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[G.R. No. 138570. October 10, 2000]

BAYAN (Bagong Alyansang Makabayan), JUNK VFA MOVEMENT, BISHOP TOMAS MILLAMENA (Iglesia Filipina Independiente), BISHOP ELMER BOLOCAN (United Church of Christ of the Phil.), DR. REYNALDO LEGASCA, MD, KILUSANG MAMBUBUKID NG PILIPINAS, KILUSANG MAYO UNO, GABRIELA, PROLABOR, and the PUBLIC INTEREST LAW CENTER, *petitioners, vs.* **EXECUTIVE SECRETARY RONALDO ZAMORA, FOREIGN AFFAIRS SECRETARY DOMINGO SIAZON, DEFENSE SECRETARY ORLANDO MERCADO, BRIG. GEN. ALEXANDER AGUIRRE, SENATE PRESIDENT MARCELO FERNAN, SENATOR FRANKLIN DRILON, SENATOR BLAS OPLE, SENATOR RODOLFO BIAZON, and SENATOR FRANCISCO TATAD,** *respondents.*

[G.R. No. 138572. October 10, 2000]

PHILIPPINE CONSTITUTION ASSOCIATION, INC.(PHILCONSA), EXEQUIEL B. GARCIA, AMADOGAT INCIONG, CAMILO L. SABIO, AND RAMON A. GONZALES, *petitioners, vs.* **HON. RONALDO B. ZAMORA, as Executive Secretary, HON. ORLANDO MERCADO, as Secretary of National Defense, and HON. DOMINGO L. SIAZON, JR., as Secretary of Foreign Affairs,** *respondents.*

[G.R. No. 138587. October 10, 2000]

TEOFISTO T. GUINGONA, JR., RAUL S. ROCO, and SERGIO R. OSMEÑA III, *petitioners, vs.* **JOSEPH E. ESTRADA, RONALDO B. ZAMORA, DOMINGO L. SIAZON, JR., ORLANDO B. MERCADO, MARCELO B. FERNAN, FRANKLIN M. DRILON,**

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BLAS F. OPLE and RODOLFO G. BIAZON, *respondents.*

[G.R. No. 138680. October 10, 2000]

INTEGRATED BAR OF THE PHILIPPINES, Represented by its National President, Jose Aguila Grapilon, *petitioners, vs.* **JOSEPH EJERCITO ESTRADA, in his capacity as President, Republic of the Philippines, and HON. DOMINGO SIAZON, in his capacity as Secretary of Foreign Affairs,** *respondents.*

[G.R. No. 138698. October 10, 2000]

JOVITO R. SALONGA, WIGBERTO TAÑADA, ZENAIDA QUEZON AVANCEÑA, ROLANDO SIMBULAN, PABLITO V. SANIDAD, MA. SOCORRO I. DIOKNO, AGAPITO A. AQUINO, JOKER P. ARROYO, FRANCISCO C. RIVERA JR., RENE A.V. SAGUISAG, KILOSBAYAN, MOVEMENT OF ATTORNEYS FOR BROTHERHOOD, INTEGRITY AND NATIONALISM, INC. (MABINI), *petitioners, vs.* **THE EXECUTIVE SECRETARY, THE SECRETARY OF FOREIGN AFFAIRS, THE SECRETARY OF NATIONAL DEFENSE, SENATE PRESIDENT MARCELO B. FERNAN, SENATOR BLAS F. OPLE, SENATOR RODOLFO G. BLAZON, AND ALL OTHER PERSONS ACTING THEIR CONTROL, SUPERVISION, DIRECTION, AND INSTRUCTION IN RELATION TO THE VISITING FORCES AGREEMENT (VFA),** *respondents.*

SYNOPSIS

The instant petitions for *certiorari* and prohibition assailed the agreement forged between the RP and the USA — THE VISITING FORCES AGREEMENT, which formalized, among others, the use of installations in the Philippine territory by the US military personnel to strengthen their defense and

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security relationship. On October 5, 1998, President Joseph E. Estrada ratified the VFA, and then transmitted to the Senate his letter of ratification and the VFA for concurrence pursuant to Section 21, Art. VII of the 1987 Constitution. The Senate subsequently approved the VFA by a 2/3 vote of its members.

From these consolidated petitions, petitioners — as legislators, non-governmental organizations, citizens and taxpayers — assailed the constitutionality of the VFA and imputed to respondents grave abuse of discretion in ratifying the agreement.

In dismissing the petition, the Supreme Court held: that at the outset, petitioners have no *locus standi* to bring the suit because they have not shown any interest in the case nor have they substantiated that they have sustained or will sustain direct injury as a result of the operation of the VFA; that as taxpayers, they have not established that the VFA involves the illegal disbursement of public funds raised by taxation; that whether the President referred the VFA to the Senate and the latter extended its concurrence under Section 21 , Article VII, or Section 25, Article XVIII, is immaterial, for in either case, the fundamental law is crystalline that the concurrence of the Senate is mandatory; that with regard to the ratification by the President of the VFA and the exercise by the Senate of its constitutional power to concur with the VFA, the Court, absent clear showing of grave abuse of discretion on the part of respondents, is without power to meddle with such affairs purely executive and legislative in character and nature; and that with the ratification of the VFA, which is equivalent to final acceptance and with the exchange of notes between the Philippines and the USA, it now becomes obligatory, under the principles of international law, to be bound by the terms of the agreement.

SYLLABUS

1. **REMEDIAL LAW; ACTIONS; REQUIREMENTS TO ALLOW A SUIT CHALLENGING THE CONSTITUTIONALITY OF A LAW, ACT OR STATUTE; PETITIONERS HAVE NO LEGAL STANDING TO ASSAIL THE LEGALITYOF THE VFA IN CASE AT BAR.** — A party bringing a suit challenging the constitutionality of a law, act, or statute must show "not only

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that the law is invalid, but also that he has sustained or is in immediate, or imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way." He must show that he has been, or is about to be, denied some right or privilege to which he is lawfully entitled, or that he is about to be subjected to some burdens or penalties by reason of the statute complained of. In the case before us, petitioners failed to show, to the satisfaction of this Court, that they have sustained, or are in danger of sustaining any direct injury as a result of the enforcement of the VFA. As taxpayers, petitioners have not established that the VFA involves the exercise by Congress of its taxing or spending powers. On this point, it bears stressing that a taxpayer's suit refers to a case where the act complained of directly involves the illegal disbursement of public funds derived from taxation... Clearly, inasmuch as no public funds raised by taxation are involved in this case, and in the absence of any allegation by petitioners that public funds are being misspent or illegally expended, petitioners, as taxpayers, have no legal standing to assail the legality of the VFA. Similarly, Representatives Wigberto Tañada, Agapito Aquino and Joker Arroyo, as petitioners-legislators, do not possess the requisite *locus standi* to maintain the present suit... [T]he allegations of impairment of legislative power, such as the delegation of the power of Congress to grant tax exemptions, are more apparent than real. While it may be true that petitioners pointed to provisions of the VFA which allegedly impair their legislative powers, petitioners failed however to sufficiently show that they have in fact suffered direct injury.

2. **POLITICAL LAW; INTERNATIONAL LAW; *PACTA SUNT SERVANDA*; EFFECT OF RP'S RATIFICATION OF THE VFA AND USA'S ACKNOWLEDGMENT OF THE VFA AS A TREATY; CASE AT BAR.** — The records reveal that the United States Government, through Ambassador Thomas C. Hubbard, has stated that the United States government has fully committed to living up to the terms of the VFA. For as long as the United States of America accepts or acknowledges the VFA as a treaty, and binds itself further to comply with its obligations under the treaty, there is indeed marked compliance with the mandate of the Constitution. Worth stressing too, is that the ratification, by the President, of the VFA and the concurrence of the Senate should be taken as a clear an

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unequivocal expression of our nation's consent to be bound by said treaty, with the concomitant duty to uphold the obligations and responsibilities embodied thereunder. With the ratification of the VFA, which is equivalent to final acceptance, and with the exchange of notes between the Philippines and the United States of America, it now becomes obligatory and incumbent on our part, under the principles of international law, to be bound by the terms of the agreement. Thus, no less than Section 2, Article II of the Constitution, declares that the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. While the international obligation devolves upon the state and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. As an integral part of the community of nations, we are responsible to assure that our government, Constitution and laws will carry out our international obligation... Article 26 of the convention provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This is known as the principle of *pacta sunt servanda* which preserves the sanctity of treaties and have been one of the most fundamental principles of positive international law, supported by the jurisprudence of international tribunals.

3. **CONSTITUTIONAL LAW; EXECUTIVE DEPARTMENT; POWER TO ENTER INTO TREATIES AND INTERNATIONAL AGREEMENTS IS VESTED IN THE PRESIDENT; CASE AT BAR.** — As regards the power to enter into treaties or international agreements, the Constitution vests the same in the President, subject only to the concurrence of at least two-thirds vote of all the members of the Senate. In this light, the negotiation of the VFA and the subsequent ratification of the agreement are exclusive acts which pertain solely to the President, in the lawful exercise of his vast executive and diplomatic powers granted him no less than by the fundamental law itself. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.*

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Consequently, the acts or judgment calls of the President involving the VFA— specifically the acts of ratification and entering into a treaty and those necessary or incidental to the exercise of such principal acts — squarely fall within the sphere of his constitutional powers and thus, may not be validly struck down, much less calibrated by this Court, in the absence of clear showing of grave abuse of power or discretion.

4. **REMEDIAL LAW; *CERTIORARI*; GRAVE ABUSE OF DISCRETION; ACT OF THE PRESIDENT IN SUBMITTING THE VFA TO THE SENATE FOR CONCURRENCE UNDER SECTION 21 OF ARTICLE VII, INSTEAD OF SECTION 25 OF ARTICLE XVIII OF THE CONSTITUTION, NOT A CASE OF.** — It is the Court's considered view that the President, in ratifying the VFA and in submitting the same to the Senate for concurrence, acted within the confines and limits of the powers vested in him by the Constitution. It is of no moment that the President, in the exercise of his wide latitude of discretion and in the honest belief that the VFA falls within the ambit of Section 21, Article VII of the Constitution, referred the VFA to the Senate for concurrence under the aforementioned provision. Certainly, no abuse of discretion, much less a grave, patent and whimsical abuse of judgment, may be imputed to the President in his act of ratifying the VFA and referring the same to the Senate for the purpose of complying with the concurrence requirement embodied in the fundamental law. In doing so, the President merely performed a constitutional task and exercised a prerogative that chiefly pertains to the functions of his office. Even if he erred in submitting the VFA to the Senate for concurrence under the provisions of Section 21 of Article VII, instead of Section 25 of Article XVIII of the Constitution, still, the President may not be faulted or scarred, much less be adjudged guilty of committing an abuse of discretion in some patent, gross, and capricious manner.

5. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; TREATY-CONCURRING POWER OF THE SENATE PERTAINS TO THE WISDOM OF AN ACT WHICH IS BEYOND THE PROVINCE OF THE COURTS TO INQUIRE.** — As to the power to concur with treaties, the constitution lodges the same with the Senate alone. Thus, once the Senate performs that power, or exercises its prerogative within the boundaries prescribed by the Constitution, the concurrence

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manner, be viewed to constitute an abuse of power, much less grave abuse thereof. Corollarily, the Senate, in the exercise of its discretion and acting within the limits of such power, may not be similarly faulted for having simply performed a task conferred and sanctioned by no less than the fundamental law. For the role of the Senate in relation to treaties is essentially legislative in character; the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of *separation of powers* and of *checks and balances* alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation's pursuit of political maturity and growth. True enough, rudimentary is the principle that matters pertaining to the wisdom of a legislative act are beyond the ambit and province of the courts to inquire.

PUNO, *J., dissenting:*

1. **CONSTITUTIONAL LAW; SEC. 25, ART. XVIII THEREOF; TREATY ALLOWING PRESENCE OF MILITARY BASES, TROOPS AND FACILITIES SHOULD ALSO BE "RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING PARTY."** — ... Sec. 25, Art. XVIII of the Constitution requires that the treaty allowing the presence of foreign military bases, troops, and facilities should also be "recognized as a treaty by the other contracting party." In plain language, *recognition of the United States as the other contracting party of the VFA should be by the U.S. President with the advice and consent of the U.S. Senate.*

2. **ID; ID; ID; TREATY AND EXECUTIVE AGREEMENT IN U.S. PRACTICE, DISTINGUISHED; THE VFA IS MORE AKIN TO A SOLE OR PRESIDENTIAL EXECUTIVE AGREEMENT.** — *... In U.S. practice, a "treaty" is only one of four types of international agreements, namely: Article II treaties, executive*

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agreements pursuant to a treaty, congressional-executive agreements, and sole executive agreements. The term "executive agreement" is used both colloquially and in scholarly and governmental writings as a convenient catch-all to subsume all international agreements intended to bind the United States and another government, other than those which receive consent of two-thirds of the U.S. Senate. *The U.S. Constitution does not expressly confer authority to make these executive agreements*, hence the authority to make them, their scope, and legal force have been the subject of a long-ongoing debate... *At best, the VFA would be more akin to a sole or presidential executive agreement which would be valid if concluded on the basis of the U.S. President's exclusive power under the U.S. Constitution... While treaties and sole executive agreements have the same legal effect on state law, sole executive agreements pale in comparison to treaties when pitted against prior inconsistent acts of Congress.* [C]ommentators have been in general agreement that unlike treaties, *sole executive agreements cannot prevail over prior inconsistent federal legislation.*

3. **ID.; ID.; ID.; VFA, AS A SOLE EXECUTIVE AGREEMENT UNDER U.S. LAW, FALLS SHORT OF THE CONSTITUTIONAL REQUIREMENT SET THEREIN ALLOWING PRESENCE OF U.S. TROOPS IN PHILIPPINE SOIL.** — *In conclusion,* after a macro view of the landscape of U.S. foreign relations *vis-a-vis* U.S. constitutional law, with special attention on the legal status of sole executive agreements, *I respectfully submit that the Court will be standing on unstable ground if it places a sole executive agreement like the VFA on the same constitutional plateau as a treaty. Questions remain and the debate continues on the constitutional basis as well as the legal effects of sole executive agreements under U.S. law.* The observation of Louis Henkin, a noted international and U.S. constitutional law scholar, captures the sentiments of the framers of the Philippine Constitution and of the Filipinos in crafting Sec. 25, Art. XVIII of the 1987 Constitution — "(o)ften the treaty process will be used at the insistence of other parties to an agreement because they believe that a treaty has greater 'dignity' than an executive agreement, because its constitutional effectiveness is beyond doubt, because a treaty will 'commit' the Senate and the people of the United States and make its subsequent abrogation or

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violation less likely." *With the cloud of uncertainty still hanging on the exact legal force of sole executive agreements under U.S. constitutional law, this Court must strike a blow for the sovereignty of our country by drawing a bright line between the dignity and status of a treaty in contrast with a sole executive agreement. However we may wish it, the VFA, as a sole executive agreement, cannot climb to the same lofty height that the dignity of a treaty can reach. Consequently, it falls short of the requirement set by Sec. 25, Art. XVIII of the 1987 Constitution that the agreement allowing the presence of foreign military troops on Philippine soil must be "recognized as a treaty by the other contracting state."*

APPEARANCES OF COUNSEL

Romeo B. Igot and *Victoria G. delos Reyes* for petitioner in G.R. No. 138680.

Eulogia M. Cueva for petitioner IBP.

Ramon A. Gonzales for PHILCONSA.

Wigberto E. Tañada and *Lorenzo Tañada III* for petitioners Jovito R. Salonga, Wigberto E. Tañada, Sr., Agapito A. Aquino, Joker P. Arroyo, and Rene A.V. Saguisag.

Theodore O. Te for petitioners Avanceña, Simbulan, Sanidad, Diokno and Rivera, Jr.

D E C I S I O N

BUENA, *J.*:

Confronting the Court for resolution in the instant consolidated petitions for *certiorari* and prohibition are issues relating to, and borne by, an agreement forged in the turn of the last century between the Republic of the Philippines and the United States of America — the Visiting Forces Agreement.

The antecedents unfold.

On March 14, 1947, the Philippines and the United States of America forged a Military Bases Agreement which formalized, among others, the use of installations in the Philippine territory by United States military personnel. To further strengthen their

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defense and security relationship, the Philippines and the United States entered into a Mutual Defense Treaty on August 30, 1951. Under the treaty, the parties agreed to respond to any external armed attack on their territory, armed forces, public vessels, and aircraft.[1]

In view of the impending expiration of the RP-US Military Bases Agreement in 1991, the Philippines and the United States negotiated for a possible extension of the military bases agreement. On September 16, 1991, the Philippine Senate rejected the proposed RP-US Treaty of Friendship, Cooperation and Security which, in effect, would have extended the presence of US military bases in the Philippines.[2] With the expiration of the RP-US Military Bases Agreement, the periodic military exercises conducted between the two countries were held in abeyance. Notwithstanding, the defense and security relationship between the Philippines and the United States of America continued pursuant to the Mutual Defense Treaty.

On July 18, 1997, the United States panel, headed by US Defense Deputy Assistant Secretary for Asia Pacific Kurt Campbell, met with the Philippine panel, headed by Foreign Affairs Undersecretary Rodolfo Severino Jr., to exchange notes on "the complementing strategic interests of the United States and the Philippines in the Asia-Pacific region." Both sides discussed, among other things, the possible elements of the Visiting Forces Agreement (VFA for brevity). Negotiations by both panels on the VFA led to a consolidated draft text, which in turn resulted to a final series of conferences and negotiations[3] that culminated in Manila on January 12 and 13,

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[1] *Article V.* Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measure necessary to restore and maintain international peace and security.

[2] Joint Report of the Senate Committee on Foreign Relation and the Committee on National Defense and Security on the Visiting Forces Agreement.

[3] Joint Committee Report.

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1998. Thereafter, then President Fidel V. Ramos approved the VFA, which was respectively signed by public respondent Secretary Siazon and Unites States Ambassador Thomas Hubbard on February 10, 1998.

On October 5, 1998, President Joseph E. Estrada, through respondent Secretary of Foreign Affairs, ratified the VFA.[4]

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[4] Petition, G.R. No. 138698, Annex "B", *Rollo*, pp. 61-62.

"INSTRUMENT OF RATIFICATION

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

KNOW YE, that whereas, the Agreement between the government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of the United States Armed Forces Visiting the Philippines, hereinafter referred to as VFA, was signed in Manila on 10 February 1998;

WHEREAS, the VFA is essentially a framework to promote bilateral defense cooperation between the Republic of the Philippines and the United States of America and to give substance to the 1951 RP-US Mutual Defense Treaty (RP-US MDT). To fulfill the objectives of the RP-US MDT, it is necessary that regular joint military exercises are conducted between the Republic of the Philippines and the United States of America;

WHEREAS, the VFA seeks to provide a conducive setting for the successful conduct of combined military exercises between the Philippines and the United States armed forces to ensure interoperability of the RP-US MDT;

WHEREAS, in particular, the VFA provides the mechanism for regulating the circumstances and conditions under which US armed forces and defense personnel may be present in the Philippines such as the following *inter alia*:

(a) specific requirements to facilitate the admission of United States personnel and their departure from the Philippines in connection with activities covered by the agreement;

(b) clear guidelines on the prosecution of offenses committed by any member of the United States armed forces while in the Philippines;

(c) precise directive on the importation and exportation of United States Government equipment, materials, supplies and other property imported into or acquired in the Philippines by or on behalf of the United States armed forces in connection with activities covered by the Agreement; and

(d) explicit regulations on the entry of United States vessels, aircraft, and vehicles;

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On October 6, 1998, the President, acting through respondent Executive Secretary Ronaldo Zamora, officially transmitted to the Senate of the Philippines,[5] the Instrument of Ratification, the letter of the President[6] and the VFA, for concurrence pursuant to Section 21, Article VII of the 1987 Constitution. The Senate, in turn, referred the VFA to its Committee on Foreign Relations,

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WHEREAS, Article IX of the Agreement provides that it shall enter into force on the date on which the Parties have notified each other in writing, through diplomatic channels, that they have completed their constitutional requirements for its entry into force. It shall remain in force until the expiration of 180 days from the date on which either Party gives the other party written notice to terminate the Agreement.

NOW, THEREFORE, be it known that I, JOSEPH EJERCITO ESTRADA, President of the Republic of the Philippines, after having seen and considered the aforementioned Agreement between the Government of the United States of America Regarding the Treatment of the United States Armed Forces Visiting the Philippines, do hereby ratify and confirm the same and each and every Article and Clause thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

GIVEN under my hand at the City of Manila, this 5th day of October, in the year of Ou Lord one thousand nine hundred and ninty-eight."

[5] Petition, G.R. No. 138587, Annex "C", *Rollo*, p. 59.

The Honorable Senate President and
Member of the Senate of the Philippines
Pasay City

Gentlemen and Ladies of the Senate:

I have the honor to transmit herewith the Instrument of Ratification duly signed by H.E. President Joseph Ejercito Estrada, his message to the Senate and a draft Senate Resolution of Concurrence in connection with the ratification of the AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA REGARDING THE TREATMENT OF THE UNITED STATES ARMED FORCES VISITING THE PHILIPPINES.

With best wishes.

Very truly yours,
RONALDO B. ZAMORA
Executive Secretary

[6] Petition, G.R. No. 138698, Annex "C".

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chaired by Senator Blas F. Ople, and its Committee on National Defense and Security, chaired by Senator Rodolfo G. Biazon, for their joint consideration and recommendation. Thereafter, joint public hearings were held by the two Committees.[7]

On May 3, 1999, the Committees submitted Proposed Senate Resolution No. 443[8] recommending the concurrence of the Senate

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[7] Between January 26 and March 11, 1999, the two Committees jointly held six public hearings three in Manila and one each in General Santos, Angeles City and Cebu City.

[8] Petition, G.R. No. 138570, Annex "C", *Rollo*, pp. 88-95.

"WHEREAS, the VFA is essentially a framework for promoting the common security interest of the two countries; and for strengthening their bilateral defense partnership under the 1951 RP-US Mutual Defense Treaty;

"x x x x x x x x x

"WHEREAS, the VFA does not give unrestricted access or unhampered movement to US Forces in the Philippines; in fact, it recognizes the Philippine government as the sole authority to approve the conduct of any visit or activity in the country by US Forces, hence the VFA is not a derogation of Philippine sovereignty;

"WHEREAS, the VFA is not a basing arrangement; neither does it pave way for the restoration of the American bases and facilities in the Philippines, in contravention of the prohibition against foreign bases and permanent stationing of foreign troops under Article XVIII, Section 25 of the 1987 Constitution because the agreement envisions only temporary visits of US personnel engaged in joint military exercises or other activities as may be approved by the Philippine Government;

"WHEREAS, the VFA gives Philippine courts primary jurisdiction over offenses that may be committed by US personnel within Philippine territory, with the exception of those incurred solely against the security or property of the Us or solely against the person or property of US personnel, and those committed in the performance of official duty;

"x x x x x x x x x

"WHEREAS, by virtue of Article II of the VFA, the United States commits to respect the laws of the Republic of the Philippines, including the Constitution, which declares in Article II, Section 8 thereof, a policy of freedom from nuclear weapons consistent with the national interest;

"WHEREAS, the VFA shall serve as the legal mechanism to promote defense cooperation between two countries — enhancing the preparedness of the Armed Forces of the Philippines against external threats; and enabling the Philippines to bolster the stability of the Pacific area in a shared effort with its neighbor-states;

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to the VFA and the creation of a Legislative Oversight Committee to oversee its implementation. Debates then ensued.

On May 27, 1999, Proposed Senate Resolution No. 443 was approved by the Senate, by a two-thirds (2/3) vote[9] of its

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"WHEREAS, the VFA will enhance our political, economic and security partnership and cooperation with the United States which has helped promote the development of our country and improved the lives of our people;

"WHEREAS, in accordance with the powers and functions of Senate as mandated by the Constitution, this Chamber, after holding several public hearings and deliberations, concurs in the President's ratification of the VFA, for the following reasons:

(1) The Agreement will provide the legal mechanism to promote defense cooperation between the Philippines and the U.S. and thus enhance the tactical, strategic, and technological capabilities of our armed forces;

(2) The Agreement will govern the treatment of U.S., military and defense personnel within Philippine territory, while they are engaged in activities covered by the Mutual Defense Treaty and conducted with the prior approval of the Philippine government; and

(3) The Agreement will provide the regulatory mechanism for the circumstances and conditions under which U.S. military forces may visit the Philippines; x x x

"x x x x x x x x x

"WHEREAS, in accordance with Article IX of the VFA, the Philippine government reserves the right to terminate the agreement unilaterally once it no longer redounds to our national interest: Now, therefore, be it

"Resolved, that the Senate concur, as it hereby concurs, in the Ratification of the Agreement between the Government of the Republic of the Philippines and the United States of America Regarding the Treatment of United States Armed Forces visiting the Philippines.x x x"

[9] The following voted for concurrence: (1) Senate President Marcelo Fernan, (2) Senate President *Pro Tempore* Blas Ople, (3) Senator Franklin Drilon, (4) Senator Rodolfo Biazon, (5) Senator Francisco Tatad, (6) Senator Renato Cayetano, (7) Senator Teresa Aquino-Oreta, (8) Senator Robert Barbers (9) Senator Robert Jaworski (10) Senator Ramon Magsaysay, Jr., (11) Senator John Osmeña, (12) Senator Juan Flavier, (13) Senator Miriam Defensor-Santiago, (14) Senator Juan Ponce Enrile, (15) Senator Vicente Sotto III, (16) Senator Ramon Revilla, (17) Senator Anna Dominique Coseteng, and (18) Senator Gregorio Honasan.

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members. Senate Resolution No. 443 was then re-numbered as Senate Resolution No. 18.[10]

On June 1, 1999, the VFA officially entered into force after an Exchange of Notes between respondent Secretary Siazon and United States Ambassador Hubbard.

The VFA, which consists of a Preamble and nine (9) Articles, provides for the mechanism for regulating the circumstances and conditions under which US Armed Forces and defense personnel maybe present in the Philippines, and is quoted in its full text, hereunder:

"Article I
Definitions

"As used in this Agreement, 'United States personnel' means United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippine Government.

"Within this definition:

"1. The term 'military personnel' refers to military members of the United States Army, Navy, Marine Corps, Air Force, and Coast Guard.

"2. The term 'civilian personnel' refers to individuals who are neither nationals of, nor ordinary residents in the Philippines and who are employed by the United States armed forces or who are accompanying the United States armed forces, such as employees of the American Red Cross and the United Services Organization.

"Article II
Respect for Law

"It is the duty of the United States personnel to respect the laws of the Republic of the Philippines and to abstain from any activity inconsistent with the spirit of this-agreement, and, in particular, from any political activity in the Philippines. The Government of the United States shall take all measures within its authority to ensure that this is done.

Only the following voted to reject the ratification of the VFA: (1) Senator Teofisto Guingona, Jr., (2) Senator Raul Roco, (3) Senator Sergio Osmeña III, (4) Senator Aquilino Pimentel, Jr., and (5) Senator Loren Legarda-Leviste.

[10] See Petition. G.R. No. 138570, *Rollo*, pp. 105.

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"Article III
Entry and Departure

"1. The Government of the Philippines shall facilitate the admission of United States personnel and their departure from the Philippines in connection with activities covered by this agreement.

"2. United States military personnel shall be exempt from passport and visa regulations upon entering and departing the Philippines.

"3. The following documents only, which shall be presented on demand, shall be required in respect of United States military personnel who enter the Philippines:

"(a) personal identity card issued by the appropriate United States authority showing full name, date of birth, rank or grade and service number (if any), branch of service and photograph;

"(b) individual or collective document issued by the appropriate United States authority, authorizing the travel or visit and identifying the individual or group as United States military personnel; and

"(c) the commanding officer of a military aircraft or vessel shall present a declaration of health, and when required by the cognizant representative of the Government of the Philippines, shall conduct a quarantine inspection and will certify that the aircraft or vessel is free from quarantinable diseases. Any quarantine inspection of United States aircraft or United States vessels or cargoes thereon shall be conducted by the United States commanding officer in accordance with the international health regulations as promulgated by the World Health Organization, and mutually agreed procedures.

"4. United States civilian personnel shall be exempt from visa requirements but shall present, upon demand, valid passports upon entry and departure of the Philippines

"5. If the Government of the Philippines has requested the removal of any United States personnel from its territory, the United States authorities shall be responsible for receiving the person concerned within its own territory or otherwise disposing of said person outside of the Philippines.

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"Article IV
Driving and Vehicle Registration

1. Philippine authorities shall accept as valid, without test or fee, a driving permit or license issued by the appropriate United States authority to United States personnel for the operation of military or official vehicles.

2. Vehicles owned by the Government of the United States need not be registered, but shall have appropriate markings.

"Article V
Criminal Jurisdiction

1. Subject to the provisions of this article:

   (a) Philippine authorities shall have jurisdiction over United States personnel with respect to offenses committed within the Philippines and punishable under the law of the Philippines.

   (b) United States military authorities shall have the right to exercise within the Philippines all criminal and disciplinary jurisdiction conferred on them by the military law of the United States over United States personnel in the Philippines.

2. (a) Philippine authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the Philippines, punishable under the laws of the Philippines, but not under the laws of the United States.

   (b) United States authorities exercise exclusive jurisdiction over United States personnel with respect to offenses, including offenses relating to the security of the United States, punishable under the laws of the United States, but not under the laws of the Philippines.

   (c) For the purposes of this paragraph and paragraph 3 of this article, an offense relating to security means:

      (1) treason;

      (2) sabotage, espionage or violation of any law relating to national defense.

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"3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

(a) Philippine authorities shall have the primary right to exercise jurisdiction over all offenses committed by United States personnel, except in cases provided for in paragraphs 1(b), 2(b), and 3(b) of this Article.

(b) United States military authorities shall have the primary right to exercise jurisdiction over United States personnel subject to the military law of the United States in relation to.

(1) offenses solely against the property or security of the United States or offenses solely against the property or person of United States personnel; and

(2) offenses arising out of any act or omission done in performance of official duty.

(c) The authorities of either government may request the authorities of the other government to waive their primary right to exercise jurisdiction in a particular case.

(d) Recognizing the responsibility of the United States military authorities to maintain good order and discipline among their forces, Philippine authorities will, upon request by the United States, waive their primary right to exercise jurisdiction except in cases of particular importance to the Philippines. If the Government of the Philippines determines that the case is of particular importance, it shall communicate such determination to the United States authorities within twenty (20) days after the Philippine authorities receive the United States request.

(e) When the United States military commander determines that an offense charged by authorities of the Philippines against United States personnel arises out of an act or omission done in the performance of official duty, the commander will issue a certificate setting forth such determination. This certificate will be transmitted to the appropriate authorities of the Philippines and will constitute sufficient proof of performance of official

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duty for the purposes of paragraph 3(b)(2) of this Article. In those cases where the Government of the Philippines believes the circumstances of the case require a review of the duty certificate, United States military authorities and Philippine authorities shall consult immediately. Philippine authorities at the highest levels may also present any information bearing on its validity. United States military authorities shall take full account of the Philippine position. Where appropriate, United States military authorities will take disciplinary or other action against offenders in official duty cases, and notify the Government of the Philippines of the actions taken.

(f) If the government having the primary right does not exercise jurisdiction, it shall notify the authorities of the other government as soon as possible.

(g) The authorities of the Philippines and the United States shall notify each other of the disposition of all cases in which both the authorities of the Philippines and the United States have the right to exercise jurisdiction.

"4. Within the scope of their legal competence, the authorities of the Philippines and United States shall assist each other in the arrest of United States personnel in the Philippines and in handling them over to authorities who are to exercise jurisdiction in accordance with the provisions of this article.

"5. United States military authorities shall promptly notify Philippine authorities of the arrest or detention of United States personnel who are subject of Philippine primary or exclusive jurisdiction. Philippine authorities shall promptly notify United States military authorities of the arrest or detention of any United States personnel.

"6. The custody of any United States personnel over whom the Philippines is to exercise jurisdiction shall immediately reside with United States military authorities, if they so request, from the commission of the offense until completion of all judicial proceedings. United States military authorities shall, upon formal notification by the Philippine authorities and without delay, make such personnel available to those authorities in time for any investigative or judicial proceedings relating to the offense

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with which the person has been charged in extraordinary cases, the Philippine Government shall present its position to the United States Government regarding custody, which the United States Government shall take into full account. In the event Philippine judicial proceedings are not completed within one year, the United States shall be relieved of any obligations under this paragraph. The one-year period will not include the time necessary to appeal. Also, the one-year period will not include any time during which scheduled trial procedures are delayed because United States authorities, after timely notification by Philippine authorities to arrange for the presence of the accused, fail to do so.

"7. Within the scope of their legal authority, United States and Philippine authorities shall assist each other in the carrying out of all necessary investigation into offenses and shall cooperate in providing for the attendance of witnesses and in the collection and production of evidence, including seizure and, in proper cases, the delivery of objects connected with an offense.

"8. When United States personnel have been tried in accordance with the provisions of this Article and have been acquitted or have been convicted and are serving, or have served their sentence, or have had their sentence remitted or suspended, or have been pardoned, they may not be tried again for the same offense in the Philippines. Nothing in this paragraph, however, shall prevent United States military authorities from trying United States personnel for any violation of rules of discipline arising from the act or omission which constituted an offense for which they were tried by Philippine authorities.

"9. When United States personnel are detained, taken into custody, or prosecuted by Philippine authorities, they shall be accorded all procedural safeguards established by the law of the Philippines. At the minimum, United States personnel shall be entitled:

(a) To a prompt and speedy trial;
(b) To be informed in advance of trial of the specific charge or charges made against them and to have reasonable time to prepare a defense;
(c) To be confronted with witnesses against them and to cross examine such witnesses;

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(d) To present evidence in their defense and to have compulsory process for obtaining witnesses;
(e) To have free and assisted legal representation of their own choice on the same basis as nationals of the Philippines;
(f) To have the service of a competent interpreter; and
(g) To communicate promptly with and to be visited regularly by United States authorities, and to have such authorities present at all judicial proceedings. These proceedings shall be public unless the court, in accordance with Philippine laws, excludes persons who have no role in the proceedings.

"10. The confinement or detention by Philippine authorities of United States personnel shall be carried out in facilities agreed on by appropriate Philippine and United States authorities. United States Personnel serving sentences in the Philippines shall have the right to visits and material assistance.

"11. United States personnel shall be subject to trial only in Philippine courts of ordinary jurisdiction, and shall not be subject to the jurisdiction of Philippine military or religious courts.

"Article VI
Claims

"1. Except for contractual arrangements, including United States foreign military sales letters of offer and acceptance and leases of military equipment, both governments waive any and all claims against each other for damage, loss or destruction to property of each other's armed forces or for death or injury to their military and civilian personnel arising from activities to which this agreement applies.

"2. For claims against the United States, other than contractual claims and those to which paragraph 1 applies, the United States Government, in accordance with United States law regarding foreign claims, will pay just and reasonable compensation in settlement of meritorious claims for damage, loss, personal injury or death, caused by acts or omissions of United States personnel, or otherwise incident to the non-combat activities of the United States forces.

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"Article VII
Importation and Exportation

"1. United States Government equipment, materials, supplies, and other property imported into or acquired in the Philippines by or on behalf of the United States armed forces in connection with activities to which this agreement applies, shall be free of all Philippine duties, taxes and other similar charges. Title to such property shall remain with the United States, which may remove such property from the Philippines at any time, free from export duties, taxes, and other similar charges. The exemptions provided in this paragraph shall also extend to any duty, tax, or other similar charges which would otherwise be assessed upon such property after importation into, or acquisition within, the Philippines. Such property may be removed from the Philippines, or disposed of therein, provided that disposition of such property in the Philippines to persons or entities not entitled to exemption from applicable taxes and duties shall be subject to payment of such taxes, and duties and prior approval of the Philippine Government.

"2. Reasonable quantities of personal baggage, personal effects, and other property for the personal use of United States personnel may be imported into and used in the Philippines free of all duties, taxes and other similar charges during the period of their temporary stay in the Philippines. Transfers to persons or entities in the Philippines not entitled to import privileges may only be made upon prior approval of the appropriate Philippine authorities including payment by the recipient of applicable duties and taxes imposed in accordance with the laws of the Philippines. The exportation of such property and of property acquired in the Philippines by United States personnel shall be free of all Philippine duties, taxes, and other similar charges.

"Article VIII
Movement of Vessels and Aircraft

"1. Aircraft operated by or for the United States armed forces may enter the Philippines upon approval of the Government of the Philippines in accordance with procedures stipulated in implementing arrangements.

"2. Vessels operated by or for the United States armed forces may enter the Philippines upon approval of the Government of the

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Philippines. The movement of vessels shall be in accordance with international custom and practice governing such vessels, and such agreed implementing arrangements as necessary.

"3. Vehicles, vessels, and aircraft operated by or for the United States armed forces shall not be subject to the payment of landing or port fees, navigation or over flight charges, or tolls or other use charges, including light and harbor dues, while in the Philippines. Aircraft operated by or for the United States armed forces shall observe local air traffic control regulations while in the Philippines. Vessels owned or operated by the United States solely on United States Government non-commercial service shall not be subject to compulsory pilotage at Philippine ports.

"Article IX
Duration and Termination

"This agreement shall enter into force on the date on which the parties have notified each other in writing through the diplomatic channel that they have completed their constitutional requirements for entry into force. This agreement shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement."

Via these consolidated[11] petitions for *certiorari* and prohibition, petitioners — as legislators, non-governmental organizations, citizens and taxpayers — assail the constitutionality of the VFA and impute to herein respondents grave abuse of discretion in ratifying the agreement.

We have simplified the issues raised by the petitioners into the following:

I

Do petitioners have legal standing as concerned citizens, taxpayers, or legislators to question the constitutionality of the VFA?

II

Is the VFA governed by the provisions of Section 21, Article VII or of Section 25, Article XVIII of the Constitution?

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[11] Minute Resolution dated June 8, 1999.

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III

Does the VFA constitute an abdication of Philippine sovereignty?

a. Are Philippine courts deprived of their jurisdiction to hear and try offenses committed by US military personnel?

b. Is the Supreme Court deprived of its jurisdiction over offenses punishable by reclusion perpetua or higher?

IV

Does the VFA violate:

a. the equal protection clause under Section 1, Article III of the Constitution?

b. the prohibition against nuclear weapons under Article II, Section 8?

c. Section 28 (4), Article VI of the Constitution granting the exemption from taxes and duties for the equipment, materials, supplies and other properties imported into or acquired in the Philippines by, or on behalf, of the US Armed Forces?

LOCUS STANDI

At the outset, respondents challenge petitioners' standing to sue, on the ground that the latter have not shown any interest in the case, and that petitioners failed to substantiate that they have sustained, or will sustain direct injury as a result of the operation of the VFA.[12] Petitioners, on the other hand, counter that the validity or invalidity of the VFA is a matter of transcendental importance which justifies their standing.[13]

A party bringing a suit challenging the constitutionality of a law, act, or statute must show "not only that the law is invalid, but also that he has sustained or is in immediate, or imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way." He must show that he has been, or is about

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[12] See Consolidated Comment.

[13] Reply to Consolidated Comment, G.R.No. 138698; G.R.No. 138587.

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to be, denied some right or privilege to which he is lawfully entitled, or that he is about to be subjected to some burdens or penalties by reason of the statute complained of.[14]

In the case before us, petitioners failed to show, to the satisfaction of this Court, that they have sustained, or are in danger of sustaining any direct injury as a result of the enforcement of the VFA. As taxpayers, petitioners have not established that the VFA involves the exercise by Congress of its taxing or spending powers.[15] On this point, it bears stressing that a taxpayer's suit refers to a case where the act complained of directly involves the illegal disbursement of public funds derived from taxation.[16] Thus, in *Bugnay Const. & Development Corp. vs. Laron*,[17] we held:

"x x x it is exigent that the taxpayer-plaintiff sufficiently show that he would be benefited or injured by the judgment or entitled to the avails of the suit as a real party in interest. Before he can invoke the power of judicial review, he must specifically prove that he has sufficient interest in preventing the illegal expenditure of money raised by taxation and that he will sustain a direct injury as a result of the enforcement of the questioned statute or contract. It is not sufficient that he has merely a general interest common to all members of the public."

Clearly, inasmuch as no public funds raised by taxation are involved in this case, and in the absence of any allegation by petitioners that public funds are being misspent or illegally

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[14] *Valmonte vs. Philippine Charity Sweepstakes Office*, (Res.) G.R. No. 78716, September 22, 1987, cited in *Telecommunications and Broadcast Attorneys of the Philippines, Inc. vs. COMELEC*, 289 SCRA 337, 343 [1998]; *Valley Forge College vs. Americans United*, 454 US 464, 70 L. Ed. 2d 700 [1982]; *Bugnay Const. and Dev. Corp. vs. Laron*, 176 SCRA 240, 251-252 [1989]; *Tatad vs. Garcia, Jr.*, 243 SCRA 436, 473 [1995].

[15] See Article VI, Sections 24, 25 and 29 of the 1987 Constitution.

[16] *Pascual vs. Secretary of Public Works*, 110 Phil. 331 [1960]; *Maceda vs. Macaraig*, 197 SCRA 771 [1991]; *Lozada vs. COMELEC*, 120 SCRA 337 [1983]; *Dumlao vs. COMELEC*, 95 SCRA 392 [1980]; *Gonzales vs. Marcos*, 65 SCRA 624 [1975].

[17] 176 SCRA 240, 251-252 [1989].

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expended, petitioners, as taxpayers, have no legal standing to assail the legality of the VFA.

Similarly, Representatives Wigberto Tañada, Agapito Aquino and Joker Arroyo, as petitioners-legislators, do not possess the requisite *locus standi* to maintain the present suit. While this Court, in *Phil. Constitution Association vs. Hon. Salvador Enriquez*,[18] sustained the legal standing of a member of the Senate and the House of Representatives to question the validity of a presidential veto or a condition imposed on an item in an appropriation bill, we cannot, at this instance, similarly uphold petitioners' standing as members of Congress, in the absence of a clear showing of any direct injury to their person or to the institution to which they belong.

Beyond this, the allegations of impairment of legislative power, such as the delegation of the power of Congress to grant tax exemptions, are more apparent than real. While it may be true that petitioners pointed to provisions of the VFA which allegedly impair their legislative powers, petitioners failed however to sufficiently show that they have in fact suffered direct injury.

In the same vein, petitioner Integrated Bar of the Philippines (IBP) is stripped of standing in these cases. As aptly observed by the Solicitor General, the IBP lacks the legal capacity to bring this suit in the absence of a board resolution from its Board of Governors authorizing its National President to commence the present action.[19]

Notwithstanding, in view of the paramount importance and the constitutional significance of the issues raised in the petitions, this Court, in the exercise of its sound discretion, brushes aside the procedural barrier and takes cognizance of the petitions, as we have done in the early *Emergency Powers Cases*,[20] where we had occasion to rule:

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[18] 235 SCRA 506 [1994]

[19] Consolidated Memorandum, p. 11.

[20] *Araneta vs. Dinglasan*, 84 Phil. 368 [1949]; *Iloilo Palay & Corn Planters Association vs. Feliciano*, 121 Phil. 358 [1965]; *Philippine Constitution Association vs. Gimenez*, 122 Phil. 894 [1965].

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"x x x ordinary citizens and taxpayers were allowed to question the constitutionality of several executive orders issued by President Quirino although they were involving only an indirect and general interest shared in common with the public. The Court dismissed the objection that they were not proper parties and ruled that *'transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside, if we must, technicalities of procedure'* We have since then applied the exception in many other cases. (*Association of Small Landowners in the Philippines, Inc. v. Sec. of Agrarian Reform,* 175 SCRA 343)." (Italics Supplied)

This principle was reiterated in the subsequent cases of *Gonzales vs. COMELEC,*[21] *Daza vs. Singson,*[22] and *Basco vs. Phil. Amusement and Gaming Corporation,*[23] where we emphatically held:

"Considering however the importance to the public of the case at bar, and in keeping with the Court's duty, under the 1987 Constitution, to determine whether or not the other branches of the government have kept themselves within the limits of the Constitution and the laws and that they have not abused the discretion given to them, the Court has brushed aside technicalities of procedure and has taken cognizance of this petition. x x x"

Again, in the more recent case of *Kilosbayan vs. Guingona, Jr.,*[24] this Court ruled that in cases of transcendental importance, *the Court may relax the standing requirements and allow a suit to prosper even where there is no direct injury to the party claiming the right of judicial review.*

Although courts generally avoid having to decide a constitutional question based on the doctrine of separation of powers, which enjoins upon the departments of the government

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[21] 21 SCRA 774 [1967].

[22] 180 SCRA 496, 502 [1988] cited in *Kilosbayan, Inc. vs. Guingona, Jr.*, 232 SCRA 110 [1994].

[23] 197 SCRA 52, 60 [1991].

[24] 232 SCRA 110 [1994].

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a becoming respect for each others' acts,[25] this Court nevertheless resolves to take cognizance of the instant petitions.

APPLICABLE CONSTITUTIONAL PROVISION

One focal point of inquiry in this controversy is the determination of which provision of the Constitution applies, with regard to the exercise by the Senate of its constitutional power to concur with the VFA. Petitioners argue that Section 25, Article XVIII is applicable considering that the VFA has for its subject the presence of foreign military troops in the Philippines. Respondents, on the contrary, maintain that Section 21, Article VII should apply inasmuch as the VFA is not a basing arrangement but an agreement which involves merely the temporary visits of United States personnel engaged in joint military exercises.

The 1987 Philippine Constitution contains two provisions requiring the concurrence of the Senate on treaties or international agreements. Section 21, Article VII, which herein respondents invoke, reads:

"No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

Section 25, Article XVIII, provides:

"After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."

Section 21, Article VII deals with treaties or international agreements in general, in which case, the concurrence of at least two-thirds (2/3) of all the Members of the Senate is required

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[25] *J. Santos vs. Northwest Orient Airlines*, 210 SCRA 256, 261 [1992].

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to make the subject treaty, or international agreement, valid and binding on the part of the Philippines. This provision lays down the general rule on treaties or international agreements and applies to any form of treaty with a wide variety of subject matter, such as, but not limited to, extradition or tax treaties or those economic in nature. All treaties or international agreements entered into by the Philippines, regardless of subject matter, coverage, or particular designation or appellation, requires the concurrence of the Senate to be valid and effective.

In contrast, Section 25, Article XVIII is a special provision that applies to treaties which involve the presence of foreign military bases, troops or facilities in the Philippines. Under this provision, the concurrence of the Senate is only one of the requisites to render compliance with the constitutional requirements and to consider the agreement binding on the Philippines. Section 25, Article XVIII further requires that "foreign military bases, troops, or facilities" may be allowed in the Philippines only by virtue of a treaty duly concurred in by the Senate, ratified by a majority of the votes cast in a national referendum held for that purpose if so required by Congress, and recognized as such by the other contracting state.

It is our considered view that both constitutional provisions, far from contradicting each other, actually share some common ground. These constitutional provisions both embody phrases in the negative and thus, are deemed prohibitory in mandate and character. In particular, Section 21 opens with the clause "No treaty x x x," and Section 25 contains the phrase "shall not be allowed." Additionally, in both instances, the concurrence of the Senate is indispensable to render the treaty or international agreement valid and effective.

To our mind, the fact that the President referred the VFA to the Senate under Section 21, Article VII, and that the Senate extended its concurrence under the same provision, is immaterial. For in either case, whether under Section 21, Article VII or Section 25, Article XVIII, the fundamental law is crystalline that the concurrence of the Senate is mandatory to comply with the strict constitutional requirements.

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On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

Undoubtedly, Section 25, Article XVIII, which specifically deals with treaties involving foreign military bases, troops, or facilities, should apply in the instant case. To a certain extent and in a limited sense, however, the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate, as will be further discussed hereunder.

It is a finely-imbedded principle in statutory construction that a special provision or law prevails over a general one. *Lex specialis derogat generali.* Thus, where there is in the same statute a particular enactment and also a general one which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language which are not within the provision of the particular enactment.[26]

In *Leveriza vs. Intermediate Appellate Court,*[27] we enunciated:

"x x x that another basic principle of statutory construction mandates that general legislation must give way to special legislation on the same subject, and generally be so interpreted as to embrace only cases in which the special provisions are not applicable (*Sto. Domingo vs. de los Angeles,* 96 SCRA 139), that a specific statute prevails over a general statute (*De Jesus vs. People*, 120 SCRA 760) and that where two statutes are of equal theoretical application to a

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[26] *Manila Railroad Co. vs. Collector of Customs,* 52 Phil. 950.

[27] 157 SCRA 282 [1988] cited in *Republic vs. Sandiganbayan,* 173 SCRA 72, 85 [1989].

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particular case, the one designed therefor specially should prevail (*Wil Wilhensen Inc. vs. Baluyot,* 83 SCRA 38)."

Moreover, it is specious to argue that Section 25, Article XVIII is inapplicable to mere transient agreements for the reason that there is no permanent placing of structure for the establishment of a military base. On this score, the Constitution makes no distinction between "transient" and "permanent." Certainly, we find nothing in Section 25, Article XVIII that requires *foreign troops or facilities* to be stationed or placed *permanently* in the Philippines.

It is a rudiment in legal hermeneutics that when no distinction is made by law the Court should not distinguish — *Ubi lex non distinguit nec nos distinguire debemos.*

In like manner, we do not subscribe to the argument that Section 25, Article XVIII is not controlling since no foreign military bases, but merely foreign troops and facilities, are involved in the VFA. Notably, a perusal of said constitutional provision reveals that the proscription covers "*foreign military bases, troops, or facilities.*" Stated differently, this prohibition is not limited to the entry of troops and facilities without any foreign bases being established. The clause does not refer to "*foreign military bases, troops, or facilities*" collectively but treats them as separate and independent subjects. The use of comma and the disjunctive word "*or*" clearly signifies disassociation and independence of one thing from the others included in the enumeration,[28] such that, the provision contemplates three different situations — a military treaty the subject of which could be either (a) foreign bases, (b) foreign troops, or (c) foreign facilities — any of the three standing alone places it under the coverage of Section 25, Article XVIII.

To this end, the intention of the framers of the Charter, as manifested during the deliberations of the 1986 Constitutional Commission, is consistent with this interpretation:

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[28] *Castillo-Co v. Barbers,* 290 SCRA 717, 723 (1998).

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"MR. MAAMBONG. I just want to address a question or two to Commissioner Bernas.

This formulation speaks of three things: foreign military bases, troops or facilities. My first question is: *If the country does enter into such kind of a treaty, must it cover the three-bases, troops or facilities or could the treaty entered into cover only one or two?*

FR. BERNAS. *Definitely, it can cover only one. Whether it covers only one or it covers three, the requirement will be the same.*

MR. MAAMBONG. *In other words, the Philippine government can enter into a treaty covering not bases but merely troops?*

FR. BERNAS. *Yes.*

MR. MAAMBONG. I cannot find any reason why the, government can enter into a treaty covering only troops.

FR. BERNAS. Why not? Probably if we stretch our imagination a little bit more, we will find some. We just want to cover everything."[29] (Italics Supplied)

Moreover, military bases established within the territory of another state is no longer viable because of the alternatives offered by new means and weapons of warfare such as nuclear weapons, guided missiles as well as huge sea vessels that can stay afloat in the sea even for months and years without returning to their home country. These military warships are actually used as substitutes for a land-home base not only of military aircraft but also of military personnel and facilities. Besides, vessels are mobile as compared to a land-based military headquarters.

At this juncture, we shall then resolve the issue of whether or not the requirements of Section 25 were complied with when the Senate gave its concurrence to the VFA.

Section 25, Article XVIII disallows foreign military bases, troops, or facilities in the country, unless the following conditions are sufficiently met, *viz*: (a) it must be under a *treaty*; (b) the

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[29] Records of the Constitutional Commission, September 18, 1986 Deliberation, p. 782.

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treaty must be *duly concurred in by the Senate* and, when so required by Congress, ratified by a majority of the votes cast by the people in a national referendum; and (c) *recognized as a treaty* by the other contracting state.

There is no dispute as to the presence of the first two requisites in the case of the VFA. The concurrence handed by the Senate through Resolution No. 18 is in accordance with the provisions of the Constitution, whether under the general requirement in Section 21, Article VII, or the specific mandate mentioned in Section 25, Article XVIII, the provision in the latter article requiring ratification by a majority of the votes cast in a national referendum being unnecessary since Congress has not required it.

As to the matter of voting, *Section 21, Article VII* particularly requires that a treaty or international agreement, to be valid and effective, must be *concurred in by at least two-thirds of all the members of the Senate.* On the other hand, *Section 25, Article XVIII* simply provides that the treaty be "*duly concurred in by the Senate.*"

Applying the foregoing constitutional provisions, a two-thirds vote of all the members of the Senate is clearly required so that the concurrence contemplated by law may be validly obtained and deemed present. While it is true that Section 25, Article XVIII requires, among other things, that the treaty — the VFA, in the instant case — be "duly concurred in by the Senate," it is very true however that said provision must be related and viewed in light of the clear mandate embodied in Section 21, Article VII, which in more specific terms, requires that the concurrence of a treaty, or international agreement, be made by a two-thirds vote of all the members of the Senate. Indeed, Section 25, Article XVIII must not be treated in isolation to Section 21, Article, VII.

As noted, the "concurrence requirement" under Section 25, Article XVIII must be construed in relation to the provisions of Section 21, Article VII. In a more particular language, the concurrence of the Senate contemplated under Section 25, Article XVIII means that at least two-thirds of all the members of the Senate favorably vote to concur with the treaty — the VFA in the instant case.

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Under these circumstances, the charter provides that the Senate shall be composed of twenty-four (24) Senators.[30] Without a tinge of doubt, two-thirds (2/3) of this figure, or not less than sixteen (16) members, favorably acting on the proposal is an unquestionable compliance with the requisite number of votes mentioned in Section 21 of Article VII. The fact that there were actually twenty-three (23) incumbent Senators at the time the voting was made,[31] will not alter in any significant way the circumstance that more than two-thirds of the members of the Senate concurred with the proposed VFA, even if the two-thirds vote requirement is based on this figure of actual members (23). In this regard, the fundamental law is clear that two-thirds of the 24 Senators, or at least 16 favorable votes, suffice so as to render compliance with the strict constitutional mandate of giving concurrence to the subject treaty.

Having resolved that the first two requisites prescribed in Section 25, Article XVIII are present, we shall now pass upon and delve on the requirement that the VFA should be recognized as a treaty by the United States of America.

Petitioners contend that the phrase "recognized as a treaty," embodied in Section 25, Article XVIII, means that the VFA should have the advice and consent of the United States Senate pursuant to its own constitutional process, and that it should not be considered merely an executive agreement by the United States.

In opposition, respondents argue that the letter of United States Ambassador Hubbard stating that the VFA is binding on the United States Government is conclusive, on the point that the VFA is recognized as a treaty by the United States of America. According to respondents, the VFA, to be binding, must only be accepted as a treaty by the United States.

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[30] *1987 Constitution, Article VI, Section 2.* — The Senate shall be composed of twenty-four Senators who shall be elected at large by the qualified voters of the Philippines, as may be provided by law.

[31] The 24th member (Gloria Macapagal-Arroyo) of the Senate whose term was to expire in 2001 was elected Vice-President in the 1998 national elections.

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This Court is of the firm view that the phrase "*recognized as a treaty*" means that the other contracting party *accepts or acknowledges* the agreement as a treaty.[32] To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its Constitution,[33] is to accord strict meaning to the phrase.

Well-entrenched is the principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed, in which case the significance thus attached to them prevails. Its language should be understood in the sense they have in common use.[34]

Moreover, it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an executive agreement is as binding as a treaty.[35] To be sure, as long as the VFA possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty.

A treaty, as defined by the Vienna Convention on the Law of Treaties, is "an international instrument concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation."[36] There are many other terms used for a treaty or international agreement, some of which are: act, protocol, agreement, *compromis d' arbitrage,* concordat, convention, declaration, exchange of notes,

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[32] Ballentine's *Legal Dictionary*, 1995.

[33] Article 2, Section 2, paragraph 2 of the United States Constitution, speaking of the United States President provides: "He shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the senators present concur."

[34] *J.M Tuazon & Co., Inc. vs. Land Tenure Association*, 31 SCRA 413 [1970].

[35] *Altman Co. vs. United States,* 224 US 263 [1942], cited in Coquia and Defensor-Santiago, *International Law*, 1998 Ed. P. 497.

[36] Vienna Convention, Article 2.

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pact, statute, charter and *modus vivendi*. All writers, from Hugo Grotius onward, have pointed out that the names or titles of international agreements included under the general term *treaty* have little or no legal significance. Certain terms are useful, but they furnish little more than mere description.[37]

Article 2(2) of the Vienna Convention provides that "the provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms, or to the meanings which may be given to them in the internal law of the State."

Thus, in international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, as long as the negotiating functionaries have remained within their powers.[38] International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.[39]

In our jurisdiction, we have recognized the binding effect of executive agreements even without the concurrence of the Senate or Congress. In *Commissioner of Customs vs. Eastern Sea Trading,*[40] we had occasion to pronounce:

"x x x the right of the Executive to enter into binding agreements *without* the necessity of subsequent Congressional approval has been *confirmed by long usage*. From the earliest days of our history we have entered into executive agreements covering such subjects as commercial and consular relations, most-favored-nation rights, patent

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[37] Gerhard von Glahn, *Law Among Nations, An Introduction to Public International Law*, 4th Ed., p. 480.

[38] Hackworth, *Digest of International Law*, Vol. 5, p. 395, cited in *USAFE Veterans Association Inc. vs. Treasurer of the Philippines,* 105 Phil. 1030,1037[1959].

[39] Richard J Erickson. "*The Making of Executive Agreements by the United States Department of Defense: An agenda for Progress*," *13 Boston U. Intl. L.J. 58* [1995], citing Restatement [Third] of Foreign Relations Law pt. III, introductory note [1987] and Paul Reuter, *Introduction to the Law of Treaties* 22 [Jose Mico & Peter Haggemacher trans., 1989] cited in Consolidated Memorandum, p. 32.

[40] 3 SCRA 351, 356-357 [1961].

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rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. *The validity of these has never been seriously questioned by our courts.*

"x x x x x x x x x

"Furthermore, the United States Supreme Court has expressly recognized the validity and constitutionality of executive agreements entered into without Senate approval." (*39 Columbia Law Review, pp. 753-754) (See, also, U.S. vs. Curtis Wright Export Corporation, 299 U.S. 304, 81 L. ed. 255; U.S. vs. Belmont, 301 U.S. 324, 81 L. ed. 1134; U.S. vs. Pink, 315 U.S. 203, 86 L. ed. 796; Ozanic vs. U.S. 188 F. 2d. 288; Yale Law Journal, Vol. 15 pp. 1905-1906; California Law Review, Vol. 25, pp. 670-675; Hyde on International Law [Revised Edition], Vol. 2, pp. 1405, 1416-1418; Willoughby on the U.S. Constitution Law, Vol. I [2d ed.], pp. 537-540; Moore, International Law Digest, Vol. V, pp. 210-218; Hackworth, International Law Digest, Vol. V, pp. 390-407). "(Italics supplied*)

The deliberations of the Constitutional Commission which drafted the 1987 Constitution is enlightening and highly-instructive:

"MR. MAAMBONG. Of course it goes without saying that as far as ratification of the other state is concerned, that is entirely their concern under their own laws.

FR. BERNAS. Yes, but we will accept whatever they say. If they say that we have done everything to make it a treaty, then as far as we are concerned, we will accept it as a treaty."[41]

The records reveal that the United States Government, through Ambassador Thomas C. Hubbard, has stated that the United States government has fully committed to living up to the terms of the VFA.[42] For as long as the United States of America

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[41] 4 Record of the Constitutional Commission 782 [Session of September 18, 1986].

[42] Letter of Ambassador Hubbard to Senator Miriam Defensor-Santiago:

"Dear Senator Santiago:

I am happy to respond to your letter of April 29, concerning the way the US Government views the Philippine-US Visiting Forces Agreement in US legal terms. You raise an important question and I believe this response will help in the Senate deliberations.

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accepts or acknowledges the VFA as a treaty, and binds itself further to comply with its obligations under the treaty, there is indeed marked compliance with the mandate of the Constitution.

Worth stressing too, is that the ratification, by the President, of the VFA and the concurrence of the Senate should be taken as a clear and unequivocal expression of our nation's consent to be bound by said treaty, with the concomitant duty to uphold the obligations and responsibilities embodied thereunder.

Ratification is generally held to be an executive act, undertaken by the head of the state or of the government, as the case may be, through which the formal acceptance of the treaty is proclaimed.[43] A State may provide in its domestic legislation

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As a matter of both US and international law, an international agreement like the Visiting Forces Agreement is legally binding on the US Government. In international legal terms, such an agreement is a 'treaty.' However, as a matter of US domestic law, an agreement like the VFA is an 'executive agreement,' because it does not require the advice and consent of the Senate under Article 11, Section 2 of our Constitution

The President's power to conclude the VFA with the Philippines, and other status of forces agreements with other countries, derives from the President's responsibilities for the conduct of foreign relations (Art. II, Sec. 1) and his constitutional powers as Commander in Chief of the Armed Forces. Senate advice and consent is not needed, *inter alia*, because the VFA and similar agreements neither change US domestic nor require congressional appropriation of funds. It is important to note that only about five percent of the international agreement entered into by the US Government require Senate advice and consent. However, in terms of the US Government's obligation to adhere to the terms of the VFA, there is no difference between a treaty concurred in by our Senate and an executive agreement. Background information on these points can be found in the 'Restatement 3rd of the Foreign Relations Law of the United States, Sec. 301, et seq. [1986].

I hope you find this answer helpful. As the President's representative to the Government of the Philippines, I can assure you that the United States Government is fully committed to living up to the terms of the VFA.

Sincerely yours,
THOMAS C. HUBBARD
Ambassador"

[43] Gerhard von Glahn, *Law Among Nations, An Introduction to Public International Law*, 4th Ed., p. 486.

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the process of ratification of a treaty. The consent of the State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such ratification, (b) it is otherwise established that the negotiating States agreed that ratification should be required, (c) the representative of the State has signed the treaty subject to ratification, or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative, or was expressed during the negotiation.[44]

In our jurisdiction, the power to ratify is vested in the President and not, as commonly believed, in the legislature. The role of the Senate is limited only to giving or withholding its consent, or concurrence, to the ratification.[45]

With the ratification of the VFA, which is equivalent to final acceptance, and with the exchange of notes between the Philippines and the United States of America, it now becomes obligatory and incumbent on our part, under the principles of international law, to be bound by the terms of the agreement. Thus, no less than Section 2, Article II of the Constitution,[46] declares that the Philippines adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.

As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relations. While the international obligation devolves upon the state and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch

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[44] Article 14 of the Vienna Convention, cited in Coquia and Defensor-Santiago, *International Law*, 1998 Ed., pp. 506-507.

[45] Cruz, Isagani, "*International Law*," 1985 Ed., p. 175.

[46] Sec. 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

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or subdivision of its government or any official thereof. As an integral part of the community of nations, we are responsible to assure that our government, Constitution and laws will carry out our international obligation.[47] Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law.

Beyond this, Article 13 of the Declaration of Rights and Duties of States adopted by the International Law Commission in 1949 provides: *"Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."*[48]

Equally important is Article 26 of the Convention which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This is known as the principle of *pacta sunt servanda* which preserves the sanctity of treaties and have been one of the most fundamental principles of positive international law, supported by the jurisprudence of international tribunals.[49]

NO GRAVE ABUSE OF DISCRETION

In the instant controversy, the President, in effect, is heavily faulted for exercising a power and performing a task conferred upon him by the Constitution — the power to enter into and ratify treaties. Through the expediency of Rule 65 of the Rules of Court, petitioners in these consolidated cases impute *grave abuse of discretion* on the part of the Chief Executive in ratifying the VFA, and referring the same to the Senate pursuant to the provisions of Section 21, Article VII of the Constitution.

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[47] Louis Henkin, Richard C. Pugh, Oscar Schachter, Hans Smit, *International Law, Cases and Materials*, 2nd Ed American Casebook Series, p. 136.

[48] Gerhard von Glahn, *supra*, p. 487.

[49] Harris, p. 634 cited in Coquia, *International Law*, *supra*, p. 512.

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On this particular matter, grave abuse of discretion implies such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty enjoined or to act at all in contemplation of law.[50]

By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is (then) conceded."[51] Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is *"executive altogether."*[52]

As regards the power to enter into treaties or international agreements, the Constitution vests the same in the President, subject only to the concurrence of at least two thirds vote of all the members of the Senate. In this light, the negotiation of the VFA and the subsequent ratification of the agreement are exclusive acts which pertain solely to the President, in the lawful exercise of his vast executive and diplomatic powers granted him no less than by the fundamental law itself. *Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.*[53] Consequently, the acts or judgment calls of the President involving the VFA — specifically the acts of ratification and entering into a treaty and those necessary or incidental to the exercise of such principal acts — squarely fall within the sphere of his constitutional powers

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[50] *Cuison vs. CA*, 289 SCRA 159 [1998]. See also *Jardine vs. NLRC*, G.R. No. 119268, Feb. 23, 2000 citing *Arroyo vs. de Venecia*, 277 SCRA 268 [1997].

[51] Cortes, "*The Philippine Presidency a Study of Executive Power*, 2nd Ed.," p. 195.

[52] Cruz, *Phil. Political Law*, 1995 Ed., p. 223.

[53] *United States vs. Curtis Wright Corp.*, 299 U.S. 304 (1934), per Justice Sutherland.

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and thus, may not be validly struck down, much less calibrated by this Court, in the absence of clear showing of grave abuse of power or discretion.

It is the Court's considered view that the President, in ratifying the VFA and in submitting the same to the Senate for concurrence, acted within the confines and limits of the powers vested in him by the Constitution. It is of no moment that the President, in the exercise of his wide latitude of discretion and in the honest belief that the VFA falls within the ambit of Section 21, Article VII of the Constitution, referred the VFA to the Senate for concurrence under the aforementioned provision. Certainly, no abuse of discretion, much less a grave, patent and whimsical abuse of judgment, may be imputed to the President in his act of ratifying the VFA and referring the same to the Senate for the purpose of complying with the concurrence requirement embodied in the fundamental law. In doing so, the President merely performed a constitutional task and exercised a prerogative that chiefly pertains to the functions of his office. Even if he erred in submitting the VFA to the Senate for concurrence under the provisions of Section 21 of Article VII, instead of Section 25 of Article XVIII of the Constitution, still, the President may not be faulted or scarred, much less be adjudged guilty of committing an abuse of discretion in some patent, gross, and capricious manner.

For while it is conceded that Article VIII, Section 1, of the Constitution has broadened the scope of judicial inquiry into areas normally left to the political departments to decide, such as those relating to national security, it has not altogether done away with political questions such as those which arise in the field of foreign relations.[54] The High Tribunal's function, as sanctioned by Article VIII, Section 1, *"is merely (to) check whether or not the governmental branch or agency has gone beyond the constitutional limits of its jurisdiction, not that it erred or has a different view. In the absence of a showing x x x (of) grave abuse of discretion amounting to lack of jurisdiction, there is no occasion for the Court to*

[54] *Arroyo vs. De Venecia*, 277 SCRA 269 [1997].

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exercise its corrective power x x x It has no power to look into what it thinks is apparent error.[55]

As to the power to concur with treaties, the Constitution lodges the same with the Senate alone. Thus, once the Senate[56] performs that power, or exercises its prerogative within the boundaries prescribed by the Constitution, the concurrence cannot, in like manner, be viewed to constitute an abuse of power, much less grave abuse thereof. Corollarily, the Senate, in the exercise of its discretion and acting within the limits of such power, may not be similarly faulted for having simply performed a task conferred and sanctioned by no less than the fundamental law.

For the role of the Senate in relation to treaties is essentially legislative in character;[57] the Senate, as an independent body possessed of its own erudite mind, has the prerogative to either accept or reject the proposed agreement, and whatever action it takes in the exercise of its wide latitude of discretion, pertains to the wisdom rather than the legality of the act. In this sense, the Senate partakes a principal, yet delicate, role in keeping the principles of *separation of powers* and of *checks and balances* alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nation's pursuit of political maturity and growth. True enough, rudimentary is the principle that matters pertaining to the wisdom of a legislative act are beyond the ambit and province of the courts to inquire.

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[55] *Co vs. Electoral Tribunal of the House of Representatives,* 199 SCRA 692, 701 (1991); *Llamas vs. Orbos,* 202 SCRA 849, 857 (1991); *Lansang vs. Garcia,* 42 SCRA at 480-481 [1971].

[56] *1987 Constitution, Article VI Section 1.* — The legislative power shall be vested in the Congress of the Philippine which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.

[57] See Akehurst, Michael: *Modern Introduction to International Law,* (London: George Allen and Unwin) 5th ed., p. 45; *United States vs. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936).

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In fine, absent any clear showing of grave abuse of discretion on the part of respondents, this Court — as the final arbiter of legal controversies and staunch sentinel of the rights of the people — is then without power to conduct an incursion and meddle with such affairs purely executive and legislative in character and nature. For the Constitution no less, maps out the distinct boundaries and limits the metes and bounds within which each of the three political branches of government may exercise the powers exclusively and essentially conferred to it by law.

WHEREFORE, in light of the foregoing disquisitions, the instant petitions are hereby *DISMISSED.*

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Kapunan, Quisumbing, Purisima, Pardo, Gonzaga-Reyes, Ynares-Santiago, and *De Leon, Jr., JJ.*, concur.

Puno, J., see dissenting opinion.

Melo and *Vitug, JJ.*, join Justice Puno in his dissenting opinion.

Mendoza, J., in the result.

Panganiban, J., no part due close personal and former professional relations with a petitioner, Sen. J. R. Salonga.

PUNO, *J., dissenting opinion:*

The cases at bar offer a smorgasbord of issues. As summed up by the Solicitor General, they are:

"I

DO PETITIONERS HAVE STANDING AS CONCERNED CITIZENS, TAXPAYERS, OR LEGISLATORS?

II

IS THE VFA CONSISTENT WITH THE GENERAL WELFARE CLAUSE OF THE CONSTITUTION?

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III

IS THE VFA GOVERNED BY THE PROVISIONS OF SECTION 21, ARTICLE VII OR SECTION 25, ARTICLE XVIII OF THE CONSTITUTION?

IV

DOES THE VFA CONSTITUTE AN ABDICATION OF PHILIPPINE SOVEREIGNTY?

(a) DOES THE VFA DEPRIVE PHILIPPINE COURTS OF THEIR JURISDICTION TO HEAR AND TRY OFFENSES COMMITTED BY U.S. MILITARY PERSONNEL?

(b) IS THIS COURT DEPRIVED OF ITS JURISDICTION OVER OFFENSES PUNISHABLE BY *RECLUSION PERPETUA* OR HIGHER?

(c) IS THE GRANT OF TAX EXEMPTIONS UNDER THE VFA UNCONSTITUTIONAL?

V

DOES THE VFA VIOLATE THE EQUAL PROTECTION CLAUSE UNDER SECTION 1, ARTICLE III OF THE CONSTITUTION?

VI

IS THE NUCLEAR BAN UNDER SECTION 8, ARTICLE II OF THE CONSTITUTION VIOLATED BY THE VFA?

VII

ARE FILIPINOS DENIED THEIR PERSONAL AND PROPERTY RIGHT TO SUE FOR TORTS AND DAMAGES?

VIII

WAS THERE UNDUE DELEGATION OF LEGISLATIVE POWER IN THE APPROVAL OF THE VFA?

IX

DOES THE VFA CONTRAVENE THE POLICY OF NEUTRALITY UNDER SECTION 7, ARTICLE II OF THE CONSTITUTION?

X

IS THE TERM ACTIVITIES UNDER THE COVERAGE OF THE VFA VAGUE, UNQUALIFIED OR UNCERTAIN?"

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I like to think that the most significant issue is whether the Visiting Forces Agreement (VFA) violates Sec. 25, Art. XVIII of the Constitution. I shall therefore limit my opinion on this jugular issue.

The 1987 Constitution provides in Sec. 25, Art. XVIII, *viz:*

"After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."

This provision lays down three constitutional requisites that must be complied with before foreign military bases, troops, or facilities can be allowed in Philippine territory, namely: (1) their presence should be allowed by a treaty duly concurred in by the Philippine Senate; (2) when Congress so requires, such treaty should be ratified by a majority of the votes cast by the Filipino people in a national referendum held for that purpose; and (3) *such treaty should be recognized as a treaty by the other contracting party.*

To start with, respondents, with unrelenting resolve, claim that these constitutional requirements, are not applicable to the VFA. They contend that the VFA, as its title implies, contemplates merely *temporary* visits of U.S. military troops in Philippine territory, and thus does not come within the purview of Sec. 25, Art. XVIII of the Constitution. They assert that this constitutional provision applies only to the stationing or *permanent* presence of foreign military troops on Philippine soil since the word "troops" is mentioned along with "bases" and "facilities" which are permanent in nature.[1] This assertion would deserve serious attention if the temporary nature of these visits were indeed borne out by the provisions of the VFA. If we turn, however, a heedful eye on the provisions of the VFA as well as the interpretation accorded to it by the government officials

[1] *Rollo*, pp. 140-141; Consolidated Comment, pp. 20-21.

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charged with its negotiation and implementation, the temporary nature of the visits would turn out to be a mirage in a desert of vague provisions of the VFA. Neither the VFA nor the Mutual Defense Treaty between the Republic of the Philippines and the United States of America[2] to which the VFA refers in its preamble,[3] provides the slightest suggestion on the duration of visits of U.S. forces in Philippine territory. The joint public hearings on the VFA conducted by the Senate Committee on Foreign Relations and the Senate Committee on National Defense and Security give us a keyhole to the time frame involved in these visits.

Secretary of Foreign Affairs Domingo L. Siason, the Philippine's signatory to the VFA, testified before the said committees that even before the signing of the VFA, Philippine and U.S. troops conducted joint military exercises in Philippine territory for two days to four weeks at the frequency of ten to twelve exercises a year. The "Balikatan," the largest combined military exercise involving about 3,000 troops, lasted at an average of three to four weeks and occurred once every year or one and a half years.[4] He further declared that the VFA contemplates the same time line for visits of U.S. troops, but argued that even if these troops conduct ten to twelve exercises a year with each exercise lasting for two to three weeks, their stay will not be uninterrupted, hence, not permanent.[5] Secretary of National Defense Orlando S. Mercado further testified that the VFA will allow joint military exercises between the Philippine and U.S. troops on a larger scale than those we had been undertaking since 1994.[6] As the joint military

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[2] Entered into force on August 27, 1952.

[3] The Preamble of the VFA states in relevant part as follows:

The Government of the Republic of the Philippines and Government of the United States of America,

Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951; x x x

[4] Transcript of Committee Meeting, Committee on Foreign Relations, January 26, 1999 [hereinafter referred to as Transcript], p. 21.

[5] *Id.*, pp. 103-104.

[6] *Id.*, p. 34.

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exercises will be conducted on a larger scale, it would be reasonable to project an escalation of the duration as well as frequency of past joint military exercises between Philippine and U.S. troops.

These views on the temporary nature of visits of U.S. troops cannot stand for, clearly, the VFA does not provide for a specific and limited period of effectivity. It instead provides an *open-ended term* in Art. IX, *viz*: ". . . (t)his agreement shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement." No magic of semantics will blur the truth that the *VFA could be in force indefinitely.* The following exchange between Senator Aquilino Q. Pimentel, Jr. and Secretary Siazon in the public hearings on the VFA is apropos to the issue:

"SEN. PIMENTEL. . . . In other words, this kind of activities are not designed to last only within one year, for example, the various visits, but can cover eternity until the treaty is abrogated?

MR. SIAZON. Well, Your Honor, this is an exercise for the protection of our national security, and until conditions are such that there is no longer a possible threat to our national security, then you will have to continue exercising, Your Honor, because we cannot take a chance on it.

SEN. PIMENTEL. So, this will be temporarily permanent, or permanently temporary?

MR. SIAZON. Permanently temporary, Your Honor."[7]

The worthiest of wordsmiths cannot always manipulate the meaning of words. Black's Law Dictionary defines "temporary" as "that which is to last for a limited time only, as distinguished from that which is perpetual or indefinite in its duration"[8] and states that "permanent" is "generally opposed to 'temporary' but not always meaning perpetual."[9] The definitions of

[7] *Id.*, p. 104.

[8] *Black's Law Dictionary* (6th ed.), p. 1464.

[9] *Id.*, p. 1139.

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"temporary" and "permanent" in Bouvier's Law Dictionary are of similar import: temporary is "that which is to last for a limited time"[10] while permanent "does not always embrace the idea of absolute perpetuity."[11] By these definitions, even the contingency that the Philippines may abrogate the VFA when there is no longer any threat to our national security does not make the visits of U.S. troops temporary, nor do short interruptions in or gaps between joint military exercises carve them out from the definition of "permanent" as *permanence does not necessarily contemplate absolute perpetuity.*

It is against this tapestry woven from the realities of the past and a vision of the future joint military exercises that the Court must draw a line between temporary visits and permanent stay of U.S. troops. *The absence in the VFA of the slightest suggestion as to the duration of visits of U.S. troops in Philippine territory, coupled with the lack of a limited term of effectivity of the VFA itself justify the interpretation that the VFA allows permanent, not merely temporary, presence of U.S. troops on Philippine soil.* Following Secretary Siazon's testimony, if the visits of U.S. troops could last for four weeks at the most and at the maximum of twelve times a year for an indefinite number of years, then by no stretch of logic can these visits be characterized as temporary because in fact, the U.S. troops could be in Philippine territory 365 days a year for 50 years — longer than the duration of the 1947 RP-US Military Bases Agreement[12] which expired in 1991 and which, without question, contemplated permanent presence of U.S. bases, facilities, and troops.

To be sure, even former Secretary of Justice, Serafin Cuevas, admitted in the same public hearings that the subject matter of the VFA, *i.e.*, the visits and activities of U.S. troops in Philippine territory, partakes of a permanent character. He declared with clarity:

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[10] Bouvier's Law Dictionary (Third Revision), p. 3254.

[11] *Id.*, p. 2568.

[12] Entered into force on March 26, 1947.

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"MR. CUEVAS. . . . Why we considered this as a treaty is because the subject therein treated had some character of permanence; and secondly, there is a change insofar as some of our laws are concerned."[13]

Thus, regardless of whether Sec. 25, Art. XVIII of the Constitution contemplates permanent presence of foreign military troops alone, or temporary presence as well, the VFA comes within its purview as it allows the permanent presence of U.S. troops on Philippine soil. Contrary to respondents' allegation, the determination of the permanent nature of visits of U.S. troops under the VFA is an issue ripe for adjudication since Sec. 25 of Art. XVIII speaks of the manner by which U.S. troops may be allowed to enter Philippine territory. We need not wait and see, therefore, whether the U.S. troops will actually conduct military exercises on Philippine soil on a permanent basis before adjudicating this issue. What is at issue is *whether the VFA allows such permanent presence of U.S. troops in Philippine territory.*

To determine compliance of the VFA with the requirements of Sec. 25, Art. XVIII of the Constitution, it is necessary to ascertain the intent of the framers of the Constitution as well as the will of the Filipino people who ratified the fundamental law. This exercise would inevitably take us back to the period in our history when U.S. military presence was entrenched in Philippine territory with the establishment and operation of U.S. Military Bases in several parts of the archipelago under the 1947 R.P.-U.S. Military Bases Agreement. As articulated by Constitutional Commissioner Blas F. Ople in the 1986 Constitutional Commission deliberations on this provision, the 1947 RP-US Military Bases Agreement was ratified by the Philippine Senate, but not by the United States Senate. *In the eyes of Philippine law, therefore, the Military Bases Agreement was a treaty, but by the laws of the United States, it was a mere executive agreement.*[14] This asymmetry in the

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[13] Transcript, p. 139.

[14] IV Record of the Constitutional Commission (1986) [hereinafter referred to as the Record], p. 780.

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legal treatment of the Military Bases Agreement by the two countries was believed to be a slur to our sovereignty. Thus, in the debate among the Constitutional Commissioners, the unmistakable intention of the commission emerged that this *anomalous asymmetry must never be repeated.*[15] To correct this historical aberration, Sec. 25, Art. XVIII of the Constitution requires that the treaty allowing the presence of foreign military bases, troops, and facilities should also be "recognized as a treaty by the other contacting party." In plain language, *recognition of the United States as the other contracting party of the VFA should be by the U.S. President with the advice and consent of the U.S. Senate.*[16]

The following exchanges manifest this intention:

"MR. OPLE. Will either of the two gentlemen yield to just one question for clarification? Is there anything in this formulation, whether that of Commissioner Bernas or of Commissioner Romulo, that will prevent the Philippine government from abrogating the existing bases agreement?

FR. BERNAS. To my understanding, none.

MR. ROMULO. I concur with Commissioner Bernas.

MR. OPLE. I was very keen to put this question because I had taken the position from the beginning — and this is embodied in a resolution filed by Commissioners Natividad, Maambong and Regalado — that it is very important that the government of the Republic of the Philippines be in a position to terminate or abrogate the bases agreement as one of the options . . . . we have acknowledged starting at the committee level that *the bases agreement was ratified by our Senate; it is a treaty under Philippine law. But as far as the Americans are concerned, the Senate never took cognizance of this and therefore, it is an executive agreement.* That creates a wholly unacceptable asymmetry between the two countries. Therefore, in my opinion, the right step to take, if the government of our country will deem it in the national interest to terminate this agreement or even to renegotiate it, is that we must begin with a clean slate; *we*

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[15] Bernas, *Constitution Explicit on VFA, Today*, May 5, 1999.

[16] Record, p. 781.

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should not be burdened by the flaws of the 1947 Military Bases Agreement. . .

MR. ROMULO. Madam President, I think the two phrases in the Bernas formulation take care of Commissioner Ople's concerns.

The first says "EXCEPT UNDER THE TERMS OF A TREATY." That means that if it is to be renegotiated, it must be under the terms of a new treaty. The second is the concluding phrase which says: "AND RECOGNIZED AS A TREATY BY THE OTHER CONTRACTING STATE."

xxx xxx xxx

MR. SUAREZ. Is the proposal prospective and not retroactive in character?

FR. BERNAS. Yes, it is prospective because it does not touch the validity of the present agreement. However, if a decision should be arrived at that the present agreement is invalid, then even prior to 1991, this becomes operative right away.

MR. SUAREZ. In other words, we do not impress the previous agreements with a valid character, neither do we say that they are null and void *ab initio* as claimed by many of us here.

FR. BERNAS. The position I hold is that it is not the function of this Commission to pass judgment on the validity or invalidity of the subsisting agreement.

MR. SUAREZ . . . the proposal requires recognition of this treaty by the other contracting nation. How would that recognition be expressed by that other contracting nation? That is in *accordance with their constitutional or legislative process, I assume.*

FR. BERNAS. As Commissioner Romulo indicated, since this certainly would refer only to the United States, because it is only the United States that would have the possibility of being allowed to have treaties here, then *we would have to require that the Senate of the United States concur in the treaty because under American constitutional law, there must be concurrence on the part of the Senate of the United States to conclude treaties.*

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FR. BERNAS. When I say that the other contracting state must recognize it as a treaty, by that I mean *it must perform all the acts*

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required for the agreement to reach the status of a treaty under their jurisdiction." (italics supplied)[17]

In ascertaining the VFA's compliance with the constitutional requirement that it be "recognized as a treaty by the other contracting state," it is crystal clear from the above exchanges of the Constitutional Commissioners that *the yardstick should be U.S. constitutional law.* It is therefore apropos to make a more *in depth study* of the U.S. President's power to enter into executive agreements under U.S. constitutional law.

Sec. 2, Art. II, Clause 2 of the U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." The U.S. Constitution does not define "treaties." Nevertheless, the accepted definition of a "treaty" is that of "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law."[18] Although the United States did not formally ratify the Vienna Convention on the Law of Treaties, its definition of a treaty has been applied by U.S. courts and the State Department has stated that the Vienna Convention represents customary international law.[19] The Vienna Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law."[20] It has been observed that this definition is broader than the sense in which "treaty" is used in the U.S.

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[17] Record, pp. 780-783.

[18] Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed., pp. 184-185 (1996), citing Restatement (Third) of the Foreign Relations Law of the United States, sec. 301, adopting Article 1 of the Vienna Convention on the Law of Treaties.

[19] Knaupp, *Classifying International Agreements Under U.S. Law*: The Beijing Platform as a Case Study, Brigham Young University Law Review, vol. 1998 (1), p. 244, citing Carter and Trimble, *International Law*, p. 110 (1995).

[20] Vienna Convention on the Law of Treaties, U.N. Doc. A/C.39/27 (1969), Sec. 1, Art. II.

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Constitution. *In U.S. practice, a "treaty" is only one of four types of international agreements, namely: Article II treaties, executive agreements pursuant to a treaty, congressional-executive agreements, and sole executive agreements.*[21]

The term *"executive agreement"* is used both colloquially and in scholarly and governmental writings as a convenient catch-all to subsume all international agreements intended to bind the United States and another government, other than those which receive consent of two-thirds of the U.S. Senate.[22] *The U.S. Constitution does not expressly confer authority to make these executive agreements*, hence the authority to make them, their scope, and legal force have been the subject of a long-ongoing debate.[23] This, notwithstanding, *executive agreements have grown to be a primary instrument of foreign policy in the United states.* In 1789-1839, the United States concluded 60 treaties and only 27 executive agreements. In 1930-1939, the United States entered into 142 treaties and 144 executive agreements. In 1940-1949, 116 treaties and 919 executive agreements were concluded by the United States. From 1980-1988, the United States entered into 136 treaties and 3,094 executive agreements. In sum, by 1988, there were 12,778 executive agreements as opposed to 1,476 treaties, accounting for about 90% of the international agreements concluded by the United States.[24]

The upsurge in the use of executive agreements in the post World War II period may be attributed to several factors. President Franklin Roosevelt set a precedent for the more recent

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[21] Knaupp, *op. cit. supra* note 19, citing Carter and Trimble, *op. cit. supra* note 19 at 165-166.

[22] McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*: 1, The Yale Law Journal, vol. 54 (2), pp. 197-198 (1945).

[23] Henkin, *op. cit. supra* note 18 at 215.

[24] McCormick, *American Foreign Policy and Process*, 2nd ed., p. 276 (1992), citing Nelson, *Congressional Quarterly's Guide to the Presidency* (Washington, D.C.: Congressional Quarterly, Inc., 1989), p. 1104.

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presidents by, for instance, completing the Destroyer-for-Bases deal of 1940 with an executive agreement. President Harry S. Truman likewise concluded the Potsdam Agreement by executive agreement. The U.S. Presidents also committed military missions in Honduras and E1 Salvador in the 1950's; pledged security to Turkey, Iran, and Pakistan; acquired permission from the British to use the island of Diego Garcia for military purposes in the 1960's; and established a military mission in Iran in 1974, all by way of executive agreements.[25] U.S. Supreme Court decisions affirming the validity of executive agreements have also contributed to the explosive growth in their usage.[26] Another factor that accelerated its use was the foreign policy cooperation between Congress and the executive as expressed in the postwar refrain that "politics must end at the water's edge."[27] The fourth factor is the expansion of executive institutions including foreign policy machinery and information.[28] The fifth factor is the Cold War which put the United States in a "constant state of emergency" which required expediency in decisions and actions regarding the use of force or diplomacy. Last but not the least, the nuclear weapons race and instantaneous global communication made centralized foreign policy machinery under the U.S. President necessary.[29]

These executive agreements which have grown to be the primary instrument of U.S. foreign policy may be classified into three types, namely:

(1) *Treaty-authorized executive agreements, i.e.*, agreements made by the President pursuant to authority conferred in a prior treaty; [30]

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[25] *Id.*, pp. 277-278.

[26] *Id.*, p. 278.

[27] *Id.*, p. 288.

[28] *Id.*, p. 298.

[29] *Id.*, p. 300.

[30] Rotunda, Nowak and Young, *Treatise on Constitutional Law — Substance and Procedure* [hereinafter referred to as Treatise], p. 394 (1986), citing Restatement of the Law, 2d, Foreign Relations of the United States, Sec. 119 (1965).

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(2) *Congressional-executive agreements, i.e.,* agreements either (a) negotiated by the President with prior Congressional authorization or enactment; or (b) .confirmed by both Houses of Congress after the fact of negotiation;[31] and

(3) *Presidential or sole executive agreements, i.e. agreements made by the President based on his exclusive presidential powers, such as the power as commander-in-chief of the armed forces pursuant to which he conducts military operations with U.S. allies, or his power to receive ambassadors and recognize foreign governments.*[32]

This classification is important as the different types of executive agreements bear distinctions in terms of constitutional basis, subject matter, and legal effects in the domestic arena. For instance, *treaty-authorized executive agreements do not pose constitutional problems* as they are generally accepted to have been pre-approved by the Senate when the Senate consented to the treaty which authorized the executive to enter into executive agreements; another view supporting its acceptance is that the Senate delegated to the President the authority to make the executive agreement.[33] In comparison, *the constitutionality of congressional-executive agreements has provoked debate among legal scholars.* One view, espoused by *interpretivists* such as Edwin Borchard, holds that all international agreements must be strictly in accordance with Sec. 2, Art. II of the U.S. Constitution, and thus congressional-executive agreements are constitutionally invalid. According to them, allowing congressional-executive agreements would enhance the power of the President as well as of the House of Representatives, in utter violation of the intent of the framers of the U.S. Constitution.[34] The opposite school of thought, led by Myer S. McDougal and Asher Lans, holds that congressional-executive agreements and treaties are interchangeable, thus, such agreements are constitutional. These *non-interpretivists* buttress their stance by leaning on the

[31] *Id.*, Sec. 120.

[32] *Id.*, Sec. 121.

[33] Randall, *The Treaty Power*, 51 Ohio St. L.J., p. 6 (1990).

[34] *Id.*, p. 7.

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constitutional clause that prohibits States, without consent of Congress, from "enter(ing) into any Agreement or Compact with another State, or with a Foreign Power." By making reference to international agreements other than treaties, these scholars argue that the framers of the Constitution intended international agreements, other than treaties, to exist. This school of thought generally opposes the "mechanical, filiopietistic theory, (which) purports to regard the words of the Constitution as timeless absolutes"[35] and gives emphasis to the necessity and expediency of congressional-executive agreements in modern foreign affairs.[36] Finally, *sole executive agreements* which account for a relatively small percentage of executive agreements are the *most constitutionally problematic* since the system of checks and balances is inoperative when the President enters into an executive agreement with neither the Senate's nor Congress' consent. This last type of executive agreement draws authority upon the President's enumerated powers under Article II of the U.S. Constitution, such as the President's power as Commander-in-Chief of the U.S. army and navy.[37]

I respectfully submit that, using these three types of executive agreements as bases for classification, *the VFA would not fall under the category of an executive agreement made by the president pursuant to authority conferred in a prior treaty* because although the VFA makes reference to the Mutual Defense Treaty in its Preamble,[38] the Mutual Defense Treaty itself does not confer authority upon the U.S. President to enter into executive agreements in implementation of the Treaty. Issues have occasionally arisen about whether an executive agreement was entered into pursuant to a treaty. These issues, however, involved mere treaty interpretation.[39] In *Wilson v. Girard*, 354

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[35] *Id.*, citing McDougal and Lans, *supra* note 22 and 212.

[36] Randall, *op. cit. supra* note 33 at 8, citing McDougal and Lans, *supra* note 22 at 261-306.

[37] Randall, *op. cit. supra* note 33 at 10-11.

[38] *Supra*, note 3.

[39] Randall, *op. cit. supra* note 33 at 6.

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US 524 (1957), the U.S. Supreme Court had occasion to interpret Art. III of the Security Treaty Between the United States of America and Japan which stated that, "(t)he conditions which shall govern the disposition of armed forces of the United states of America in and about Japan shall be determined by administrative agreements between the two Governments."[40] Pursuant to this provision in the treaty, the executive entered into an administrative agreement covering, among other matters, jurisdiction of the United States over offenses committed in Japan by members of the U.S. armed forces. The U.S. Supreme Court recognized the validity of the Administrative Agreement as it was concluded by the President pursuant to the authority conferred upon him by Art. III of the Security Treaty between Japan and the United states to make administrative agreements between the two governments concerning "(t)he conditions which shall govern the disposition of armed forces of the United states of America in and about Japan."

Respondents boldly claim that the VFA is authorized by Art. II of the RP-US Mutual Defense Treaty which provides that, "(i)n order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack."[41] The alleged authorization is not as direct and unequivocal as Art. III of the Security Treaty Between the U.S. and Japan, hence it would be precarious to assume that the VFA derives authorization from. the Mutual Defense Treaty. The precariousness is heightened by the fact that when the U.S. Senate ratified the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces[42] which was concluded pursuant to the North Atlantic Treaty (NATO),[43] the Senate included in its instrument of ratification statements on matters of jurisdiction over U.S.

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[40] 136 UNTS 216 (1952).

[41] Consolidated Memorandum, p. 29.

[42] 199 UNTS 67 (1954).

[43] 34 UNTS 244 (1949).

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forces stationed abroad, among which was an admonition that the Agreement's provisions on criminal jurisdiction which have similar features as the VFA, do not constitute a precedent for future agreements. We can reasonably gather from the U.S. Senate's statements that criminal jurisdiction over U.S. forces stationed abroad is a matter of Senate concern, and thus Senate authorization for the President to enter into agreements touching upon such jurisdictional matters cannot so easily be assumed.

Neither does the VFA fall under the category of a Congressional – Executive Agreement as it was not concluded by the U.S. President pursuant to Congressional authorization or enactment nor has it been confirmed by the U.S. Congress.

At best, the VFA would be more akin to a sole or presidential executive agreement which would be valid if concluded on the basis of the U.S. President's exclusive power under the U.S. Constitution. Respondents argue that except for the Status of Forces Agreement (SOFA) entered into pursuant to the NATO, the United States, by way of executive agreements, has entered into 78 Status of Forces Agreements (SOFA) which extend privileges and immunities to U.S. forces stationed abroad,[44] similar to the provisions of the VFA. Respondents have failed, however, to qualify whether these executive agreements are sole executive agreements or were concluded pursuant to Congressional authorization or were authorized by treaty. This detail is important in view of the above discussion on the sense of the Senate on criminal jurisdiction over U.S. forces stationed abroad.

It will contribute to the elucidation of the legal status of the VFA under U.S. law if we *compare the legal force of sole executive agreements and of treaties.* Under international law, treaties and executive agreements equally bind the United States.[45] If there is any distinction between treaties and executive agreements, it must be found in U.S. constitutional law.[46] *The*

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[44] Consolidated Memorandum, p. 33.

[45] Randall, *op. cit. supra* note 33 at 4.

[46] Weston, Falk, D'Amato, *International Law and World Order*, p. 926 (1980).

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distinctions, if any, between the legal force of treaties and executive agreements on the domestic plane may be treated on three levels, namely, vis-a-vis: (1) state law; (2) acts of Congress and treaties; and (3) the U.S. Constitution.

The Supremacy Clause of the U.S. Constitution provides:

"This Constitution, and the Law of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[47]

It is well-settled that this clause provides the constitutional basis for the *superiority of a treaty over state law*. Thus, the Warsaw Convention to which the United States is a signatory preempts the California law on airline liability.[48] The U.S. Supreme Court has ruled in unmistakable terms that a treaty enjoys supremacy over state law, *viz:*

"Plainly, *the external powers of the United states are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning.* Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. "To counter-act it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war." 3 Elliot, Debates, 515 . . . . *this rule in respect of treaties is established by the express language of cl. 2, Art. 6, of the Constitution* . . ."(italics supplied)[49]

It is also generally conceded that *sole executive agreements are supreme over state law and policy.* Two cases decided by the U.S. Supreme Court support this view.

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[47] U.S. Const., Art. VI, Sec. 2.

[48] Maris, *International Law, An Introduction* (1984), p. 224, citing In re Aircrash in Bali, 1982.

[49] *United States v. Belmont*; 81. L. Ed. 1134 (1937).

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The first of these two cases, *United States v. Belmont,*[50] involved the Litvinov Assignment, a sole executive agreement executed between the United States and the Soviet Government. In 1918, the Soviet government, by laws and decrees, nationalized, among others, a Russian corporation, and appropriated its assets including a sum of money deposited with Belmont, a private banker doing business in New York. The sum of money remained Russian property until 1933, at which time the Soviet government released and assigned to the United States all amounts due the Soviet government from American nationals, including the deposit account of the Russian corporation with Belmont. The assignment, better known as the Litvinov Assignment, was effected by an exchange of diplomatic correspondence between the Soviet government and the United States to bring about a final settlement of the claims and counter-claims between the Soviet government and the United States. Coincident with the assignment, the U.S. President recognized the Soviet Government and normal diplomatic relations were established between the two governments.[51]

Upon demand duly made by the United States, the executors of Belmont's will failed and refused to pay the sum of money deposited by the Russian corporation with Belmont. The United States thus filed a suit in a federal district court to recover the sum of money. The court below held that the situs of the bank deposit was within the State of New York and not within Soviet territory. Thus, the nationalization decree, if enforced, would amount to an act of confiscation which was contrary to the controlling public policy of New York. The U.S. Supreme Court, however, held that *no state policy could prevail against the Litvinov Assignment.*[52] It ruled as follows:

"The *assignment and the agreements in connection therewith did not*, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Sec. 2, Art. 2), *require the advice and consent of the Senate.*

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[50] *Ibid.*

[51] *Id.*, p. 1139.

[52] *Id.*, at 1137.

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A treaty signifies "a compact made between two or more independent nations with a view to the public welfare." *B. Altman & Co. v. United States*, 224 U.S. 583, 600, 56 L. ed. 894, 910, 32 S. Ct. 593. But *an international compact, as this was, is not always a treaty which requires the participation of the Senate.* There are many such compacts, of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations." (italics supplied)[53]

On the supremacy of executive agreements over state law, it ruled as follows:

"Plainly, *the external powers of the United states are to be exercised without regard to state laws or policies*. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. 'To counter-act it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.' 3 Elliot, Debates, 515 . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. 6, of the Constitution, *the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subjected to any curtailment or interference on the part of the several states.*" (italics supplied)[54]

The other case, *United States v. Pink,*[55] likewise involved the Litvinov Assignment. The U.S. Supreme Court here reiterated its ruling in the *Belmont case* and held that the Litvinov Assignment was an international compact or agreement having similar dignity as a treaty under the supremacy clause of the U.S. Constitution.[56]

While adherents of sole executive agreements usually point to these two cases as bearing judicial imprimatur of sole executive agreements, the validity of sole executive agreements seems

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[53] See note 51, *supra.*

[54] *Id.*, p. 1140.

[55] 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

[56] *Id.*, p. 818.

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to have been initially dealt with by the U.S. Supreme Court in 1933 in *Monaco v. Mississippi* wherein Chief Justice Hughes stated that, "(t)he National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, *through treaty, agreement of arbitration, or otherwise."*[57]

Subsequent to the *Belmont* and *Pink* cases, the U.S. Supreme Court once again upheld the validity of a sole executive agreement in *Dames & Moore v. Regan.*[58] This case involved the Algiers Accord, an executive agreement negotiated and concluded by President Carter and confirmed by President Reagan to resolve the Iran Hostage Crisis in 1981. That agreement provided, among others, that the United states and Iran agreed to cancel certain claims between them and to establish a special tribunal to resolve other claims, including those by U.S. nationals against Iran. The United states also agreed to close its courts to those claims, as well as to suits by U.S. citizens against the government of Iran for recovery of damages arising from the Hostage Crisis. Although the agreement was entered into by the President pursuant to Congressional authorization, the Court found that the President's action with regard to claims was not so authorized. Nevertheless, the U.S. Supreme Court, noting the power of presidents in foreign affairs which includes the power to settle claims, as well as Congressional acquiescence to such practice, upheld the validity of the Algiers Accord.

Upon the other hand, those opposed to sole executive agreements argue that the pronouncements of the Court in the *Belmont* and *Pink cases* mean that sole executive agreements override state legislation only when founded upon the President's constitutional power to recognize foreign governments.[59]

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[57] McDougal and Lans, *op. cit. supra* note 22 at 310, citing *Monaco v. Mississippi,* 292 U.S. 313, 331 (1934) (italics supplied).

[58] 453 U.S. 654 (1981).

[59] For criticism of such view, see Mathews, *The Constitutional Power of the President to conclude International Agreements,* The Yale Law Journal, vol. 64, p. 376 (1954-1955) and McCormick, *American Foreign Policy and*

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While treaties and sole executive agreements have the same legal effect on state law, sole executive agreements pale in comparison to treaties when pitted against prior inconsistent acts of Congress. The U.S. Supreme Court has long ago declared that the Constitution mandates that a treaty and an act of legislation are both "supreme law of the land." As such, no supreme efficacy is given to one over the other. If the two relate to the same subject matter and are inconsistent, the one later in date will prevail, provided the treaty is self-executing,[60] *i.e.*, "whenever it operates of itself without aid of legislation."[61] In *The Cherokee Tobacco (Boudinot v. United States)*,[62] the U.S. Supreme Court also held that where there is repugnance between a treaty and an Act of Congress, "(a) treaty may supersede a prior Act of Congress . . . and an Act of Congress may supersede a prior treaty. . . ."[63] Settled is the rule, therefore, that a treaty supersedes an earlier repugnant Act of Congress, and an Act of Congress supersedes an earlier contradictory treaty.[64] As a corollary, a treaty, being placed on the same footing as an act of legislation,[65] can repeal or modify a prior inconsistent treaty.

In the case of sole executive agreements, commentators have been in general agreement that unlike treaties, *sole executive agreements cannot prevail over prior inconsistent federal legislation.* Even proponents of sole executive agreements admit that while a self-executing treaty can supersede a prior inconsistent statute, it is very doubtful whether a sole executive

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Process, 2nd ed., p. 282 (1992), citing Henkin, "*Foreign Affairs and the Constitution*," Foreign Affairs 66 (Winter 1987/88), p. 185.

[60] Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed., p. 209 (1996), citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

[61] *Id.*, p. 199, quoting Chief Justice Marshall.

[62] 11 Wallace 616 (1870).

[63] Byrd, Jr., *Treaties and Executive Agreements in the United States, Their Separate Roles and Limitations*, p. 82 (1960).

[64] *Id.*, p. 83.

[65] *Supra*, note 60, p. 209.

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agreement, in the absence of appropriate legislation, will be given similar effect.[66] Wallace McClure, a leading proponent of the interchangeability of treaties-and executive agreements, opined that it would be contrary to "the entire tenor of the Constitution" for sole executive agreements to supersede federal law.[67] The Restatement (Third) of the Foreign Relations Law of the United States postulates that a sole executive agreement could prevail at least over state law, and (only) *possibly* federal law without implementing legislation.[68] Myer S. McDougal and Asher Lans who are staunch advocates of executive agreements also concede that sole executive agreements will not ordinarily be valid if repugnant to existing legislation.[69]

In *United States v. Guy W. Capps, Inc.,*[70] a leading lower court decision discussing the issue of supremacy of executive agreements over federal legislation, the Fourth circuit held that, "the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related . . ."[71] The U.S. Supreme Court itself has "intimated that the President

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[66] Mathews, *op. cit. supra* note 59 at p. 381, citing *Lissitzyn, The Legal Status of Executive Agreements on Air Transportation*, 17 J. Air L. & Comm. 436, 444 (1950); Corwin, *The President's Control of Foreign Relations* 120 (1917); *Hearings before Subcommittee of Senate Committee on the Judiciary on S.J. Res. 1 & S.J. Res. 43,* 83d Cong., 1st sess. 224, 247 & n.57 (1953); MacChesney, *et al., The Treaty Power and the Constitution: The Case Against Amendment*, 40 A.B.A.J. 203, 205 (1954).

[67] Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86(4) California Law Review, Note 287 (1998), citing McClure, International Executive Agreements, p. 343 (1967).

[68] *Id.*, p. 729, citing Restatement (Third) of the Foreign Relations Law of the United states, Sec. 303 cmt. j.

[69] McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*: 1, The Yale Law Journal, vol. 54 (1), p. 317 (1945).

[70] 204 F. 2d 655 (4th Cir. 1953), affirmed on other grounds, 348 U.S. 296, 75 S. Ct. 326, 99 L. Ed. 329 (1955).

[71] Treatise, p. 399.

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might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."[72] The reason for this is that the U.S. President's power to enter into international agreements derives from his position as Chief Executive. *By Sec. 7, Art. I of the U.S. Constitution, the president does not have power to repeal existing federal laws. Consequently, he cannot make an indirect repeal by means of a sole executive agreement.*[73]

On the other side of the coin, it is argued, that when the U.S. President enters into a sole executive agreement pursuant to his exclusive presidential authority in the field of foreign relations, such agreement may prevail over prior inconsistent federal legislation.[74] In this situation, the doctrine of separation of powers may permit the U.S. President to disregard the prior inconsistent Act of Congress as an "unconstitutional invasion of his power."[75] However, aside from lacking firm legal support, this view has to contend with the problem of determining which powers are exclusively executive and which powers overlap with the powers of Congress.[76]

Again, although it is doubtful whether sole executive agreements can supersede prior inconsistent federal legislation, proponents of sole executive agreements interpret the *Pink case* to mean that sole executive agreements are on equal footing with a treaty, having been accorded the status of "law of the land" under the supremacy clause and the Litvinov Assignment having been recognized to have similar dignity as a treaty.[77]

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[72] Mathews, *op. cit. supra* note 59 at 381, citing *Youngstown & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (concurring opinion of Jackson).

[73] Mathews, *op. cit. supra* note 59 at 381.

[74] Treatise, p. 401.

[75] See note 69, *supra*.

[76] See Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 The George Washington Law Review, p. 550 (1999).

[77] Mathews, *op cit. supra* note 59 at 381

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As such, it is opined that a sole executive agreement may supersede a prior inconsistent treaty. Treaties of the United States have in fact been terminated on several occasions by the President on his own authority.[78] President Roosevelt terminated at least two treaties under his independent constitutional powers: the extradition treaty with Greece, in 1933, and the Treaty of Commerce and Navigation with Japan, in 1939.[79] That sole executive agreements may repeal or terminate a treaty is impliedly recognized in *Charlton v. Kelly*[80] as follows: "The executive department having thus elected to waive any right to free itself from the obligation [of the treaty], it is the plain duty of the court to recognize the obligation.[81]

As against the U.S. Constitution, treaties and sole executive agreements are in equal footing as they are subject to the same limitations. As early as 1870, the U.S. Supreme Court declared that, "a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."[82] In *Missouri v. Holland*,[83] it was held that treaties must not violate the Constitution.[84] The U.S. Supreme Court also discussed the constitutionally implied limitations on the treaty making power in *Reid v. Covert,*[85] where Justice Black stated that "(n)o agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free

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[78] Note 154, *op. cit. supra* note 59, citing Corwin, *The President: Office and Powers* 243 (2nd ed. 1941).

[79] *Id.*, p. 376, citing *Corwin op. cit. supra* note 66 at 417.

[80] 229 U.S 447, 474, 476 (1913).

[81] Note 154, Mathews, *op. cit. supra* note 59 at 376.

[82] Byrd, *Treaties and Executive Agreements in the United States, Their separate roles and limitations*, p. 84 (1960), citing The Cherokee Tobacco (*Boudinot v. United States*), 11 Wallace 616 at 620 (1870).

[83] 252 U.S. 416 (1920).

[84] Maris, *International Law, An Introduction*, p. 224 (1984).

[85] 354 U.S. at 16, 77 S. Ct. at 1230.

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from the restraints of the Constitution."[86] He concluded that the U.S. Constitution provides limits to the acts of the president, the joint action of the president and the Senate, and consequently limits the treaty making power.[87]

There is no dispute that the constitutional limitations relating to treaties also apply to sole executive agreements. It is well-settled that the due process clause of the Fifth Amendment and other substantive provisions of the U.S. Constitution constitute limitations on both treaties and executive agreements.[88] Numerous decisions have also held that both treaties and sole executive agreements cannot contravene private rights protected by the U.S. Constitution.[89]

In conclusion, after a macro view of the landscape of U.S. foreign relations *vis-a-vis* U.S. constitutional law, with special attention on the legal status of sole executive agreements, *I respectfully submit that the Court will be standing on unstable ground if it places a sole executive agreement like the VFA on the same constitutional plateau as a treaty. Questions remain and the debate continues on the constitutional basis as well as the legal effects of sole executive agreements under U.S. Law.* The observation of Louis Henkin, a noted international and U.S. constitutional law scholar, captures the sentiments of the framers of the Philippine Constitution and of the Filipinos in crafting Sec. 25, Art. XVIII of the 1987 Constitution — "(o)ften the treaty process will be used at the

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[86] Treatise, p. 387. See also, *Geoffrey v. Riggs*, 133 U.S. 258, 267, 10 S. Ct. 295, 297, 33 L. Ed. 642 (1890); *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 242-43, 21 L. Ed. 523 (1872); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21, 20 L. Ed. 227 (1870); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657, 14 L. Ed. 1090 (1853); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736, 9 L. Ed. 573 (1836).

[87] *Ibid.*

[88] McDougal and Lans, *op. cit. supra* note 69 at 315.

[89] Mathews, *op. cit. supra* note 59, at 377, citing *Missouri v. Holland,* 252 U.S. 416, 433 (1920) (*dictum*); *Geoffrey v. Riggs*, 133 U.S. 258, 267 (1890) (same); The Cherokee Tobacco, 11 Wall. (78 U.S.) 616, 620-21 (1870) (same). See also Henkin, *op. cit. supra* note 60 at 185.

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insistence of other parties to an agreement because they believe that a treaty has greater 'dignity' than an executive agreement, because its constitutional effectiveness is beyond doubt, because a treaty will 'commit' the Senate and the people of the United States and make its subsequent abrogation or violation less likely."[90]

With the cloud of uncertainty still hanging on the exact legal force of sole executive agreements under U.S. constitutional law, this Court must strike a blow for the sovereignty of our country by drawing a bright line between the dignity and status of a treaty in contrast with a sole executive agreement. However we may wish it, the VFA, as a sole executive agreement, cannot climb to the same lofty height that the dignity of a treaty can reach. Consequently, it falls short of the requirement set by Sec. 25, Art. XVIII of the 1987 Constitution that the agreement allowing the presence of foreign military troops on Philippine soil must be "recognized as a treaty by the other contracting state."

I vote to grant the petitions.

Melo and *Vitug, JJ.*, dissent.

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[90] Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed., p. 224 (1996).