.

6. The 1973 Constitution

The 1973 Constitution was enacted during the Marcos regime of Martial Law. It retained the “military power provision” of the 1935 Constitution. It also provided for the suspension of the privilege of the writ of habeas corpus in two sections, under Article IV (Bill of Rights) and Article VII (The President and Vice-President) thereof. In the latter case, the provision on habeas corpus was incorporated with the provisions on the “calling out power” and “martial law”.

SECTION 15. The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it.²⁶⁷

SECTION 11. The President shall be commander-in-chief of all armed forces of the Philippines, and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privilege of the writ of habeas corpus, or place the Philippines or any part thereof under martial law.²⁶⁸

The 1973 Constitution retained the wordings of the 1935 Constitution. It retained the calling out power of the President, the power to suspend the privilege of the writ of habeas corpus as well as the power to place the Philippines or any part thereof under martial law. In contrast to the 1943 Constitution, the 1973 Constitution restored *in toto* the conditions provided for in the 1935 Constitution. Thus, the 1973 Constitution demands once again the concurrence of the danger and the public safety requirement, prior to resort to the suspension of the privilege of the writ of habeas corpus or the declaration of martial law.

As regards the war powers and the emergency powers, some changes were made in the 1973 Constitution, thus,

SECTION 14.

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²⁶⁷ CONST. (1973), art. IV, sec. 15

²⁶⁸ CONST. (1973), art. VII, sec. 11

(2) The Batasang Pambansa, by a vote of two-thirds of all its Members, shall have the sole power to declare the existence of a state of war.²⁶⁹

SECTION 15. In times of war or other national emergency, the Batasang Pambansa may by law 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. Unless sooner withdrawn by resolution of the Batasang Pambansa, such powers shall cease upon its next adjournment.²⁷⁰

The legislature, which was vested in the Batasang Pambansa under the 1973 Constitution, retained the war powers of government. However, pursuant to the state's renunciation of war as an instrument of national policy,²⁷¹ the legislature limited itself to the declaration of "the existence of a state of war". With respect to the delegated war or emergency powers, the 1973 Constitution expressly provided that such powers shall be exercised only to the extent that it may be "necessary and proper to carry out a declared national policy", while deleting the clause in reference to the President's power "to promulgate rules and regulations" on such occasions. Moreover, the provision provided explicitly for the termination of such powers. These changes were likely influenced by jurisprudence, particularly, the *Emergency Powers cases*²⁷² which reviewed the President's exercise of emergency powers under the 1935 Constitution.

It is significant to note that in Section 3 (2) of Article XVII (Transitory Provisions), the lifting of Martial Law does not annul the proclamations of President Marcos, to wit:

"All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent President shall be part of the law of the land, and shall remain valid, legal, binding, and effective even after the lifting of the Martial Law or the ratification of this Constitution unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or unless expressly or implicitly modified or repealed by the regular National Assembly."

7. 1987 Constitution

The Philippines acknowledges only four fundamental laws to have officially governed the country since its independence in 1946: the 1935 Constitution, the 1973 Constitution, the Freedom Constitution, and now, the 1987

²⁶⁹ CONST. (1973), art. VIII, sec. 14(2)

²⁷⁰ CONST. (1973), art. VIII, sec. 15

²⁷¹ CONST. (1973), art. II, sec. 3

²⁷² *Araneta v. Dinglasan*, 84 Phil. 368; *Rodriguez v. Guella*, 92 Phil. 603

Constitution.²⁷³ This last and present Constitution was drafted in the wake of the fall of the Marcos regime, and ratified and adopted in the desire for stability and on the argument that “it would restrict the powers of the Presidency”.²⁷⁴ In one interview on ANC, Fr. Joaquin G. Bernas, S.J., an eminent constitutionalist, expressed the view that they should have done away entirely with the martial law provision.²⁷⁵ Regardless of the merits of this opinion, the present Constitution continues to embody the “military power provision”.

a. The Military Powers

Although the 1987 Constitution has some similarities with the previous organic acts and constitutions, in retaining the powers of the President to call out the armed forces, to suspend the privilege of the writ of habeas corpus, and to declare martial law, it nevertheless made several radical departures from its predecessors. In not so many words, there are now several conditions, safeguards, and checks-and-balances, provided for the imposition and continuation of martial law and of the suspension of the privilege of the writ of habeas corpus under the present constitution, several of which are not found in the preceding organic acts and previous constitutions. The apposite provisions now provide:

SECTION 15. The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion when the public safety requires it.²⁷⁶

SECTION 18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.

²⁷³ See CRUZ, *supra* note 15, at 9 (2002)

²⁷⁴ *Ibid.*

²⁷⁵ The interview concerned the controversies surrounding Proclamation No. 1017 issued by President Gloria Macapagal-Arroyo

²⁷⁶ CONST. art. III, sec. 15

The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without any need of a call.

The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.

A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ of habeas corpus.

The suspension of the privilege of the writ of habeas corpus shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion.

During the suspension of the privilege of the writ of habeas corpus, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.²⁷⁷

The grounds for the suspension of the privilege of the writ of habeas corpus or the imposition of martial law have been reduced, strengthening the exceptional character of these powers. Thus, the 1987 Constitution deleted insurrection and imminent danger of any of the enumerated circumstances, as grounds for such suspension or declaration. It retained only invasion or rebellion, which must still concur with the fact of necessity for public safety as a requirement.²⁷⁸

The 1987 Constitution added numerous restrictions in the use of these powers. Other than the limited grounds in which it may be exercised, it also provided for a specific period in which any suspension of the writ or declaration of martial law may last, particularly sixty days.²⁷⁹ As a third safeguard, the Constitution requires the President to submit a report to Congress within forty-eight hours after such proclamation or suspension.²⁸⁰ In any event, Congress must convene within twenty-four hours after such proclamation or suspension, without any need of call.²⁸¹ Fourth, Congress may revoke such proclamation or suspension by a mere majority of all its members. On the other hand, it may be extended only by Congress, albeit upon the initiative of the President, and any extension must itself be grounded upon the persistence of rebellion or invasion and the public safety

²⁷⁷ CONST. art. VII, sec. 18

²⁷⁸ CONST. art. VII, sec. 18, par. 1

²⁷⁹ CONST. art. VII, sec. 18, par. 1

²⁸⁰ CONST. art. VII, sec. 18, par. 1

²⁸¹ CONST. art. VII, sec. 18, par. 2

requirement.²⁸² Fifth, the Supreme Court is expressly granted the power to review the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, upon the initiative of any citizen. The court must render a decision thereon within thirty days from its filing.²⁸³ Sixth, the Constitution expressly delimits the effects of any suspension or proclamation. Thus, the suspension of the privilege of the writ of habeas corpus shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with invasion.²⁸⁴ Moreover, any person arrested or detained during the period of such suspension, must be judicially charged within three days, otherwise he shall be released.²⁸⁵ On the other hand, the Constitution expressly provides that a state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the other branches of government, nor authorize the conferment of jurisdiction on military courts and agencies over civilians, where civil courts are able to function.²⁸⁶ Finally, and of great significance is the explicit provision that any proclamation of martial law does not automatically suspend the privilege of the writ of habeas corpus.²⁸⁷ These safeguards show the cautious outlook of the drafters of the present Constitution, and a desire to restrict the military powers of the President.

Fr. Joaquin Bernas, S.J. provides a clearer discussion of the military powers of the president under its present formulation. In his book, Fr. Bernas summarized the new doctrine on martial law as stated in the Constitution. He stated that the 1987 Constitution: (1) limited the grounds for the proclamation of martial law and the suspension of the privilege of the writ of habeas corpus; (2) restricted the power of the President in the declaration and suspension by subjecting them to the revocation of Congress and to the review of the Supreme Court; (3) and nullified some of the decisions of the Supreme Court on the 1972 Proclamation.²⁸⁸

As a reaction to the Marcos regime, the Constitutional Commission made substantial changes in this “commander-in-chief provision” in the Constitution with respect to the grounds and period, the participation of Congress, the role of the Supreme Court, and effects. Such changes are made as safeguards against potential abuse in the proclamation and suspension and their implementation.

i) Grounds and Period

²⁸² CONST. art. VII, sec. 18, par. 1

²⁸³ CONST. art. VII, sec. 18, par. 3

²⁸⁴ CONST. art. VII, sec. 18, par. 5

²⁸⁵ CONST. art. VII, sec. 18, par. 6

²⁸⁶ CONST. art. VII, sec. 18, par. 4

²⁸⁷ CONST. art. VII, sec. 18, par. 4

²⁸⁸ JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (VOLUME II), at 233 (1988).

The Constitutional Commission deleted “insurrection” and “imminent danger of invasion, insurrection, or rebellion”, which appeared both in the 1935 and 1973 Constitutions, as grounds for the suspension of the privilege of the writ of habeas corpus and for the declaration of martial law. The same changes were made in Section 15 of Article III of the present Constitution.²⁸⁹ Such provision in the Bill of Rights of the present Constitution states that “The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion, when the public safety requires it.” “Insurrection” was also deleted as a ground for the invocation of the calling out power.

The consequence of deleting “insurrection” and “imminent danger of invasion, insurrection, or rebellion” among the grounds is that there must be *actual* invasion, or rebellion, not just imminent danger of such conditions. This view is consistent with the recent Supreme Court decisions stating that the President must have a factual basis for exercising the calling out power, in the sense that there must be actual invasion or rebellion for the President to exercise this power. It must be noted, however, that the Supreme Court places on the petitioners challenging such exercise of the calling out power the burden of proving that the President acted without factual basis.

Recent rulings of the Supreme Court on the calling-out power of the President must also be considered, because invasion and rebellion are grounds common to both the calling-out power and the powers for declaration or suspension. Also, the Supreme Court itself used such “factual basis” scope of review with respect to the existence of the grounds in recent cases involving the President's exercise of the power to call out the armed forces, with the accompanying declarations of a state of rebellion.

The Supreme Court in the *IBP case*²⁹⁰ stated that the calling out power is a discretionary power solely vested in the President's wisdom. In that case, and as affirmed in subsequent cases²⁹¹, the Court conceded the fact that the President has a vast intelligence network, and hence, is in the best position to determine the actual condition of the country. In all these cases however, the Court adamantly stated that despite this exclusive discretion of the President to call out the Armed Forces under Section 18 of Article VII of the present Constitution, the Supreme Court has the power to review the exercise of such executive power to determine whether there has been grave abuse of discretion. The Court, however, invoked its expanded power of judicial review under Section 1 of Article VIII for this purpose, because there is no express grant of review under Section 18 of Article VII or the Commander-in-Chief provision²⁹² for the President's calling-out power. In the case of a declaration of martial law or the suspension of the privilege of the writ of

²⁸⁹ JOAQUIN G. BERNAS, S.J., *THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: WITH ANNOTATIONS BASED ON COMMISSION DELIBERATIONS*, at 42 (1987).

²⁹⁰ *Integrated Bar of the Philippines v. Zamora*, 338 SCRA 81, 2000.

²⁹¹ See also *David v. Arroyo*, G.R. No. 171396, 3 May 2006.

²⁹² CONST. art. VII, sec. 18

habeas corpus, the Constitution expressly provides for prompt judicial review of the sufficiency of the factual basis of any such declaration or suspension in appropriate proceedings filed by any citizen.

With respect to the period, under the 1935 and 1973 Constitutions, the President can impose martial law and suspend the privilege of the writ of habeas corpus indefinitely. Whereas, the 1987 Constitution provides that such imposition or suspension is effective for a period of only sixty days, unless sooner revoked by Congress. The 60-day period may be shortened, if Congress revokes the declaration or suspension before the 60th day arrives and such revocation cannot be set aside by the President. Alternatively, the period may be extended by Congress, albeit upon the initiative of the President, and only when the two grounds for the invocation of such powers persist and continue to concur, and only for such period as may be determined also by Congress.²⁹³

ii) Congress

Although the President has to submit a report to Congress within forty eight hours of the proclamation or suspension, it must be noted that the President does not have to obtain the prior concurrence of Congress before he can make such proclamation or suspension. Such concurrence for the initial action was proposed during the deliberations but the Constitutional Commission decided not to add such prior legislative concurrence as it will be unduly restrictive of the President's power in a "theater of war" when martial law is necessary. The subsequent report, however, will help Congress decide whether or not to revoke the proclamation or suspension and this was deemed a sufficient safeguard.²⁹⁴

In revoking any such proclamation or suspension, the Constitution enjoins Congress to vote jointly. The Constitutional Commission decided that it would be easier to override the President's decision by this manner of voting, instead of voting separately. With respect to the extension of the proclamation and suspension, Congress is also mandated to vote jointly. Any extension may be done only with the prior initiative of the President, and Congress cannot do so *motu proprio*.²⁹⁵

With respect to the calling out power of the President, the same provision does not require the President to submit a report to Congress, nor does it state that Congress can revoke any exercise of the calling out power by the President. This omission may be based on the principle that the calling out power is one of the inherent powers of the President as commander in chief of the military arm of government. In any event, even if Congress has not been granted a checking power

²⁹³ BERNAS, *supra* note 286, at 233.

²⁹⁴ BERNAS, *supra* note 287, at 42-43.

²⁹⁵ *Ibid*, at 43.

vis-à-vis the calling out power, the Supreme Court may provide an adequate safeguard pursuant to its expanded power of judicial review under Section 1 of Article VIII of the 1987 Constitution, nullifying any act of the President made in “grave abuse of discretion”.

iii) Supreme Court

The “Commander-In-Chief provision”²⁹⁶ expressly grants the Supreme Court the power to review the sufficiency of the factual basis of any proclamation of martial law or suspension of the privilege of the writ of habeas corpus. To reiterate, this is different from the exercise by the President of the calling out power, in which case the Supreme Court has to resort to its expanded power of judicial review under Section 1 of Article VIII, there being no express grant of its power to review it under Section 18 of Article VII. Curiously however, the Supreme Court used the power of review under Section 18 of Article VII, which is to determine if there is “sufficient factual basis” for the proclamation or suspension, in its decisions in recent cases assailing the President's exercise of the calling out power, despite the lack of a similar express grant of review.

Nevertheless, and in case it indeed decides to review the President's exercise of such powers, the Supreme Court clarified in *Integrated Bar of the Philippines v. Zamora*²⁹⁷ that, although it had the power to review whether or not there was grave abuse of discretion in the exercise of the President's power to call out the armed forces, it was incumbent upon the Petitioners to show that the President's decision is totally bereft of factual basis. The administration of President Gloria Macapagal-Arroyo brought us a plethora of cases in which the Supreme Court declared, to the point of doctrinal value, its power to review the sufficiency of the factual basis of the calling-out power of the President. In *Lacson v. Perez*²⁹⁸, in which the Petitioners assailed the validity of Proclamation No. 38 issued by President Macapagal-Arroyo declaring a State of Rebellion and calling out the armed forces, the Supreme Court stated that it may, in a proper case, look into the sufficiency of the factual basis of the exercise of such calling out power. Barely three years later, in *Sanlakas v. Executive Secretary*²⁹⁹, in which the Petitioners assailed the validity of Proclamation No. 427 issued by President Macapagal-Arroyo declaring a State of Rebellion and calling out the armed forces, the Court stated that it may examine whether the calling out power was exercised within constitutional limits or in a manner constituting grave abuse of discretion but the petitioners have the burden to prove that the President acted without factual basis. A little over a year later, in *David v. Macapagal-Arroyo*³⁰⁰, in which the Petitioners assailed the validity of

²⁹⁶ CONST. art. VII, sec. 18

²⁹⁷ *Integrated Bar of the Philippines v. Zamora*, 338 SCRA 81, 2000.

²⁹⁸ *Lacson v. Perez*, G.R. No. 147780, 357 SCRA 756, 10 May 2001.

²⁹⁹ *Sanlakas v. Executive Secretary*, G.R. No. 159085, 421 SCRA 656, 3 February 2004.

³⁰⁰ *David v. Arroyo*, G.R. No. 171396, 3 May 2006.

Proclamation No. 1017 issued by President Macapagal-Arroyo declaring a State of Rebellion and calling out the armed forces, the Court stated that the Petitioners failed to show that such act of the President is totally bereft of factual basis.

In sum, Section 18, Article VII of the Constitution expressly grants the Supreme Court the power to review the sufficiency of the factual basis of any suspension of the privilege of the writ of habeas corpus, or proclamation of martial law. Nevertheless, even if the case involves the exercise by the President of the mere calling out power, and despite its accompaniment by declarations of a state of rebellion or other emergency, the Supreme Court has invariably declared that it possesses the power to review the sufficiency of the factual basis of its invocation, albeit pursuant to its expanded power of judicial review under Section 1, Article VIII (and erroneously, also under Section 18 of Article VII). Time and again, the Court has shown that it would not hesitate to review, and to strike down presidential actions exercised, in abuse of his calling out power. However, in the several cases that have accumulated over the years examining the exercise of the calling out power of the President, the Supreme Court has also laid down as a rule of thumb, that it is incumbent upon the petitioners to show that the President's decision was totally bereft of factual basis, in order to strike down actions taken pursuant thereto.

iv) Effects

Unlike the earlier organic acts and the previous constitutions, the 1987 Constitution expressly provides for the effects of a proclamation of Martial Law and the suspension of the privilege of the writ of habeas corpus. This is a reaction to the abuses committed during the Martial Law period under Marcos. It is believed that an express delineation of the effects upon the assumption of these extraordinary powers would function as safeguards against potential abuse in the future.

The principle that a state of martial law does not suspend the operation of the Constitution means that the Bill of Rights continues to subsist and that the powers of various branches of the government are not suppressed. Corollary to this, the rule that a state of martial law does not supplant the functioning of the legislature means that it is still Congress which has the power of legislation. The doctrine that the civil courts cannot be supplanted by military courts adopts the "open court" rule in *Duncan v. Kabanamaku* and rejects the contrary rule in *Aquino, Jr. v. Military Commission No. 2*.³⁰¹ The effects of the assumption of these military powers by the President may be summed up as follows:

In light of the redefinition of martial law and the delimitation of its duration and consequences, we may now say again with Willoughby that...

³⁰¹ BERNAS, *supra* note 286, at 237-238.

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The declaration of martial law... has no further legal effect than to warn the citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order... When martial law is declared no new powers are given to the executive; no extension of arbitrary authority is recognized; no civil rights of the individuals are suspended. The relation of the citizens to their State is unchanged. Whatever interference there may be with their personal freedom or property rights must be justified, as in the case of the police power, by necessity actually existing or reasonably presumed... the principle still holds good that necessity, and necessity alone, will justify an infringement upon private rights of persons and property.³⁰²

b. War and emergency power

The war and emergency powers of government under the 1987 Constitution are the following:

SECTION 23. (1) The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.

(2) In times of war or other national emergency, the Congress may, by law, 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. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.³⁰³

Akin to its forerunners, war or emergency powers are specifically lodged upon and inherent in the Legislature under the present Constitution. Considering however, the difficulty in expecting expedient action from Congress during conditions of emergency or war, it was deemed necessary to entrust the exercise of such powers to a unitary person in government, who may take action with greater efficiency and effectiveness, given the intelligence, knowledge, and resources available to him. Thus, Congress is allowed by the Constitution to authorize the President to exercise emergency powers in such times. The powers thus conferred are extensive. A constitutionalist himself has stated that, "when emergency powers are delegated to the President, he becomes in effect a constitutional dictator".³⁰⁴ Historically, this has allowed the President to assume powers traditionally located in the Legislature, including its powers of legislation, of appropriation, of raising the armed forces, among others. In relation to this, and as recently clarified by the

³⁰² Willoughby, 2nd ed., Sec. 1056, pp. 1591-1592 cited in ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW, at 227-228 (2002).

³⁰³ CONST. art. VI, sec. 23

³⁰⁴ CRUZ, *supra* note 15, at 94.

Supreme Court, upon a proper delegation, the President may “temporarily take over or direct the operation of any privately owned public utility or business affected with public interest”.³⁰⁵

It must be emphasized however, that “in strict legal theory, there is no total abdication of legislative authority in his favor”.³⁰⁶ It is subject to certain restrictions and requirements, “intended to make him only an agent rather than a replacement of the legislature”, including:

1. There must be war or other national emergency.
2. The delegation must be for a limited period only.
3. The delegation must be subject to such restrictions as the Congress may prescribe.
4. The emergency powers must be exercised to carry out a national policy declared by the Congress.³⁰⁷

The accepted principle is that the existence of war or other emergency does not automatically confer emergency powers upon the President. “Emergency itself cannot and should not create power”.³⁰⁸ Congress may very well choose to retain its legislative powers in time of emergency and even in the midst of war. The Constitution appears to have chosen this stance. In sum, the power is not inherent in the Executive, but rather, in the Legislature. Even upon a delegation to and assumption of emergency powers by him, the President is delimited by the strictures explicitly set forth in the Constitution as to its duration, method, and purpose.

C. MILITARY POWERS: PRAXIS IN THE PHILIPPINES

1. Spanish Regime

³⁰⁵ CONST. art. XII, sec. 17 in relation to David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 3 May 2006.

³⁰⁶ CRUZ, *supra* note 15, at 94.

³⁰⁷ *Ibid.*

³⁰⁸ Rodriguez v. Guella, 92 Phil. 603.

During the Spanish regime, there were at least two occasions in which the military powers were expressly invoked and assumed in Philippine territory. The first is the *Blanco Proclamation*. Governor Ramon Blanco issued a Proclamation on August 30, 1896 declaring a State of War in the provinces of Manila, Bulacan, Pampanga, Nueva Ecija, Tarlac, Laguna, Cavite and Batangas. He ordered the summary trial, by special military court (Concehos de Guerra), of persons in such provinces charged with crimes against public order, treason, against the peace or independence of the State or the form of government, against authorities or their agents, other crimes committed on the occasion of the rebellion or sedition, as well as other violations of the Code of Military Justice (Codigo de Justicia Militar). In issuing such Proclamation, Gov. Blanco invoked his powers as Governor and Captain-General and used as justification for the necessity of such Proclamation the acts of rebellion on the part of some armed groups.³⁰⁹

The second is the *Polavieja Proclamation*. Governor Camilo Polavieja issued an Executive Order on December 24, 1896 requiring all barrio folks to live within two kilometers of the town proper (poblaciones) in the provinces around Manila infested with rebels and suspended the municipal elections under the Maura Law in such provinces. He also placed certain areas under Martial Law, including Manila, Bulacan, Cavite, Laguna, Batangas, Nueva Ecija, Pampanga, Tarlac, Morong, Bataan, and Zambales, and ordered the civil governors in such provinces to appoint local officials upon recommendation of the parish priests.³¹⁰

2. Early to Middle Period of American Regime

We divided the period of the American regime into three: 1) the early American regime, which covers the period between 1899 and 1935 when the 1935 Constitution was passed; 2) the middle period of American regime, which covers the period between 1935 and 1942 when the Japanese forces invaded Philippine shores and occupied our lands; 3) the late American regime, which covers the period between 1944 and 1946, corresponding roughly to the time when the Philippines was liberated from Japanese occupation and the time when the Philippines was finally granted independence. There is an interlude between the middle and the late period of the American regime, corresponding to the time during which the Philippines was under the control and occupation of Japanese forces. This section will cover the entire period of American sovereignty in the Philippines before the Japanese invasion and occupation the country, encompassing first and second periods noted above.

³⁰⁹ CLARO C. GLORIA, *MARTIAL LAW IN THE PHILIPPINES: A CONSTITUTIONAL REVOLUTION*, at 21 (1974).

³¹⁰ GLORIA, *supra* note 307, at 21-22.

As for the early period of American regime, these authors were able to discover one instance in which the military powers of government were assumed. Particularly, on January 31, 1905, Governor General Luke E. Wright issued Executive Order No. 6, suspending the privilege of the writ of habeas corpus in Cavite and Batangas.³¹¹ Other than this case, we weren't able to find another occasion in which the military powers of the government were similarly invoked and assumed. Observably however, as can be gleaned from the legal-historical account in the preceding pages, it seems that there has not been much need for it. There was complete concentration of powers in the Governor General during the early stages of the American occupation. President McKinley's Instructions even went so far as to provide that "the military arm must necessarily be supreme" as long as insurrection continues.³¹² Despite the transfer of executive authority to a Civil Governor, municipal departments were required to maintain close relations with the military arm of government and were subject to the supervision and control of the Military Governor.³¹³ The Philippine Bill of 1902 retained the vast powers of the Civil Governor and the requisite intimate relations between the civil departments and the military arm of government. It expressly provided that the country shall continue to be governed by the provisions of President McKinley's Instructions.³¹⁴ Even under the Jones Law, the "supreme executive power" was vested in the Governor General, who can easily make use of his vast well of powers as commander in chief and his now expressly stated calling out powers, to quell violence and other such incidents. Thus, he may readily call upon and seek the assistance of the military and naval forces of the United States in the Islands, the posse comitatus, as well as the militia and other locally created armed forces.³¹⁵ These powers are subject to no other checking mechanism in its exercise.

The middle period of the American regime, for purposes of this paper, commences with the adoption of the 1935 Constitution. It retained the vast powers of the President, investing him with a great reserve of power as commander in chief of the armed forces, and expressly affirming the calling out power of the President.³¹⁶ It also retained his power to suspend the privilege of the writ of habeas corpus and to declare martial law. Moreover, the 1935 Constitution allows the legislature to delegate extraordinary powers upon the President, during times of war or other national emergency.³¹⁷ During this period of the American regime, there were several occasions in which emergency powers were delegated to the President, and one instance in which the President declared martial law. As regards the delegation of emergency powers, on September 30, 1939, Commonwealth Act Nos. 494, 496, 498, 499, and 500 granted President Manuel L. Quezon emergency

³¹¹ Philippine Center for Investigative Journalism, *The Daily PCIJ*, <http://www.pcij.org/blog/?p=446> last viewed on 2 April 2008

³¹² President McKinley's Instructions, par. 1

³¹³ President McKinley's Instructions, par. 3, 6, 7

³¹⁴ The Philippine Bill of 1902, sec. 1

³¹⁵ The Philippine Autonomy Act, sec. 21

³¹⁶ CONST. (1935), art. VII, sec. 10(2)

³¹⁷ CONST. (1935), art. VI, sec. 25, 26

powers.³¹⁸ On August 21, 1940, Commonwealth Act No. 600 granted Pres. Quezon broader emergency powers.³¹⁹ On June 6, 1941, Commonwealth Act No. 620 granted Pres. Quezon more emergency powers.³²⁰ On December 16, 1941, Commonwealth Act No. 671 or the Emergency Powers Act was passed in the face of imminent danger of invasion by Japanese forces, as the United States and the Philippines joined the theater of the Second World War.³²¹ In January 1942, Pres. Quezon declared martial law upon the invasion of the Japanese forces.³²²

3. Japanese Occupation to Late American Period

On September 21, 1944, then President Laurel issued Proclamation No. 29 declaring Martial Law throughout the Philippines and suspending the privilege of the writ of Habeas Corpus, based on imminent danger of invasion. Pres. Laurel, by virtue of such Proclamation, arrogated unto himself all powers of the government necessary or incidental to martial law, with respect to its establishment and maintenance. During this martial law period, the country was divided into nine military districts, each under a military governor who was ordered to suppress treason, sedition, disorder and violence, to make sure that all disturbance of public peace and all criminals are punished, and to protect the legitimate rights of persons. It must be noted that the existing courts of justice had jurisdiction to try offenders without unnecessary delay and in a summary manner following the procedural rules prescribed by the minister of justice.³²³ With respect to civil actions and special proceedings, existing courts of justice shall continue to be invested with and shall exercise the same jurisdiction as already provided in existing laws. The proclamation stated that it shall take effect on September 22, 1944 at 9:00 in the morning. The same issuance declared that the state of martial law shall “continue as long as the need for it exists and shall terminate upon proclamation of the President”.³²⁴

The next day, or on September 22, 1944, Pres. Laurel issued Proclamation No. 30³²⁵, declaring the existence of a state of war in the Philippines, “between the Republic of the Philippines and the United States of America and Great Britain”. Note that the war power, or the power to declare war, traditionally resides in the Legislature. It may be argued on his behalf that he did not actually declare war but only “that a state of war exists”, which is reasonably distinguishable from the

³¹⁸ Philippine Center for Investigative Journalism, *supra* note 309.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

³²³ GLORIA, *supra* note 307, at 23.

³²⁴ Proc. No. 29 (Sept. 21, 1944) at <<http://www.lawphil.net/>> last viewed on 2 April 2008

³²⁵ Proc. No. 30 (Sept. 22, 1944) at <<http://www.lawphil.net/>> last viewed on 2 April 2008

former case. The earlier constitutions lodged with the legislature the power “to declare war”, not “to declare the existence of a state of war”. Under the present Constitution, however, it is significant to point out that the “sole power to declare the existence of a state of war” now belongs wholly to the Legislature. In any event, this discussion is purely academic as the issue was mooted by the fact that, by the time Pres. Laurel issued this Proclamation on the “existence of a state of war in the Philippines”, he had already assumed military powers pursuant to his earlier Martial Law Proclamation.

4. After independence

The second World War reached and ravaged Philippine shores, which necessitated the conferment of extraordinary powers upon President Manuel L. Quezon in 1941 through Commonwealth Act No. 671.³²⁶ This law became the basis for the exercise of emergency powers by subsequent heads of state, following the war. The validity of some of these acts was directly questioned in the *Emergency Powers Cases*, particularly with respect to the exercise of such powers by President Elpidio Quirino. In *Araneta v. Dinglasan*³²⁷, petitioners assailed the exercise by President Quirino of emergency powers previously vested upon President Quezon and successively exercised by Presidents Osmeña and Roxas. Pursuant to such emergency powers, President Quirino had issued several Executive Orders providing specifically for the appropriation of public funds in the operation of the national government and the conduct of the 1949 elections, the control of exports, and the regulation of the rentals of residential lots and buildings. The Supreme Court declared these Executive Orders invalid. President Quirino continued exercising emergency powers, promulgating two executive orders appropriating public funds for public works and the relief of typhoon victims. These orders were likewise invalidated in *Rodriguez v. Guella*³²⁸, where the Supreme Court declared with finality the termination of the emergency powers.

On October 22, 1950, Pres. Quirino suspended the writ of habeas corpus.³²⁹

5. Marcos' time

³²⁶ See pages 90-92 above.

³²⁷ *Araneta v. Dinglasan*, 84 Phil. 368 (1949); see also CRUZ, *supra* note 15, at 93-99.

³²⁸ *Rodriguez v. Guella*, 92 Phil. 603; see also CRUZ, *supra* note 15, at 93-99.

³²⁹ Philippine Center for Investigative Journalism, *supra* note 309

On August 21, 1971, at an assembly in Plaza Miranda of the Liberal Party candidates for the November 8, 1971 general elections, two hand grenades were thrown into the stage killing eight people and injuring several more including many candidates. In response to the attack, President Marcos issued Proclamation No. 889 on August 23, 1971 suspending the privilege of the writ of the habeas corpus.³³⁰ Marcos invoked his authority under Article VII, Section 10, Paragraph 2 of the 1935 Constitution. On January 7, 1972, President Marcos completely lifted the suspension of the privilege of the writ of habeas corpus.

On 21 September 1972, President Marcos issued Proclamation No. 1081 declaring Martial Law.³³¹ The declaration stated in part thus:

“NOW, THEREFORE, 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 (1935 Constitution), do hereby place the entire Philippines as defined in Article I, Section 1 of the Constitution under martial law 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 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.”

Immediately the next day, President Marcos issued several General Orders. General Order No. 1 stated that President Marcos “shall govern the entire nation and direct the operation of the entire government, including all its agencies and instrumentalities.”³³² General Order No. 2 was issued on the same day ordering the arrest of several individuals contained in the accompanying list.³³³ General Order No. 3 and No. 3-A removed from the jurisdiction of the civilian courts cases involving the validity of Proclamation No. 1081 or of any decree, order, or acts issued by Pres. Marcos, as well as those involving certain crimes as expressly enumerated therein. Such cases were transferred to the jurisdiction of military tribunals.³³⁴ General Order No. 4 imposed a nation-wide curfew between 12:00 midnight and 4:00 in the morning, with the exception of those authorized in writing by the proper military commander. Any person found violating the order were to be arrested and taken to the nearest military camp, and shall be released not later than 12:00 noon the following day.³³⁵ General Order No. 5 laid down an explicit prohibition on all “rallies, demonstrations and other forms of group actions”, including “strikes and picketing in vital industries”. Persons found violating the issuance were to be arrested and taken into custody, and held “for the duration of the national emergency or until he or she is otherwise ordered released” by Marcos

³³⁰ Proc. No. 889 (1971)

³³¹ Proc. No. 1081 (1972)

³³² Gen. Order No. 1 (1972)

³³³ Gen. Order No. 2 (1972)

³³⁴ Gen. Order No. 3 and 3-A (1972)

³³⁵ Gen. Order No. 4 (1972)

himself or by a representative duly designated by him.³³⁶ Subsequently, Pres. Marcos issued numerous orders, instructions, and decrees, pursuant to the extensive legislative powers he had assumed.³³⁷

In his book, Fr. Joaquin Bernas summarized the rulings of the Supreme Court with respect to the 1972 Martial Law Proclamation. He grouped these into five, outlining them as follows:

- 1) that the Proclamation was valid because its basis, the existing rebellion, was established;
- 2) that the Proclamation carried with it the suspension of the privilege of the writ of habeas corpus;
- 3) that the “martial law administrator” had the power to legislate on any matter related to national welfare;
- 4) that such “martial law administrator” had the power create military tribunals with jurisdiction to try civilians for crimes related to the object of martial rule;
- 5) that such “martial law administrator” can even propose amendments to the Constitution if there is no other effective constituent body.³³⁸

In addition, the Supreme Court at the time also held that during martial law, claims for denial of the right to speedy trial are unavailing.³³⁹ In another case, the Court also stated that the suspension of the privilege of the writ of habeas corpus also suspends the right to bail.³⁴⁰

On 17 January 1981, Martial Law was formally lifted by the issuance of Proclamation No. 2045. However, as Fr. Joaquin Bernas, S.J. pointed out martial law effectively subsisted until the very end of Pres. Marcos' stay in power. In making such a claim, it appears that Fr. Bernas adopted a concept of martial law in its general sense. In this “general sense”, martial law basically means the concentration of governmental powers in the hands of the executive.³⁴¹ This is the same sense which we have adopted in undertaking this study.

6. After Martial Law

³³⁶ Gen. Order No. 5 (1972)

³³⁷ BERNAS, *supra* note 287, at 220-221.

³³⁸ *Ibid.*, at 232.

³³⁹ *Ocampo v. Military Commission No. 25*, 109 SCRA 22, November 6, 1981.

³⁴⁰ *Buscayno v. Military Commission*, 109 SCRA 273, November 19, 1981.

³⁴¹ BERNAS, *supra* note 287, at 232.

The years following the depose of Pres. Marcos were turbulent, punctuated by a succession of coup attempts, culminating in a wide-ranging and bloody attempt on December 1, 1989. This last coup attempt was led by then Colonel Gregorio Honasan and involved a large part of the troops as well as the support of civilians, attacking key political and military facilities, including military bases and Malacañang itself. Considering this state of affairs, it was only inevitable that President Corazon C. Aquino, who was at the helm of the government at the time, would assume military and emergency powers in order to be able to deal with the successive crises. Thus, on August 28, 1987, the Philippines was under a “de facto state of emergency”. On December 6, 1989, Pres. Aquino issued Proclamation No. 503 declaring a state of national emergency throughout the Philippines. On December 12, 1989, Pres. Aquino issued Executive Order No. 384 providing general guidelines in the implementation of the earlier Proclamation No. 503, in order “to ensure public safety and to prevent economic dislocation as a result of the recent military and civilian rebellion”. A few days later, Congress enacted Republic Act No. 6826.³⁴² This last statute declared the existence of a national emergency, and conferred emergency powers upon Pres. Aquino. It declared the existence of a national emergency, on the basis of the rebellion and coup attempt on December 1, 1989, which was committed by members of the military with the assistance of civilians. It noted that “the emergency continues even with the cessation of military hostilities”, and that those who had participated in the failed coup were still at large, posing a “clear threat to national security”. Bombings continued and secessionist elements in Mindanao were taking advantage of the country’s instability, and finally, the economy was suffering greatly from these state of insecurity.³⁴³ Pursuant to these conditions, Congress expressly delegated emergency powers to Pres. Aquino.³⁴⁴ The law enumerated specific powers which she may exercise pursuant to the delegation, and for which she may promulgate rules.³⁴⁵

7. GMA generation

On January 20, 2001, President Gloria Macapagal-Arroyo (Pres. GMA) became the fourteenth President of the Philippines, as she was sworn in at noon of the same day by Chief Justice Hilario Davide, Jr. following days of protest and

³⁴² Rep. Act No. 6826 (1989), otherwise known as An Act to Declare, in view of the Existence of a National Emergency, a National Policy in connection therewith and to authorize the President of the Republic of the Philippines for a Limited Period and Subject to Restrictions, to Exercise Powers Necessary and Proper to Carry Out the Declared National Policy and For Other Purposes

³⁴³ Rep. Act No. 6826 (1989), sec. 1

³⁴⁴ Rep. Act No. 6826 (1989), sec. 2

³⁴⁵ Rep. Act No. 6826 (1989), sec. 3

massive calls for the resignation of her predecessor, President Joseph E. Estrada. The Supreme Court affirmed the legitimacy of this new administration in a decision rendered in the case of *Estrada v. Desierto* on March 8, 2001.³⁴⁶

a. 2001

Only a few months after assuming the presidency, and a few days after Pres. Estrada was arrested on charges of plunder, thousands of people once again took to the streets, attempting to force Pres. GMA from office. On May 1, 2001, Pres. GMA issued Proclamation No. 38, declaring a State of Rebellion in the National Capital Region, in response to the Estrada loyalists attempting to storm Malacanang Palace after several days of rallying at the EDSA Shrine.³⁴⁷ This was followed by General Order No. 1, which directed the Armed Forces of the Philippines and the Philippine National Police to suppress and quell the rebellion in the National Capital Region, “with due regard to constitutional rights”.³⁴⁸ On May 7, 2001, Pres. GMA lifted the State of Rebellion.

In the days following such Proclamation, several petitions³⁴⁹ were filed challenging its validity. In *Lacson v. Perez*³⁵⁰, the Supreme Court dismissed the petitions stating that they have been rendered moot and academic by the lifting of the declaration of the State of Rebellion. The Court stated that Pres. GMA exercised the power to call out the armed forces as provided in the first clause of Section 18, Article VII of the 1987 Constitution. Citing the ruling in *Integrated Bar of the Philippines v. Hon. Zamora*³⁵¹, the Supreme Court affirmed that, in a proper case, it can examine the factual basis of the exercise of the calling out power of the President. However, the Court declared that this is no longer feasible since Proclamation No. 38 had already been lifted.

Several justices offered their own dissenting opinions, arguing in the main that such Proclamation, or at least its implementation, was reminiscent of martial law, comparing particularly the warrantless arrests made in the wake of martial law and in the days when this Proclamation was in force.

Justice Kapunan noted that the Constitution does not require the President to make a declaration of a “state of rebellion”, that it has no legal significance. Such a declaration is mere “legal surplusage”.³⁵² However, he stated that if the motive behind the declaration of a “state of rebellion” is to arrest persons without warrant and detain them without bail and, thus, skirt the Constitutional safeguards for the

³⁴⁶ *Estrada v. Desierto*, G.R. No. 146710-15, March 8, 2001

³⁴⁷ Proc. No. 38 (2001)

³⁴⁸ Gen. Order No. 1 (2001)

³⁴⁹ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756 (2001).

³⁵⁰ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756 (2001).

³⁵¹ G.R. No. 141284, August 15, 2000

³⁵² *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 773 (2001).

citizens' civil liberties, the so-called "state of rebellion" then partakes of the nature of martial law, without declaring it as such. It is a truism that a law or rule may itself be fair or innocuous on its face, yet, if it is applied and administered by public authority with an evil eye so as to practically make it unjust and oppressive, it is within the prohibition of the Constitution.³⁵³ Justice Kapunan continued that a "state of rebellion" declared as a subterfuge to effect warrantless arrest and detention for a non-bailable offense, places a heavier burden on the people's civil liberties than the suspension of the privilege of the writ of habeas corpus and the declaration of martial law. Unlike the mere declaration of a "state of rebellion" and the exercise of the calling out power, any invocation of the latter set of military powers automatically sets in motion the built-in safeguards in the Constitution, for instance: (1) The period for martial law or suspension is limited to a period not exceeding sixty day; (2) The President is mandated to submit a report to Congress within forty-eight hours from proclamation or suspension; (3) The proclamation or suspension is subject to review by Congress, which may revoke such proclamation or suspension. If Congress is not in session, it shall convene in 24 hours without need for call; and (4) the sufficiency of the factual basis thereof or its extension is subject to review by the Supreme Court in an appropriate proceeding.³⁵⁴

Justice Fernan also had misgivings with respect to the implementation of the Proclamation stating that warrantless arrests may not be allowed if the arresting officers are not sure what particular provision of law had been violated by the person arrested.³⁵⁵

Justice Gutierrez also expressed his doubt as to the validity of the arrests made in pursuit of the Proclamation. He stated that to base warrantless arrests on the doctrine of continuing offense is to give a license for the illegal detention of persons on pure suspicion. He added that he could not understand why the authorities preferred to bide their time, await the petitioner's surfacing from underground, and [p]ounce on him with no legal authority, instead of securing warrants of arrest for his apprehension.³⁵⁶

Justice Feliciano declared in strong terms that a declaration of a state of rebellion does not relieve the State of its burden of proving probable cause.³⁵⁷ He preferred to grant the petition, declare null and void the orders of arrest issued against the petitioners, and issue a writ of injunction enjoining respondents from effecting warrantless arrests against the petitioners and all other persons similarly situated.³⁵⁸ Citing a report that then Justice Secretary Hernando Perez announced that the lifting of the "state of rebellion" does not stop the police from making warrantless arrests, he noted that "if this is so, the pernicious effects of the

³⁵³ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 774 (2001).

³⁵⁴ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 774 (2001).

³⁵⁵ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 779 (2001).

³⁵⁶ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 780 (2001).

³⁵⁷ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 783 (2001).

³⁵⁸ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 784 (2001)

declaration on the people's civil liberties have not abated despite the lifting thereof".³⁵⁹ He added that "the coverage and duration of effectivity of the orders of arrest are thus so open-ended and limitless as to place in constant and continuing peril the people's Bill of Rights".³⁶⁰

Justice Sandoval-Gutierrez expressed her preference for the court to give due course to the petition and grant the same, and to enjoin the respondents from arresting the petitioners. Primarily, she believes that the lifting of the declaration should not render the petitions filed moot and academic, considering the seriousness and unprecedented nature of the constitutional issues involved, and their grave implications involving the basic human rights and civil liberties of the people. She noted the reports that saturation drives (sonas) were being conducted by the police and that warrantless arrests of individuals were being made.³⁶¹ She pointed out that the acts sought to be declared illegal and unconstitutional were capable of being repeated.³⁶² Justice Sandoval-Gutierrez emphasized that, "nowhere in the Constitution can be found a provision which grants upon the executive the power to declare a 'state of rebellion', much more, to exercise on the basis of such declaration the prerogative which a president may validly do under a state of martial law". She declared that Pres. GMA committed a constitutional short cut, disregarding clear provisions of the Constitution, particularly Section 18, Article VII thereof.³⁶³ Justice Sandoval-Gutierrez expressed the same fears voiced by Rossiter himself nearly two decades ago.³⁶⁴ We could not have put it in any way better ourselves, so we quote from her dissent thus:

... To accept the theory that the President could disregard applicable statutes, particularly that which concerns arrests, searches and seizures, on the mere declaration of a "state of rebellion" *is in effect to place the Philippines under martial law without a declaration of the executive to that effect and without observing the proper procedure.* This should not be countenanced. In a society which adheres to the rule of law, resort to extra-constitutional measures is unnecessary, where the law has provided everything for any emergency or contingency. For even if it may be proven beneficial for a time, the precedent it sets is pernicious as the law may, in a little while, be disregarded again on the same pretext but for evil purposes. *Even in time of emergency, government action may vary in breadth and intensity from more normal times, yet it need not be less constitutional.*³⁶⁵

My fear is rooted in history. Our nation had seen the rise of a dictator into power. As a matter of fact, the changes made by the 1986 Constitutional Commission on the martial law text of the Constitution were to a large extent a reaction against the direction which the Supreme Court

³⁵⁹ Lacson v. Perez, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 783 (2001).

³⁶⁰ Lacson v. Perez, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 783 (2001).

³⁶¹ Lacson v. Perez, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 789-790 (2001).

³⁶² Lacson v. Perez, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 790 (2001).

³⁶³ Lacson v. Perez, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 790 (2001).

³⁶⁴ See ROSSITER, *supra* note 33, at 155.

³⁶⁵ SMITH/COTTER, POWERS OF THE PRESIDENT DURING CRISIS, 13 (1972) cited in Lacson v. Perez, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 791-792 (2001). Italics original.

of the Constitution does not require the declaration of a state of rebellion to call out the armed forces. The petitioners also contended that since the Oakwood occupation ended within twenty four hours of its launch, there is no sufficient factual basis for the proclamation to continue for an indefinite period. Other petitioners argued that such proclamation is a circumvention of the report requirement for declarations of martial law or the suspension of the privilege of the writ of habeas corpus. They contended that such presidential issuances cannot be considered as an exercise of emergency powers, as provided for in Section 23(2) of Article VI of the Constitution, as the Congress did not delegate any such power to the President and hence, such issuances are tantamount to usurpation of the power of Congress. They maintained that such a declaration is a “superfluity” since the President does not have to declare a state of rebellion in calling out the armed forces.

The Supreme Court dismissed the petitions. The Court pronounced that the issuance of Proclamation No. 435, declaring that the state of rebellion has ceased to exist, has rendered the case moot.³⁷² Nevertheless, the Court elected to discuss in depth the “commander-in-chief” powers of the president and “finally lay to rest the validity of the declaration of a state of rebellion in the exercise of the president’s calling out power”, notwithstanding the mootness of the petitions.³⁷³ Primarily, the Court discussed that Section 18, Article VII of the Constitution grants the President, as Commander-in-Chief, a sequence of “graduated powers”. From the most to the least benign, these are: the calling out power, the power to suspend the privilege of the writ of habeas corpus, and the power to declare martial law. In the exercise of the latter two powers, the Constitution requires the concurrence of two conditions, namely, an actual invasion or rebellion, and that public safety requires the exercise of such power. In contrast, in exercising the calling out power, the only criterion is that “whenever it becomes necessary”, the President may call the armed forces “to prevent or suppress lawless violence, invasion or rebellion”.³⁷⁴ The Court conceded that for the purpose of exercising the calling out power the Constitution does not require the President to make a declaration of a state of rebellion.³⁷⁵ Nevertheless, the Court likewise emphasized that “it is equally true that Section 18, Article VII does *not* expressly prohibit the President from declaring a state of rebellion”.³⁷⁶

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

³⁷² *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 664 (2004).

³⁷³ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 665 (2004)

³⁷⁴ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656,669 (2004)

³⁷⁵ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 668 (2004)

³⁷⁶ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 669 (2004)

Commander-in-Chief powers.³⁷⁷ The Court stated in sum that the President merely exercised a “wedding of her Chief Executive and Commander-in-Chief powers” in declaring a state of rebellion and in calling out the armed forces. Such powers are purely executive, vested on the President by Sections 1 and 18, Article VII of the Constitution, as opposed to the delegated legislative powers provided in Section 23 (2), Article VI.³⁷⁸ On the other hand, the statutory authority for such a declaration may be found in Section 4, Chapter 2 (Ordinance Power), Book III (Office of the President) of the Revised Administrative Code of 1987.³⁷⁹

Although the Court agreed with the Petitioners in saying that the declaration of a state of rebellion is an utter superfluity in calling out the armed forces, the Court did not expressly strike down such declaration as invalid. The Court stated that at most, it only gives notice to the nation that such a state exists and that the armed forces may be called to prevent or suppress it. The Court also recognized the “emotional effects” of such declaration upon the allegedly enemies of the state and upon the entire nation. However, the Court admitted its limited mandate, that is, to probe only into the legal consequences of such declaration. Hence, it stated that such declaration is devoid of any legal significance, and that it cannot diminish or violate constitutionally protected rights. For all legal intents and purposes, the declaration is “deemed not written”.³⁸⁰

The Court acknowledged the President’s full discretionary power in calling out the armed forces and in determining whether or not the exercise of such power is necessary. The Court nonetheless affirmed that it has the power and mandate to examine whether the power was exercised within constitutional boundaries or in a manner constituting grave abuse of discretion. In spite of this, the Court pointed out that in this case none of the petitioners were able to prove their contention that the President acted without factual basis, in declaring a state of rebellion and in calling out the armed forces.³⁸¹

Moreover, the Court rejected the petitioner’s argument that the declaration of a state of rebellion amounts to a declaration of martial law and, hence, is a circumvention of the report requirement. The Court stated that such contention is a “leap of logic”, reasoning out that there is no indication that military tribunals have replaced civil courts in a “theater of war” or that military authorities have taken over the functions of civil government. There is no allegation of curtailment of civil or political rights, and there is no indication that the President has exercised

³⁷⁷ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 677 (2004)

³⁷⁸ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 679 (2004)

³⁷⁹ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 677 (2004)

³⁸⁰ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 677 (2004)

³⁸¹ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 678 (2004)

judicial and legislative powers. In sum, the Court stated that there is no manifestation that the President has attempted to exercise or has exercised martial law powers.³⁸² Also, the Court dismissed the argument that such declaration constitutes an indirect exercise of emergency powers, which requires an express grant by Congress under Section 23 (2), Article VI of the Constitution. The Court declared that the petitions failed to cite a specific instance where the President has attempted to or has exercised powers beyond her powers as Chief Executive or as Commander-in-Chief.

The dissenting opinions must be noted for their strong arguments in favor of the position of the petitioners. In spite of the academic disposition of the majority of the court, it is difficult to deny that the actions taken and the events which followed the declaration notably signified an assumption of extraordinary powers by the Executive branch of government, that of military and emergency powers typically exercised in times of crisis. The dissents palpably show that the Proclamation, or at least its implementation is indeed reminiscent of martial law.

Justice Ynares-Santiago declared that the Proclamation and the General Order are void for having been issued with grave abuse of discretion amounting to lack of jurisdiction. She referred to certain facts and circumstances showing the abusive implementation of the proclamation: the “search and recovery” operations conducted on the five days during which the proclamation was in effect, the arrest and detention of an official of the previous administration and the inquest proceedings initiated against him, the announcement of the DOJ that “the president’s ‘indefinite’ imposition of the ‘state of rebellion’ would make ‘warrantless arrests’ a valid exercise of executive power, and the fact that police authorities were releasing to the media “evidence found” purporting to link personalities in the political opposition.³⁸³

The Justice asserted that the majority discussed only the abstract nature of the powers exercised by the Chief Executive, without considering if there was sufficient factual basis for the President's declaration of a "state of rebellion" and when it ended.³⁸⁴ In taking this position, the majority is returning, if not expanding, the doctrine enunciated in *Garcia-Padilla v. Enrile*, which overturned the landmark doctrine in *Lansang v. Garcia*. In *Lansang*, the Supreme Court upheld its authority to inquire into the factual bases for the suspension of the privilege of the writ of habeas corpus, and held that this inquiry raises a judicial rather than a political question. In *Garcia-Padilla*, on the other hand, the ponencia held that *Lansang* was no longer authoritative, and that the President's decision to suspend the privilege is

³⁸² *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 679 (2004)

³⁸³ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 685-686 (2004)

³⁸⁴ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 686 (2004)

final and conclusive upon the courts and all other persons.³⁸⁵ She deplored that “the majority ignored the fact that the ‘state of rebellion’ declared by the President was in effect five days after the peaceful surrender of the military group”.³⁸⁶

Justice Ynares-Santiago emphasized that the declaration of a state of rebellion does not have any legal meaning or consequence; it does not give the President any extra powers.³⁸⁷ She submitted that if the declaration is used to justify warrantless arrests even after the rebellion has ended, such declaration or at least the warrantless arrest, must be struck down.³⁸⁸ Ostensibly, the purpose of the declaration and its duration as far as the overeager authorities were concerned was only to give legal cover to effect warrantless arrests even if the “state of rebellion” or the instances stated in Rule 113, Section 5 of the Rules of Court are absent or no longer exist.³⁸⁹ This Justice reminds us: Our history has shown the dangers when too much power is concentrated in the hands of one person. Unless specifically defined, it is risky to concede and acknowledge the “residual powers” to justify the validity of the presidential issuances. This can serve as a blank check for other issuances and open the door to abuses.³⁹⁰

Justice Sandoval-Gutierrez expressed her view that the Proclamation was tantamount to Martial Law, reiterating that “the passage of time has not changed [her] Opinion in *Lacson v. Perez*³⁹¹ – that President Arroyo’s declaration of a ‘state of rebellion’ is unconstitutional”.³⁹² She voted to grant the petitions and to declare Proclamation No. 427 and General Order No. 4 unconstitutional.³⁹³

She stated that if Pres. GMA's only purpose was merely to exercise her "calling out power," then she could have simply ordered the AFP to prevent or suppress what she perceived as an invasion or rebellion, as expressly provided in the Constitution itself. She asserts that what Pres. GMA in fact did, deviated from the provisions of the Constitution specifically designed to operate and govern in times of emergency. She admonished,

³⁸⁵ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 686 (2004)

³⁸⁶ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 686 (2004)

³⁸⁷ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 687 (2004)

³⁸⁸ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 687 (2004)

³⁸⁹ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 689 (2004)

³⁹⁰ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 689 (2004)

³⁹¹ *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756, 796-797 (2001); see pages 100-102, *supra*.

³⁹² *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 692 (2004)

³⁹³ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 702 (2004)

... adopting an unorthodox measure unbounded and not canalized by the language of the Constitution is dangerous. It leaves the people at her mercy and that of the military, ignorant of their rights under the circumstances and wary of their settled expectations.

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... In a society which adheres to the rule of law, resort to extra-constitutional measures is unnecessary where the law has provided everything for any emergency or contingency. For even if it may be proven beneficial for a time, the precedent it sets is pernicious as the law, in a little while, be disregarded again on the same pretext but for questionable purposes. Even in time of emergency, government action may vary in [breadth] and intensity from more normal times, yet it need not be less constitutional. Extraordinary conditions may call for extraordinary remedies. But it cannot justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.³⁹⁴

Justice Sandoval-Gutierrez submits that, “*in effect, she placed the Philippines under martial law without a declaration to that effect and without observing the proper procedure*”.³⁹⁵ She noted the fact that on Pres. GMA's mere declaration of a "state of rebellion", police authorities arrested without warrants several personalities, including Senator Juan Ponce Enrile, Senator Gregorio Honasan, Senator Panfilo Lacson, former Ambassador Ernesto Maceda, among others. Government agents then conducted warrantless arrests, searches and seizures in the days following its issuance.³⁹⁶ As Justice Sandoval-Gutierrez herself indicated in her dissent, the foregoing facts only confirm the claim that by virtue of the proclamation issued by Pres. GMA, constitutional rights, including those against unreasonable search and seizure had been placed gravely in peril, if not outright violated.³⁹⁷ The good Justice avowed, “violation of this constitutional provision cannot be justified by reason of the declaration of a "state of rebellion" for such declaration, as earlier mentioned, is unconstitutional”.³⁹⁸ She continued, “by sustaining the unusual course taken by President Arroyo, we are traversing a very dangerous path. We are opening the way to those who, in the end, would turn our democracy into a totalitarian rule”.³⁹⁹

³⁹⁴ Sanlakas v. Executive Secretary, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 692-694 (2004). Italics original.

³⁹⁵ Sanlakas v. Executive Secretary, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 695 (2004).

³⁹⁶ Sanlakas v. Executive Secretary, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 694-697 (2004).

³⁹⁷ CONST. art. III, sec. 2

³⁹⁸ Sanlakas v. Executive Secretary, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 695 (2004).

³⁹⁹ Sanlakas v. Executive Secretary, G.R. No. 159085, February 3, 2004, 421 SCRA 656, 698 (2004).

c. 2006

On February 24, 2006, as the country celebrated the 20th anniversary of EDSA People Power I, Pres. GMA issued Proclamation No. 1017 declaring a State of National Emergency, allegedly in response to a *coup d'etat* attempted earlier in the day. She invoked Section 4 of Article II, Section 18 of Article VII, and Section 17 of Article XII of the Constitution as legal basis, and commanded the Armed 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 to all decrees, orders and regulations promulgated by [me] personally or upon my direction”.⁴⁰⁰ On the same day, she issued General Order No. 5 in implementation of the Proclamation. In that Order, she directed the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) “to immediately carry out the necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence”.⁴⁰¹

The Proclamation led to the temporary suspension of lower-level education classes. The Office of the President announced the cancellation of all programs and activities related to the 20th anniversary celebration of EDSA People Power I, and the immediate revocation of all licenses and permits to hold rallies and demonstrations.⁴⁰² Presidential Chief of Staff Michael Defensor announced that “warrantless arrests and take-over of facilities, including media, can already be implemented”. Some of the rallies continued on the streets, but were violently dispersed by the police, who cited the proclamation and the general order issued earlier for their actions.⁴⁰³ The next day, members of the Criminal Investigation and Detection Group (CIDG) of the PNP raided the *Daily Tribune* offices in Manila and surrounded the premises of other publications, such as *Malaya* and *Abante*, also on the basis of these presidential issuances. Authorities warned that they would take over any media organization that would not follow “the standards set by the government during the state of national emergency”. The National Telecommunications Commissioner urged television and radio networks to “cooperate” with the government for the duration of the state of national emergency, requested them to provide “balanced reporting”, and warned that the NTC would not hesitate to recommend the closure of any broadcast outfit that violates the rules set out for media coverage when the national security is threatened.⁴⁰⁴ The police arrested Congressman Crispin Beltran, a member of the Opposition party, based on a warrant dated 1985. Other members of the same party were arrested and were refused admission when they tried to visit

⁴⁰⁰ Proc. No. 1017 (2006)

⁴⁰¹ Gen. Order No. 5 (2006)

⁴⁰² See *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 206 (2006).

⁴⁰³ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 206 (2006).

⁴⁰⁴ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 207-208 (2006).

Congressman Beltran. The police tried to arrest other members of Congress, but they managed to elude them. For their protection, these representatives billeted themselves inside the premises of the Batasan, indefinitely.⁴⁰⁵

One week after the issuance of the Proclamation and the General Order, or on March 3, 2006, Pres. GMA lifted the State of National Emergency by issuing Proclamation No. 1021 which declared that the state of national emergency had ceased to exist.⁴⁰⁶

Several petitions were filed⁴⁰⁷ challenging the validity of these presidential issuances. Essentially, these various petitions assailed the proclamation and the actions taken pursuant thereto on the following grounds: that there was no factual basis for calling out the armed forces; that it encroached upon the emergency powers of Congress; that it was a subterfuge to avoid the constitutional requirements for the imposition of martial law; and that it violated the constitutional guarantees of freedom of the press, of speech and of assembly.⁴⁰⁸ Many of the petitions claimed in sum that the President exercised the calling out power without factual basis, and that she had exceeded the bounds of her powers by exercising emergency or Martial Law powers without complying with constitutional requirements therefor.

The Supreme Court partly granted the petition. The Court maintained the constitutionality of Proclamation No. 1017 insofar as it constitutes a call by the President on the AFP to prevent or suppress lawless violence. However, it ruled that Proclamation No. 1017 was unconstitutional insofar as it commanded the AFP to enforce laws not related to lawless violence, as well as decrees promulgated by the President. The Court further clarified that the declaration does not authorize the President to take over privately owned public utility or business affected with public interest, without prior legislation. As regards General Order No. 5, the Court sustained its validity as it provided a standard by which the AFP and PNP should implement the Proclamation. The Court declared it unconstitutional only insofar as it referred to “acts of terrorism” considering that it had not yet been defined at the time.⁴⁰⁹ Finally, the Court declared as unconstitutional the warrantless arrests, the dispersals of the rallies, the warrantless searches of media offices and the seizures of publications and materials from their offices, as well as the imposition of standards on the media or any form of prior restraint on the press.⁴¹⁰

⁴⁰⁵ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 208 (2006).

⁴⁰⁶ Proc. No. 1021 (2006)

⁴⁰⁷ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160 (2006).

⁴⁰⁸ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 209-211 (2006).

⁴⁰⁹ Terrorism is now defined under the Human Security Act or Republic Act No. 9372 (2007)

⁴¹⁰ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 275 (2006).

Thus, the Supreme Court held that Proclamation No. 1017 was not a declaration of Martial Law, but merely an invocation of the President's calling out power. Citing *Integrated Bar of the Philippines v. Zamora*⁴¹¹, the Court recognized that the calling out power was solely discretionary on the part of the President. The Court nevertheless strongly affirmed its power and duty to examine whether it was exercised within permissible constitutional limits or whether it was exercised in a manner constituting grave abuse of discretion, by virtue of its expanded power of judicial review under Section 1, Article VIII of the Constitution.⁴¹² However, the Court reminded that it remained incumbent upon the petitioners to show that the President's decision was totally bereft of factual basis.⁴¹³ In this case, the Court upheld Pres. GMA's exercise of the calling-out power, as they had convincingly shown the factual bases for its invocation, which the petitioners failed to deny. In contrast, the petitioners failed to show that Pres. GMA's exercise of the calling out power, by issuing Proclamation No. 1017, was totally bereft of factual basis.⁴¹⁴

The words of the Court echoed its holding in *Sanlakas v. Executive Secretary*⁴¹⁵. Pres. GMA's declaration of a "state of rebellion" was merely an act declaring a status or condition of public moment or interest. Such declaration is harmless, without legal significance, and deemed not written.⁴¹⁶ However, the Court pointed out that "in these cases, PP 1017 is more than that", as she relied not only upon her calling out power under Section 18, Article VII of the Constitution, but also Section 17, Article XII thereof. "Indeed, Proclamation No. 1017 calls for the exercise of an awesome power".⁴¹⁷ As regards the claim that it is actually a declaration of martial law, the Court thought otherwise, maintaining that what the President invoked was her calling out power.⁴¹⁸ Citing Justice Vicente V. Mendoza, the Court clarified that Proclamation No. 1017 was not a declaration of Martial Law and that it cannot be used to justify acts that only under a valid declaration of martial law can be done. Thus, its use for any other purpose is a perversion of its nature and scope, and any act done contrary to its command is *ultra vires*.⁴¹⁹ Specifically, (a) arrests and seizures without judicial warrants; (b) ban on public assemblies; (c) take-over of news media and agencies and press censorship; and (d) issuance of Presidential Decrees, are powers which can be exercised by the

⁴¹¹ G.R. No. 141284, August 15, 2000, 338 SCRA 81 (2000)

⁴¹² *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 227 (2006).

⁴¹³ *Integrated Bar of the Philippines*, G.R. No. 141284, August 15, 2000, 338 SCRA 81 (2000), cited in *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 228 (2006).

⁴¹⁴ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 228 (2006).

⁴¹⁵ *Sanlakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, 421 SCRA 656 (2004).

⁴¹⁶ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 243 (2006).

⁴¹⁷ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 243 (2006).

⁴¹⁸ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 243-244 (2006).

⁴¹⁹ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 244-245 (2006).

President **only** where there is a valid declaration of Martial Law or suspension of the writ of *habeas corpus*.⁴²⁰

Proclamation No. 1017 invoked Section 17, Article XII of the Constitution. The Court surmised that the invocation of this provision purports to grant the president, without any authority or delegation from Congress, the power to take over or direct the operation of any privately-owned public utility or business affected with public interest.⁴²¹ The Court stated that the President could validly declare the existence of a state of national emergency, even in the absence of congressional enactment. The Court however, emphasized that the exercise of emergency powers, such as the taking of over of privately owned public utility or business affected with public interest requires a delegation from Congress.⁴²² Section 17 of Article XII on the power to take over, and Section 23 of Article VI on the war and emergency powers, both relate to national emergencies and must be read together to determine the limitation of the exercise of emergency powers.⁴²³ The Court clarified that Section 17, Article XII must be understood as an aspect of the emergency powers clause. The taking over of private business affected with public interest is just another facet the emergency powers generally reposed upon Congress. Congress is the repository of emergency powers. Thus, whether or not the President may exercise the power stated therein, is dependent on whether Congress may delegate it to him pursuant to a law prescribing reasonable terms thereof.⁴²⁴ Thus, Proclamation No. 1017 does not authorize her during the emergency to exercise emergency or other extraordinary powers without authority from Congress. In sum, while the President alone can declare a state of national emergency, however, without legislation, he has no power to take over privately-owned public utility or business affected with public interest.⁴²⁵

d. 2007

On 29 November 2007, Secretary of the Department of Interior and Local Government Ronaldo Puno announced that a five-hour curfew will be observed starting on 12 AM until 5 AM on 30 November 2007. The curfew was imposed in the wake of the Manila Pen Siege, when Senator Trillanes and a handful of military officers charged with rebellion for the Oakwood mutiny walked out of their trial and holed up in the Manila Peninsula in Makati City. Philippine National Police

⁴²⁰ Vicente V. Mendoza, *Statement before the Senate Committee on Justice*, March 13, 2006 cited in David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 244 (2006).

⁴²¹ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 249 (2006).

⁴²² David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 250-251 (2006).

⁴²³ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 251 (2006).

⁴²⁴ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 251-252 (2006).

⁴²⁵ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 256-257 (2006).

Chief Avelino Razon stated in an interview that “We are doing this to protect the citizenry. This is not martial law.” Puno justified such imposition of a curfew stating that it was issued “to allow law enforcement agencies to continue their follow-up operation.”

Unlike previous incidents, the President did not declare a State of Rebellion or a State of Emergency. The executive department merely announced the implementation of the curfew. This is again reminiscent of martial law under President Marcos.

Florin T. Hilbay, in his column⁴²⁶ in the Philippine Daily Inquirer dated December 12, 2007, assailed such curfew. He asserts that First, curfews effectively detain citizens under house arrest. Ultimately, curfews entail a system where citizens are reduced to choosing which cell they want during the period of restraint -- theirs or the government's. Second, this form of embargo violates the due process rights of citizens. If the right to travel means anything, it is that the government is barred from picking and choosing who may roam the streets. Along with checkpoints, curfews flip the presumption of innocence by making those not on the list of exceptions immediately subject to arrest. Thirdly, excepting only “legitimate media people” from curfews violates the freedom of the press. Give the government the right to choose who among the media are legitimate and the only media you will get will be the mouthpieces of the government. The arrests of journalists covering the takeover of the Manila Pen are a glaring attestation. Restraints upon the press are particularly constitutionally noxious precisely because those in power suffer from a conflict of interest: the censor's desire to avoid criticism by those being censored. The hallmark of a repressive government is its remarkable ability to control the pipelines of information, and the right to classify journalists and direct their movements is a classic example of prior restraint.

VIII. CONCLUSION

*One of the saddest lessons of history is this:
If we've been bamboozled long enough,
we tend to reject any evidence of the bamboozle.
The bamboozle has captured us.
Once you give a charlatan power over you,
you almost never get it back.
— Carl Sagan*

⁴²⁶ Florin T. Hilbay, *The Curfew State*, http://opinion.inquirer.net/inquireropinion/columns/view_article.php?article_id=106041 last viewed on 22 March 2008.

*Everybody's for democracy in principle.
It's only in practice that the thing
gives rise to stiff objections.*
— Meg Greenfield

*The death of democracy is not
likely to be an assassination from ambush.
It will be a slow extinction from apathy,
indifference, and undernourishment.*
— Robert M. Hutchins

The Supreme Court acknowledged, in *David v. Macapagal-Arroyo*⁴²⁷, that there is one real problem in emergency governance, i.e., that of allotting increasing areas of discretionary power to the Chief Executive, while insuring that such powers will be exercised with a sense of political responsibility and under effective limitations and checks. The Court stated in answer to that problem that, to wit:

Our Constitution has fairly coped with this problem. Fresh from the fetters of a repressive regime, the 1986 Constitutional Commission, in drafting the 1987 Constitution, endeavored to create a government in the concept of Justice Jackson's "balanced power structure." Executive, legislative, and judicial powers are dispersed to the President, the Congress, and the Supreme Court, respectively. Each is supreme within its own sphere. But none has the monopoly of power in times of emergency. Each branch is given a role to serve as limitation or check upon the other. This system does not weaken the President, it just limits his power, using the language of McIlwain. In other words, in times of emergency, our Constitution reasonably demands that we repose a certain amount of faith in the basic integrity and wisdom of the Chief Executive but, at the same time, it obliges him to operate within carefully prescribed procedural limitations.

It is a given that tragedies arise in the life of every nation. The experiences of different countries show that these crises have been dealt with through extraordinary governmental action, even in the most democratic among them. Our own experience during the American regime and contemporary events show that even those who cherish the most democratic of values can resort to the most severe of measures in order to ostensibly maintain peace. Military powers, upon the invocation of which, the several powers of government converge, are assumed in times of crisis, economic depression, invasion, rebellion, or other kinds of emergency. The manner in which various states have chosen to deal with the inevitability of crisis are just as varied. Weimar Germany, we learned, had more in common with the present Philippine constitutional scheme in respect of the military powers of the President, than the United States. The United States, we learned, despite the lack of legal or constitutional basis therefor, had itself resorted to

⁴²⁷ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 256-257 (2006).

extreme measures, as exemplified by the actions of its past presidents and the legal and constitutional structures they have built in the Philippines. The Philippines, we are reminded, as what some eminent legal minds have taught us⁴²⁸, did not in fact derive its present constitutional scheme much less the legal concept of military and emergency powers from the American constitution.

Philippine legal history shows us how serendipitous, even haphazard, the making of our fundamental law has been. A compilation of legal principles and rules derived from an assortment of legal systems appears to be the remote origin of our laws on the military and emergency powers of the President. This of course does not necessarily imply that they are less effective. The Philippines has learned from history, and the present state of the military powers provision is ideally formidable enough to deter any ambitious person from trampling upon the democratic institutions of the nation. Indeed, the 1987 Constitution appears to have followed several of the guidelines laid down by Clinton Rossiter in ensuring the safety of a constitutional democracy.⁴²⁹ In *David v. Macapagal-Arroyo*⁴³⁰, the Supreme Court cited these very guidelines, Rossiter's "criteria of constitutional dictatorship". The Court referred to them as "the conditions of success of the 'constitutional dictatorship'":

- 1) No general regime or particular institution of constitutional dictatorship should be initiated unless it is necessary or even indispensable to the preservation of the State and its constitutional order...
- 2) ... the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator...
- 3) No government should initiate a constitutional dictatorship without making specific provisions for its termination...
- 4) ... all uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements...
- 5) ... no dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis...
- 6) The measures adopted in the prosecution of the constitutional dictatorship should never be permanent in character or effect...

⁴²⁸ See MENDOZA, *supra* note 210, at 51-53.

⁴²⁹ See ROSSITER, *supra* note 33, at 297-306.

⁴³⁰ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160 (2006) citing

- 7) The dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order...
- 8) Ultimate responsibility should be maintained for every action taken under a constitutional dictatorship...
- 9) The decision to terminate a constitutional dictatorship like the decision to institute one should never be in the hands of the man or men who constitute the dictator...
- 10) No constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted...
- 11) ... the termination of the crisis must be followed by a complete return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship...⁴³¹

But some still beg to differ, and indeed, the facts so far seem to show otherwise. The successive declarations of State of Rebellion and State of National Emergency; the usurpation of legislative powers, unintentional or otherwise; the legal and constitutional short-cuts and transgressions; the warrantless arrests and unreasonable searches and seizures; the attempted control of, and restraint on, cherished freedoms particularly the freedoms of speech, of the press, and of public assembly; the systematic nature of extrajudicial killings, which have been carried out with impunity and which remain un-explained even to this day; the level of corruption. Several of these measures and actions have been undertaken, in several instances at different points in time, under the justification that emergency conditions exist, whether due to rebellion or impending economic depression. The Court itself and/or some Justices have noted their occurrence. These are the same incidents that have been observed to occur during times of crisis in the countries we have surveyed in this study on crisis government. These authors as well as others, including Rossiter and Agamben, have observed these phenomena to occur in states operating under a constitutional dictatorship, or state of exception, or military and emergency government or authoritarian rule as we call them in this study. These are the facts which necessarily arise when governments have assumed military and emergency powers to meet perceived crises or emergencies.

The claim is that the state of our nation today is far from democratic. Filipinos are not alone in making this observation. As early as February 2007, Philip Alston, Special Rapporteur of the United Nations Human Rights Council on extrajudicial, summary or arbitrary executions, released his findings following ten days of sojourn in the Philippines, investigating the reported extrajudicial killings

⁴³¹ David v. Macapagal-Arroyo, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 233-234 (2006) citing CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, at 297-306 (2002)

occurring in the country. According to his report, conclusively, extrajudicial killings in the Philippines have been occurring and should be cause for great concern. Alston dismissed the claim that the killings were the result of leftist internal purges, finding the evidence offered by the military “unconvincing”. In fact, the findings of his own investigation implicated the police and the military including rogue elements thereof, although he did not completely exclude private actors or other groups such as the NPA and other vigilantes, as being responsible for a relatively small percentage of the deaths. He noted that the government’s response to these killings has been “varied”, ranging from an acknowledgment of its seriousness, to downright “incredulity, mixed with offence”, and ultimately insufficient.⁴³² In June 2007, Human Rights Watch, an international organization advocating human rights, released a report regarding the extrajudicial killings in the country and made strong recommendations to various institutions of the Philippine government, the CPP-NPA-NDF, as well as the United States.⁴³³ In January 2008, Freedom House, an international organization monitoring the status of democracy, released its latest report on the state of freedom or democracy in the world. The organization noted the decline of freedom in the Philippines, categorizing it only as “partly free” and removing it from its electoral democracy list. The report explained that the political rights rating of the Philippines declined from 3 to 4, as a result of serious, high-level corruption allegations; the pardon of former President Estrada; and a spike in political killings in the run-up to the 2007 legislative elections.⁴³⁴ Other international organizations working for freedom and human rights have made the same observations and recommendations.

Some have gone farther in the belief that we actually currently operate under martial law *de facto* under the administration of President Gloria Macapagal-Arroyo. Primarily, and not to disappoint those who wish to find some validation to their claims, in strict legal terms, the Philippines is not under Martial Law. There has been no declaration thereof, and the institutions and mechanisms that accompany such a proclamation have not commenced to work.

⁴³² Press Statement of Professor Philip Alston, Special Rapporteur of the United Nations Human Rights Council on extrajudicial, summary or arbitrary executions, Manila, February 21, 2007 in Project on Extrajudicial Executions, Center for Human Rights and Global Justice, New York University School of Law <http://www.extrajudicialexecutions.org/news/Philippines_21_Feb_2007.pdf> last viewed on April 4, 2008; see also “Alston Report: AFP Behind Killings”, Philippine Daily Inquirer, November 28, 2007 <http://newsinfo.inquirer.net/inquirerheadlines/nation/view_article.php?article_id=103513> last viewed April 4, 2008

⁴³³ Human Rights Watch, *Scared Silent: Impunity for Extrajudicial Killings in the Philippines*, vol. 19, no. 9(C) (June 2007)

⁴³⁴ Arch Puddington of Freedom House, *Freedom in Retreat: Is the Tide Turning? Findings of Freedom in the World 2008*, 16 (2008); also quoted by Carmela Fonbuena, “*Freedom in RP Declines, Says Int’l Report*”, **Newsbreak**, <http://newsbreak.com.ph/index.php?option=com_content&task=view&id=4088&Itemid=88889051> last viewed April 4, 2008

We would have left it at that. But this study has assumed a broader concept of military and emergency powers, akin to that of Rossiter's "constitutional dictatorship", or Agamben's "state of exception", or that of crisis (military or emergency) government, or simply, authoritarian rule. Our study has not been confined to an analysis of the Philippine legal scenario, but has included within its scope the use of the military and emergency powers of government in its varied forms, across different countries, and throughout history. We will first offer a possible framework and particular criteria by which one can objectively analyze and determine, with some measure of certainty, whether a government has effectively assumed military powers in its general sense, and is thus currently operating under a system of constitutional dictatorship or crisis government. These authors have chosen to adopt some of the features identified by Rossiter as characteristic of every crisis government. He claimed that,

In terms of power, crisis government in a constitutional democracy – whatever the character of the emergency and whatever the dictatorial institutions temporarily adopted – entails one or two, or more probably all, of three things: *concentration, expansion, and liberation*. Generally these three features are fused together and evidence themselves as an increase in authority and prestige of the state and a decrease in the liberty and importance of the individual.

(1) *Concentration* – The concentration of governmental power in a democracy faced by an emergency...

(2) *Expansion* – The expansion of power... In areas where it already exists – taxation, the control of public businesses, the punishment of public crimes, the maintenance of internal order – the power of the state manifests itself in stronger and more arbitrary control, administration, and adjudication... The crisis of expansion of governmental power is most clearly evidenced in the contraction of civil and economic freedom which works. Whether the emergency be that of war or rebellion or depression, the government finds it necessary to abridge the rights of its citizens to speak freely, assemble peaceably, maintain an inviolate domicile, strike, escape military service, or even vote their representatives out of office...

(3) *Liberation* – The power of the state must not only be concentrated and expanded, it must also be freed from the normal system of constitutional and legal limitations... everywhere the wielders of public power are relieved of normal restrictions and responsibility.⁴³⁵

Added to the three characteristics we have identified in the earlier part of this paper⁴³⁶, we can sum up these criteria into the following:

1. Existence or declared existence of some emergency

⁴³⁵ ROSSITER, *supra* note 33, at 288-290; numbering and italics added.

⁴³⁶ See portion on "Constitutional Dictatorship", pp. 9-16 *supra*; ROSSITER, *supra* note 33, at 288-290.

2. Concentration of powers either in a single person or body
3. Expansion of power of government, in the form of increased arbitrariness or disregard for rights, incremental or sudden
4. Liberation from, or dismissal of normal constitutional or legal limitations
5. Invasion of civil, political or economic liberties

These criteria need not concur, although they normally do. Particularly, the three last enumerated criteria are inextricably linked and interdependent. One can only surmise that an increase in one factor, inevitably leads to the decrease of the other. A balloon as it expands with air inside, displaces the air surrounding it as it increases in size. “The crisis expansion of power is generally matched by a crisis contraction of liberty”.⁴³⁷ The existence of at least one factor will lead one to surmise that the government has adopted, consciously or unconsciously, an extraordinary stance or approach in dealing with a particular issue or crisis.

Judging by the abovementioned facts, and the foregoing criteria, these authors find no difficulty in preliminarily concluding that, indeed, the Philippines currently operates under a form of crisis government. The administration has, on more than one occasion and for varied reasons, declared the existence of a state of emergency, economic or otherwise, including rebellion. And each declaration thereof has invariably been followed by actions and measures of an extraordinary character, invasive, even violative of the rights of its citizens, as well as the powers of the legislature. On such occasions, the government has assumed powers, exceptional in nature, making full use of measures found not only within the text of the Constitution such as the calling out power, but also those traditionally considered inherent in and residual of her position as President and Commander-in-Chief. Independent organizations and impartial observers have recorded the human rights violations, as well as the decline of freedoms in this country. The Supreme Court itself acknowledged the occurrence of these events, in the case of *David v. Macapagal-Arroyo*⁴³⁸ and in the separate and dissenting opinions of various Justices in earlier cases. Unfortunately or otherwise, we cannot close our eyes to the facts blatantly before us, as objectively applied to the criteria we have delineated above. Perhaps a more accurate methodology or better measures for evaluation will be created in the future. Until then, we limit ourselves to this suggested framework, as sifted from the studies of other authors. And our framework has led us to this conclusion. The abovementioned criteria are intended to be applicable in any state context or setting. We hope that this framework of analysis will be helpful in the critical assessment of government actions and responses.

⁴³⁷ ROSSITER, *supra* note 33, at 10.

⁴³⁸ *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160 (2006)

The use and abuse of the military and emergency powers of government has become a persistent problem for us. Clearly, the limitations we currently have in place are insufficient. There is an urgent need for novel and creative solutions, and more effective constraints upon the immense powers of government. The Supreme Court, to our great relief, has momentarily responded by the promulgation of new rules intended “for the protection and enforcement of the constitutional rights of the people”,⁴³⁹ such as the new Rule on the Writ of Amparo⁴⁴⁰, the Rule on the Writ of Habeas Data⁴⁴¹, and the recently released “guidelines” laying down a rule of preference with respect to the imposition of penalties in libel cases.⁴⁴² These new Rules amply mitigate the effects of authoritarian measures. Our response need not be so limited. The ready and most obvious solution lies in the character of our leaders, who ideally would be endowed with profound thought, great moral fiber and a deep sense of responsibility. Another would be the composition of the legislature and, also the character of its members. The legislature provides a possibly effective bulwark against an overbearing executive, by ensuring that they always remain functional and operative, and by adapting the method of their operations to prevailing circumstances. A genuine and professional partnership between the executive and legislative branches of government may prove a better and more benign way of meeting crises and emergencies, rather than leaving to a single person all the powers and duties requisite even in such times. U.S. President Wilson’s administration may provide a good example, by his technique of legislative leadership and by the manner in which he always sought prior legislative authorization for any action he planned to undertake. Our own Constitution provides a ready source or legal basis for such a mechanism. For instance, Section 26(2), Article VI, expressly provides for an abbreviated legislative process, when the President certifies to the necessity of the immediate enactment of certain laws in order “to meet a public calamity or emergency”.⁴⁴³ Third, a revision of the Constitution may be in order. It might be good to place provisions which would provide more effective restrictions in the initiation and exercise of military and emergency powers. Note that the effectiveness of such restrictions does not necessarily lie in numbers. Alternatively, it is probably time to re-think the very nature of our emergency institutions. Emergency devices existing in other jurisdictions may be considered. For instance, the present German Constitution perhaps provides the most liberal provisions regarding the matter. In fact, the present German Constitution actually resembles the first of our fundamental laws, the Malolos Constitution. In emergency conditions, military and emergency powers are bestowed upon a multiple-member committee. Moreover, only certain explicitly specified provisions and guarantees may be suspended during the emergency. Moreover, a special law is required to be enacted to govern for the duration of the emergency. Fourth, appropriate

⁴³⁹ CONST. art. VIII, sec. 5(5)

⁴⁴⁰ The Rule on the Writ of Amparo, A.M. No. 07-9-12-SC (effective on October 24, 2007)

⁴⁴¹ The Rule on the Writ of Habeas Data, A.M. 08-1-16-SC (effective on February 2, 2008)

⁴⁴² Guidelines in the observance of a rule of preference in the imposition of penalties in libel cases, Administrative Circular No. 08-2008 (January 25, 2008)

⁴⁴³ CONST. art. VI, sec. 26(2)

legislation may be made, governing this aspect of presidential power, delimiting the specific effects and the proper actions of government agents and authorities for the duration of any crisis or emergency. Finally, and most important of all, citizens must remain vigilant and continue to protest immediately at any attempt to infringe their rights. “People should not be afraid of their governments, governments should be afraid of their people.”⁴⁴⁴

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⁴⁴⁴ Hugo Weaving as V in the film V for Vendetta produced by Alan and Larry Wachowski, a movie adaptation of the comic book V for Vendetta originally written and published in 1981 and created by Alan Moore (writer) and David Lloyd (artist).