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accused, and the aggravating or mitigating circumstances attending the commission thereof, if there are any; (b) the participation of the accused in the commission of the offense, whether as principal, accomplice, or accessory after the fact; (c) the penalty imposed upon the accused; and (d) the civil liability or damages caused by the wrongful act to be recovered from the accused by the offended party, if there is any, unless the enforcement of the civil liability by a separate action has been reserved or waived."

This Court, therefore, urges the members of the bench to observe precision of language in writing their decisions. The dispositions of courts must be complete by themselves, bereft of equivocation and conflicting interpretations. We have said it before and we say it again: clarity and accuracy are shibboleths of the judicial craft.

WHEREFORE, the appeal is hereby *DENIED* and the assailed Decision is *AFFIRMED* with the *CLARIFICATION* that appellant is convicted as principal in the crime of murder, without any aggravating or mitigating circumstance, and with the *ADDITION* that the appellant is *ORDERED* to pay civil indemnity in the amount of fifty thousand pesos (₱50,000) to the heirs of the victim, Sesenando Sandoval. Costs against appellant.

SO ORDERED.

Davide, Jr. (Chairman), Bellosillo, Vitug, and *Quisumbing, JJ.,* concur.

EN BANC

[G.R. No. 132922. April 21, 1998]

TELECOMMUNICATIONS AND BROADCAST ATTORNEYS OF THE PHILIPPINES, INC. and GMA NETWORK, INC., *petitioners, vs.* **THE COMMISSION ON ELECTIONS,** *respondent.*

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SYNOPSIS

Section 11 (b) of R.A. No. 6646 prohibits the sale or donation of print space or air time for political ads, except to the Commission on Elections. Petitioners challenge the validity thereof on the ground (1) that it takes property without due process of law and without just compensation; (2) that it denies radio and television broadcast companies the equal protection of the laws; and (3) that it is in excess of the power given to the COMELEC to supervise or regulate the operation of media of communication or information during the period of election.

Radio and television broadcasting companies do not own the airwaves and frequencies through which they transmit broadcast signals and images. They are merely given the temporary privilege of using them or franchise, the exercise of the which may reasonably be burdened with the performance by the grantee of some form of public service, such as providing print space or air time to Comelec. Section 92 of B.P. Blg. 881 must be deemed incorporated in R.A. No. 7252 granting GMA Network, Inc. a franchise and does not constitute denial of due process and that B.P. Blg. 881, §92 is not an invalid amendment of petitioner's franchise but the enforcement of a duty voluntarily assumed by petitioner in accepting a public grant of privilege.

An administrative agency cannot, in the exercise of lawmaking, amend a statute of Congress. Therefore §2 of Resolution No. 2983-A of the Comelec providing for payment of just compensation is invalid.

B.P. Blg. 881, §92 does not single out radio and television stations in providing free air time. There are important differences in the characteristics of the broadcast media and the print media, which justify their differential treatment for free speech purposes.

The freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper and print media.

What the COMELEC is authorized to supervise or regulate by Art. IX-C, §4 of the Constitution, among other things, is the use by media of information of their franchises or permits, while what Congress (not the COMELEC) prohibits is the sale or donation of print space or air time for political ads. In other

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words, the object of supervision or regulation is different from the object of the prohibition.

SYLLABUS

1. **REMEDIAL LAW; ACTIONS; PARTIES; *LOCUS STANDI;* LAWYERS OF RADIO AND TELEVISION BROADCASTING COMPANIES WITHOUT STANDING TO QUESTION OPERATION OF SECTION 92 OF B. P. BLG. 881 PROVIDING FREE COMELEC AIR TIME.**— At the threshold of this suit is the question of standing of petitioner Telecommunications and Broadcast Attorneys of the Philippines, Inc. (TELEBAP). As already noted, its members assert an interest as lawyers of radio and television broadcasting companies and as citizens, taxpayers, and registered voters. In those cases in which citizens were authorized to sue, this Court upheld their standing in view of the "transcendental importance" of the constitutional question raised which justified the granting of relief. In contrast, in the case at bar, as will presently be shown, petitioners' substantive claim is without merit. To the extent, therefore, that a party's standing is determined by the substantive merit of his case or a preliminary estimate thereof, petitioner TELEBAP must be held to be without standing. Indeed, a citizen will be allowed to raise a constitutional question only when he can show that he has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government; the injury is fairly traceable to the challenged action; and the injury is likely to be redressed by a favorable action. Members of petitioner have not shown that they have suffered harm as a result of the operation of §92 of B.P. Blg. 881. Nor do members of petitioner TELEBAP have an interest as registered voters since this case does not concern their right of suffrage. Their interest in §92 of B.P. Blg. 881 should be precisely in upholding its validity. Much less do they have an interest as taxpayers since this case does not involve the exercise by Congress of its taxing or spending power. A party suing as a taxpayer must specifically show that he has a 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. Nor indeed as a corporate entity does TELEBAP have standing to assert the rights of radio and television broadcasting companies. Standing *jus tertii* will

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be recognized only if it can be shown that the party suing has some substantial relation to the third party, or that the third party cannot assert his constitutional right, or that the right of the third party will be diluted unless the party in court is allowed to espouse the third party's constitutional claim. None of these circumstances is here present. The mere fact that TELEBAP is composed of lawyers in the broadcast industry does not entitle them to bring this suit in their name as representatives of the affected companies.

2. **ID.; ID.; ID.; ID.; OPERATOR OF RADIO AND TV BROADCAST STATIONS WITH STANDING TO CHALLENGE RESOLUTION OF COMELEC PROVIDING FREE AIR TIME.**— Nevertheless, we have decided to take this case since the other petitioner, GMA Network, Inc., appears to have the requisite standing to bring this constitutional challenge. Petitioner operates radio and television broadcast stations in the Philippines affected by the enforcement of §92 of B.P. Blg. 881 requiring radio and television broadcast companies to provide free air time to the COMELEC for the use of candidates for campaign and other political purposes.

3. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; FRANCHISE OF RADIO AND TV STATIONS; SUBJECT TO AMENDMENT, ALTERATION OR REPEAL.**— All broadcasting, whether by radio or by television stations, is licensed by the government. Airwave frequencies have to be allocated as there are more individuals who want to broadcast than there are frequencies to assign. A franchise is thus a privilege subject, among other things, to amendment by Congress in accordance with the constitutional provision that "any such franchise or right granted . . . shall be subject to amendment, alteration or repeal by the Congress when the common good so requires."

4. **ID.; ID.; ID.; COMELEC RESOLUTION PROVIDING FREE COMELEC TIME, AN AMENDMENT THERETO; CASE AT BAR.**— The idea that broadcast stations may be required to provide COMELEC Time free of charge is not new. It goes back to the Election Code of 1971 (R.A. No. 6388). This provision was carried over with slight modification by the 1978 Election Code (P.D. No. 1296). Substantially the same

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provision is now embodied in §92 of B.P. Blg. 881. Indeed, provisions for COMELEC Time have been made by amendment of the franchises of radio and television broadcast stations and, until the present case was brought, such provisions had not been thought of as taking property without just compensation. Art. XII, §11 of the Constitution authorizes the amendment of franchises for "the common good." What better measure can be conceived for the common good than one for free air time for the benefit not only of candidates but even more of the public, particularly the voters, so that they will be fully informed of the issues in an election? "[I]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. Radio and television broadcasting companies, which are given franchises, do not own the airwaves and frequencies through which they transmit broadcast signals and images. They are merely given the temporary privilege of using them. Since a franchise is a mere privilege, the exercise of the privilege may reasonably be burdened with the performance by the grantee of some form of public service.

5. **ID.; ID.; ID.; ID.; RADIO AND TV BROADCAST STATIONS DO NOT OWN THE AIRWAVES; NO PROPERTY TAKEN WHERE THEY WERE REQUIRED TO PROVIDE FREE AIRTIME TO COMELEC.**— As held in *Red Lion Broadcasting Co. v. F.C.C.*, which upheld the right of a party personally attacked to reply, "licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." Consequently, "a license permits broadcasting, but the license has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." As radio and television broadcast stations do not own the airwaves, no private property is taken by the requirement that they provide air time to the COMELEC.

6. **ID.; ID.; ID.; SECTION 92 OF B.P. BLG. 881, A VALID AMENDMENT OF GMA'S FRANCHISE.**— It is noteworthy that §49 of R.A. No. 6388, from which §92 of B.P. Blg. 881

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was taken, expressly provided that the COMELEC Time should "be considered as part of the public service time said stations are required to furnish the Government for the dissemination of public information and education under their respective franchises or permits." There is no reason to suppose that §92 of B.P. Blg. 881 considers the COMELEC Time therein provided to be otherwise than as a public service which petitioner is required to render under §4 of its charter (R.A. No. 7252). In sum, B.P. Blg. 881, §92 is not an invalid amendment of petitioner's franchise but the enforcement of a duty voluntarily assumed by petitioner in accepting a public grant of privilege.

7. **ADMINISTRATIVE LAW; ADMINISTRATIVE AGENCY; CANNOT IN THE EXERCISE OF LAWMAKING, AMEND A STATUTE OF CONGRESS.**— Thus far, we have confined the discussion to the provision of § 92 of B.P. Blg. 881 for free air time without taking into account COMELEC Resolution No. 2983-A, §2. This is because the amendment providing for the payment of "just compensation" is invalid, being in contravention of §92 of B.P. Blg. 881 that radio and television time given during the period of the campaign shall be "free of charge." Indeed, Resolution No. 2983 originally provided that the time allocated shall be "free of charge," just as § 92 requires such time to be given "free of charge." The amendment appears to be a reaction to petitioners' claim in this case that the original provision was unconstitutional because it allegedly authorized the taking of property without just compensation. The Solicitor General, relying on the amendment, claims that there should be no more dispute because the payment of compensation is now provided for. It is basic, however, that an administrative agency cannot, in the exercise of lawmaking, amend a statute of Congress. Since §2 of Resolution No. 2983-A is invalid, it cannot be invoked by the parties.

8. **CONSTITUTIONAL LAW; BILL OF RIGHTS; EQUAL PROTECTION OF THE LAWS; IMPORTANT DIFFERENCES BETWEEN PRINT AND AIR MEDIA JUSTIFY DIFFERENTIAL TREATMENT FOR FREE SPEECH PURPOSES.**— Petitioners complain that B.P. Blg. 881, §92 singles out radio and television stations to provide free air time. They contend that newspapers and magazines are not similarly required as, in fact, in *Philippine Press Institute*

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v. COMELEC we upheld their right to the payment of just compensation for the print space they may provide under §90. The argument will not bear analysis. It rests on the fallacy that broadcast media are entitled to the same treatment under the free speech guarantee of the Constitution as the print media. There are important differences in the characteristics of the two media, however, which justify their differential treatment for free speech purposes. Because of the physical limitations of the broadcast spectrum, the government must, of necessity, allocate broadcast frequencies to those wishing to use them. There is no similar justification for government allocation and regulation of the print media. In the allocation of limited resources, relevant conditions may validly be imposed on the grantees or licensees. The reason for this is that, as already noted, the government spends public funds for the allocation and regulation of the broadcast industry, which it does not do in the case of the print media. To require the radio and television broadcast industry to provide free air time for the COMELEC Time is a fair exchange for what the industry gets. From another point of view, this Court has also held that because of the unique and pervasive influence of the broadcast media, "[n]ecessarily . . . the freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper and print media." Petitioners' assertion therefore that §92 of B.P. Blg. 881 denies them the equal protection of the law has no basis.

9. **ID.; COMMISSION ON ELECTIONS; POWER TO REGULATE; DIFFERENT FROM POWER OF CONGRESS TO PROHIBIT.**— It is argued that the power to supervise or regulate given to the COMELEC under Art. IX-C, §4 of the Constitution does not include the power to prohibit. In the first place, what the COMELEC is authorized to supervise or regulate by Art. IX-C, §4 of the Constitution, among other things, is the use by media of information of their franchises or permits, while what Congress (not the COMELEC) prohibits is the sale or donation of print space or air time for political ads. In other words, the object of supervision or regulation is different from the object of the prohibition. It is another fallacy for petitioners to contend that the power to regulate does not include the power to prohibit. This may have force if the object of the power were the same.

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10. ID.; LEGISLATIVE DEPARTMENT; SEC. 92 OF B.P. BLG. 881 PROVIDING FREE COMELEC AIRTIME, UPHOLDS THE PEOPLE'S RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN.— To affirm the validity of §92 B.P. Blg. 881 is to hold public broadcasters to their obligation to see to it that the variety and vigor of public debate on issues in an election is maintained. For while broadcast media are not mere common carriers but entities with free speech rights, they are also public trustees charged with the duty of ensuring that the people have access to the diversity of views on political issues. This right of the people is paramount to the autonomy of broadcast media. To affirm the validity of §92, therefore, is likewise to uphold the people's right to information on matters of public concern. The use of property bears a social function and is subject to the state's duty to intervene for the common good. Broadcast media can find their just and highest reward in the fact that whatever altruistic service they may render in connection with the holding of elections is for that common good.

ROMERO, *J., dissenting opinion:*

1. CONSTITUTIONAL LAW; EMINENT DOMAIN; CONSTRUED.— The power of eminent domain is a power inherent in sovereignty and requires no constitutional provision to give it force. It is the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience or welfare demand. The right to appropriate private property to public use, however, lies dormant in the state until legislative action is had, pointing out the occasions, the modes, the conditions and agencies for its appropriation.

2. ID.; COMMISSION ON ELECTIONS; RESOLUTION GRANTING FREE COMELEC AIR TIME, AN EXERCISE OF EMINENT DOMAIN WITHOUT PAYMENT OF JUST COMPENSATION.— Section 92 of BP 881, insofar as it requires radio and television stations to provide Comelec with radio and television time free of charge is a flagrant violation of the constitutional mandate that private property shall

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not be taken for public use without just compensation. While it is inherent in the State, the sovereign right to appropriate property has never been understood to include taking property for public purposes without the duty and responsibility of ordering compensation to the individual whose property has been sacrificed for the good of the community. There is, of course, no question that the taking of the property in the case at bar is for public use, *i.e.*, to ensure that air time is allocated equally among the candidates, however, there is no justification for the taking without payment of just compensation. While Resolution No. 2983-A has provided that just compensation shall be paid for the 30 minutes of prime time granted by the television stations to respondent Comelec, we note that the resolution was passed *pursuant* to Section 92 of BP 881 which mandates that radio and television time be provided to respondent Comelec *free of charge*. Since the legislative intent is the controlling element in determining the administrative powers, rights, privileges and immunities granted, respondent Comelec may, at any time, despite the resolution passed, compel television and radio stations to provide it with airtime free of charge.

3. **ID.; EMINENT DOMAIN; LIMITATIONS.**— Section 9, Article III of the 1987 Constitution which reads "No private property shall be taken for public use without just compensation," gives us two limitations on the power of eminent domain: (1) the purpose of taking must be for public use and (2) just compensation must be given to the owner of the private property.

4. **ID.; ID.; DIFFERENTIATED FROM POLICE POWER.**— Police power must be distinguished from the power of eminent domain. In the exercise of police power, there is a *restriction* of property interest to promote public welfare or interest which involves no compensable taking. When the power of eminent domain, however, is exercised, property interest is appropriated and *applied to some public purpose*, necessitating compensation therefor. Traditional distinctions between police power and the power of eminent domain precluded application of both powers at the same time on the same subject. Property condemned under the exercise of police power, on the other hand, is noxious or intended for noxious purpose and, consequently, is not compensable. Police power proceeds from the principle that every holder of property, however absolute

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and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

5. **ID.; POLICE POWER; RESTRICTION OF SALE OR DONATION OF AIRTIME DURING CAMPAIGN PERIOD TO COMELEC, AN EXERCISE THEREOF; EXERCISE EXCEEDS LIMITATION.—** The petition before us is no different from the above-cited case. Insofar as Sec. 92 of BP 881 read in conjunction with Sec. 11(b) of RA 6646 restricts the sale or donation of airtime by radio and television stations during the campaign period to respondent Comelec, there is an exercise of police power for the regulation of property in accordance with the Constitution. To the extent however that Sec. 92 of BP 881 mandates that airtime be provided free of charge to respondent Comelec to be allocated equally among all candidates, the regulation exceeds the limits of police power and should be recognized as a taking. In the case of *Pennsylvania Coal Co. v. Mahon*, Justice Holmes laid down the limits of police power in this wise, "The general rule is that while property may be regulated to a certain extent, if the regulation goes too far, it will be recognized as a taking."

6. **ID.; EMINENT DOMAIN; ACQUISITION OF TITLE OR POSSESSION OF PROPERTY, NOT ESSENTIAL TO TAKING.—** While the power of eminent domain often results in the appropriation of title to or possession of property, it need not always be the case. It is a settled rule that neither acquisition of title nor total destruction of value is essential to taking and it is equally in cases where title remains with the private owner that inquiry should be made to determine whether the impairment of a property is merely regulated or amounts to a compensable taking. A regulation which deprives any person of the profitable use of his property constitutes a taking and entitles him to compensation unless the invasion of right is so slight as to permit the regulation to be justified under the police

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power. Similarly, a police regulation which unreasonably restricts the right to use business property for business purposes, amounts to taking of private property and the owner may recover therefor. It is also settled jurisprudence that acquisition of right of way easement falls within the purview of eminent domain.

7. **ID.; ID.; COMPENSABLE TAKING; MANIFEST IN LOSS OF EARNING.**— While there is no taking or appropriation of title to, and possession of the expropriated property in the case at bar, there is compensable taking inasmuch as there is a loss of the earnings for the airtime which the petitioner-intervenors are compelled to donate. It is a loss which, to paraphrase *Philippine Press Institute v. Comelec*, could hardly be considered "*de minimis*" if we are to take into account the monetary value of the compulsory donation measured by the current advertising rates of the radio and television stations.

8. **ID.; ID.; PRINT MEDIA NOT COMPELLED TO DONATE FREE SPACE.**— In the case of *Philippine Press Institute v. Comelec*, we had occasion to state that newspapers and other print media are not compelled to donate free space to respondent Comelec inasmuch as this would be in violation of the constitutional provision that no private property shall be taken for public use without just compensation.

9. **ID.; ID.; ID.; RULE APPLICABLE TO RADIO AND TV STATIONS; REASON.**— We find no cogent reason why radio and television stations should be treated any differently considering that their operating expenses as compared to those of the newspaper and other print media publishers involve considerably greater amount of financial resources. The fact that one needs a franchise from government to establish a radio and television station while no license is needed to start a newspaper should not be made a basis for treating broadcast media any differently from the print media in compelling the former to "donate" airtime to respondent Comelec. While no franchises and rights are granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires, this provides no license for government to disregard the cardinal rule that corporations with franchises are as much entitled to due process and equal protection of laws guaranteed under the Constitution.

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VITUG, *J.*, *separate opinion:*

1. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; BATAS PAMBANSA BLG. 881; A LEGITIMATE EXERCISE OF POLICE POWER.**— I assent in most part to the well-considered opinion written by Mr. Justice Vicente V. Mendoza in his *ponencia*, particularly, in holding that petitioner TELEBAP lacks *locus standi* in filing the instant petition and in declaring that Section 92 of *Batas Pambansa Blg. 881* is a legitimate exercise of police power of the State.

2. **ID.; STATE; POLICE POWER; STANDARDS FOR LAWFUL EXERCISE.**— In this case, the assailed law, in my view, has not failed in meeting the standards set forth for its lawful exercise, *i.e.*, (a) that its utilization is demanded by the interests of the public, and (b) that the means employed are reasonably necessary, and not unduly oppressive, for the accomplishment of the purpose and objectives of the law.

3. **ID.; LEGISLATIVE DEPARTMENT; FRANCHISE TO BROADCAST MEDIA; A PRIVILEGE BURDENED WITH RESPONSIBILITIES.**— The grant of franchise to broadcast media is a privilege burdened with responsibilities. While it is, primordially, a business enterprise, it nevertheless, also addresses in many ways certain imperatives of public service. In *Stone vs. Mississippi* (101, U.S. 814, cited in Cruz, Constitutional Law, 1995 ed., p. 40), a case involving a franchise to sell lotteries which petitioner claims to be a contract which may not be impaired, the United States Supreme Court opined: "x x x (T)he Legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police x x x.

4. **ID.; COMMISSION ON ELECTIONS; SECTION 2 OF RESOLUTION NO. 2983-A REQUIRING FREE COMELEC AIR TIME, A VALID EXERCISE OF POLICE POWER.**— I cannot consider COMELEC Resolution No. 2983-A, particularly Section 2 thereof, as being in contravention of B.P. No. 881. There is nothing in the law that prohibits the COMELEC

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from itself procuring airtime, perhaps longer than that which can reasonably be allocated, if it believes that in so opting, it does so for the public good.

PANGANIBAN, *J.*, *dissenting opinion:*

1. **POLITICAL LAW; EMINENT DOMAIN; PRINT MEDIA CANNOT BE REQUIRED TO DONATE ADVERTISING SPACE TO COMELEC WITHOUT PAYMENT OF JUST COMPENSATION.**— In *Philippine Press Institute, Inc. (PPI) vs. Commission on Elections,* this Court ruled that *print media companies* cannot be required to donate advertising space, *free of charge,* to the Comelec for equal allocation among candidates, on the ground that such compulsory seizure of print space is equivalent to a proscribed taking of private property for public use *without payment of just compensation.*

2. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; FRANCHISE; ONCE GRANTED BECOMES PROPERTY OF THE GRANTEE WHICH CANNOT BE TAKEN WITHOUT PAYMENT OF JUST COMPENSATION.**— In stamping unbridled donations with its imprimatur, the majority overlooks the twofold nature and purpose of a franchise: other than serving the public benefit which is subject to government regulation, it must also be to the franchise holder's advantage. Once granted, a franchise (not the air lanes) together with concomitant private rights, becomes property of the grantee. It is regarded by law precisely as other property. and, as any other property, it is safeguarded by the Constitution from arbitrary revocation or impairment. The rights under a franchise can be neither taken nor curtailed for pubic use or purpose, even by the government as the grantor, without payment of just compensation as guaranteed under our fundamental law. The fact that the franchise relates to public use or purpose does not entitle the state to abrogate or impair its use without just compensation.

3. **STATUTORY CONSTRUCTION; STATUTES; CONSIDERED VAGUE AND INVALID IF THEY LEAVE LAW ENFORCERS UNBRIDLED DISCRETION IN CARRYING OUT THEIR PROVISIONS.**— As a rule, a statute may be said to be vague and invalid if "it leaves law enforcers (in this

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case, the Comelec) unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the government muscle." (*People vs. Nazario*, 165 SCRA 186, 195, August 31, 1988)

4. **CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; LIMITATIONS ON LEGISLATIVE REGULATIONS OF PUBLIC UTILITIES.—** "[L]egislative regulation of public utilities must not have the effect of depriving an owner of his property without due process of law, nor of confiscating or appropriating private property without due process of law, nor of confiscating or appropriating private property without just compensation, nor of limiting or prescribing irrevocably vested rights or privileges lawfully acquired under a charter or franchise." The power to regulate is subject to these constitutional limits. Consequently, "rights under a franchise cannot be taken or damaged for a public use without the making of just compensation therefor." To do so is clearly beyond the power of the legislature to regulate.

5. **ID.; BILL OF RIGHTS; EQUAL PROTECTION OF LAWS; VIOLATION THEREOF MANIFEST WHERE BROADCAST STATIONS WERE COMPELLED TO DONATE FREE TIME WHILE MAKING PAYMENT TO PRINT MEDIA ADS.—** Smacking of undisguised discrimination is the fact that in *PPI vs. Comelec*, this Court has required payment of print media ads but, in this case, compels broadcast stations to donate their end product on a massive scale. The simplistic distinction given — that radio and TV stations are mere grantees of government franchises while newspaper companies are not — does not justify the grand larceny of precious air time. This is a violation not only of private property, but also of the constitutional right to equal protection itself. The proffered distinction between print and broadcast media is too insignificant and too flimsy to be a valid justification for the discrimination. The print and broadcast media are equal in the sense that both derive their revenues principally from paid ads. They should thus be treated equally by the law in respect of such ads.

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DECISION

MENDOZA, *J.*:

In *Osmeña v. COMELEC,* G.R. No. 132231, decided March 31, 1998,[1] we upheld the validity of §11(b) of R.A. No. 6646 which prohibits the sale or donation of print space or air time for political ads, except to the Commission on Elections under §90, of B.P. No. 881, the Omnibus Election Code, with respect to print media, and §92, with respect to broadcast media. In the present case, we consider the validity of §92 of B.P. Blg. No. 881 against claims that the requirement that radio and television time be given free takes property without due process of law; that it violates the eminent domain clause of the Constitution which provides for the payment of just compensation; that it denies broadcast media the equal protection of the laws; and that, in any event, it violates the terms of the franchise of petitioner GMA Network, Inc.

Petitioner Telecommunications and Broadcast Attorneys of the Philippines, Inc. is an organization of lawyers of radio and television broadcasting companies. They are suing as citizens, taxpayers, and registered voters. The other petitioner, GMA Network, Inc., operates radio and television broadcasting stations throughout the Philippines under a franchise granted by Congress.

Petitioners challenge the validity of §92 on the ground (1) that it takes property without due process of law and without just compensation; (2) that it denies radio and television broadcast companies the equal protection of the laws; and (3) that it is in excess of the power given to the COMELEC to supervise or regulate the operation of media of communication or information during the period of election.

The Question of Standing

At the threshold of this suit is the question of standing of petitioner Telecommunications and Broadcast Attorneys of the

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[1] Reiterated in *Kapisanan ng mga Broadkaster sa Pilipinas (Negros Occidental Chapter) v. COMELEC*, (res.), G.R. No. 132749, April 2, 1998.

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Philippines, Inc. (TELEBAP). As already noted, its members assert an interest as lawyers of radio and television broadcasting companies and as citizens, taxpayers, and registered voters.

In those cases[2] in which citizens were authorized to sue, this Court upheld their standing in view of the "transcendental importance" of the constitutional question raised which justified the granting of relief. In contrast, in the case at bar, as will presently be shown, petitioners' substantive claim is without merit. To the extent, therefore, that a party's standing is determined by the substantive merit of his case or a preliminary estimate thereof, petitioner TELEBAP must be held to be without standing. Indeed, a citizen will be allowed to raise a constitutional question only when he can show that he has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government; the injury is fairly traceable to the challenged action; and the injury is likely to be redressed by a favorable action.[3] Members of petitioner have not shown that they have suffered harm as a result of the operation of §92 of B.P. Blg. 881.

Nor do members of petitioner TELEBAP have an interest as registered voters since this case does not concern their right of suffrage. Their interest in §92 of B.P. Blg. 881 should be precisely in upholding its validity.

Much less do they have an interest as taxpayers since this case does not involve the exercise by Congress of its taxing or spending power.[4] A party suing as a taxpayer must specifically show that he has a sufficient interest in preventing the illegal expenditure of money raised by taxation and that he will sustain

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[2] Emergency Powers Cases [*Araneta v. Dinglasan*], 84 Phil. 368 (1949), *Iloilo Palay and Corn Planters Ass'n v. Feliciano*, 121 Phil. 358 (1965); *Philconsa v. Gimenez*, 122 Phil. 894 (1965); *CLU v. Executive Secretary*, 194 SCRA 317 (1991).

[3] *Lawyers League for a Better Philippines v. Aquino*, G.R. Nos. 73748, 73972 and 73990, May 22, 1986; *In re: Bermudez*, 145 SCRA 160 (1986); *Tatad v. Garcia, Jr.*, 243 SCRA 436, 473 (1995) (Mendoza, *J.*, concurring).

[4] Const., Art. VI, §§24-25 and 29.

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a direct injury as a result of the enforcement of the questioned statute.

Nor indeed as a corporate entity does TELEBAP have standing to assert the rights of radio and television broadcasting companies. Standing *jus tertii* will be recognized only if it can be shown that the party suing has some substantial relation to the third party, or that the third party cannot assert his constitutional right, or that the right of the third party will be diluted unless the party in court is allowed to espouse the third party's constitutional claim. None of these circumstances is here present. The mere fact that TELEBAP is composed of lawyers in the broadcast industry does not entitle them to bring this suit in their name as representatives of the affected companies.

Nevertheless, we have decided to take this case since the other petitioner, GMA Network, Inc., appears to have the requisite standing to bring this constitutional challenge. Petitioner operates radio and television broadcast stations in the Philippines affected by the enforcement of §92 of B.P. Blg. 881 requiring radio and television broadcast companies to provide free air time to the COMELEC for the use of candidates for campaign and other political purposes.

Petitioner claims that it suffered losses running to several million pesos in providing COMELEC Time in connection with the 1992 presidential election and the 1995 senatorial election and that it stands to suffer even more should it be required to do so again this year. Petitioner's allegation that it will suffer losses again because it is required to provide free air time is sufficient to give it standing to question the validity of §92.[5]

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[5] In *Valmonte v. Philippine Charity Sweepstakes Office,* (res.), G.R. No. 78716, Sept. 22, 1987, we held that the party bringing a suit challenging the constitutionality of a law must show "not only that the law is invalid, but also that he has sustained or is *in immediate danger* of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining 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." (Italics added)

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Airing of COMELEC Time, a Reasonable Condition for Grant of Petitioner's Franchise

As pointed out in our decision in *Osmeña v. COMELEC*, §11(b) of R.A. No. 6646 and §90 and §92 of B.P. Blg. 881 are part and parcel of a regulatory scheme designed to equalize the opportunity of candidates in an election in regard to the use of mass media for political campaigns. These statutory provisions state in relevant parts:

R.A. No. 6646

SEC. 11. *Prohibited Forms of Election Propaganda.* — In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:

. . . . . .

(b) for any newspapers, radio broadcasting or television station, or other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Section 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer or personality who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period.

B.P. Blg. 881, (Omnibus Election Code)

SEC. 90. *Comelec space.* — The Commission shall procure space in at least one newspaper of general circulation in every province or city: *Provided, however,* That in the absence of said newspaper, publication shall be done in any other magazine or periodical in said province or city, which shall be known as "Comelec Space" wherein candidates can announce their candidacy. Said space shall be allocated, free of charge, equally and impartially by the Commission among all candidates within the area in which the newspaper is circulated. (Sec. 45, 1978 EC).

SEC. 92. *Comelec time.* — The Commission shall procure radio and television time to be known as "Comelec Time" which shall be

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allocated equally and impartially among the candidates within the area of coverage of all radio and television stations. For this purpose, the franchise of all radio broadcasting and television stations are hereby amended so as to provide radio or television time, free of charge, during the period of the campaign. (Sec. 46, 1978 EC)

Thus, the law prohibits mass media from selling or donating print space and air time to the candidates and requires the COMELEC instead to procure print space and air time for allocation to the candidates. It will be noted that while §90 of B.P. Blg. 881 requires the COMELEC to procure print space which, as we have held, should be paid for, §92 states that air time shall be procured by the COMELEC free of charge.

Petitioners contend that §92 of BP Blg. 881 violates the due process clause[6] and the eminent domain provision[7] of the Constitution by taking air time from radio and television broadcasting stations without payment of just compensation. Petitioners claim that the primary source of revenue of the radio and television stations is the sale of air time to advertisers and that to require these stations to provide free air time is to authorize a taking which is not "a *de minimis* temporary limitation or restraint upon the use of private property." According to petitioners, in 1992, the GMA Network, Inc. lost ₱22,498,560.00 in providing free air time of one (1) hour every morning from Mondays to Fridays and one (1) hour on Tuesdays and Thursdays from 7:00 to 8:00 p.m. (prime time) and, in this year's elections, it stands to lose ₱58,980,850.00 in view of COMELEC's requirement that radio and television stations provide at least 30 minutes of prime time daily for the COMELEC Time.[8]

Petitioners' argument is without merit. All broadcasting, whether by radio or by television stations, is licensed by the

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[6] Art. III, §1 provides: "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

[7] *Id.*, §9 provides: "Private Property shall not be taken for public use without just compensation."

[8] Memorandum for Petitioners, pp. 21-28.

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government. Airwave frequencies have to be allocated as there are more individuals who want to broadcast than there are frequencies to assign.[9] A franchise is thus a privilege subject, among other things, to amendment by Congress in accordance with the constitutional provision that "any such franchise or right granted . . . shall be subject to amendment, alteration or repeal by the Congress when the common good so requires."[10]

The idea that broadcast stations may be required to provide COMELEC Time free of charge is not new. It goes back to the Election Code of 1971 (R.A. No. 6388), which provided:

> SEC. 49. *Regulation of election propaganda through mass media.* — (a) The franchises of all radio broadcasting and television stations are hereby amended so as to require each such station to furnish free of charge, upon request of the Commission [on Elections], during the period of sixty days before the election not more than fifteen minutes of prime time once a week which shall be known as "Comelec Time" and which shall be used exclusively by the Commission to disseminate vital election information. Said "Comelec Time" shall be considered as part of the public service time said stations are required to furnish the Government for the dissemination of public information and education under their respective franchises or permits.

This provision was carried over with slight modification by the 1978 Election Code (P.D. No. 1296), which provided:

> SEC. 46. *COMELEC Time.* — The Commission [on Elections] shall procure radio and television time to be known as "COMELEC Time" which shall be allocated equally and impartially among the candidates within the area of coverage of said radio and television stations. For this purpose, the franchises of all radio broadcasting and television stations are hereby amended so as to require such stations to furnish the Commission radio or television time, free of charge, during the period of the campaign, at least once but not oftener than every other day.

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[9] *Eastern Broadcasting Corp. (DYRE) v. Dans, Jr.*, 137 SCRA 628 (1985); *Red Lion Broadcasting Corp. Co. v. FCC*, 395 U.S. 367, 23 L.Ed2d 371 (1969). *See* The Radio Act (Act No. 3846, as amended), §3(c) & (d).

[10] Art. XII, §11.

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Substantially the same provision is now embodied in §92 of B.P. Blg. 881.

Indeed, provisions for COMELEC Time have been made by amendment of the franchises of radio and television broadcast stations and, until the present case was brought, such provisions had not been thought of as taking property without just compensation. Art. XII, §11 of the Constitution authorizes the amendment of franchises for "the common good." What better measure can be conceived for the common good than one for free air time for the benefit not only of candidates but even more of the public, particularly the voters, so that they will be fully informed of the issues in an election? "[I]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[11]

Nor indeed can there be any constitutional objection to the requirement that broadcast stations give free air time. Even in the United States, there are responsible scholars who believe that government controls on broadcast media can constitutionally be instituted to ensure diversity of views and attention to public affairs to further the system of free expression. For this purpose, broadcast stations may be required to give free air time to candidates in an election.[12] Thus, Professor Cass R. Sunstein

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[11] *Red Lion Broadcasting Corp. v. FCC*, 395 U.S. at 390, 23 L.Ed.2d at 389.

[12] *E.g.*, Owen M. Fiss, *The Irony of Free Speech* 2-3 (1996) ("Surely the state can be an oppressor, but it may also be a source of freedom . . . In some instances, instrumentalities of the state will try to stifle free and open debate, and the First Amendment is the tried-and-true mechanism that stops or prevents such abuse of state power. In other instances, however, the state may have to further the robustness of public debate. . . . It may have to allocate public resources . . . to those whose voices would not otherwise be heard in the public square."); Cass R. Sunstein, *Democracy and the Problem of Free Speech* 50-51 (1993) ("The idea that threats to speech stem from the government is undoubtedly correct, but as usually understood, it is far too simple. Sometimes threats come from what seems to be the private sphere, and, much more fundamentally, these threats could not be made without legal entitlements that enable some private actors but not others to speak and to be heard. . . . [Government regulation] may therefore be necessary.")

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of the University of Chicago Law School, in urging reforms in regulations affecting the broadcast industry, writes:

> *Elections.* We could do a lot to improve coverage of electoral campaigns. Most important, government should ensure free media time for candidates. Almost all European nations make such provision; the United States does not. Perhaps government should pay for such time on its own. *Perhaps broadcasters should have to offer it as a condition for receiving a license. Perhaps a commitment to provide free time would count in favor of the grant of a license in the first instance.* Steps of this sort would simultaneously promote attention to public affairs and greater diversity of view. They would also help overcome the distorting effects of "soundbites" and the corrosive financial pressures faced by candidates in seeking time on the media.[13]

In truth, radio and television broadcasting companies, which are given franchises, do not own the airwaves and frequencies through which they transmit broadcast signals and images. They are merely given the temporary privilege of using them. Since a franchise is a mere privilege, the exercise of the privilege may reasonably be burdened with the performance by the grantee of some form of public service. Thus, in *De Villata v. Stanley*,[14] a regulation requiring interisland vessels licensed to engage in the interisland trade to carry mail and, for this purpose, to give advance notice to postal authorities of date and hour of sailings of vessels and of changes of sailing hours to enable them to tender mail for transportation at the last practicable hour prior to the vessel's departure, was held to be a reasonable condition for the state grant of license. Although the question of compensation for the carriage of mail was not in issue, the Court strongly implied that such service could be without compensation, as in fact under Spanish sovereignty the mail was carried free.[15]

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[13] Cass R. Sunstein, *id.* at 85 (italics added).

[14] 32 Phil. 541 (1915).

[15] The Court said:

> Considerable expenditures of public money have been made in the past and continue to be made annually for the purpose of securing the safety of vessels plying in Philippine waters. [Here the Court

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In *Philippine Long Distance Telephone Company v. NTC,*[16] the Court ordered the PLDT to allow the interconnection of its domestic telephone system with the international gateway facility of Eastern Telecom. The Court cited (1) the provisions of the legislative franchise allowing such interconnection; (2) the absence of any physical, technical, or economic basis for restricting the linking up of two separate telephone systems; and (3) the possibility of increase in the volume of international traffic and more efficient service, at more moderate cost, as a result of interconnection.

Similarly, in the earlier case of *PLDT v. NTC,*[17] it was held:

Such regulation of the use and ownership of telecommunications systems is in the exercise of the plenary police power of the State for the promotion of the general welfare. The 1987 Constitution recognizes the existence of that power when it provides:

> "Sec. 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands" (Article XII).

The interconnection which has been required of PLDT is a form of "intervention" with property rights dictated by "the objective of government to promote the rapid expansion of telecommunications services in all areas of the Philippines, . . . to maximize the use of telecommunications facilities available, . . . in

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enumerated many government facilities to make the coastwise transportation safe.] Can it be fairly contended that a regulation is unreasonable which requires vessels licensed to engage in the interisland trade, in whose behalf the public funds are so lavishly expended, to hold themselves in readiness to carry the public mails when duly tendered for transportation, and to give such reasonable notice of their sailing hours as will insure the prompt dispatch of all mails ready for delivery at the hours thus designated? *Id.*, at 552.

[16] 241 SCRA 486 (1995).

[17] 190 SCRA 717, 734 (1990) (italics by the Court).

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recognition of the vital role of communications in nation building . . . and *to ensure that all users of the public telecommunications service have access to all other users of the service wherever they may be within the Philippines at an acceptable standard of service and at reasonable cost*" (DOTC Circular No. 90-248). Undoubtedly, the encompassing objective is the common good. The NTC, as the regulatory agency of the State, merely exercised its delegated authority to regulate the use of telecommunications networks when it decreed interconnection.

In the granting of the privilege to operate broadcast stations and thereafter supervising radio and television stations, the state spends considerable public funds in licensing and supervising such stations.[18] It would be strange if it cannot even require the licensees to render public service by giving free air time.

Considerable effort is made in the dissent of Mr. Justice Panganiban to show that the production of television programs involves large expenditure and requires the use of equipment for which huge investments have to be made. The dissent cites

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[18] For example, under the Radio Act (Act No. 3846, as amended), the government performs, *inter alia*, the following functions:

> SEC. 3. The Secretary of Public Works and Communications is hereby empowered, to regulate the construction or manufacture, possession, control, sale and transfer of radio transmitters or transceivers (combination transmitter-receiver) and the establishment, use, the operation of all radio stations and of all forms of radio communications and transmissions within the Philippines. In addition to the above he shall have the following specific powers and duties:
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> . . . . . .
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> (c) He shall assign call letters and assign frequencies for each station licensed by him and for each station established by virtue of a franchise granted by the Congress of the Philippines and specify the stations to which each of such frequencies may be used;
>
> (d) He shall promulgate rules and regulations to prevent and eliminate interference between stations and carry out the provisions of this Act and the provisions of the International Radio Regulations: *Provided, however,* That changes in the frequencies or in the authorized power, or in the character of emitted signals, or in the type of the power supply, or in the hours of operations of any licensed stations, shall not be made without first giving the station licensee a hearing.

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the claim of GMA Network that the grant of free air time to the COMELEC for the duration of the 1998 campaign period would cost the company ₱52,380,000, representing revenue it would otherwise earn if the air time were sold to advertisers, and the amount of ₱6,600,850, representing the cost of producing a program for the COMELEC Time, or the total amount of ₱58,980,850.

The claim that petitioner would be losing ₱52,380,000 in unrealized revenue from advertising is based on the assumption that air time is "finished product" which, it is said, become the property of the company, like oil produced from refining or similar natural resources after undergoing a process for their production. But air time is not owned by broadcast companies. As held in *Red Lion Broadcasting Co. v. F.C.C.,*[19] which upheld the right of a party personally attacked to reply, "licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." Consequently, "a license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[20] As radio and television broadcast stations do not own the airwaves, no private property is taken by the requirement that they provide air time to the COMELEC.

Justice Panganiban's dissent quotes from Tolentino on the *Civil Code* which says that "the air lanes themselves 'are not property because they cannot be appropriated for the benefit of any individual.'" (p.5) That means neither the State nor the stations own the air lanes. Yet the dissent also says that "The

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[19] 395 U.S. at 394, 23 L.Ed.2d at 391, *quoting* 47 U.S.C. §301.

[20] 395 U.S. at 389, 23 L.Ed.2d at 388-389.

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franchise holders can recover their huge investments only by selling air time to advertisers." (p. 13) If air lanes cannot be appropriated, how can they be used to produce air time which the franchise holders can sell to recover their investment? There is a contradiction here.

As to the additional amount of ₱6,600,850, it is claimed that this is the cost of producing a program and it is for such items as "sets and props," "video tapes," "miscellaneous (other rental, supplies, transportation, etc.)," and "technical facilities (technical crew such as director and cameraman as well as 'on air plugs')." There is no basis for this claim. Expenses for these items will be for the account of the candidates. COMELEC Resolution No. 2983, §6(d) specifically provides in this connection:

> (d) *Additional services such as tape-recording or video-taping of programs, the preparation of visual aids, terms and condition thereof, and the consideration to be paid therefor may be arranged by the candidates with the radio/television station concerned.* However, no radio/television station shall make any discrimination among candidates relative to charges, terms, practices or facilities for in connection with the services rendered.

It is unfortunate that in the effort to show that there is taking of private property worth millions of pesos, the unsubstantiated charge is made that by its decision the Court permits the "grand larceny of precious time," and allows itself to become "the people's unwitting oppressor." The charge is really unfortunate. In *Jackson v. Rosenbaun*,[21] Justice Holmes was so incensed by the resistance of property owners to the erection of party walls that he was led to say in his original draft, "a statute, which embodies the community's understanding of the reciprocal rights and duties of neighboring landowners, does not need to invoke the *petty larceny* of the police power in its justification." Holmes's brethren corrected his taste, and Holmes had to amend the passage so that in the end it spoke only of invoking "the

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[21] 260 U.S. 22, 67 L.Ed. 107 (1922).

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police power."[22] Justice Holmes spoke of the "petty larceny" of the police power. Now we are being told of the "grand larceny [by means of the police power] of precious air time."

Giving Free Air Time a Duty Assumed by Petitioner

Petitioners claim that §92 is an invalid amendment of R.A. No. 7252 which granted GMA Network, Inc. a franchise for the operation of radio and television broadcasting stations. They argue that although §5 of R.A. No. 7252 gives the government the power to temporarily use and operate the stations of petitioner GMA Network or to authorize such use and operation, the exercise of this right must be compensated.

The cited provision of R.A. No. 7252 states:

SEC. 5. *Right of Government.* — A special right is hereby reserved to the President of the Philippines, in times of rebellion, public peril, calamity, emergency, disaster or disturbance of peace and order, to temporarily take over and operate the stations of the grantee, to temporarily suspend the operation of any station in the interest of public safety, security and public welfare, or to authorize the temporary use and operation thereof by any agency of the Government, upon due compensation to the grantee, for the use of said stations during the period when they shall be so operated.

The basic flaw in petitioner's argument is that it assumes that the provision for COMELEC Time constitutes the use and operation of the stations of the GMA Network, Inc. This is not so. Under §92 of B.P. Blg. 881, the COMELEC does not take over the operation of radio and television stations but only the allocation of air time to the candidates for the purpose of ensuring, among other things, equal opportunity, time, and the right to reply as mandated by the Constitution.[23]

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[22] 260 U.S. at 31, 67 L.Ed. at 112. 1 Holmes-Laski Letters 457 (1953), *quoted* in P. Freund, A. Sutherland, M. Howe and E. Brown, *Constitutional Law, Cases and Other Problems,* 1095 (1978).

[23] Art. IX-C, §4.

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Indeed, it is wrong to claim an amendment of petitioner's franchise for the reason that B.P. Blg. 881, which is said to have amended R.A. No. 7252, actually antedated it.[24] The provision of §92 of B.P. Blg. 881 must be deemed instead to be incorporated in R.A. No. 7252. And, indeed, §4 of the latter statute does.

For the fact is that the duty imposed on the GMA Network, Inc. by its franchise to render "adequate public service time" implements §92 of B.P. Blg. 881. Undoubtedly, its purpose is to enable the government to communicate with the people on matters of public interest. Thus, R.A. No. 7252 provides:

> SEC. 4. *Responsibility to the Public. — The grantee shall provide adequate public service time to enable the Government, through the said broadcasting stations, to reach the population on important public issues*; provide at all times sound and balanced programming; promote public participation such as in community programming; *assist in the functions of public information and education*; conform to the ethics of honest enterprise; and not use its station for the broadcasting of obscene and indecent language, speech, act or scene, or for the dissemination of deliberately false information or willful misrepresentation, or to the detriment of the public interest, or to incite, encourage, or assist in subversive or treasonable acts. (Italics supplied)

It is noteworthy that §49 of R.A. No. 6388, from which §92 of B.P. Blg. 881 was taken, expressly provided that the COMELEC Time should "be considered as part of the public service time said stations are required to furnish the Government for the dissemination of public information and education under their respective franchises or permits." There is no reason to suppose that §92 of B.P. Blg. 881 considers the COMELEC Time therein provided to be otherwise than as a public service which petitioner is required to render under §4 of its charter (R.A. No. 7252). In sum, B.P. Blg. 881, §92 is not an invalid amendment of petitioner's franchise but the enforcement of a

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[24] B.P. Blg. 881 took effect on Dec. 3, 1985, whereas R.A. No. 7252 took effect on March 20, 1992.

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duty voluntarily assumed by petitioner in accepting a public grant of privilege.

Thus far, we have confined the discussion to the provision of §92 of B.P. Blg. 881 for free air time without taking into account COMELEC Resolution No. 2983-A, §2 of which states:

> SEC. 2. *Grant of "Comelec Time."* — Every radio broadcasting and television station operating under franchise shall grant the Commission, *upon payment of just compensation*, at least thirty (30) minutes of prime time daily, to be known as "Comelec Time," effective February 10, 1998 for candidates for President, Vice-President and Senators, and effective March 27, 1998, for candidates for local elective offices, until May 9, 1998. (Italics supplied)

This is because the amendment providing for the payment of "just compensation" is invalid, being in contravention of §92 of B.P. Blg. 881 that radio and television time given during the period of the campaign shall be "free of charge." Indeed, Resolution No. 2983 originally provided that the time allocated shall be "free of charge," just as §92 requires such time to be given "free of charge." The amendment appears to be a reaction to petitioners' claim in this case that the original provision was unconstitutional because it allegedly authorized the taking of property without just compensation.

The Solicitor General, relying on the amendment, claims that there should be no more dispute because the payment of compensation is now provided for. It is basic, however, that an administrative agency cannot, in the exercise of lawmaking, amend a statute of Congress. Since §2 of Resolution No. 2983-A is invalid, it cannot be invoked by the parties.

Law Allows Flextime for Programming by Stations, Not Confiscation of Air Time by COMELEC

It is claimed that there is no standard in the law to guide the COMELEC in procuring free air time and that "theoretically

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the COMELEC can demand all of the air time of such stations."[25] Petitioners do not claim that COMELEC Resolution No. 2983-A arbitrarily sequesters radio and television time. What they claim is that because of the breadth of the statutory language, the provision in question is susceptible of "unbridled, arbitrary and oppressive exercise."[26]

The contention has no basis. For one, the COMELEC is required to procure free air time for candidates "within the area of coverage" of a particular radio or television broadcaster so that it cannot, for example, procure such time for candidates outside that area. At what time of the day and how much time the COMELEC may procure will have to be determined by it in relation to the overall objective of informing the public about the candidates, their qualifications and their programs of government. As stated in *Osmeña v. COMELEC,* the COMELEC Time provided for in §92, as well as the COMELEC Space provided for in §90, is in lieu of paid ads which candidates are prohibited to have under §11(b) of R.A. No. 6646. Accordingly, this objective must be kept in mind in determining the details of the COMELEC Time as well as those of the COMELEC Space.

There would indeed be objection to the grant of power to the COMELEC if §92 were so detailed as to leave no room for accommodation of the demands of radio and television programming. For were that the case, there could be an intrusion into the editorial prerogatives of radio and television stations.

Differential Treatment of

Broadcast Media Justified

Petitioners complain that B.P. Blg. 881, §92 singles out radio and television stations to provide free air time. They contend that newspapers and magazines are not similarly required as, in fact, in *Philippine Press Institute v. COMELEC*[27] we upheld

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[25] Memorandum for Petitioners, p. 17.

[26] *Ibid.*

[27] 244 SCRA 272 (1995).

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their right to the payment of just compensation for the print space they may provide under §90.

The argument will not bear analysis. It rests on the fallacy that broadcast media are entitled to the same treatment under the free speech guarantee of the Constitution as the print media. There are important differences in the characteristics of the two media, however, which justify their differential treatment for free speech purposes. Because of the physical limitations of the broadcast spectrum, the government must, of necessity, allocate broadcast frequencies to those wishing to use them. There is no similar justification for government allocation and regulation of the print media.[28]

In the allocation of limited resources, relevant conditions may validly be imposed on the grantees or licensees. The reason for this is that, as already noted, the government spends public funds for the allocation and regulation of the broadcast industry, which it does not do in the case of the print media. To require the radio and television broadcast industry to provide free air time for the COMELEC Time is a fair exchange for what the industry gets.

From another point of view, this Court has also held that because of the unique and pervasive influence of the broadcast

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[28] In the United States, because of recognition of these differences in the characteristics of news media, it has been held that broadcast stations may be required to give persons subjected to personal attack during discussion of an important public issue the right to reply (*Red Lion Broadcasting Corp. v. FCC*, 395 U.S. 367, 23 L.Ed.2d 371 (1969)), but a similar "right of reply" is inapplicable to newspapers. It was pointed out that a statute providing for such right "operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish specified matter. . . . [It] exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty [is] exacted in terms of the cost in printing and in taking up space that could be devoted to other material the newspaper may have preferred to print. . . . [Faced with such a penalty,] editors might well conclude that the safe course is to avoid controversy. . . . [Thus, the government-enforced] right of access inescapably 'dampens the vigor and limits the variety of public debate.'" (*Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 4 L.Ed.2d 730 (1974)

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media, "[n]ecessarily . . . the freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper and print media."[29]

The broadcast media have also established a uniquely pervasive presence in the lives of all Filipinos. Newspapers and current books are found only in metropolitan areas and in the poblaciones of municipalities accessible to fast and regular transportation. Even here, there are low income masses who find the cost of books, newspapers, and magazines beyond their humble means. Basic needs like food and shelter perforce enjoy high priorities.

On the other hand, the transistor radio is found everywhere. The television set is also becoming universal. Their message may be simultaneously received by a national or regional audience of listeners including the indifferent or unwilling who happen to be within reach of a blaring radio or television set. The materials broadcast over the airwaves reach every person of every age, persons of varying susceptibilities to persuasion, persons of different I.Q.s and mental capabilities, persons whose reactions to inflammatory or offensive speech would be difficult to monitor or predict. The impact of the vibrant speech is forceful and immediate. Unlike readers of the printed work, the radio audience has lesser opportunity to cogitate, analyze, and reject the utterance.[30]

Petitioners' assertion therefore that §92 of B.P. Blg. 881 denies them the equal protection of the law has no basis. In addition, their plea that §92 (free air time) and §11(b) of R.A. No. 6646 (ban on paid political ads) should be invalidated would pave the way for a return to the old regime where moneyed candidates could monopolize media advertising to the disadvantage of candidates with less resources. That is what Congress tried to reform in 1987 with the enactment of R.A. No. 6646. We are not free to set aside the judgment of Congress, especially in light of the recent failure of interested parties to have the law repealed or at least modified.

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[29] *Eastern Broadcasting (DYRE) Corporation v. Dans, Jr.*, 137 SCRA at 635.

[30] *Id.* at 635-636.

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Requirement of COMELEC Time, a Reasonable Exercise of the State's Power to Regulate Use of Franchises

Finally, it is argued that the power to supervise or regulate given to the COMELEC under Art. IX-C, §4 of the Constitution does not include the power to prohibit. In the first place, what the COMELEC is authorized to supervise or regulate by Art. IX-C, §4 of the Constitution,[31] among other things, is the use by media of information of their franchises or permits, while what Congress (not the COMELEC) prohibits is the sale or donation of print space or air time for political ads. In other words, the object of supervision or regulation is different from the object of the prohibition. It is another fallacy for petitioners to contend that the power to regulate does not include the power to prohibit. This may have force if the object of the power were the same.

In the second place, the prohibition in §11(b) of R.A. No. 6646 is only half of the regulatory provision in the statute. The other half is the mandate to the COMELEC to procure print space and air time for allocation to candidates. As we said in *Osmeña v. COMELEC*:

The term political "ad ban," when used to describe §11(b) of R.A. No. 6646, is misleading, for even as §11(b) prohibits the sale or donation of print space and air time to political candidates, it

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[31] This provision reads: "The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections."

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mandates the COMELEC to procure and itself allocate to the candidates space and time in the media. There is no suppression of political ads but only a regulation of the time and manner of advertising.

. . . . . .

. . . What is involved here is simply regulation of this nature. Instead of leaving candidates to advertise freely in the mass media, the law provides for allocation, by the COMELEC of print space and air time to give all candidates equal time and space for the purpose of ensuring "free, orderly, honest, peaceful, and credible elections."

With the prohibition on media advertising by candidates themselves, the COMELEC Time and COMELEC Space are about the only means through which candidates can advertise their qualifications and programs of government. More than merely depriving candidates of time for their ads, the failure of broadcast stations to provide air time unless paid by the government would clearly deprive the people of their right to know. Art. III, §7 of the Constitution provides that "the right of the people to information on matters of public concern shall be recognized," while Art. XII, §6 states that "the use of property bears a social function [and] the right to own, establish, and operate economic enterprises [is] subject to the duty of the State to promote distributive justice and to intervene when the common good so demands."

To affirm the validity of §92 of B.P. Blg. 881 is to hold public broadcasters to their obligation to see to it that the variety and vigor of public debate on issues in an election is maintained. For while broadcast media are not mere common carriers but entities with free speech rights, they are also public trustees charged with the duty of ensuring that the people have access to the diversity of views on political issues. This right of the people is paramount to the autonomy of broadcast media. To affirm the validity of §92, therefore, is likewise to uphold the people's right to information on matters of public concern. The use of property bears a social function and is subject to the

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state's duty to intervene for the common good. Broadcast media can find their just and highest reward in the fact that whatever altruistic service they may render in connection with the holding of elections is for that common good.

For the foregoing reasons, the petition is dismissed.

SO ORDERED.

Narvasa, C.J., Regalado, Davide, Jr., Bellosillo, Melo, Puno, Kapunan, Martinez, and *Quisumbing, JJ.,* concur.

Romero, Panganiban and *Purisima, JJ.,* dissent.

Vitug, J., please see separate opinion.

ROMERO, *J., dissenting opinion:*

Section 92 of B.P. 881 constitutes taking of private property without just compensation. The power of eminent domain is a power inherent in sovereignty and requires no constitutional provision to give it force. It is the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience or welfare demand.[1] The right to appropriate private property to public use, however, lies dormant in the state until legislative action is had, pointing out the occasions, the modes, the conditions and agencies for its appropriation.[2]

Section 92 of B.P. 881 states

Sec. 92. Comelec Time — The Comelec shall procure radio and television time to be known as "Comelec Time" which shall be allocated equally and impartially among the candidates within the area of coverage of all radio and television stations. For this purpose, the franchise of all radio and television stations are hereby amended

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[1] Cooley, Thomas, II *A Treatise on Constitutional Limitations*, pp. 1110. [1927].

[2] *Supra* at p. 1119.

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so as to provide radio and television time *free of charge* during the period of election campaign.

Pursuant to Section 92 of B.P. 881, respondent COMELEC on March 3, 1998 passed Resolution 2983-A, the pertinent provision of which reads as follows:

> Sec. 2. Grant of "Comelec Time." — Every radio broadcasting and television station operating under franchise shall grant the Commission, upon payment of just compensation, at least thirty (30) minutes of prime time daily, to be known as "Comelec Time," effective February 10, 1998 for candidates for President, Vice-President and Senators, and effective March 27, 1998, for candidates for local elective offices, until May 9, 1998.

Section 92 of B.P. 881, insofar as it requires radio and television stations to provide COMELEC with radio and television time free of charge is a flagrant violation of the constitutional mandate that private property shall not be taken for public use without just compensation. While it is inherent in the State, the sovereign right to appropriate property has never been understood to include taking property for public purposes without the duty and responsibility of ordering compensation to the individual whose property has been sacrificed for the good of the community. Hence, Section 9 Article III of the 1987 Constitution which reads "No private property shall be taken for public use without just compensation," gives us two limitations on the power of eminent domain: (1) the purpose of taking must be for public use and (2) just compensation must be given to the owner of the private property.

There is, of course, no question that the taking of the property in the case at bar is for public use, i.e. to ensure that air time is allocated equally among the candidates, however, there is no justification for the taking without payment of just compensation. While Resolution No. 2983-A has provided that just compensation shall be paid for the 30 minutes of prime time granted by the television stations to respondent Comelec, we note that the resolution was passed *pursuant* to Section 92 of B.P. 881 which mandates that radio and television time be provided to respondent Comelec *free of charge*. Since the

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legislative intent is the controlling element in determining the administrative powers, rights, privileges and immunities granted,[3] respondent Comelec may, at any time, despite the resolution passed, compel television and radio stations to provide it with airtime free of charge.

Apparently, Sec 92 of B.P. 881 justifies such taking under the guise of police power regulation which cannot be validly done. Police power must be distinguished from the power of eminent domain. In the exercise of police power, there is a *restriction* of property interest to promote public welfare or interest which involves no compensable taking. When the power of eminent domain, however, is exercised, property interest is appropriated and *applied to some public purpose,* necessitating compensation therefor. Traditional distinctions between police power and the power of eminent domain precluded application of both powers at the same time on the same subject.[4] Hence, in the case of *City of Baguio v. NAWASA,*[5] the Court held that a law requiring the transfer of all municipal waterworks systems to NAWASA in exchange for its assets of equivalent value involved the exercise of eminent domain because the property involved was wholesome and intended for public use. Property condemned under the exercise of police power, on the other hand, is noxious or intended for noxious purpose and, consequently, is not compensable. Police power proceeds from the principle that every holder of property, however absolute and unqualified may by his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable

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[3] *Horack, Frank, Sutherland Statutory Construction*, p. 279 [1989].

[4] *Association of Small Landowners of the Philippines, Inc. vs. Secretary of Agrarian Reform*, 175 SCRA 343 [1989].

[5] 106 Phil. 144.

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restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.[6]

In the case of *Small Landowners of the Philippines Inc. v. Secretary of Agrarian Reform,* we found occasion to note that recent trends show a mingling of the police power and the power of eminent domain, with the latter being used as an implement of the former like the power of taxation. Citing the cases of *Berman v. Parker*[7] and *Penn Central Transportation Co. v. New York City*[8] where owners of the Grand Central Terminal who were not allowed to construct a multi-story building to preserve a historic landmark were allowed certain compensatory rights to mitigate the loss caused by the regulation, this Court in *Small Landowners of the Philippines, Inc.* case held that measures prescribing retention limits for landowners under the Agrarian Reform Law involved the exercise of police power for the regulation of private property in accordance with the constitution. And, where to carry out the regulation, it became necessary to deprive owners of whatever lands they may own in excess of the maximum area allowed, the Court held that there was definitely a taking under the power of eminent domain for which payment of just compensation was imperative.

The petition before us is no different from the above-cited case. Insofar as Sec 92 of B.P. 881 read in conjunction with Sec 11(b) of R.A. 6646 restricts the sale or donation of airtime by radio and television stations during the campaign period to respondent Comelec, there is an exercise of police power for the regulation of property in accordance with the Constitution. To the extent however that Sec 92 of B.P. 881 mandates that airtime be provided free of charge to respondent Comelec to be allocated equally among all candidates, the regulation exceeds the limits of police power and should be recognized as a taking.

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[6] See Cooley, Thomas II *Constitutional Limitations*, 8th Ed, pp. 1224 [1927].

[7] 348 US 1954 [1954].

[8] 438 US 104.

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In the case of *Pennsylvania Coal Co.v. Mahon,*[9] Justice Holmes laid down the limits of police power in this wise, "The general rule is that while property may be regulated to a certain extent, if the regulation goes too far, it will be recognized as a taking."

While the power of eminent domain often results in the appropriation of title to or possession of property, it need not always be the case. It is a settled rule that neither acquisition of title nor total destruction of value is essential to taking and it is usually in cases where title remains with the private owner that inquiry should be made to determine whether the impairment of a property is merely regulated or amounts to a compensable taking. A regulation which deprives any person of the profitable use of his property constitutes a taking and entitles him to compensation unless the invasion of rights is so slight as to permit the regulation to be justified under the police power. Similarly, a police regulation which unreasonably restricts the right to use business property for business purposes, amounts to taking of private property and the owner may recover therefor.[10] It is also settled jurisprudence that acquisition of right of way easement falls within the purview of eminent domain.[11]

While there is no taking or appropriation of title to, and possession of the expropriated property in the case at bar, there is compensable taking inasmuch as there is a loss of the earnings for the airtime which the petitioner-intervenors are compelled to donate. It is a loss which, to paraphrase *Philippine Press Institute v. Comelec,*[12] could hardly be considered "*de minimis*" if we are to take into account the monetary value of the compulsory donation measured by the current advertising rates of the radio and television stations.

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[9] 260 US 393.

[10] Cooley, Thomas, II *Constitutional Limitations*, pp. 1161 [1927].

[11] *Napocor v. CA*, 129 SCRA 665 [1984]; *Garcia v. CA*, 102 SCRA 597 [1981]; *Republic v. PLDT*, 26 SCRA 620 [1969].

[12] 244 SCRA 272 [1995].

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In the case of *Philippine Press Institute v. Comelec*,[13] we had occasion to state that newspapers and other print media are not compelled to donate free space to respondent Comelec inasmuch as this would be in violation of the constitutional provision that no private property shall be taken for public use without just compensation. We find no cogent reason why radio and television stations should be treated any differently considering that their operating expenses as compared to those of the newspaper and other print media publishers involve considerably greater amount of financial resources.

The fact that one needs a franchise from government to establish a radio and television station while no license is needed to start a newspaper should not be made a basis for treating broadcast media any differently from the print media in compelling the former to "donate" airtime to respondent Comelec. While no franchises and rights are granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires,[14] this provides no license for government to disregard the cardinal rule that corporations with franchises are as much entitled to due process and equal protection of laws guaranteed under the Constitution.

ACCORDINGLY, I vote to declare Section 92 of BP 881 insofar as it mandates that radio and television time be provided to respondent Comelec free of charge *UNCONSTITUTIONAL*.

VITUG, *J.*, *separate opinion*:

I assent in most part to the well-considered opinion written by Mr. Justice Vicente V. Mendoza in his *ponencia,* particularly, in holding that petitioner TELEBAP lacks *locus standi* in filing the instant petition and in declaring that Section 92 of *Batas Pambansa Blg. 881* is a legitimate exercise of police power of the State.

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[13] *Supra.*

[14] See Section 11, Article XII of the 1987 Constitution.

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The grant of franchise to broadcast media is a privilege burdened with responsibilities. While it is, primordially, a business enterprise, it nevertheless, also addresses in many ways certain imperatives of public service. In *Stone vs. Mississipi* (101, U.S. 814, cited in Cruz, *Constitutional Law*, 1995 ed., p. 40.), a case involving a franchise to sell lotteries which petitioner claims to be a contract which may not be impaired, the United States Supreme Court opined:

"x x x (T)he Legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. x x x.

In this case, the assailed law, in my view, has not failed in meeting the standards set forth for its lawful exercise, *i.e.*, (a) that its utilization is demanded by the interests of the public, and (b) that the means employed are reasonably necessary, and not unduly oppressive, for the accomplishment of the purposes and objectives of the law.

I cannot consider COMELEC Resolution No. 2983-A, particularly Section 2 thereof, as being in contravention of B.P. No. 881. There is nothing in the law that prohibits the COMELEC from itself procuring airtime, perhaps longer than that which can reasonably be allocated, if it believes that in so opting, it does so for the public good.

I vote to DISMISS the petition.

PANGANIBAN, *J.*, *dissenting opinion:*

At issue in this case is the constitutionality of Section 92 of the Omnibus Election Code[1] which compels *all* broadcast stations

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[1] §92 of BP Blg. 881 (Omnibus Election Code) provides:

"Sec. 92. *Comelec time.* — The Commission shall procure radio and television time to be known as "Comelec Time" which shall be

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in the country "to provide radio and television time, *free of charge*, during the period of the [election] campaigns," which the Commission on Elections shall allocate "equally and impartially among the candidates x x x." Petitioners contend, and I agree, that this legal provision is unconstitutional because it confiscates private property without due process of law and without payment of just compensation, and denies broadcast media equal protection of the law.

In *Philippine Press Institute, Inc. (PPI) vs. Commission on Elections*,[2] this Court ruled that *print media companies* cannot be required to donate advertising space, *free of charge*, to the Comelec for equal allocation among candidates, on the ground that such compulsory seizure of print space is equivalent to a proscribed taking of private property for public use *without payment of just compensation*.[3]

The Court's majority in the present case, speaking through the distinguished Mr. Justice Vicente V. Mendoza, holds, however, that the foregoing *PPI* doctrine applies *only to print media, not to broadcast (radio and TV) networks*, arguing that "radio and television broadcasting companies, which are given franchises, do not own the airwaves and frequencies through which they transmit broadcast signals and images. They are merely given the temporary privilege of using them. Since a franchise is a mere privilege, the exercise of the privilege may reasonably be burdened with the performance by the grantee of some form of public service." In other words, the majority theorizes that the forced donation of air time to the Comelec

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allocated equally and impartially among the candidates within the area of coverage of all radio and television stations. For this purpose, the franchise of all radio broadcasting and television stations are hereby amended so as to provide radio or television time, free of charge, during the period of the campaign."

[2] 244 SCRA 272, May 22, 1995, per Feliciano, *J.*

[3] §9, Art. III of the Constitution provides:

"Sec. 9. Private property shall not be taken for public use without just compensation."

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is a means by which the State gets compensation for the grant of the franchise and/or the use of the air lanes.

With all due respect, I disagree. *The majority is relying on a theoretical distinction that does not make any real difference. Theory must yield to reality.* I respectfully submit the following arguments to support my dissent:

1. The State does not own the airwaves and broadcast frequencies. It merely allocates, supervises and regulates their proper use. Thus, other than collecting supervision or regulatory fees which it already does, it cannot exact any *onerous and unreasonable post facto* burdens from the franchise holders, without due process and just compensation. Moreover, the invocation of the "common good" does not excuse the unbridled and clearly excessive taking of a franchisee's property.

2. Assuming *arguendo* that the State owns the air lanes, the broadcasting companies already pay rental fees to the government for their use. Hence, the seizure of air time cannot be justified by the theory of compensation.

3. Airwaves and frequencies alone, without the radio and television owners' humongous investments amounting to billions of pesos, cannot be utilized for broadcasting purposes. Hence, a forced donation of broadcast time is in *actual fact* a taking of such investments without due process and without payment of just compensation.

Let me explain further each of these arguments.

I. The State Does Not Own Air Lanes;
It Merely Regulates Their Proper Use;
"Common Good" Does Not Excuse Unbridled Taking.

Significantly, the majority does not claim that the State owns the air lanes. It merely contends that "broadcasting, whether by radio or by television stations, is licensed by the government. Airwave frequencies have to be allocated as there are more individuals who want to broadcast than there are frequencies to assign. A franchise is thus a privilege subject among other

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things x x x to amendment, alteration or repeal by the Congress when the common good so requires."[4] True enough, a "franchise started out as a 'royal privilege or [a] branch of the King's prerogative, subsisting in the hands of a subject.'"[5]

Indeed, while the Constitution expressly provides that "[a]ll lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State," it is silent as to the ownership of the airwaves and frequencies. It is then reasonable to say that no one owns them. Like the air we breathe and the sunshine that sustains life, the air lanes themselves "are not property because they cannot be appropriated for the benefit of any individual,"[6] but are to be used to the best advantage of all.

Because, as mentioned earlier, there are more prospective users than frequencies, the State — in the exercise of its police power — allocates, supervises and regulates their use, so as to derive maximum benefit for the general public. The franchise granted by the legislature to broadcasting companies is essentially for the purpose of putting order in the use of the airwaves by assigning to such companies their respective frequencies. The purpose is not to grant them the privilege of using public property. For, as earlier stated, airwaves are not owned by the government.

Accordingly, the National Telecommunications Commission (NTC) was tasked by law to institutionalize this regulation of the air lanes. To cover the administrative cost of supervision and regulation, the NTC levies charges, which have been revised upwards in NTC Memorandum Circular No. 14-8-94 dated

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[4] Pp. 6-7, Decision in G.R. 132922.

[5] Finch, adopted by Blackstone in *State v. Twin Village Water Co.*, 98 Me 214, 56 A 763 (1903), cited in *Radio Communication of the Philippines, Inc. vs. National Telecommunications Commission*, 150 SCRA 450, 457, May 29, 1987. Also in *Lim vs. Pacquing*, 240 SCRA 649, 678, January 27, 1995.

[6] Tolentino, Arturo M., *Commentaries and Jurisprudence on the Civil Code of the Philippines*, p. 2, Vol. II, (1992); citing 3 Planiol & Ripert 59.

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August 26, 1994. In accordance with this Circular, Petitioner GMA Network, Inc., for the year 1996, paid the NTC ₱2,880,591 of which ₱2,501,776.30 was NTC "supervision and regulation fee," as borne out by its Audited Consolidated Financial Statements for said year, on file with the Securities and Exchange Commission. In short, for its work of allocation, supervision and regulation, the government is adequately compensated by the broadcast media through the payment of fees unilaterally set by the former.

Franchisee's Property Cannot Be Taken Without Just Compensation

In stamping unbridled donations with its imprimatur, the majority overlooks the twofold nature and purpose of a franchise: other than serving the public benefit which is subject to government regulation, it must also be to the franchise holder's advantage. Once granted, a franchise (not the air lanes) together with concomitant private rights, becomes property of the grantee.[7] It is regarded by law precisely as other property and, as any other property, it is safeguarded by the Constitution from arbitrary revocation or impairment.[8] The rights under a franchise can be neither taken nor curtailed for public use or purpose, even by the government as the grantor, without payment of just compensation[9] as guaranteed under our fundamental law.[10] The fact that the franchise relates to public use or purpose does not entitle the state to abrogate or impair its use without just compensation.[11]

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[7] 36 Am Jur 2d, §4 Franchises.

[8] *Ibid.*, §5.

[9] *Ibid.*, §8 citing *Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 US 32, 64 L ed. 121, 40 S Ct 76; *United States v. Brooklyn Union Gas Co.* (CA 2 NY) 168 F 2d 391; *South California Gas Co. v. Los Angeles*, 50 Cal 2d 713, 329 P 2d 289. Also in *Eighth Ave. Coach Corp. v. New York*, 286 NY 84, 35 NE 2d 907.

[10] *See* footnote no. 3.

[11] 36 Am Jur 2d, §8 Franchises, citing *Grand Turk Western R. Co. v. South Bend*, 227 US 544, 57 L ed. 633, 33 S Ct 303; *Wilcox Consolidated Gas Co.*, 212 US 19, 53 L ed. 382, 29 S Ct 192; *Wilmington & W.R. Co.*

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The majority further claims that, constitutionally,[12] franchises are always subject to alteration by Congress, "when the common good so requires." The question then boils down to this: Does Section 92 of the Omnibus Election Code constitute a franchise "modification for the "common good," or an "unlawful taking of private property"? To answer this question, I go back to *Philippine Press Institute, Inc. vs. Commission on Elections*, where a unanimous Supreme Court held:[13]

"To *compel* print media companies *to donate* 'Comelec space' of the dimensions specified in Section 2 of Resolution No. 2772 (not less than one-half page), amounts to 'taking' of private personal property for public use or purposes. Section 2 failed to specify the intended *frequency* of such compulsory 'donation': only *once* during the period from 6 March 1995 (or 21 March 1995) until 12 May 1995? or everyday or once a week? or as often as Comelec may direct during the same period? The extent of the taking or deprivation is not insubstantial; this is not a case of a *de minimis* temporary limitation or restraint upon the use of private property. The monetary value of the compulsory 'donation,' measured by the advertising rates ordinarily charged by newspaper publishers whether in cities or in non-urban areas, may be very substantial indeed." (Italics in original)

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v. Reid, 13 Wall (US) 264, 20 L ed 568; *Arkansas State Highway Commission v. Arkansas Power & Light Co.*, 231 Ark 307, 330 SW 2d 77; and others.

[12] §11, Art. XII of the Constitution provides:

"Sec. 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty *per centum* of whose capital is owned by such citizens, nor shall such franchise, certificate or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

[13] 244 SCRA at p. 279.

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"Common Good" Does Not Justify Unbridled Taking of Franchisee's Broadcast Time

Like the questioned resolution in *PPI*, Section 92 *contains no limit as to the amount and recurrence of the "donation" of air time that Comelec can demand from radio and TV stations. There are no guidelines or standards provided as to the choice of stations, time and frequency of airing, and programs to be aired.* Theoretically, Comelec can compel the use of all the air time of a station. The fact that Comelec has not exercised its granted power arbitrarily is immaterial because the law, *as worded,* admits of unbridled exercise.

"A statute is considered *void for overbreadth* when 'it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by *means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'* (*Zwickler v. Koota*, 19 L ed 2d 444 [1967]). In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[14]

"In a 1968 opinion, the American Supreme Court made clear that the absence of such reasonable and definite standards in a legislation of its character is fatal. Where, as in the case of the above paragraphs, the majority of the Court could discern *'an overbreadth that makes possible oppressive or capricious application' of the statutory provisions, the line dividing the valid from the constitutionally infirm has been crossed.* Such provisions offend the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

"It is undeniable, therefore, that even though the governmental purpose be legitimate and substantial, *they cannot be pursued by*

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[14] *Blo Umpar Adiong v. Comelec*, 207 SCRA 712, 719, March 31, 1992, per Gutierrez, *J.*, cited in Memorandum for Petitioners, p. 15.

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means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. For precision of regulation is the touchstone in an area so closely related to our most precious freedoms."[15]

As a rule, a statute may be said to be vague and invalid if "it leaves law enforcers (in this case, the Comelec) unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the government muscle."[16]

Moreover, the extent of the actual taking of air time is enormous, exorbitant and unreasonable. In their Memorandum,[17] petitioners allege (and this has not been rebutted at all) that during the 1992 election period, GMA Network has been compelled to donate ₱22,498,560 worth of advertising revenues; and for the current election period, GMA stands to lose a staggering ₱58,980,850. Now, clearly and most obviously, these amounts are not inconsequential or *de minimis*. *They constitute arbitrary taking on a grand scale!*

American jurisprudence is replete with citations showing that "[l]egislative regulation of public utilities must not have the effect of depriving an owner of his property without due process of law, nor of confiscating or appropriating private property without due process of law, nor of confiscating or appropriating private property without just compensation, nor of limiting or prescribing irrevocably vested rights or privileges lawfully acquired under a charter or franchise." The power to regulate is subject to these constitutional limits.[18] Consequently, "rights

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[15] *Gonzales vs. Comelec*, 27 SCRA 835, 871, April 18, 1969, per Fernando, *J.*

[16] *People vs. Nazario*, 165 SCRA 186, 195, August 31, 1988, per Sarmiento, *J.*

[17] See pp. 20-27 for the detailed computation.

[18] Agbayani, Aguedo F., *Commentaries and Jurisprudence on the Commercial Laws of the Philippines*, p. 560, 1993 ed.; citing *Fisher vs. Yangco Steamship Company*, 31 Phil. 1, (1915), referring to *Chicago etc. R. Co. vs. Minnesota*, 134 U.S. 418, *Minneapolis Eastern R. Co. vs. Minnesota*, 134 U.S. 467, *Chicago etc. R. Co. vs. Wellman*, 143 U.S. 339, *Smyth vs.*

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under a franchise cannot be taken or damaged for a public use without the making of just compensation therefor."[19] To do so is clearly beyond the power of the legislature to regulate.

II. Assuming That the State Owns Air Lanes, Broadcast Companies Already Pay Rental Therefor.

Let me grant for the moment and for the sake of argument that the State owns the air lanes and that, by its grant of a franchise, it should thus receive compensation for the use of said frequencies. I say, however, that by remitting unreasonably high "annual fees and charges," which as earlier stated amounts to millions of pesos yearly, television stations are in effect paying rental fees for the use (not just the regulation) of said frequencies. Except for the annual inspection conducted by the NTC, no other significant service is performed by the government in exchange for the enormous fees charged the stations. *Evidently, the sums collected by the NTC exceed the cost of services performed by it, and are therefore more properly understood as rental fees for the use of the frequencies granted them.*[20]

Since the use of the air frequencies is already paid for annually by the broadcast entities, there is no basis for the government, through the Comelec, to compel unbridled donation of the air time of said companies without due process and without payment of just compensation.

In fact, even in the case of state-owned resources referred to earlier — like oil, minerals and coal — once the license to exploit and develop them is granted to a private

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Ames, 169 U.S. 466, 524, *Henderson Bridge Co. vs. Henderson City*, 173 U.S. 592, 614.

[19] 36 Am Jur 2d 732; citing *Los Angeles v. Los Angeles Gas & E. Corp.* 251 US 32, 64 L ed 121, 40 S Ct 76; *United States v. Brooklyn Union Gas Co.* (CA2 NY) 168 F2d 391; *Southern California Gas Co v. Los Angeles*, 50 Cal 2d 713, 329 P2d 289, cert den 359 US 907, 3 L ed 2d 572, 79 S Ct 583.

[20] Apart from paying "supervision fees," broadcast media also pay normal taxes, imposts, fees, assessments and other government charges.

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corporation, the government can no longer *arbitrarily* confiscate or appropriate them *gratis* under the guise of serving the common good. Crude oil, for instance, once explored, drilled, and refined is thereafter considered the property of the authorized explorer (or refiner) which can sell it to the public and even to the government itself. The State simply cannot demand free gasoline for the operation of public facilities even if they benefit the people in general. It still has to pay compensation therefor.

III. Airwaves Useless Without Huge Investment of Broadcast Companies

Setting up and operating a credible broadcasting network requires billions of pesos in investments. It is precisely the broadcast licensee's use of a state-granted franchise or privilege which occasions its acquisition of private property in the form of broadcast facilities and its production of air time. These properties are distinct from its franchise.[21] The 1996 Audited Consolidated Balance Sheet of Petitioner GMA, on file with the SEC, shows that its "property and equipment," which it uses in its broadcast function, amount to over one billion pesos or, to be exact, ₱1,245,741,487.[22] This does not include the cost of producing the programs to be broadcast, talent fees and other aspects of broadcasting. In their Memorandum,[23] petitioners explain that the total cost for GMA to stay on the air (for television) at present is approximately ₱136,100 per hour, which includes electricity, depreciation, repairs and maintenance, technical facilities, salaries, and so on. *The point is: The franchise holders can recover their huge investments only by selling air time to advertisers. This is their "product,"*

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[21] 36 Am Jur 2d pp. 724 and 727; citing *Gordon v. Appeal Tax Ct.* 3 How (US) 133, 11 L ed. 529; *Bridgeport v. New York & N.H.R. Co.*, 36 Conn 255; *Consolidated Gas Co. v. Baltimore*, 101 Md 541, 61 A 532.

[22] In the case of ABS-CBN Broadcasting Corporation, the amount is much larger: ₱3,196,912,000, per its Audited Consolidated Financial Report as of December 31, 1996, on file with the SEC.

[23] At p. 20. *See also* Annex B of said Memorandum.

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their valuable property which Section 92 forcibly takes from them in massive amounts without payment of just compensation.

It is too simplistic to say that because the Constitution allows Congress to alter franchises, *ergo*, an unbridled taking of private property may be allowed. If such appropriation were only, to use the words of *PPI vs. Comelec*, *de minimis* or insignificant — say, one hour once or twice a month — perhaps, it can be justified by the promotion of the "common good." But a taking in the gargantuan amount of over ₱58 million from Petitioner GMA for the 1998 election season alone is an actual seizure of its private investment, and not at all a reasonable "compensation" or "alteration" for the "common good." Certainly, this partakes of CONFISCATION of private property.

What makes the taking of air time even more odious is its *ex post facto* nature. When the broadcast companies acquired their franchises and set up their expensive facilities, they were not informed of the immensity of the donations they are now compelled to give.

Note should be made, too, of the fact that what Section 92 takes away is air time. Air time is the "finished product" after a station uses its own broadcast facilities. The frequency is just the specific "route" or "channel" by which this medium reaches the TV sets of the general public. Technically, therefore, the wholesale alteration by Section 92 of all broadcast franchises would appear unrelated to the compelled donations. While the express modification is in the franchise, what Section 92 really does is that it takes away the end product of the facilities which were set up through the use of the entrepreneurs' investments and the broadcasters' work.

EPILOGUE

By way of epilogue, I must point out that even Respondent Comelec expressly recognizes the need for just compensation. Thus, Section 2 of its Resolution No. 2983-A states that "[e]very radio broadcasting and television station operating under franchise shall grant the Commission, *upon payment of just compensation*, at least thirty (30) minutes of prime time daily

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to be known as 'Comelec Time' x x x." And yet, even with such a judicious legal position taken by the very agency tasked by the Constitution to administer elections, the majority still insists on an arbitrary seizure of precious property produced and owned by private enterprise.

That Petitioner GMA is a viable, even profitable, enterprise[24] is no argument for seizing its profits. The State cannot rob the rich to feed the poor in the guise of promoting the "common good." Truly, the end never justifies the means.

It cannot be denied that the amount and the extent of the air time demanded from GMA is huge and exorbitant, amounting, I repeat, to over ₱58 million for the 1998 election season alone. If the air time required from "every radio and television station" in the country in the magnitude stated in the aforesaid Comelec Resolution 2983-A is added up and costed, the total would indeed be staggering — in several hundred million pesos.

Smacking of undisguised discrimination is the fact that in *PPI vs. Comelec*, this Court has required payment of print media ads but, in this case, compels broadcast stations to donate their end product on a massive scale. The simplistic distinction given — that radio and TV stations are mere grantees of government franchises while newspaper companies are not — does not justify the grand larceny of precious air time. This is a violation not only of private property, but also of the constitutional right to equal protection itself. The proffered distinction between print and broadcast media is too insignificant and too flimsy to be a valid justification for the discrimination. The print and broadcast media are equal in the sense that both derive their revenues principally from paid ads. They should thus be treated equally by the law in respect of such ads.

To sum up, the Bill of Rights of our Constitution expressly guarantees the following rights:

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[24] This is not to say that all broadcast networks are profitable. A comparative study of their Financial Statements on file with the SEC shows that a majority are not really profitable.

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1. No person, whether rich or poor, shall be deprived of property without due process.[25]

2. Such property shall not be taken by the government, even for the use of the general public, without first paying just compensation to the owner.[26]

3. No one, regardless of social or financial status, shall be denied equal protection of the law.[27]

The majority, however, peremptorily brushes aside all these sacred guarantees and prefers to rely on the nebulous legal theory that broadcast stations are mere recipients of state-granted franchises which can be altered or withdrawn anytime or otherwise burdened with post facto elephantine yokes. By this short-circuited rationalization, the majority blithely ignores the private entrepreneurs' billion-peso investments and the broadcast professionals' grit and toil in transforming these invisible franchises into merchandisable property; and conveniently forgets the grim reality that the taking of honestly earned media assets is unbridled, exorbitant and arbitrary. Worse, the government,[28] against which these constitutional rights to property were in the first place written, prudently agrees to respect them and to pay adequate compensation for their taking. But ironically, the majority rejects the exemplary observance by the government of the people's rights and insists on the confiscation of their private property.

I have always believed that the Supreme Court is the ever vigilant guardian of the constitutional rights of the citizens and their ultimate protector against the tyrannies of their own government. I am afraid that by this unfortunate Decision, the majority, in this instance, has instead converted this honorable and majestic Court into the people's unwitting oppressor.

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[25] §1, Art. III of the Constitution.

[26] §9, Art. III of the Constitution.

[27] §1, Art. III of the Constitution.

[28] As personified in this case by the Comelec.

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WHEREFORE, I vote to *GRANT* the petition and to declare Section 92 of the Omnibus Election Code *UNCONSTITUTIONAL* and *VOID*.

SECOND DIVISION

[A.M. No. MTJ-97-1128. April 22, 1998]

FLORENTINO C. BAGUNAS, *complainant, vs.* **ACTG. JUDGE CONCORDIO L. FABILLAR,** *respondent.*

SYNOPSIS

Florentino C. Bagunas, former Municipal Mayor of Giporlos, Eastern Samar, was charged with Illegal Possession of Firearms for failure to return the .38 caliber revolver (Smith and Wesson) lent by Col. Alzate, the then Provincial Commander of Eastern Samar during his incumbency. Respondent Judge conducted the preliminary investigation, thereon. Bagunas moved to inhibit respondent claiming that respondent is closely associated with his (Baguna's) political rivals and for the forwarding of the case to the Provincial Prosecutor for preliminary investigation. The motion was Criminal Case No. 1238 for Illegal Possession of Firearms was filed against Bagunas and a warrant for his arrest was issued by respondent. The Department of Justice on reinvestigation of the case, recommended the dismissal of the complaint since there was no gun recovered from Bagunas the same having been returned to two (2) soldiers sent by Col. Alzate which was witnessed by two (2) persons and duly recorded in the police blotter. Hence, this complaint against respondent for gross ignorance of the law and grave abuse of discretion in refusing to inhibit himself, failure to dismiss Criminal Case No. 1238 and the precipitate issuance of the warrant of arrest.

Whether or not a judge should voluntarily inhibit himself is addressed to his sound discretion. In the case at bar, respondent judge gravely abused his discretion when he decided to proceed