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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

EN BANC

[G.R. No. 124360. December 3, 1997]

FRANCISCO S. TATAD, *petitioner, vs.* **THE SECRETARY OF THE DEPARTMENT OF ENERGY AND THE SECRETARY OF THE DEPARTMENT OF FINANCE,** *respondents.*

[G.R. No. 127867. December 3, 1997]

EDCEL C. LAGMAN, JOKER P. ARROYO, ENRIQUE GARCÍA, WIGBERTO TAÑADA, FLAG HUMAN RIGHTS FOUNDATION, INC., FREEDOM FROM DEBT COALITION (FDC), SANLAKAS, *petitioners, vs.* **HON. RUBEN TORRES in his capacity as the Executive Secretary, HON. FRANCISCO VIRAY, in his capacity as the Secretary of Energy, CALTEX Philippines, Inc., PETRON Corporation, and PILIPINAS SHELL Corporation,** *respondents.*

EASTERN PETROLEUM CORP., SEAOIL PETROLEUM CORP., SUBIC BAY DISTRIBUTION, INC., TWA, INC., and DUBPHIL GAS, *Movants-in-Intervention.*

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SYNOPSIS

Motions for reconsideration and partial motions for reconsideration were filed by the parties of the decision of the Supreme Court declaring R.A. No. 8180 unconstitutional.

The choice and crafting of the standard to guide the exercise of delegated power is part of the lawmaking process and lies within the exclusive jurisdiction of Congress. The standard cannot be altered in any way by the Executive for the Executive cannot modify the will of the Legislature.

The power of Congress to enact laws does not include the right to pass unconstitutional laws. In fine, the Court did not usurp the power of Congress to enact laws but merely discharged its bounden duty to check the constitutionality of laws when challenged in appropriate cases. Our decision annulling R.A. 8180 is justified by the principle of check and balance. We hold that power and obligation of this Court to pass upon the constitutionality of laws cannot be defeated by the fact that the challenged law carries serious economic implications. This Court has struck down laws abridging the political and civil rights of our people even if it has to offend the other more powerful branches of government. There is no reason why the Court cannot strike down R.A. No. 8180 that violates the economic rights of our people even if it has to bridle the liberty of big business within reasonable bounds.

The Constitution gave this Court the authority to strike down all laws that violate the Constitution. It did not exempt from the reach of this authority laws with economic dimension.

A separability clause does not clothe the valid parts with immunity from the invalidating effect the law gives to the inseparable blending of the bad with the good. The separability clause cannot also be applied if it will produce an absurd result. In sum, if the separation of the statute will defeat the intent of the legislature, separation will not take place despite the inclusion of a separability clause in the law. In the case of Republic Act No. 8180, the unconstitutionality of the provisions on tariff differential, minimum inventory and predatory pricing cannot but result in the unconstitutionality of the entire law despite its separability clause. These provisions cannot be struck down alone for they were the ones intended to carry out the policy

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of the law embodied in Section 2 thereof. The provisions on 4% tariff differential, minimum inventory and predatory pricing are anti-competition, and they are the key provisions of R.A. 8180. Without these provisions in place, Congress could not have deregulated the downstream oil industry.

The Motions for Reconsideration of the public respondents and of the intervenors as well as the Partial Motion for Reconsideration of petitioner Enrique Garcia are denied for lack of merit.

SYLLABUS

1. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; DELEGATED POWER; CRAFTING OF STANDARD LIES WITHIN THE EXCLUSIVE JURISDICTION OF CONGRESS.—** The choice and crafting of the standard to guide the exercise of delegated power is part of the lawmaking process and lies within the exclusive jurisdiction of Congress. The standard cannot be altered in any way by the Executive for the Executive cannot modify the will of the Legislature.

2. **ID.; ID.; REPUBLIC ACT NO. 8180 (OIL DEREGULATION LAW); 4% TARIFF DIFFERENTIAL GIVES A DECISIVE EDGE TO EXISTING OIL COMPANIES.—** This 4% tariff differential gives a decisive edge to the existing oil companies even as it constitutes a substantial barrier to the entry of prospective players. We do not agree with the public respondents that there is no empirical evidence to support this ruling. In the recent hearing of the Senate Committee on Energy chaired by Senator Freddie Webb, it was established that the 4% tariff differential on crude oil and refined petroleum importation gives a 20-centavo per liter advantage to the three big oil companies over the new players. It was also found that said tariff differential serves as a protective shield for the big oil companies. Nor do we approve public respondents' submission that the entry of new players after deregulation is proof that the 4% tariff differential is not a heavy disincentive.

3. **ID.; ID.; ID.; ID.; DOES NOT VIOLATE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION BUT EXCLUDE FAIR AND EFFECTIVE COMPETITION.—** Public respondents try to justify the 4% tariff differential on the ground that there is a substantial difference between a refiner

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and an importer just as there is a difference between raw material and finished product. Obviously, the effort is made to demonstrate that the unequal tariff does not violate the equal protection clause of the Constitution. The effort only proves that the public respondents are still looking at the issue of tariff differential from the wrong end of the telescope. Our Decision did not hold that the 4% tariff differential infringed the equal protection clause of the Constitution even as this was contended by petitioner Tatad. Rather, we held that said tariff differential substantially occluded the entry point of prospective players in the downstream oil industry. We further held that its inevitable result is to exclude fair and effective competition and to enhance the monopolists ability to tamper with the mechanism of a free market. This consideration is basic in anti-trust suits and cannot be eroded by belaboring the inapplicable principle in taxation that different things can be taxed differently.

4. **ID.; ID.; ID.; MINIMUM INVENTORY REQUIREMENT; HIGH COST OF MEETING REQUIREMENT HAS AN INHIBITING EFFECT ON OPERATIONS.—** The public respondents tenaciously defend the validity of the minimum inventory requirement. They aver that the requirement will not prejudice new players "x x x during their first year of operation because they do not have yet annual sales from which the required minimum inventory may be determined. Compliance with such requirement on their second and succeeding years of operation will not be difficult because the putting up of storage facilities in proportion to the volume of their business becomes an ordinary and necessary business undertaking just as the case of importers of finished products in other industries." The contention cannot convince for as well articulated by petitioner Garcia, "the prohibitive cost of the required minimum inventory will not be any less burdensome on the second, third, fourth, etc. years of operations. Unlike most products which can be imported and stored with facility, oil imports require ocean receiving, storage facilities. Ocean receiving terminals are already very expensive, and to require new players to put up more than they need is to compound and aggravate their costs, and consequently their great disadvantage *vis-a-vis* the Big 3." Again, the argument on whether the minimum inventory requirement seriously hurts the new players is best settled by hearing the new players themselves. In their motion for intervention, they implicitly confirmed that the high cost of meeting the inventory requirement

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has an inhibiting effect in their operation and hence, they support the ruling of this Court striking it down as unconstitutional.

5. **ID.; ID.; ID.; PREDATORY PRICING; DEFINITION TOO LOOSE TO BE DETERRENT.—** As discussed, the provisions of R.A. No. 8180 on tariff differential and minimum inventory erected high barriers to the entry of prospective players even as they raised their new rivals' costs, thus creating the clear danger that the deregulated market in the downstream oil industry will not operate under an atmosphere of free and fair competition. It is certain that lack of real competition will allow the present oil oligopolists to dictate prices, and can entice them to engage in predatory pricing to eliminate rivals. The fact that R.A. No. 8180 prohibits predatory pricing will not dissolve this clear danger. In truth, its definition of predatory pricing is too loose to be a real deterrent. Following the more effective Areeda-Turner test, Congressman Tinga has proposed to redefine predatory pricing, *viz.*: "Predatory pricing means selling or offering to sell any oil product at a price below the average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a competitor from entering the market." In light of its loose characterization in R.A. 8180 and the law's anti-competitive provisions, we held that the provision on predatory pricing is constitutionally infirmed for it can be wielded more successfully by the oil oligopolists. Its cumulative effect is to add to the arsenal of power of the dominant oil companies.

6. **REMEDIAL LAW; SUPREME COURT; DID NOT REVIEW THE WISDOM OF R.A. NO. 8180 BUT MERELY DISCHARGED ITS BOUNDEN DUTY TO CHECK CONSTITUTIONALITY OF LAWS.—** Public respondents insist on their thesis that the cases at bar actually assail the wisdom of R.A. No. 8180 and that this Court should refrain from examining the wisdom of legislations. They contend that R.A. No. 8180 involves an economic policy which this Court cannot review for lack of power and competence. The Court is aware that the principle of separation of powers prohibits the judiciary from interferring with the policy setting function of the legislature. For this reason we italicized in our Decision that the Court did not review the wisdom of R.A. No. 8180 but its compatibility with the Constitution; the Court did not annul the economic policy of deregulation but vitiated its aspects which offended the constitutional mandate on fair competition. It is

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beyond debate that the power of Congress to enact laws does not include the right to pass unconstitutional laws. In fine, the Court did not usurp the power of Congress to enact laws but merely discharged its bounden duty to check the constitutionality of laws when challenged in appropriate cases. Our Decision annulling R.A. No. 8180 is justified by the principle of checks and balance.

7. **ID.; ID.; POWER TO PASS UPON CONSTITUTIONALITY OF LAWS DID NOT EXEMPT LAWS WITH ECONOMIC DIMENSIONS.—** We hold that the power and obligation of this Court to pass upon the constitutionality of laws cannot be defeated by the fact that the challenged law carries serious economic implications. This Court has struck down laws abridging the political and civil rights of our people even if it has to offend the other more powerful branches of government. There is no reason why the Court cannot strike down R.A. No. 8180 that violates the economic rights of our people even if it has to bridle the liberty of big business within reasonable bounds. The Constitution gave this Court the authority to strike down all laws that violate the Constitution. It did not exempt from the reach of this authority laws with economic dimension.

8. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; R.A. NO. 8180; CHOICE OF DATE OF FULL DEREGULATION, A JUDGMENT CALL OF CONGRESS WHICH CANNOT BE IMPUGNED BY THIS COURT.—** Petitioner has no basis in condemning as unconstitutional *per se* the date fixed by Congress for the beginning of the full deregulation of the downstream oil industry. Our Decision merely faulted the Executive for factoring the depletion of OPSF in advancing the date of full deregulation to February 1997. Nonetheless, the error of the Executive is now a non-issue for the full deregulation set by Congress itself at the end of March 1997 has already come to pass. March 1997 is not an arbitrary date. By that date, the transition period has ended and it was expected that the people would have adjusted to the role of market forces in shaping the prices of petroleum and its products. The choice of March 1997 as the date of full deregulation is a judgment of Congress and its judgment call cannot be impugned by this Court.

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9. **ID.; ID.; ID.; SEPARABILITY CLAUSE; INTENT OF THE LEGISLATURE SHOULD BE CONSIDERED AND SHOULD NOT CLOTHE VALID PARTS WITH IMMUNITY FROM INVALIDATING EFFECT OF LAW.—** We cannot affirm the movants for to determine whether or not a particular provision is separable, the courts should consider the intent of the legislature. It is true that most of the time, such intent is expressed in a separability clause stating that the invalidity or unconstitutionality of any provision or section of the law will not affect the validity or constitutionality of the remainder. Nonetheless, the separability clause only creates *a presumption* that the act is severable. *It is merely an aid in statutory construction. It is not an inexorable command. A separability clause does not clothe the valid parts with immunity from the invalidating effect the law gives to the inseparable blending of the bad with the good. The separability clause cannot also be applied if it will produce an absurd result. In sum, if the separation of the statute will defeat the intent of the legislature, separation will not take place despite the inclusion of a separability clause in the law.*

10. **ID.; ID.; ID.; ID.; ID.; CASE AT BAR.—** In the case of Republic Act No. 8180, the unconstitutionality of the provisions on tariff differential, minimum inventory and predatory pricing cannot but result in the unconstitutionality of the entire law despite its separability clause. These provisions cannot be struck down alone for they were the ones intended to carry out the policy of the law embodied in Section 2 thereof. They actually set the stage for the regime of deregulation where government will no longer intervene in fixing the price of oil and the operations of oil companies. It is conceded that the success of deregulation lies in a truly competitive market and there can be no competitive market without the easy entry and exit of competitors. We held in our Decision that the provisions on 4% tariff differential, minimum inventory and predatory pricing are anti-competition, and they are the key provisions of R.A. No. 8180. Without these provisions in place, Congress could not have deregulated the downstream oil industry. To decree the partial unconstitutionality of R.A. 8180 will bring about an absurdity — a fully deregulated downstream oil industry where government is impotent to regulate run away prices, where the oil oligopolists can engage in cartelization without competition, where

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prospective players cannot come in, and where new players will close shop.

11. ID.; AN UNCONSTITUTIONAL LAW REVIVES THE LAWS IT HAS REPEALED.— It is settled jurisprudence that the declaration of a law as unconstitutional revives the laws that it has repealed. Stated otherwise, an unconstitutional law returns us to the *status quo ante* and this return is beyond the power of the Court to stay. *Under our scheme of government, however, the remedy to prevent the revival of an unwanted status quo ante lies with Congress. Congress can block the revival of the status quo ante or stop its continuation by immediately enacting the necessary remedial legislation.* We emphasize that in the cases at bar, the Court did not condemn the economic policy of deregulation as unconstitutional. It merely held that as crafted, the law runs counter to the constitutional provision calling for fair competition. Thus, there is no impediment in re-enacting R.A. No. 8180 minus its provisions which are anti-competition. The Court agrees that our return to the regime of regulation has pernicious consequences and it specially sympathizes with the intervenors. Be that as it may, the Court is powerless to prevent this return just as it is powerless to repeal the 10% tariff differential of the Tariff Code. It is Congress that can give all these remedies.

12. ID.; SUPREME COURT; WITH NO PARTISAN POLITICAL THEOLOGY.— When the Court reviews the constitutionality of a law, it does not deal with the realities of politics nor does it delve into the mysticism of politics. The Court has no partisan political theology for as an institution it is at best apolitical, and at worse, politically agnostic.

13. ID.; ID.; WITH THE UNYIELDING DUTY TO UPHOLD THE SUPREMACY OF THE CONSTITUTION.— The Constitution mandates the regulation of monopolies and interdicts unfair competition. Thus, the Constitution provides a shield to the economic rights of our people, especially the poor. It is the unyielding duty of this Court to uphold the supremacy of the Constitution not with a mere wishbone but with a backbone that should neither bend nor break.

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KAPUNAN, *J., concurring and dissenting opinion:*

1. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; LEGISLATIVE POWER; STATUTES; SEPARABILITY CLAUSE; CONSTRUED.—** A separability clause states that if for any reason, any section or provision of the statute is held to be unconstitutional or (invalid), the other section(s) or provision(s) of the law shall not be affected thereby. It is a legislative expression of intent that the nullity of one provision shall not invalidate the other provisions of the act. Such a clause is not, however, controlling and the courts may, in spite of it, invalidate the whole statute where what is left, after the void part, is not complete and workable.

2. **ID.; ID.; ID.; ID.; ID.; CASE AT BAR.—** The three provisions declared void are severable from the main statute and their removal therefrom would not affect the validity and enforceability of the remaining provisions of the said law R.A. 8180, sans the constitutionally infirmed portions, remains "complete in itself, sensible, capable of being executed and wholly independent of (those) which (are) rejected. In other words, despite the elimination of some of its parts, the law can still stand on its own.

APPEARANCES OF COUNSEL

Sanidad, Abaya, Cortez, Te, Madrid, Viterbo & Tan Law Firm for petitioners.

Angara, Abello, Concepcion, Regala & Cruz co-counsel for Caltex Phil., Inc.

R E S O L U T I O N

PUNO, *J.*:

For resolution are: (1) the motion for reconsideration filed by the public respondents; and (2) the partial motions for reconsideration filed by petitioner Enrique T. Garcia and the intervenors.[1]

[1] Intervenors' Motion for Reconsideration only protests the restoration of the 10% tariff differential before R.A. No. 8180.

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In their Motion for Reconsideration, the public respondents contend:

I

"Executive Order No. 392 is not a misapplication of Republic Act No. 8180;

II

Sections 5(b), 6 and 9(b) of Republic Act No. 8180 do not contravene Section 19, Article XII of the Constitution; and

III

Sections 5(b), 6 and 9(b) of R.A. No. 8180 do not permeate the essence of the said law; hence their nullity will not vitiate the other parts thereof."

In their motion for Reconsideration, the intervenors argue:

"2.1.1 The total nullification of Republic Act No. 8180 restores the disproportionate advantage of the three big oil firms — Caltex, Shell and Petron — over the small oil firms;

2.1.2 The total nullification of Republic Act. No. 8180 "disarms" the new entrants and seriously cripples their capacity to compete and grow; and

2.1.3 Ultimately the total nullification of Republic Act No. 8180 removes substantial, albeit imperfect, barriers to monopolistic practices and unfair competition and trade practices harmful not only to movant-intervernors but also to the public in general."

In his Partial Motion for Reconsideration,[2] petitioner Garcia prays that only the provisions of R.A. No. 8180 on the 4% tariff differential, predatory pricing and minimum inventory be declared unconstitutional. He cites the "pernicious effects" of a total declaration of unconstitutionality of R.A. No. 8180.

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[2] In the *Manila Times* issue of November 6, 1997, p. 1, petitioner Garcia was initially reported as having hailed our Decision as a "clear victory to the Constitution and the Filipino people against the Big Three (major oil firms), against cartelization and against oligopoly.

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He avers that "it is very problematic xxx if Congress can fasttrack an entirely new law."

We find no merit in the motions for reconsideration and partial motion for reconsideration.

We shall first resolve public respondents' motion for reconsideration. They insist that there was no misapplication of Republic Act. No. 8180 when the Executive considered the depletion of the OPSF in advancing the date of full deregulation of the downstream oil industry. They urge that the consideration of this factor did not violate the rule that the exercise of delegated power must be done strictly in accord with the standard provided in the law. They contend that the rule prohibits the Executive from subtracting but not from adding to the standard set by Congress. This hair splitting is a sterile attempt to make a distinction when there is no difference. The choice and crafting of the standard to guide the exercise of delegated power is part of the lawmaking process and lies within the exclusive jurisdiction of Congress. The standard cannot be altered in any way by the Executive for the Executive cannot modify the will of the Legislature. To be sure, public respondents do not cite any authority to support its strange thesis for there is none in our jurisprudence.

The public respondents next recycle their arguments that Sections 5(b), 6 and 9(b) of R.A. No. 8180 do not contravene Section 19, Article XII of the Constitution.[3] They reiterate that the 4% tariff differential would encourage the construction of new refineries which will benefit the country for they use Filipino labor and goods. We have rejected this submission for a reality check will reveal that this 4% tariff differential gives a decisive edge to the existing oil companies even as it constitutes a substantial barrier to the entry of prospective players. We do not agree with the public respondents that there is no empirical evidence to support this ruling. In the recent hearing of the

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[3] It provides that "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."

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Senate Committee on Energy chaired by Senator Freddie Webb, it was established that the 4% tariff differential on crude oil and refined petroleum importation gives a 20-centavo per liter advantage to three big oil companies over the new players. It was also found that said tariff differential serves as a protective shield for the big oil companies.[4] Nor do we approve public respondents' submission that the entry of new players after deregulation is proof that the 4% tariff differential is not a heavy disincentive. Acting as the mouthpiece of the new players, public respondents even lament that "unfortunately, the opportunity to get the answer right from the 'horses' mouth' eluded this Honorable Court since none of the new players supposedly adversely affected by the assailed provisions came forward to voice their position."[5] They need not continue their lamentation. The new players represented by Eastern Petroleum, Seaoil Petroleum Corporation, Subic Bay Distribution, Inc., TWA Inc., and DubPhil Gas have intervened in the cases at bar and have spoken for themselves. In their motion for intervention, they made it crystal clear that it is not their intention "xxx to seek the reversal of the Court's nullification of the 4% differential in Section 5(b) nor of the inventory requirement of Section 6, nor of the prohibition of predatory pricing in Section 9(b)."[6] They stressed that they only protest the restoration of the 10% oil tariff differential under the Tariff Code.[7] The horse's mouth

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[4] *Manila Chronicle,* November 26, 1997, p. 1.

[5] Motion for Reconsideration of public respondents, p. 3.

[6] Motion for Reconsideration-in-intervention, p. 2.

[7] Their prayer states:

x x x x x x x x x

"Wherefore, movants-intervenors, through undersigned counsel, respectfully pray that this Honorable Court en banc, reconsider its Decision of 05 November 1997:

1) by limiting nullification to the provision on predatory pricing in Section 9(b) and on inventory requirement in Section 6;

2) by retaining the nullification of the tariff differential in Section 5(b) but not restoring the 10% oil tariff differential under the old regime; and

3) Movants-intervenors further pray for other just and equitable measures or relief in the premises."

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therefore authoritatively tells us that the new players themselves consider the 4% tariff differential in R.A. No. 8180 as oppressive and should be nullified.

To give their argument a new spin, public respondents try to justify the 4% tariff differential on the ground that there is a substantial difference between a refiner and an importer just as there is difference between raw material and finished product. Obviously, the effort is made to demonstrate that the unequal tariff does not violate the equal protection clause of the Constitution. The effort only proves that the public respondents are still looking at the issue of tariff differential from wrong end of the telescope. Our Decision did not hold that the 4% tariff differential infringed the equal protection clause of the Constitution even as this was contended by petitioner Tatad.[8] Rather, we held that said tariff differential substantially occluded the entry point of prospective players in the downstream oil industry. We further held that its inevitable result is to exclude fair and effective competition and to enhance the monopolists' ability to tamper with the mechanism of a free market. This consideration is basic in anti-trust suits and cannot be eroded by belaboring the inapplicable principle in taxation that different things can be taxed differently.

The public respondents tenaciously defend the validity of the minimum inventory requirement. They aver that the requirement will not prejudice new players "xxx during their first year of operation because they do not have yet annual sales from which the required minimum inventory may be determined. Compliance with such requirement on their second and succeeding years of operation will not be difficult because the putting up of storage facilities in proportion to the volume of their business becomes an ordinary and necessary business undertaking just as the case of importers of finished products in other industries."[9] The contention is an old one although it is purveyed with a new lipstick. The contention cannot convince

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[8] See Petition in G.R. 124360, p. 8.

[9] See Motion for Reconsideration, pp. 23-24.

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for as well articulated by petitioner Garcia, "the prohibitive cost of the required minimum inventory will not be any less burdensome on the second, third, fourth, etc. years of operations. Unlike most products which can be imported and stored with facility, oil imports require ocean receiving, storage facilities. Ocean receiving terminals are already very expensive, and to require new players to put up more than they need is to compound and aggravate their costs, and consequently their great disadvantage vis-a-vis the Big 3."[10] Again, the argument on whether the minimum inventory requirement seriously hurts the new players is best settled by hearing the new players themselves. In their motion for intervention, they implicitly confirmed that the high cost of meeting the inventory requirement has an inhibiting effect in their operation and hence, they support the ruling of this Court striking it down as unconstitutional.

Public respondents still maintain that the provision on predatory pricing does not offend the Constitution. Again, their argument is not fresh though embellished with citations of cases in the United States sustaining the validity of sales-below-costs statutes.[11] A quick look at these American cases will show that they are inapplicable. R.A. No. 8180 has a different cast. As discussed, its provisions on tariff differential and minimum inventory erected high barriers to the entry of prospective players even as they raised their new rivals' costs, thus creating the clear danger that the deregulated market in the downstream oil industry will not operate under an atmosphere of free and fair competition. It is certain that lack of real competition will allow the present oil oligopolists to dictate prices,[12] and can entice them to engage in predatory pricing to eliminate rivals. The fact that R.A. No. 8180 prohibits predatory pricing will not

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[10] Petitioner Garcia's Comments and Partial Opposition to Public Respondents' Motion for Reconsideration, p.14.

[11] Motion for Reconsideration, pp. 28-29.

[12] Anti-competitive Exclusion: Raising Rival's Costs to Achieve Power Over Price, Yale L.J. Vol. 96, No. 2, December 1986, pp. 209-293; Monopolization by Raising Rivals' Cost: The Standard Oil Case, The Journal of Law and Economics, Vol. 39, No. 1 April 1996, pp. 1-48.

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dissolve this clear danger. In truth, its definition of predatory pricing is too loose to be real deterrent. Thus, one of the law's principal authors, Congressman Dante O. Tinga filed H.B. No. 10057 where he acknowledged in its explanatory note that "the definition of predatory pricing xxx needs to be tightened up particularly with respect to the definitive benchmark price and the specific anti-competitive intent. The definition in the bill at hand which was taken from the Areeda-Turner test in the United States on predatory pricing resolves the questions." Following the more effective Areeda-Turner test, Congressman Tinga has proposed to redefine predatory pricing, *viz.*: "Predatory pricing means selling or offering to sell any oil product at a price below the average variable cost for the purpose of destroying competition, eliminating a competitor or discouraging a competitor from entering the market."[13] In light of its loose characterization in R.A. 8180 and the law's anti-competitive provisions, we held that the provision on predatory pricing is constitutionally infirmed for it can be wielded more successfully by the oil oligopolists. Its cumulative effect is to add to the arsenal of power of the dominant oil companies. For as structured, it has no more than the strength of a spider web — it can catch the weak but cannot catch the strong; it can stop the small oil players but cannot stop the big oil players from engaging in predatory pricing.

Public respondents insist on their thesis that the cases at bar actually assail the wisdom of R.A. No. 8180 and that this Court should refrain from examining the wisdom of legislations. They contend that R.A. No. 8180 involves an economic policy which this Court cannot review for lack of power and competence. To start with, no school of scholars can claim any infallibility. Historians with undefiled learning have chronicled[14] over the

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[13] Congressman Manuel A. Roxas II has also filed H.B. No. 10292 redefining predatory pricing to focus on preventing the dominant players in the industry from discouraging new entrants in the market.

[14] In his speech before the 30th Annual Meeting of the Philippine Economic Society on December 14, 1992, President Fidel V. Ramos aptly said: "xxx the recent history of economic theory has really been the downfall of one

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years the disgrace of many economists and the fall of one economic dogma after another. Be that as it may, the Court is aware that the principle of separation of powers prohibits the judiciary from interferring with the policy setting function of the legislature.[15] For this reason we italicized in our Decision that the Court did not review the wisdom of R.A. No. 8180 but its compatibility with the Constitution; the Court did not annul the Economic policy of deregulation but vitiated its aspects which offended the constitutional mandate on fair competition. It is beyond debate that the power of Congress to enact laws does not include the right to pass unconstitutional laws. In fine, the Court did not usurp the power of Congress to enact laws but merely discharged its bounden duty to check the constitutionality of laws when challenged in appropriate cases. Our Decision annulling R.A. No. 8180 is justified by the principle of check and balance.

We hold that the power and obligation of this Court to pass upon the constitutionality of laws cannot be defeated by the fact that the challenged law carries serious economic implications. This Court has struck down laws abridging the political and civil rights of our people even if it has to offend the other more powerful branches of government. There is no reason why the Court cannot strike down R.A. No. 8180 that violates the economic rights of our people even if it has to bridle the liberty of big business within reasonable bounds. In

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orthodoxy after another. The only theoretical certainly is that no economic doctrine can be engraved in stone — if only because each country is unique in its character and historical experience." He quoted the witty observation of George Bernard Shaw that "if all economists were laid end to end, they would not reach a conclusion." (To Win the Future, A Collection of Speeches of President Fidel V. Ramos, 1993 ed., p. 91.)

[15] For a more general study of the rise and fall of economic theories like the Malthusian Theory of Evolution, Theory of Comparative Advantage, Linear Stages Theories (1950s to 1960s), Theories and Patterns of Structural Change, International Dependence Revolution Theories (1970s), Free Market Counter Revolution Theories (1980s) and New Growth Theories (1990s), see Todaro, Economic Development, 5th ed.; Lipsey and Steiner, Economics, 4th ed.

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Alalayan vs. National Power Corporation [16] the Court, speaking thru Mr. Chief Justice Enrique M. Fernando, held:

"2. Nor is petitioner anymore successful in his plea for the nullification of the challenged provision on the ground of his being deprived of the liberty to contract without due process of law.

It is to be admitted of course that property rights find shelter in specific constitutional provisions, one of which is the due process clause. It is equally certain that our fundamental law framed at a time of "surging unrest and dissatisfaction," when there was a fear expressed in many quarters that a constitutional democracy, in view of its commitment to the claims of property, would not be able to cope effectively with the problems of poverty and misery that unfortunately afflict so many of our people, is not susceptible to the indictment that the government therein established is impotent to take the necessary remedial measures. The framers saw to that. The welfare state concept is not alien to the philosophy of our Constitution. It is implicit in quite a few of its provisions. It suffices to mention two.

There is the clause on the promotion of social justice to ensure the well-being and economic security of all the people, as well as the pledge of protection to labor with the specific authority to regulate the relations between landowners and tenants and between labor and capital. This particularized reference to the rights of working men whether in industry and agriculture certainly cannot preclude attention to and concern for the rights of consumers, who are the objects of solicitude in the legislation now complained of. The police power as an attribute to promote the common weal would be diluted considerably of its reach and effectiveness if on the mere plea that the liberty to contract would be restricted, the statute complained of may be

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[16] 24 SCRA 172, 181-183 [1968]. In the United States, one of the more criticized decisions of the federal Supreme Court is the 1905 case of *Lochner v. New York,* 195 US 45, where by a 5-4 vote, it rejected a law regulating the hours and working conditions of bakers. In 1937, in *West Coast Hotel Co. v. Parrish,* 300 US 379, the US Supreme Court again by 5-4 vote reversed its Lochner ruling. Thru Mr. Chief Justice Charles Evan Hughes, it upheld a state minimum wage law for women. This ended the Court's laissez faire philosophy which denied the power of legislatures to redress imbalances of economic power. Ever since, the Court actively reviewed and affirmed the constitutionality of laws protecting the people from the greed of big business.

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characterized as a denial of due process. The right to property cannot be pressed to such an unreasonable extreme.

It is understandable though why business enterprises, not unnaturally evincing lack of enthusiasm for police power legislation that affect them adversely and restrict their profits could predicate alleged violation of their rights on the due process clause, which as interpreted by them is a bar to regulatory measures. Invariably, the response from this Court, from the time the Constitution was enacted, has been far from sympathetic. Thus, during the Commonwealth, we sustained legislations providing for collective bargaining, security of tenure, minimum wages, compulsory arbitration, and tenancy regulation. Neither did the objections as to the validity of measures regulating the issuance of securities and public services prevail."

The Constitution gave this Court the authority to strike down *all* laws that violate the Constitution.[17] It did not exempt from the reach of this authority laws with economic dimension. A 20-20 vision will show that the grant by the Constitution to this Court of this all important power of review is written without any fine print.

The *next issue* is whether the Court should only declare as unconstitutional the provisions of R.A. No. 8180 on 4% tariff differential, minimum inventory and predatory pricing.

Positing the affirmative view, *petitioner Garcia* proffered the following arguments:

"5. Begging the kind indulgence and benign patience of the Court, we humbly submit that the unconstitutionality of the aforementioned provisions of R.A. No. 8180 *implies that the other provisions are constitutional. Thus, said constitutional provisions of R.A. No. 8180 may and can very well be spared.*

5.1 With the striking down of 'ultimately full deregulation,' *we will simply go back to the transition period under R.A. 8180 which will continue until Congress enacts an amendatory law for the start of full oil deregulation in due time,* when free market forces are already in place. In turn, the *monthly automatic price control mechanism based on Singapore Posted Prices (SPP)*

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[17] Sec. 4(2), Article VII of the Constitution.

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will be revived. *The energy Regulatory Board (ERB), which still exists, would re-acquire jurisdiction and would easily compute the monthly price ceiling, based on SPP, of each and every petroleum fuel product,* effective upon finality of this Court's favorable resolution on this motion for partial reconsideration.

5.2 Best of all, the *oil deregulation can continue uninterrupted without the three other assailed provisions, namely, the 4% tariff differential, predatory pricing and minimum inventory.*

6. We further humbly submit that a favorable resolution on this motion for partial reconsideration *would be consistent with public interest.*

6.1 In consequence, new players that have already come in *can uninterruptedly continue their operations more competitively and bullishly with an even playing field.*

6.2 Further, an even playing field *will attract many more new players to come in in a much shorter time.*

6.3 Correspondingly, *Congress does not anymore have to pass a new deregulation law, thus it can immediately concentrate on just amending R.A. No. 8180 to abolish the OPSF,* on the government's assumption that it is necessary to do so. Parenthetically, it is neither correct nor fair for high government officials to criticize and blame the Honorable Court on the OPSF, *considering that said OPSF is not inherent in nor necessary to the transition period and may be removed at any time.*

6.4 In as much as R.A. No. 8180 would continue to be in place (*sans* its unconstitutional provision), *only the Comprehensive Tax Reform Package (CTRP) would be needed for the country to exit from IMF by December 1997.*

7. The Court, in declaring the entire R.A. No. 8180 unconstitutional, was evidently expecting that Congress "can fasttrack the writing of a new law on oil deregulation in accord with the Constitution" (Decision, p. 38). However, *it is very problematic, to say the least, if Congress can fasttrack an entirely new law.*

7.1 There is already *limited time* for Congress to pass such a new law *before it adjourns for the 1998 elections.*

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7.2 At the very least, whether or not Congress will be able to fasttrack the enactment of a new oil deregulation law consistent with the Honorable Court's ruling, *would depend on many unforseeable and uncontrollable factors.* Already, several statements from legislators, senators and congressmen alike, say that the new law can wait because of other pending legislative matters, etc. Given the "realities" of politics, especially with the 1998 presidential polls six months away, it is not far-fetched that the general welfare could be sacrificed to gain political mileage, thus further unduly delaying the enactment of a new oil deregulation law.

8. Furthermore, if the entire R.A. No. 8180 remains nullified as unconstitutional, the following *pernicious effects* will happen:

8.1 Until the new oil deregulation law is enacted, we would have to go back to the old law. This means *full regulation, i.e., higher tariff differential of 10%, higher petroleum product price ceilings based on transfer prices of imported crude oil, and restrictions on the importation of refined petroleum products that would be allowed only if there are shortages, etc.*

8.2 In consequence of the above, the existing new players, *would have to totally stop their operations.*

8.3 The existing new players *would find themselves in a bind on how to fulfill their contractual obligations, especially on their delivery commitments of petroleum fuel products. They will be in some sort of "limbo" upon the nullification of the entire R.A. No. 8180.*

8.4 The investments that existing new players have already made *would become idle and unproductive. All their planned additional investments would be put on hold.*

8.5 Needless to say, all this would translate into *tremendous losses for them.*

8.6 And obviously, *prospective new players cannot and will not come in.*

8.7 On top of everything, *public interest will suffer.* Firstly, the oil deregulation program will be *delayed.* Secondly, *the prices of petroleum products will be higher because of price ceilings based on transfer prices of imported crude.*

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9. When it passed R.A. No. 8180, Congress provided a *safeguard* against the possibility that any of its provisions could be declared unconstitutional, thus *the separability clause* thereof, which the Court noted (Decision, p. 29). We humbly submit that *this is another reason to grant this motion for partial reconsideration.*

In his Supplement to Urgent Motion for Partial Reconsideration, petitioner Garcia amplified his contentions.

In a similar refrain, the *public respondents* contend that the "unmistakable intention of Congress" is to make each and every provision of R.A. No. 8180 "independent and separable from one another." To bolster this proposition, they cite the separability clause of the law and the pending bills in Congress proposing to repeal said offensive provisions but not the entire law itself. They also recite the "inevitable consequences of the declaration of unconstitutionality of R.A. No. 8180" as follows:

"1. There will be bigger price adjustments in petroleum products due to (a) the reimposition of the higher tariff rates for imported crude oil and imported refined petroleum products [10%-20%], (b) the uncertainty regarding R.A. 8184, or the "Oil Tariff Law," which simplified tax administration by lowering the tax rates for socially-sensitive products such as LPG, diesel, fuel oil and kerosene, and increasing tax rates of gasoline products which are used mostly by consumers who belong to the upper income group, and (c) the issue of wiping out the deficit of P2.6 billion and creating a subsidy fund in the Oil Price Stabilization Fund;

2. Importers, traders, and industrial end-users like the National Power Corporation will be constrained to source their oil requirement only from existing oil companies because of the higher tariff on imported refined petroleum products and restrictions on such importation that would be allowed only if there are shortages;

3. Government control and regulation of all the activities of the oil industry will discourage prospective investors and drive away the existing new players;

4. All expansion and investment programs of the oil companies and new players will be shelved indefinitely;

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5. Petitions for price adjustment should be filed and approved by the ERB."

Joining the chorus, the *intervenors* contend that:

"2.1.1 The total nullification of Republic Act No. 8180 restores the disproportionate advantage of the three big oil firms — Caltex, Shell and Petron — over the small oil firms;

2.1.2 The total nullification of Republic Act No. 8180 "disarms" the new entrants and seriously cripples their capacity to compete and grow; and

2.1.3 Ultimately, the total nullification of Republic Act No. 8180 removes substantial, albeit imperfect, barriers to monopolistic practices and unfair competition and trade practices harmful not only to movant-intervenors but also to the public in general."

The intervenors further aver that under a regime of regulation, (1) the big oil firms can block oil importation by small oil firms; (2) the big oil firms can block the expansion and growth of the small oil firms. They likewise submit that the provisions on tariff differential, minimum inventory, predatory pricing are separable from the body of R.A. No. 8180 because of its separability clause. They also allege that their separability is further shown by the pending bills in Congress which only seek the partial repeal of R.A. No. 8180.

We shall first resolve petitioner Garcia's linchpin contention that the full deregulation decreed by R.A. No. 8180 to start at the end of March 1997 is unconstitutional. For prescinding from this premise, petitioner suggests that "we simply go back to the transition period under R.A. No. 8180. Under the transition period, price control will be revived through the automatic pricing mechanism based on Singapore Posted Prices. The Energy Regulatory Board xxx would play a limited and ministerial role of computing the monthly price ceiling of each and every petroleum fuel product, using the automatic pricing formula. While the OPSF would return, this coverage would be limited to monthly price increases in excess of ₱0.50 per liter."

We are not impressed by petitioner Garcia's submission. Petitioner has no basis in condemning as unconstitutional *per*

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se the date fixed by Congress for the beginning of the full deregulation of the downstream oil industry. Our Decision merely faulted the Executive for factoring the depletion of OPSF in advancing the date of full deregulation to February 1997. Nonetheless, the error of the Executive is now a non-issue for the full deregulation set by Congress itself at the end of March 1997 has already come to pass. March 1997 is not an arbitrary date. By that date, the transition period has ended and it was expected that the people would have adjusted to the role of market forces in shaping the prices of petroleum and its products. The choice of March 1997 as the date of full deregulation is a judgement of Congress and its judgment call cannot be impugned by this Court.

We come to the submission that the provisions on 4% tariff differential, minimum inventory and predatory pricing are separable from the body of R.A. No. 8180, and hence, should alone be declared as unconstitutional. In taking this position, the movants rely heavily on the separability provision of R.A. No. 8180. We cannot affirm the movants for to determine whether or not a particular provision is separable, the courts should consider the intent of the legislature. It is true that most of the time, such intent is expressed in a separability clause stating that the invalidity or unconstitutionality of any provision or section of the law will not affect the validity or constitutionality of the remainder. Nonetheless, the separability clause only creates a *presumption* that the act is severable. *It is merely an aid in statutory construction. It is not inexorable command.*[18] *A separability clause does not clothe the valid parts with immunity from the invalidating effect the law gives to the inseparable blending of the bad with the good. The separability clause cannot also be applied if it will produce an absurd result.*[19] *In sum, if the separation of the statute will defeat the intent of the legislature, separation will not take place despite the inclusion of a separability clause in the law.*[20]

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[18] *Dorchy v. Kansas,* 68 L ed 686 (1924).

[19] Crawford, The Construction of Statutes (1940), pp. 219-221.

[20] Sutherland Statutory Construction, 5th edition, p. 52.

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In the case of Republic Act No. 8180, the unconstitutionality of the provisions on tariff differential, minimum inventory and predatory pricing cannot but result in the unconstitutionality of the entire law despite its separability clause. These provisions cannot be struck down alone for they were the ones intended to carry out the policy of the law embodied in Section 2 thereof which reads:

> Sec. 2. Declaration of Policy. — It shall be the policy of the State to deregulate the downstream oil industry to foster a truly competitive market which can better achieve the social policy objectives of fair prices and adequate, continuous supply of environmentally-clean and high-quality petroleum products.

They actually set the stage for the regime of deregulation where government will no longer intervene in fixing the price of oil and the operations of oil companies. It is conceded that the success of deregulation lies in a truly competitive market and there can be no competitive market without the easy entry and exit of competitors. No less than *President Fidel V. Ramos* recognized this matrix when he declared that the need is to "x x x recast our laws on trust, monopolies, oligopolies, cartels and combinations injurious to public welfare —— to restore competition where it has disappeared and to preserve it where it still exists. *In a word, we need to perpetuate competition as a system to regulate the economy and achieve global product quality.*"[21]

We held in our Decision that the provisions on 4% tariff differential, minimum inventory and predatory pricing are anti-competition, and they are the key provisions of R.A. No. 8180. Without these provisions in place, Congress could not have deregulated the downstream oil industry. Consider the 4% tariff differential on crude oil and refined petroleum. Before R.A. No. 8180,[22] there was a ten-point difference between the tariff

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[21] State of the Nation Adrress, 3rd Session of the Ninth Congress, July 25, 1994, From Growth to Modernization, (4th Collection of Speeches of President Fidel V. Ramos) .1995 ed., p. 19.

[22] See Sections 27.09 and 27.10, chapter 27 of R.A. No. 1937 as amended, otherwise known as Tariff and Customs Code.

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imposed on crude oil and that on refined petroleum. Section 5(b) of R.A. No. 8180 lowered the difference to four by imposing a 3% tariff on crude oil and a 7% tariff on refined petroleum. We ruled, however, that this reduced tariff differential is unconstitutional for it still posed a substantial barrier to the entry of new players and enhanced the monopolistic power of the three existing oil companies. The ruling that the 4% differential is unconstitutional will unfortunately revive the 10% tariff differential of the Tariff and Customs Code. The high 10% tariff differential will certainly give a bigger edge to the three existing oil companies, will form an insuperable barrier to prospective players, and will drive out of business the new players. Thus, there can be no question that Congress will not allow deregulation if the tariff is 10% on crude oil and 20% on refined petroleum. To decree the partial unconstitutionality of R.A. No. 8180 will bring about an absurdity — a fully deregulated downstream oil industry where government is impotent to regulate run away prices, where the oil oligopolists can engage in cartelization without competition, where prospective players cannot come in, and where new players will close shop.

We also reject the argument that the bills pending in Congress merely seek to remedy the partial defects of R.A. No. 8180, and that this is proof that R.A. No. 8180 can be declared unconstitutional minus its offensive provisions. We referred to the pending bills in Congress in our Decision only to show that Congress itself is aware of the various defects of the law and not to prove the inseparability of the offending provisions from the body of R.A. No. 8180. To be sure, movants even overlooked the fact that resolutions have been filed in both Houses of Congress calling for a *total review* of R.A. No. 8180.

The movants warn that our Decision will throw us back to the undesirable regime of regulation. They emphasize its pernicious consequences — the revival of the 10% tariff differential which will wipe out the new players, the return of the OPSF which is too burdensome to government, the unsatisfactory scheme of price regulation by the ERB, etc. To stress again, it is not the will of the Court to return even temporarily to the regime of regulation. If we return to the

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regime of regulation, it is because it is the inevitable consequence of the enactment by Congress of an unconstitutional law, R.A. No. 8180. It is settled jurispudence that the declaration of a law as unconstitutional revives the laws that it has repealed. Stated otherwise, an unconstitutional law returns us to the *status quo ante* and this return is beyond the power of the Court to stay. *Under our scheme of government, however, the remedy to prevent the revival of an unwanted status quo ante lies with Congress. Congress can block the revival of the status quo ante or stop its continuation by immediately enacting the necessary remedial legislation.* We emphasize that in the cases at bar, the Court did not condemn the economic policy of deregulation as unconstitutional. It merely held that as crafted, the law runs counter to the constitutional provision calling for fair competition.[23] Thus, there is no impediment in re-enacting R.A. No. 8180 minus its provisions which are anti-competition. The Court agrees that our return to the regime of regulation has pernicious consequences and it specially symphatizes with the intervenors. Be that as it may, the Court is powerless to prevent this return just as it is powerless to repeal the 10% tariff differential of the Tariff Code. It is Congress that can give all these remedies.[24]

Petitioner Garcia, however, injects a non-legal argument in his motion for partial reconsideration. He avers that "given the 'realities' of politics, especially with the 1998 presidential polls six months away, it is not far-fetched that the general welfare could be sacrificed to gain political mileage, thus further unduly delaying the enactment of a new oil deregulation law." The short answer to petitioner Garcia's argument is that when the Court reviews the constitutionality of a law, it does not deal with the realities of politics nor does it delve into the mysticism of politics. The Court has no partisan political theology for as an institution it is at best apolitical, and at worse, politically agnostic. In any event, it should not take a long time for Congress to enact a new oil deregulation law given its interest for the

[23] Section 19, Article XII of the 1987 Constitution.

[24] In the *Manila Chronicle* issue of November 7, 1997, p. 1, President Ramos called for Congress "to amend the law as soon as possible x x x."

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welfare of our people. Petitioner Garcia himself has been quoted as saying that "x x x with the Court's decision, it would now be easy for Congress to craft a new law, considering that lawmakers will be guided by the Court's points."[25] Even before our Decision, bills amending the offensive provisions of R.A. No. 8180 have already been filed in the Congress and under consideration by its committees. Speaker Jose de Venecia has assured after a meeting of the Legislative-Executive Advisory Council (LEDAC) that: "I suppose before Christmas, we should be able to pass a new oil deregulation law.[26] The Chief Executive himself has urged the immediate passage of a new and better oil deregulation law.[27]

Finally, public respondents raise the scarecrow argument that our Decision will drive away foreign investors. In response to this official repertoire, suffice to state that our Decision precisely levels the playing field for foreign investors as against the three dominant oil oligopolist. No less than the influential Philippine Chamber of Commerce and Industry whose motive is beyond question, stated thru its Acting President Jaime Ladao that "x x x this Decision, in fact tells us that we are for honest-to-goodness competition." Our Decision should be a confidence-booster to foreign investors for it assures them of an effective judicial remedy against an unconstitutional law. There is need to attract foreign investment but the policy has never been foreign investment at any cost. We cannot trade-in the Constitution for foreign investment. It is not economic heresy to hold that that trade-in is not a fair exchange.

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[25] *Today*, November 6, 1997, p. 8.

[26] See *Philippine Star* issue of November 12, 1997.

[27] 7 Pending before the Congress are House Bill (H.B.) No. 10270 introduced by Hernando B. Perez, H.B. No. 10292 introduced by Rep. Manuel A. Roxas II, H.B. No. 10305 introduced by Rep. Miguel L. Romero, H.B. No. 10309 introduced by Rep. Marcial C. Punzalan, Jr., H.B. No. 10313 introduced by Rep. Leopoldo E. San Buenaventura, H.B. No. 10302 introduced by Rep. Dante O. Tinga, Senate Bill (S.B.) No. 2336 introduced by Sen. Alberto G. Romulo, S.B. No. 2338 introduced by Sen. Francisco S. Tatad, S.B. No. 2339 introduced by Sen. Freddie N. Webb, S.B. No. 2346 introduced by Sen. Heherson T. Alvarez, all intended to purge R.A. No. 8180 of its unconstitutionality.

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To recapitulate, our Decision declared R.A. No. 8180 unconstitutional for three reasons: (1) it gave more power to an already powerful oil oligopoly; (2) it blocked the entry of effective competitors; and (3) it will sire an even more powerful oligopoly whose unchecked power will prejudice the interest of the consumers and comprise the general welfare.

A weak and developing country like the Philippines cannot risk downstream oil industry controlled by foreign oligopoly that can run riot. Oil is our most socially sensitive commodity and for it to be under the control of a foreign oligopoly without effective competitors is a clear and present danger. A foreign oil oligopoly can undermine the security of the nation; it can exploit the economy if greed becomes it creed; it will have the power to drive the Filipino to a prayerful pose. Under a deregulated regime, the people's only hope to check the overwhelming power of the foreign oil oligopoly lies on a market where there is fair competition. With prescience, the Constitution mandates the regulation of monopolies and interdicts unfair competition. Thus, the Constitution provides a shield to the economic rights of our people, especially the poor. It is the unyielding duty of this Court to uphold the supremacy of the Constitution not with a mere wishbone but with a backbone that should neither bend nor break.

IN VIEW WHEREOF, the Motions for Reconsideration of the public respondents and of the intervenors as well as the Partial Motion for Reconsideration of petitioner Enrique Garcia are *DENIED* for lack of merit.

SO ORDERED.

Regalado, Davide, Jr., Romero, Bellosillo, Vitug, Mendoza, and *Panganiban, JJ.,* concur.

Narvasa, C.J., took no part. On official leave when the case was deliberated.

Martinez, J., No part. Not yet a member of the Court when the case was deliberated.

Melo and *Francisco, JJ.,* maintain their dissent.

Kapunan, J., has separate concurring and dissenting opinion.

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KAPUNAN, *J., concurring and dissenting opinion:*

Brought before us are the motions for reconsideration of public respondents and the partial motions for reconsideration of petitioner Enrique T. Garcia and the movants-in-intervention. The majority, acting on the motions, resolves to deny the same for lack of merit. With due respect, I concur in part and dissent in part.

At the outset let me clarify that, although I concurred with the enlightened *ponencia* of Mr. Justice Reynato S. Puno in the decision sought to be reconsidered. I did not go along with his conclusion declaring the Downstream Oil Industry Deregulation Act (R.A. No. 8180) unconstitutional in its *entirety*. In the dispositive portion of my separate opinion, I explicitly stated that only the three anti-competition provisions of the said law should be deemed unconstitutional. The rest of the law, free from the taint of unconstitutionality, should remain in force and effect in view of the separability clause contained therein.[1]

Let me explain. A separability clause states that if for any reason, any section or provision of the statute is held to be unconstitutional or (invalid), the other section(s) or provision(s) of the law shall not be affected thereby.[2] It is a legislative expression of intent that the nullity of one provision shall not invalidate the other provisions of the act. Such a clause is not, however, controlling and the courts may, in spite of it, invalidate the whole statute where what is left, after the void part, is not complete and workable.[3]

The rules on statutory construction, thus, prescribed that:

The general rule is that where part of a statute is void as repugnant to the Constitution, while another part is valid, the valid portion, if

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[1] Sec. 23 Separability Clause - If, for any reason, any section or provision of this Act is declared unconstitutional or invalid, such parts not affected thereby shall remain in full force and effect.

[2] Rolando Suarez Statutory Construction, 1993, p. 51.

[3] Ruben E. Agpalo, Statutory Construction, 1990, p. 15.

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separable from the invalid, may stand and be enforced. The presence of the separability clause in a statute creates the presumption that the legislature intended separability, rather than complete nullity, of the statute. To justify this result, the valid portion must be so far independent of the invalid portion that it is fair to presume that the legislature would have enacted it by itself if it had supposed that it could not constitutionally enact the other. Enough must remain to make a complete, intelligible, and valid statute, which carries out the legislative intent. The void provisions must be eliminated without causing results affecting the main purpose of the act in a manner contrary to the intention of the legislature. The language used in the invalid part of the statute can have no legal effect or efficacy for any purpose whatsoever, and what remains must express the legislative will independently of the void part, since the court has no power to legislate.

The exception to the general rule is that when the parts of a statute are so mutually dependent and connected, as conditions, considerations, inducements, or compensations for each other, as to warrant a belief that the legislature intended them as a whole the nullity of one part will vitiate the rest. In making the parts of the statute dependent, conditional, or connected with one another, the legislature intended the statute to be carried out as a whole and would not have enacted it if one part is void, in which case if some parts are unconstitutional, all the other provisions thus dependent, conditional, or connected must fall with them.[4]

However, in the instant case, the exception rather than the general rule was applied. The majority opinion enunciated, thus:

This separabililty clause not withstanding, we hold that the offending provisions of R.A. No. 8180 so premeate its essence that the entire law has to be struck down. The provisions on tariff differential, inventory and predatory pricing are among the principal props of the R.A. No. 8180. Congress could not have deregulated the downstream oil industry without these provisions. Unfortunately, contrary to their intent, these provisions on tariff differential, inventory and pradatory pricing inhibit fair competition, encourage monopolistic power and interfere with the free interaction of market forces.[5]

I beg to disagree.

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[4] *Id.*, at 27-28.

[5] Decision, p. 29.

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The three provisions declared void are severable from the main statute and their removal therefrom would not affect the validity and enforceability of the remaining provisions of the said law R.A. No. 8180, sans the constitutionally infirmed portions, remains "complete in itself, sensible, capable of being executed and wholly independent of (those) which (are) rejected.[6] In other words, despite the elimination of some of its parts, the law can still stand on its own.

The crucial test is to determine if expulsion of the assailed provisions cripples the whole statute, so much so, that it is no longer expressive of the legislative will and could no longer carry out the legislative purpose.

The principal intent of R.A. No. 8180 is to open the country's oil market to fair and free competition and the three provisions are assailed precisely because they are anti-competition and they obstruct the entry of new players. Therefore, in order to make the deregulation law work, it is imperative that the anti-competition provisions found therein be taken out. In other words, it is only through the "separation" of these provisions that the deregulation law be able to fully realize its objective.

Take the tariff provision for instance. The repudiation of the tariff differential will not revive the 10% and 20% tariff rates. What is being discarded is the differential not the tariff itself, hence, the removal of the 4% differential would result in the imposition of a single uniform tariff rate on the importation of both crude oil and refined petroleum products at 3% as distinctly and deliberately set in Sec. 5(b) of R.A. No. 8180 itself. The tariff provision which, admittedly, is among the "principal props" of R.A. No. 8180 remains intact in substance and the elimination of the tariff differential would, in effect, transform it into one of the statute's "vouchsafing provisions," a tool to effectively carry out the legislative intent of fostering a truly competitive market.

There is no question that the legislature intended a single uniform tariff rate for imported crude oil and imported petroleum

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[6] 73 Am Jur 2d. Patents. Sec. 114.

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products. This is obvious from the proviso contained in Sec. 5(b)[7] of R.A. No. 8180 which specifically states that:

> Provided, That beginning on January 1, 2004 the tariff rate on imported crude oil and refined petroleum products shall be the same. Provided, further, That this provision maybe amended only by an Act of Congress;

although said proviso equalizing the tariff rate takes effect on January 1, 2004. However, the nullification of the tariff differential renders the prospective effectivity of the rate equalization irrelevant and superfluous. Naturally, there would no longer be any basis for postponing the leveling of the tariff rate to a later date. The provision that the tariff rate shall be equalized on January 1, 2004 is premised on the validity of the tariff differential, without which there is nothing to equalize. Stated differently, the imposition of a single uniform tariff rate on imported crude oil and imported petroleum products is to take effect immediately. A different way of interpreting the law would be less than faithful to the legislative intent to enhance free competition in the oil industry for the purpose of obtaining fair prices for high-quality petroleum products.

The provision requiring a minimum inventory was similarly found by the majority to be anti-competition. Its exclusion, therefore, would not have any deleterious effect on the oil deregulation law. On the contrary, the essence of R.A. No. 8180, which is free and fair competition, is preserved.

The same rationale applies to the provision concerning predatory pricing and may be subsumed (at least in the meantime pending the amendment of the law) under Sec. 9(a):

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[7] Sec. 5(b) states in full

> b) Any law to the contrary notwithstanding and starting with the effectivity of this Act, tariff duty shall be imposed and collected on imported crude oil at the rate of three percent (3%) and imported refined petroleum products at the rate of seven percent (7%), except fuel oil and LPG, the rate for which shall be same as that for the imported crude oil: Provided, That beginning January 1, 2004 the tariff rate on imported crude oil and refined petroleum products shall be the same: Provided, further, That this provision may be amended only by an Act of Congress.

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SEC. 9. Prohibited Acts. — To ensure fair competition and prevent cartels and monopolies in the downstream oil industry, the following acts are hereby prohibited:

a). Cartelization which means any agreement, combination or concerted action by refiners and or importers or their representatives to fix prices, restrict outputs or divide markets, either by products or by areas, or allocating markets, either by products or by areas, in restraint of trade or free competition; and

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The answer is not the wholesale rejection of R.A. No. 8180. To strike down the whole statute would go against the very ideal that our country is striving for. The goal is to unshackle the oil industry from the restraints of regulation. To declare R.A. No. 8180 void in its entirety would bring us back to where we started. Worse, as pointed out by the eminent constitutionalist, Joaquin G. Bernas, SJ, the hardest hit would be the few new players who have entered the oil business and have begun investing in our country under the deregulated regime.

He expounds, thus;

. . . Under the regulated regime, importation of oil was controlled by the Energy Industry Administrative Bureau (EIAB). The procedure followed was that, whenever there was an application to import oil products, the EIAB was required to inform the oil companies of the proposed importation in order to give them the option to match the desired importation with locally available products. Equivalently, therefore, the large oil companies could block imports by the smaller players.

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Another barrier to equalization concerns the expansion of services of small players. Under the regulated regime, expansion of facilities was also under the control of the EIAB. Any person wishing to build and establish or operate, remodel or refurbish any retail outlet for petroleum products had to obtain approval from the EIAB. Copies of applications filed with the EIAB had to be given to competing oil companies which, under the rules, were allowed to file their opposition. The EIAB was duty bound to evaluate the applications against the

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opposition. This rule made it possible for the big players to block the expansion of the competing facilities.[8]

These barriers were eradicated by R.A. No. 8180, as expressly mandated in Sec. 5(a) thereof

SEC 5. Liberalization of Downstream Oil Industry and Tariff Treatment — a)Any law to the contrary notwithstanding, any person or entity may import or purchase any quantity of crude oil and petroleum products from a foreign or domestic source, lease or own and operate refineries and other downstream oil facilities and market such crude oil and petroleum products either in a generic name or its own trade name, or use the same for his own requirement. Provided, That any person or entity who shall engage in any such activity shall give prior notice thereof to the DOE for monitoring purposes: Provided further, That such notice shall not exempt such person or entity from securing certificates of quality, health and safety and environmental clearance from the proper governmental agencies: Provided, furthermore, That such person or entity shall, for monitoring purposes, report to the DOE his or its every importation/exportation; Provided, finally, That all oil importations shall be in accordance with the Basel Convention.

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The nullification of the whole law would, therefore, considerably jeopardize the chances of the new entrants to survive and remain competitive in the market.

As a consequence thereof, Eastern Petroleum Corp., Seaoil Petroleum Corp., Subic Bay Distribution, Inc., TWA, Inc. and Dubphil Gas, which are some of the oil industry's new entrants, filed a motion for intervention on 18 November 1997 urging the Court to reconsider its decision declaring the whole R.A. No. 8180 unconstitutional. The intervenors raise similar apprehensions concerning the power of the existing oil firms, under the regulated industry, to block the importation of petroleum products by the small oil companies and likewise impede their expansion and growth.[9]

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[8] Joaquin G. Bernas, SJ, Ironies in Oil Deregulation Decision, Today, 19 November 1997.

[9] Motion for Reconsideration in Intervention, pp. 7-11.

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Even the public respondents in their motion for reconsideration concedes that if R.A. No. 8180 should be declared unconstitutional, the unconstitutionality is partial, that is, only the three (3) anti-competition provisions should be declared void. Public respondents, thus, opine:

> Thus, even assuming that the assailed provisions are constitutionally defective, they cannot be that contagious as to infect or contaminate the other valid parts of the law which are complete in themselves, or capable of bringing about the full deregulation of the oil industry.
>
> To apply the exception to the general rule of separability will require a clear and overwhelming demonstration which will erase any and all doubts on the unconstitutionality of R.A. 8180.
>
> Moreover, the separable and independent character of the assailed provisions may be inferred from the various bills filed by leading legislators which, as noted by the Honorable Court, seek "the repeal of this odious and offensive provisions in R.A. No. 8180." In fact, the original as well as the final versions of House Bill No. 5264 and Senate Bill No. 1253, which later became R.A. 8180, did not contain any tariff differential.
>
> The foregoing instances clearly demonstrate that the assailed provisions were indeed separable and independent of the other provisions of R.A. 8180 and Congress did not consider the same to be that indispensable, without which Congress would not have passed R.A. 8180 into law.[10]

The public need not fear that prices of petroleum products, particularly gasoline, will soar if R.A. No. 8180 is declared only partially unconstitutional. The oil deregulation law itself provides adequate safeguards that would effectively avert and preclude such a dire scenario. For instance, Sec. 8 of the said law, provides that:

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Any report from any person of an unreasonable rise in the prices of petroleum products shall be immediately acted upon. For this

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[10] Public Respondents' Motion for Reconsideration, 18 November 1997, pp. 39-40.

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purpose, the creation of a Department of Energy (DOE) — Department of Justice (DOJ) Task Force is hereby mandated to determine the merits of the report and to initiate the necessary actions warranted under the circumstances to prevent cartelization, among others.

The law also tasks the Department of Energy (DOE) to "take all measures to promote fair trade and to prevent cartelization, monopolies and combinations in restraint of trade and any unfair competition, as defined in Articles 186, 188 and 189 of the Revised Penal Code, in the downstream oil industry. The DOE shall continue to encourage certain practices in the oil industry which serve the public interest and are intended to achieve efficiency and cost reduction, ensure continuous supply of petroleum products, or enhance environmental protection. These practices may include borrow-and-loan agreements, rationalized deport operations, hospitality agreements, joint tanker and pipeline utilization, and joint actions on oil spill control and fire prevention."[11]

Likewise, the DOE is endowed with monitoring powers as mandated in Sec. 6 of R.A. No. 8180.

SEC. 8 Monitoring — The DOE shall monitor and publish daily international oil prices to enable the public to detemine whether current market oil prices are reasonable. It shall likewise monitor the quality of petroleum products and stop the operation of businesses involved in the sale of petroleum products which do not comply with the national standards of quality. The Bureau of Product Standards (BPS), in coordination with DOE, shall set national standards of quality that are aligned with the international standards/protocols of quality.

The DOE shall monitor the refining and manufacturing processes of local petroleum products to ensure that clean and safe (environment and worker-benign) technologies are applied. This shall also apply to the process of marketing local and imported petroleum products.

The DOE shall maintain in a periodic schedule of present and future total industry inventory of petroleum products for the purpose of determining the level of supply. To implement this, the importers, refiners, and marketers are hereby required to submit monthly to the

[11] Sec. 7, R.A. No. 8180.

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DOE their actual and projected importations, local purchases, sales and/or consumption, and inventory on a per crude/product basis.

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Reverting to a regulated oil industry, even if only for a short period while the legislature "fasttracks" the passage of a new oil deregulation law (the feasibility of which remains a big "if") defeats the whole purpose and only succeeds in retarding the country's economic growth.

R.A. No. 8180 is a bold and progressive piece of legislation. It must be given a chance to work and prove its worth. Thus, the better solution is to retain the foundations of the law and leave it to Congress to pass the necessary amendments and enact the appropriate supporting legislation to fortify R.A. No. 8180.

In view of the foregoing, I find myself unable to concur with the majority's thesis that the three assailed provisions "cannot be struck down alone for they were the ones intended to carry out the policy of (R.A. No. 8180)" and that "without these provisions in place, Congress could not have deregulated the downstream oil industry." As I have prieviously pointed out, the aforementioned provisions were declared unconstitutional precisely because they were found to be anti-competition. How can anti-competition provisions, therefore, have any place in a law whose goal is to promote and achieve fair and free competition?

The oil deregulation law was not built upon and do not center on the provisions on tariff differential, minimum inventory requirement and predatory pricing. These are not the only provisions of R.A. No. 8180 intended to implement the legislative intent as expressed in Sec. 2 thereof. The heart and soul of R.A. No. 8180 is embodied in Sec. 5(a) aptly entitled "Liberalization of Downstream Oil Industry and Tariff Treatment." It is this provision which does away with the burdensome requirements and procedures for the importation of petroleum products (the main impediments to the entry of new players in the oil market). With this provision the "entry

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and exit of competitors" is made relatively easy and from this the competitive market is established.

The other remaining provisions are, likewise, suffucient to serve the legislative will. There is, among others, Sec. 7 mandating the promotion of fair trade practices and Sec. 9(a) on the prevention of cartels and monopolies.

The point is, even without the subject three provisions what remains is a comprehensible and workable law. The infirmities of some parts of the statute should not taint the whole when these parts could successfully be incised.

I also take exception to the majority's observation that ". . . a partial declaration of unconstitutionality of R.A. No. 8180 will bring about a fully deregulated downstream oil industry where government will be impotent to regulate run away prices, where the oil oligopolists can engage in cartelization without competition, where prospective players cannot come in, and where new players will close shop. . . " As I have earlier discussed, R.A. No. 8180 has armed the government with adequate measures to deal with the above problems, should any of these arise. The implemention, therefor, of R.A. No. 8180 (sans the void provisions) is not an absurdity, on the contrary as shown above, it is the sensible thing to do.

ACCORDINGLY, resolving the pending motion for reconsideration and partial motions for reconsideration, I *CONCUR* with the majority insofar as it maintains the opinion to strike down as unconstitutional the three (3) anti-competition provisions of R.A. No. 8180, but I register my *DISSENT* to its ruling declaring the entire law as unconstitutional.