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SCOPE OF THE POWERS OF THE PRESIDENT OF THE PHILIPPINES AND OF THE PRESIDENT OF THE UNITED STATES—A COMPARATIVE STUDY*

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INTRODUCTION

It was only sixteen years ago at the sacred grounds of the Luneta that the American flag was hoisted down to give way to the Philippine flag.[1] But behind this gesture of nationhood is a history dating back to the 1500s when European powers first came into the country and provided occasion for history to write that in these heretofore unknown islands dwelt a people who knew freedom, who loved freedom and would fight and die for freedom. In that island bastion of Mactan, Lapu-lapu and his men fought Magellan and his troops who came to claim the Philippines for Spain, ending the battle with Magellan himself killed.[2] From then on a history of colonization started: institutions and cultures of the colonizing powers were implanted among the people so that in the midst of a turbulent Asia, the Philippines now stands out as the only Christian

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1 ". . . now therefore, I, Harry S. Truman, ... hereby withdraw and surrender all rights of possession, supervision, jurisdiction, control or sovereignty now existing and exercised by the United States of America in and over the territory and people of the Philippines and on behalf of the United States of America, I do hereby recognize the independence of the Philippines as a separate and self-governing nation and acknowledge the authority and control over the Constitution now in force."

Proclamation of Independence, read by U.S. High Commissioner Paul V. McNutt on July 4, 1946, printed in Blue Book of the First Year of the Republic, p. 2 (1947); Proclamation No. 2695, 3 CFR, 1943-1948, Com., p. 8.

2 Malcolm, First Malayan Republic (1951), p. 62.

nation in this part of the earth,[3] with a republican system of government and three official languages,[4] and where democracy is a way of life.[5]

This generation of Filipinos is blessed with the opportunity to live in a system of government patterned after that of the United States which has grown through the centuries from the once disorganized colony of England to become the leading world power that she is today, proving the success of a great experiment in the republican system of government where the President is vigorous and independent and the citizens assured of their civil liberties.[6] Presidential prerogatives, at times extensive, at times contracting, depending upon the imperatives of the hour or the tenant of that great office, have contributed much to the shaping of her national destiny.[7]

Against this background of rich American experience, this paper shall try to examine the extent of the powers of the President of the Philippines viewed in the context of the pressing problems facing the nation today[8] — not so much the problem of taking up arms to fight the battles

[3] "The fact that the Philippines is the only Christian country in a non-Christian part of the world is significant in the international position of the Islands." Hayden, The Philippines, A Study in National Development (1950), p. 560.

[4] When the Americans took over the government, they added English to Spanish as an official language, and established it as a language of instruction in schools. Hayden, The Philippines, *op. cit.*, p. 589. Tagalog became the official language upon the declaration of independence on July 4, 1946. Com. Act. No. 570 (1940).

[5] High-placed representatives of the foreign services both of the Philippines and of the United States are agreed that the country is the show window of democracy in the Far East. Malcolm, First Malayan Republic (1951), p. 21.

[6] "Through the range of executive powers the mental image which formed the ideal of the framers was primarily a composite picture of the crown shorn of its medieval prerogatives and of the state governor freed from legislative domination. The product was an Executive at once vigorous and safe. But one fundamental principle, whether found in the intent of the framers or its meaning which practice and judicial interpretations have read into it is 'that the President . . . is a mere agent to whom it is delegated in the Constitution all the authority he possesses'." Hart, The Ordinance Making Powers of the President of the U.S. (1925), pp. 111-112. "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government . . . were determined in the light of emergency and they are not altered by emergency." Chief Justice Hughes in Home Building and Loan Association v. Blaisdell, 290 U.S. 398, at 425 (1934).

[7] President Theodore Roosevelt believed that the President has the residuum of powers to govern for the public good except when restricted by the Constitution or the laws; President Taft took issue, and advocated the theory that the President can exercise only those powers derived from the Constitution or laws, or reasonably implied therefrom. Roosevelt, An Autobiography (1920), pp. 357, 363. Taft, Our Chief Magistrate and His Powers, pp. 139-140. President Wilson had shades of the parliamentarism concept. Binkley, The Power of the President (1937), pp. 223-227.

[8] ". . . it is a constitution we are expounding," "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." McCulloch v. Maryland, 4 L. ed. 579, 602, 603-604 (1819). "It was made for an undefined and expanding future." Hurtato v. California, 28 L. ed. 232, 237 (1884).

of the great powers of the earth, but to meet the problems of rising expectation — population growth, unemployment, poverty, disease. From the vantage point of a successful American experiment, we shall try to examine what our President, under a regime of law, can do in a democracy.

PRELIMINARY CONSIDERATIONS

Steps in Adopting Philippine Constitution

The Philippine Constitution was born as a result of the joint action of five different entities before it was finally adopted as the supreme law of the land. Congress of the United States first approved Public Act No. 127,[1] as amended by Public Act No. 300,[2] authorizing the Philippine Legislature to call a constitutional convention for drafting and framing a Constitution, and providing among others that the government was to be republican in form with a Bill of Rights.[3] As said Act was not to take effect until accepted by the concurrent resolution of the Philippine Legislature, or by a convention called for the purpose,[4] on May 1, 1934, choosing the first method, the Philippine Legislature adopted a concurrent resolution accepting said law.[5] A constitutional convention was called,[6] and on February 8, 1935, the Constitution was adopted by the convention. This was certified by the President of the United States[7] on March 24, 1935, and the Filipino people ratified it in a plebiscite on May 14, 1935, by an overwhelming majority.[8]

The Basic Difference

Unlike the U.S. Constitution which establishes a federal system of government, the Philippine Constitution creates a unitary type[9] with powers centralized on national government, leaving the provincial and municipal governments dependent upon the former for their creation and grant of powers necessary to serve the purposes of their existence.[10]

[1] 73rd U.S. Congress, *supra.*

[2] 76th U.S. Congress, otherwise known as the "Tydings-McDuffie" or "Independence Act."

[3] Public Act No. 127, supra, Sec. 2 (a).

[4] *Ibid*, Sec. 17.

[5] Philippine Public Laws, Vol. 29 (1935), pp. 254-255; Malcolm & Laurel, *op. cit.*, 77.

[6] Aruego, The Framing of the Philippine Constitution, Vol. II, pp. 842-976.

[7] Franklin D. Roosevelt was the U.S. President at the time.

[8] People v. Lingsangan, 62 Phil. 646, 648-649 (1935); Malcolm & Laurel, *op. cit.*, pp. 77-78.

[9] Rivera, Law of Public Administration (1956), p. 649; Revised Administrative Code, Sec. 2.

[10] Unson v. Lacson, G.R. No. L-7909, Jan. 12, 1957; Hebron v. Reyes, G.R. No. L-9124, July 28, 1958.

Thus, while the United States Constitution speaks of reserved powers of the States[11] with particular enumeration of powers to be exercised by Congress,[12] carved out from the mass of legislative powers possessed by the several states and leaving those not included in the enumeration as still belonging to the States,[13] such is not the case under the Philippine Constitution; under the latter, Congress has plenary powers of legislation and any power deemed to be legislative by usage and tradition is lodged in Congress unless the Constitution has placed it elsewhere.[14] The Philippine Constitution is viewed more as constituting limitations on the plenary powers of Congress rather than as a grant thereof.[15]

In his Valedictory Address, the President of the Constitutional Convention affirmed this idea when he said that "x x x in contradistinction to the American Constitution, our Constitution vests in the legislature all the inherent legislative powers of a modern democratic State except only those expressly withheld x x x"[16]

On the other hand, while the Philippine Constitution provides that the President "shall have control of all the executive departments, bureaus or offices, exercise general supervision over all local governments as may be provided by law . . .",[17] thus giving the President the constitutional sanction

[11] U.S. Const., Xth Amendment.

[12] U.S. Const., Art. I, Sec. 8; In matters of foreign affairs, Congress has inherent powers, which it shares with the executive — United States v. Curtiss-Wright, 81 L. ed. 255 (1936), and Perez v. Brownwell, 2 L. ed., 2d 603 (1958). "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the nation. The States that joined together to form a single nation and to create through the Constitution, a federal government to conduct the affairs of that nation, must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations." *Id.*

[13] United States v. Curtiss-Wright Export Corp., *supra.*

[14] Tañada & Fernando, Constitution of the Philippines, Vol. II, 4th ed., pp. 737-738. The U.S. Constitution says: "All legislative powers herein granted x x x," while the Philippine Constitution merely says: "The Legislative power shall be vested in Congress x x x," without mentioning any enumeration of powers.

[15] Vera v. Avelino, 77 Phil. 192.

[15] Valedictory Address of Hon. Claro M. Recto, printed in Aruego, The Framing of the Philippine Constitution, Vol. II, pp. 1063, 1065.

[17] For example, the Local Autonomy Act has granted local governments a wide range of powers to enable them to meet effectively problems arising in local administration. Under the law, provinces, cities, and municipalities are authorized to make their own annual and supplemental budgets, subject only to a very limited supervision of the Secretary of Finance. Rep. Act No. 2264, Sec. 1, printed in 55 O.G. 5736. The Secretary, before the enactment of said law, had general supervision over the financial affairs of provincial, city and municipal governments (Revised Administrative Code, Sec. 81), but under the present law, he can interfere in matters involving local finances only when the provincial, city and municipal budgets violate the Salary Laws and Executive Orders (Rep. Act. No. 2264, Sec. 1). The taxing and spending powers have likewise been enlarged and local governments are now authorized to enact zoning and subdivision ordinances, subject only to consultation with the national agency, the National Planning Commission. *Ibid.*, Secs. 2, 3.

to interfere in a limited manner with the management of local affairs,[18] no such provision appears in the United States Constitution. Under the Philippine Constitution, Congress is the dispenser of all powers of local governments, provincial, city and municipal, and the latter exercise only such powers as have been authorized by Congress.[19] It is not therefore difficult to understand that while a taxpayer has no standing to question a federal statute,[20] he has standing to do so under the Philippine unitary system because of his peculiar relationship with the Philippine government, which is basically different from that existing between a taxpayer and the United States Federal Government. Thus, said the Philippine Supreme Court:[21]

> However, this view was not favored by the Supreme Court of the U.S. in Frothingham v. Mellon (262 U.S. 447), insofar as *federal* laws are concerned, upon the ground that the relationship of a taxpayer of the U.S. to its Federal Government is different from that of a taxpayer of a municipal corporation to its government. Indeed, under the composite system of government existing in the U.S., the states of the Union are integral parts of the Federation from an international viewpoint, but each state enjoys internally a substantial measure of sovereignty, subject to the limitations imposed by the Federal Constitution. In fact, the same was made by representatives of *each state* of the Union, not of the people of the U.S., except insofar as the former represented the people of the respective States, and the people of each State has, independently of that of others, ratified the Constitution. In other words, the Federal Constitution and the Federal statutes have become binding upon the people of the U.S. in consequence of an act of, and, in this sense, *through* the respective States of the Union of which they are citizens. The peculiar nature of the relation between said people and the Federal Government of the U.S. is reflected in the election of its President, who is chosen directly, not by the people of the U.S., but by electors chosen by *each State*, in such manner as the legislature thereof may direct (Article II, Section 2, of the Federal Constitution).
>
> The relation between the people of the Philippines and its taxpayers, on the one hand, and the Republic of the Philippines, on the other, is not identical to that obtaining between the people and taxpayers of the U.S. and its Federal Government. It is closer, from a domestic viewpoint, to that existing between the people and taxpayers of each state and the government thereof, except that the authority of the Republic of the Philippines over the people of the Philippines is more fully direct than that of the states of the Union, insofar as the simple and unitary type of our national government

[18] Philippine Constitution, Art. VII, Sec. 10 (1). The power of the national government over local governmental units is the constitutional provision vesting upon the President general supervision over them. Unson v. Lacson, *supra*; Hebron v. Reyes, *supra*. Supervision was a compromise between the two opposing theories of local governments, namely, the historical, which recognizes inherent rights of local self-government, and the legal, which vests control over local governments on the national government. Planas v. Gil, 67 Phil. 62 (1939).

[19] Unson v. Lacson, *supra.*

[20] Frothingham v. Mellon, 67 L. ed. 1078 (1923).

[21] Pascual v. Secretary, G.R. No. L-10405, December 29, 1960.

is not subject to limitations analogous to those imposed by the Federal Constitution upon the states of the Union, and those imposed upon the Federal Government in the interest of the states of the Union. For this reason, the rule recognizing the right of taxpayers to assail the constitutionality of a legislation appropriating local or state public funds — which has been upheld by the Federal Supreme Court (Crampton v. Zabriskie, 101 U.S. 601) — has greater application in the Philippines than that adopted with respect to act: of Congress of the United States appropriating federal funds. (Underscoring supplied.)

FOREIGN AFFAIRS

In General

In the vast realm of foreign affairs, the fountain of power reposed in the government springs not only from the mandates of the Constitution,[1] but also and more importantly, from the very essence of sovereignty which is the supreme, absolute, uncontrollable power; the *jus summi imperii*, the absolute right to govern.[2] This power in external affairs was emphasized by the United States Supreme Court in United States vs. Curtiss-Wright Export Corp.,[3] where it was emphatically stated that there are fundamental differences, both in origin and nature, "between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs," because while in domestic affairs the federal government "can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers," such is not the case in matters of external affairs.[4] Sovereignty, like in the case of the Philippines prior to independence which resided in the United States,[5] resided with the British Crown, so that by the Declaration of Independence declaring the United [not the several] Colonies,[6] free and independent states with "full power to levy War, conclude Peace, contract Alliances, establish Commerce and do all other Acts and Things which Independent States may of right do," sovereignty passed directly not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.[7] A political society cannot endure without a supreme will somewhere so that when external sovereignty of Great Britain over the American colonies, very much like that of America over the Philippines, ceased, it immediately passed to the Union. Sovereignty survives changes in government and it is held in suspense.[8]

It is this aspect of sovereignty that vests the Federal government, in the case of the Philippines the national government, with inherent powers in dealing with matters of foreign affairs;[9] these she must possess, if she is to stand equal to the right and power of the other members of the family of nations, for otherwise, a country would not be completely sovereign.[10] For this reason, the Constitution is so worded to state that

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1 "The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the nation." Phil. Const., Art. II, Sec. 3. "The Legislative power shall be vested in a Congress of the Philippines..." *Ibid.*, Art. VI, Sec. 1. "The President shall have power, with the concurrence of two-thirds of all the Members of the Senate, to make treaties, and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines." *Ibid.*, Art. VII, Sec. 10, (7). On the part of the United States: "To regulate Commerce with foreign Nations; to establish a uniform Rule of Naturalization...; To declare war...; To raise and support Armies...; To provide and maintain a Navy; To make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, Sec. 8; "He shall have power by and with the advice and consent of the Senate, to make Treaties, providing two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls"; *Ibid.*, Art. II, Sec. 2; "he shall receive Ambassadors and other public Ministers." *Ibid.*, Art. II, Sec. 3.

2 Tañada and Carreon, Political Law of the Philippines, Vol. 1 (1961), p. 17, citing Story on the Constitution and Cherokee Nation v. Southern Kansas R. Co., 33 F. 900, 906; Sinco, Philippine Political Law (10th ed.), p. 298, citing Jones v. U.S., 137 U.S. 202; Fong Yue Ting v. U.S., 149 U.S. 698; Altman & Co. v. U.S., 224 U.S. 583.

There are two aspects of sovereignty — internal and external. In its internal aspect, sovereignty is the power inherent in the people or vested in its ruler by the Constitution to govern the State, but it does not depend in any degree, upon its recognition by other States. In its external aspect, sovereignty consists in the independence of one political society in respect to all other political societies, and it requires the recognition of the State by other states to render it perfect and complete. Tañada and Carreon, Political Law of the Philippines, Vol. 1 (1961), p. 19.

3 299 U.S. 304, 57 S. Ct. 216, 81 L. ed. 255 (1936).

4 At 260, 81 L. ed.

5 Laurel v. Misa, 44 O.G. (4) 1176, 1182-1183 (1947).

6 The States were not sovereigns as they did not possess the peculiar features of sovereignty — they could not make war nor peace nor alliances or treaties; they were deaf and dumb for they could neither speak nor hear of any proposition from any foreign power, 5 Elliot, Debates 212. 1 Story on the Constitution, 4th ed., Secs. 198-217, cited in United States v. Curtiss-Wright, *supra*.

7 United States v. Curtiss-Wright Export Corp., *supra*, at 260-261, 81 L. ed.

8 United States v. Curtiss-Wright Export Corp., at 261, 81 L. ed.; Laurel v. Misa, *supra*, at 1179-1180. The exercise of the rights of sovereignty may, however, be suspended. *Id.*, II Oppenhaim, 6th Lautherpatch ed., 1944 p. 482.

9 Four powers may be exercised arising from external sovereignty: (a) To declare war; (b) To conclude peace; (c) To make treaties; (d) To maintain diplomatic relations. United States v. Curtiss-Wright Export Corp., *supra*, at 261, 81 L. ed.

10 "As a nation with all the attributes of sovereignty, the United States is vested all the powers of government necessary to maintain an effective control of international relations." Burnet v. Brooks, 77 L. ed. 844, 852 (1933), citing Fong Yue Ting v. United States, 37 L. ed. 905, 913; Mackenzie v. Hare, 60 L. ed. 297, 301 (1915). "It results that the investment of the Federal government with the powers of external sovereignty did not depend upon affirmative grants of the Constitution." United States v. Curtiss-Wright Export Corp., *supra*, at 261, 81 L. ed.

"Treaties made or which shall be made, under the Authority of the United States [and not in pursuance to the Constitution] shall be the supreme law of the Land," to give sanction to acts on foreign affairs concluded even before the Constitution, particularly the peace treaty entered into by the United States under the Articles of Confederation concluding the Revolutionary War.[11] The Constitution itself in effect recognizes that in foreign affairs the federal government can act even without the authority of the Constitution. Indeed, the power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to enter into international agreements not constituting treaties in the constitutional sense, may be done not so much through the authority of the Constitution, as the Constitution is not very specific on these matters, but rather as they exist inherently in the conception of sovereignty which in each of these cases the courts have found warrant in the law of nations.[12] It was obviously with this concept of inherent powers that in Missouri v. Holland,[13] the Supreme Court upheld an act of Congress[14] supported by a treaty entered into between the United States and Great Britain regulating migratory birds, which, having been enacted previously without the treaty power support, had been declared illegal.[15] Clearly, the act of Congress here received the support not only of the Constitution, which in fact was found inadequate in the first instance, thus resulting in its annulment, but also from the status of sovereignty formalized by the treaty entered into by the contracting powers.

Because these powers on external affairs flow principally from the status of sovereignty, as a fully sovereign entity established upon the recognition of her independence in 1946, the Philippine Government can assert for her external powers the claim to inherency in just the same way as the United States federal government has.[16] The fact that a unitary and not a federal system of government has been established here does not alter the situation, because while this may affect her internal powers, those powers in external affairs remain the same.

[11] Reid v. Covert, 354 U.S. 1, 16-17, 77 S. Ct. 1222, 1 L. ed. 2d. 1148, 1163 (1957).

[12] Jones v. United States, 137 U.S. 202, 212, acquisition of territories; Fong Yue Ting v. United States 1949 U.S. 698, 705 et seq., expulsion of undesirable aliens; Altman & Co. v. United States, 224 U.S. 583, 600-601, executive agreement; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note 1; Forbes v. Chuaco Tiaco, 16 Phil. 534, 560, 569, 581 (1910), expulsion of undesirable aliens is an inherent power of the executive and may be exercised even in the absence of any law, with which the judicial department may not intervene. *Id.;* Tan Sin v. Deportation Board, 55 O.G. (26), 4819 (1958), because of his inherent power, the President may deport aliens even for causes not provided for by law.

[13] 252 U.S. 416, 40 S. Ct. 382, 64 L. ed. 641 (1960).

[14] Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755.

[15] United States v. Shauver, 214 Fed. Rep. 154; United States v. McCullagh, 221 Fed. Rep. 288.

[16] Forbes v. Chuaco Tiaco, 16 Phil. 560, 569,581 (1910).

But what is the concept of these inherent powers in external affairs that we have been trying to put forward? Certainly, we cannot mean all powers to the extent that their exercise would contravene specific provisions of the Constitution or would result in the alteration of the existing system of government. It is not unlimited and in this sense it is perhaps a misnomer to call them "inherent powers", because they should be subject to those restraints, said the Supreme Court, "which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself ... It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government..."[17] Hence, in Reid vs. Covert,[18] the Supreme Court disauthorrized the trial of a civilian dependent by a military tribunal constituted by authority of an existing executive agreement between the United States and Great Britain, on the principal ground that it deprived the accused of her constitutional right to a jury trial. Indeed, if we may say so, the concept here has the undertones of the theory, advocated by U.S. President Theodore Roosevelt, that the federal government has all the powers except those "limited ... by specific restrictions and prohibitions appearing in the Constitution..."[19] While international law may

[17] Geofrey v. Riggs, 133 U.S. 258, 267, 33 L. ed. 642, 645 (1890).

[18] *Supra.*

[19] Roosevelt, An Autobiography, pp. 388-389. In June 1908, some months before leaving the Presidency, Roosevelt wrote Sir George Otto Trevelyan as follows: "While President, I have been President, emphatically; I have used every ounce of power there was in the Office and I have not cared a rap for the criticisms of those who spoke of my 'usurpation of power'; for I know that the talk has been all nonsense and that there had been no usurpation. I believe that the efficiency of this Government depends upon its possessing a strong central executive, and as I did for instance as regards external affairs in the case of sending the fleet around the world, taking Panama, settling affairs of Santo Domingo, and Cuba; or as I did in internal affairs in settling the anthracite coal strike, in keeping order in Nevada ... or as I have done in bringing the big corporations to book ... in all these cases I have felt not merely that my action was right in itself, but that in throwing the strength of, or in giving strength to, the executive, I was establishing a precedent of value; I believe in a strong executive; I believe in power; but I believe that responsibility should go with power, and that it is not well that the strong executive should be a perpetual executive." Joseph B. Bishop, Roosevelt and His Time, II, 94, quoted in Corwin, The President, *op. cit.*, p. 407.

Referring to the inherent powers of Congress in foreign affairs, Justice Frankfurter, speaking for the court, said: "The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations." Perez v. Brownell, 356 U.S. 44, 78 S. Ct. 568, 2 L. ed. 2d. 603, 613 (1958). He further said: "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318; Mackenzie v. Hare, 239 U.S. 299, 311-312." Perez v. Brownell, *supra,* at 613, 2 L. ed. 2d. In effect, Justice Frankfurter wanted to convey the idea that the sources of external powers of Congress are both the Constitution and sovereignty, thereby affirming the inherent powers theory.

also constitute a limitation since the theory of inherent powers is founded on the status of sovereignty, yet there is the added and all pervading principle that the Constitution is a limitation upon all powers of government be it the executive, legislative or the judiciary.[20] It would probably only be in actual shooting war, when the very survival of the nation is at stake, that we might be justified in joining President Lincoln: "...is it possible to lose the nation and yet preserve the Constitution?"[21] Indeed, while there are limitations to and qualifications on these inherent powers, these limitations must be viewed in an altogether different light in the face of a grave national peril in order to be consistent with and equal to the problem at hand.

The power of the federal government in foreign affairs is not only inherent but also exclusive. There is, however, a provision in the United States Constitution which would seem to contradict this assertion of exclusiveness. Section 10 of Article I thereof states that "No State shall enter into any Treaty Alliance or Confederation," or "grant letters of Marque and Reprisals," nor shall without the consent of Congress, "enter into any agreement or compact with ... a foreign Power." Under this provision, a State may, independent of the federal government, enter into agreement or compact with any foreign power provided Congress consents. However, as the power of the States thus implied has never been availed of, it is today regarded as having "atrophied." Commenting on this section, Corwin said: "The capacity thus implied must nevertheless be regarded as atrophied, no such consent having ever been sought or granted."[22] Moreover, while the federal and state governments may exercise concurrent jurisdiction on a given subject, yet, where the authority vested in the Union is contradictory and repugnant to a similar constitutional power vested upon the states, the latter cannot validly exercise said powers. Thus, the Supreme Court said:

> It is admitted that an affirmative grant of a power to the general government is not of itself a prohibition of the same power to the States; and that there are subjects over which the Federal and State governments exercise concurrent jurisdiction. But, where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive, and the same power cannot be constitutionally exercised by the States.[23]

[20] Hurtado, v. People of California, 28 L. ed. 233, 237 (1884); Marbury v. Madison, 1 Cranch 137, 176-180, 2 L. ed. 60, 73, 74; Hawaii v. Mankichi, 190 U.S. 197, 236-239, 47 L. ed. 1016, 1030, 1031.

[21] From letter of April 4, 1864, to A. G. Hodges in 10 Complete Works of Abraham Lincoln (1894), p. 66.

[22] Corwin, The President: Office and Powers (1957), p. 174.

[23] Holmes v. Jennison, 10 L. ed. 579, 596 (1840).

This quality of exclusiveness received judicial recognition in the case of Holmes vs. Jennison.[24] The question at issue was whether the Government of Vermont was constitutionally entitled to surrender to the government of Lower Canada a fugitive from justice of the latter. Although no judgment was handed down because of the equal division of the justices regarding the jurisdiction of the court, Chief Justice Tanney, speaking for himself and three others, emphatically laid down the view that the states had no power on matters of foreign affairs. "All powers," he said, "which relate to our foreign intercourse are confided to the federal government. The framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union"; and one of their main objects was "to make us, so far as regarded our foreign relations, one people and one nation; and to cut off all communications between foreign governments and the several state authorities."[25] This exclusiveness is further reflected in the fact that the reserved power of the States under the Tenth Amendment has no application in matters of foreign affairs,[26] and in disparaging the idea that "some invisible radiation from the general terms of the Tenth Amendment" limited the treaty-making power, the Supreme Court unqualifiedly said that a "treaty may override" state powers,[27] for to hold otherwise would eventually result in that the "will of a small part of the United States may control or defeat the will of the whole."[28] It was upon this consideration that in 1933, in upholding the right of the federal government to impose customs duties on equipment imported by a state university, Chief Justice Hughes, speaking for the Court, remarked generally:

> In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate power... There is no encroachment [here] on the power of the State, as none exists with respect to the subject over which the federal power has been exerted.[29]

Exclusiveness in matters of foreign affairs has never been a problem under the Philippine Constitution, not only because of the absence of a constitutional provision similar to the Tenth Amendment of the United States Constitution, but also and primarily because the unitary system

[24] 14 Pet. 540, 10 L. ed. 579 (1840).

[25] At 594, 596, 597, 10 L. ed.

[26] "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement ... Independent, therefore, of the constitution ... the treaty is sufficient to remove every impediment founded on the law" of the state. Ware v. Hylton, 3 Dall. 199, 281, 1 L. ed. 568, 603 (1796).

[27] Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. ed. 641 (1920).

[28] Havenstein v. Lynham, 100 U.S. 483, 25 L. ed. 628 (18803.

[29] University of Illinois v. United States, 289 U.S. 48, 59, 77 L. ed. 1025, 1029, 1030 (1933).

of government here denies to any province or municipality the power to conclude independent agreements or compacts with foreign nations.[30] While these local political units antedated by many years the present Constitution,[31] the framers of the Constitution chose not to follow the historical view of recognizing in them the inherent powers of self-government, but instead, according to the Philippine Supreme Court, struck a compromise by vesting upon the President the power, not of control, but of supervision over their operations.[32] Their powers are always to be derived from law, and in its absence they are incapable of exercising any power at all. For this reason, in a case where the municipal council had passed a resolution withdrawing a certain public street from public use, the Supreme Court of the Philippines declared said ordinance void as not having been authorized by the municipality's charter.[33] The national government has always exercised unquestionable power to deal with matters of foreign affairs and local governments have never challenged this authority.

"The President is the sole organ," said Justice Marshall, "of the nation in its external relations, and its sole representative with foreign nations."[34] This statement was made in his defense of President John Adams who had ordered the extradition under the Jay Treaty of Jonathan Robbins, a fugitive from British justice. Justice Marshall intended this phrase to acknowledge the President's role as the instrument of communications with other governments.[35] This was also the intention of President Jefferson when some years before, he answered Ganet's request for an exequator for a consul whose commission was addressed to Congress, thus:

> As the President is the only channel of communications between the United States and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such they have and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it.[36]

As sole instrument of communications, the President addresses and is addressed on all matters involving the nation's relations with foreign

30 See Tañada & Carreon, Vol. 2, 1962 ed., p. 327.

31 *Supra*, pp. 15-16.

32 Planas v. Gil, 67 Phil. 62, 78 (1939); Hebron v. Reyes, G.R. No. L-0124, July 28, 1958.

33 Unson v. Lacson, G.R. No. L-7909, Jan. 12, 1957.

34 Annals, 6th Cong., Col. 613, quoted in United States v. Curtiss-Wright Export Corp., *supra*.

35 Corwin, The President: Office and Powers (1957), pp. 177-178. ed.), IX, 256; Writings (Ford ed.), VI 451, quoted by Corwin, *op. cit.*, p. 178.

governments, and as such, he is or at least may be the mouthpiece of a "power of decision that resides elsewhere".[37] It would seem, therefore, that the idea that the President is the sole organ or instrument of a power residing somewhere else was the concept originally attached to the famous phrase uttered by Justice Marshall.

But when Justice Sutherland quoted Justice Marshall in United States v. Curtiss-Wright Export Corp.,[38] he obviously did not intend to assert that the President was no more than a mouthpiece of Congress for having acted pursuant to a Joint Resolution prohibiting the sale of arms to the warring parties in the Chaco conflict. While the President is the sole instrument of power in foreign affairs, he is also a power unto himself.[39] While he "makes treaties with the advice and consent of the Senate," said Justice Sutherland, "he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[40] The President's external role is essentially more dynamic and positive than being a mere instrument of communications. Alexander Hamilton, in defending President Washington's issuance upon the outbreak of war between France and Great Britain of the proclamation stating in effect that the United States would pursue a course of neutrality, asserted that the direction of foreign policy is inherently an executive function.[41] President Washington demanded the recall of a diplomatic agent without consulting Congress,[42] and setting another great precedent, Washington, upon demand by the House of Representatives of the papers concerning the negotiation of the Jay Treaty (particularly fathered by Madison who advocated the theory that the President is a mere instrument of legislative will in matters of foreign affairs), refused to comply with the request. He argued that so far as the President's deliberate judgment is concerned, the papers were "of a nature that did not permit of disclosure at this time."[43]

The acknowledged power of the President in concluding executive agreements,[44] and even to terminate treaties without the consent of the

37 Corwin, *op. cit.*, p. 178.

38 *Supra*, at 262, 81 L. ed.

39 "The President, in fact, shapes and voices the foreign policy ... to a degree that no other competing power can rival ... His speeches have an influence that is supreme. His ambassadors act under his instructions. It is with him that foreign ministers must engage in the give-and-take of diplomatic intercourse. And we must never forget that he is the commander-in-chief of the armed forces..." Laski, The American Presidency, An Interpretation, p. 179 (1940).

40 *Ibid.*

41 Works (Hamilton, ed.) VII, 76 ff, as digested by Corwin, *op. cit.*, pp. 178-179.

42 Moore, Digest of Int. Law, IV, 484-549.

43 Corwin, *op. cit.*, p. 182.

44 U.S. v. Belmont, 301 U.S. 324, 57 S. Ct. 758, 81 L. ed. 1134 (1937); U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. ed. 796 (1942).

Senate,[45] appointing ambassadors and other diplomatic, consular or special agents, and with his powers as commander-in-chief,[46] and as executive, charged with the duty to take care that the laws be faithfully executed, which includes the execution of international laws,[47] the President is certainly not a mere powerless mouthpiece acting by dictated powers residing elsewhere. His positional advantages, considering the unity of the President's office and its capacity for secrecy and dispatch and superior sources of information, and the fact that he is always on his station ready to act at any moment, while Congress is in adjournment much of the time,[48] enable the President to take bold initiative in foreign affairs that at times Congress is confronted with nothing but faits accomplis.[49] No better example can we recall than the "fifty destroyer" deal with England, in effect a declaration of economic war,[50] which Congress ratified by the enactment of the Lend-Lease Act of 1941.[51]

Indeed, the inherent power of the Presidency in foreign affairs is dynamic and positive; it derives its powers from its bedrock as it were, from the nation's status as a sovereign, and while Congress shares this power, its constitutional positional disadvantages relegate it to the background in the struggle. Matters of external affairs are a delicate subject affecting the integrity of sovereign states, so highly sensitive in their relations with foreign powers that very often the President has to act upon facts that must be held secret, as premature disclosure may result in international embarassment.[52] This is the reason why in the event of legislative delegations of power, the delegating legislation is not subject to the undue delegation restriction;[53] and by the doctrine of political question, even the courts do not ordinarily interfere with or annul matters involving external affairs, as the courts cannot sit in camera

[45] "... it was incumbent upon the President ... to reach a conclusion as to the inconsistency between the provisions of a treaty and the provisions of the new law." Van Der Wayne v. Ocean Transport, 297 U.S. 114, 118, 80 L. ed. 515, 518 (1936).

[46] Mathews, The Constitutional Power of the President to Conclude International Agreements, 64 Yale L.J. 345 (1955).

[47] Montesquieu, quoted in 25 Calif. L. Rev. 642, 644-645 (1937); Corwin, *op. cit.*, p. 226.

[48] The Federalist, No. 64; Earle, pp. 418-419.

[49] Corwin, *op. cit.*, pp. 180, 222.

[50] This was according to Secretary of War Stimson. Morris, Great Presidential Decisions (1960), pp. 381-382.

[51] 55 Stat. 31

[52] Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 92 L. ed. 568 (1948); U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 81 L. ed. 255 (1936).

[53] U.S. v. Curtiss-Wright, *supra.*

to be taken into executive confidence.[54] The President, therefore, by his positional advantages, has exercised, and should continue to exercise the lion's share of the inherent powers governing external affairs.

The Philippine Presidency need not wait for a local Hamilton to advocate the view that direction of foreign policy is essentially executive, or a local Washington to give dynamism and positiveness to that office. American precedents furnish the guide. The federal-unitary variation does not affect the similitude in the scope and sphere within which the Philippine President can act, because the source of this power is not only the Constitution, similar in this respect in both countries, but also and primarily its status as a sovereign state. The Philippines acquired this status in 1946,[55] and although of a comparatively small and weak country, the Philippine President may exercise these powers within the same scope and breadth as is exercised by the President of the United States.

Treaties

The Philippine President, similarly with the United States President, is by constitutional mandate empowered to make treaties with the consent of the Senate.[56] The constitutional provisions of both countries in this respect are identical except for the variation regarding the ratifying body, the Senate. While the Philippine Constitution requires the ratification of two-thirds of all the Members of the Senate, computed on the total number of members, the United States Constitution merely requires the ratification of two-thirds of the Senators present, provided there is a quorum meeting for the purpose,[57] so that the absence of some senators during the ratifying session of the Senate alters the number of senators necessary for ratification, which is not the case under the Phil-

[54] Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., *supra;* Foster v. Neilson, 2 Pet. 253, 309, 7 L. ed. 415, 434 (1829); Oetgen Cent. Leather Co. 246 U.S. 297, 302, 62 L. ed. 726, 732 (1918); Hausten v. Lynham, 100 U.S. 483, 25 L. ed. 628 (1879); Geofrey v. Riggs, 133 U.S. 258, 33 L. ed. 642 (1890); Laurel v. Misa, 44 O.G. (4) 1176, 1182-1183 (1947); United States v. Belmont, 301 U.S. 324, 57 S. Ct. 758, 81 L. ed. 1134 (1937).

[55] Recently, incumbent President Macapagal forwarded the theory that the U.S. merely recognized our independence on July 4, 1946, but that we had won our freedom from Spain on June 12, 1898, so that to rectify a historical error, he issued Proclamation No. 28, dated May 12, 1962, changing the annual independence day celebration from July 4 to June 12.

[56] "The President shall have the power, with the concurrence of two-thirds of all the Members of the Senate, to make treaties..." Phil. Const., Art. VII, Sec. 10, (7). "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. Const., Art. II, Sec. 2, Cl. 2.

[57] Rule III, V, Clause 3 and XXXVII, Rules of Senate, U.S. Congress, Senate Manual, 1959 ed., pp. 2-4, 48-50.

ippine Constitution.[58] But in so far as the Presidential powers of both countries are concerned, the constitutional provisions do not make for any appreciable difference. In fact, both similarly authorize the President to "make treaties."

Accordingly, American precedents on the extent of the treaty-making power will apply with equal validity to this power of the Philippine President.

Treaties are contracts[59] between independent nations and having been entered into in the exercise of their sovereign rights as such, the scope of the treaty power which the President may exercise covers all proper subjects of negotiation between independent governments.[60] Hence, in the case of Geofrey v. Riggs,[61] where the right of a Frenchman to inherit from an American citizen in the United States pursuant to treaties

[58] Another aspect of difference is that while the Philippine Constitution merely requires the "concurrence" of the Senate, the U.S. Constitution requires the "consent and advice" of the Senate. But since the episode which happened during the time of President Washington concerning the treaty with the Southern Indians, where he was allegedly disgusted by the manner the proceedings before the Senate as a consultative body was conducted, no President has ever sought the advice of the Senate. Corwin, *op. cit.*, pp. 209-210, 442.

[59] Treaties have two aspects: as a contract between states as parties, and as municipal law for the people of each state to observe. As a contract, international law is more interested in the faithful performance of international obligations than in prescribing procedural requirements.. McDougal and Laus, 54 Yale L.J., 318-319, citing Searcy. As municipal law, it is the supreme law of the land, U.S. Constitution, Art. VI; Hayer v. Yaker, 9 Wall. 32, 19 L. ed. 571, 573 (1870), but a self-executing treaty on a subject within the power of Congress to regulate, is the equivalent of a legislative act to be repealed or modified at the pleasure of Congress, Chinese Exclusion Cases, 130 U.S. 581, 600, 32 L. ed. 1068 (1889), the effect of such repeal on the relation between the contracting powers, generally to be determined by the United States or the Philippines as the case may be dictated by enlightened self-interest, of its duties with the other contracting power in much the same way as the latter is also entitled to determine its duties thereunder with the former. Charlton v. Kelly, 229 U.S. 447, 472-474, 57 L. ed. 1274, 1284-1286 (1913) and authorities cited.

While the Philippine Constitution does not contain Article VI, the provision making treaties the supreme law of the land, there are provisions giving treaties the character and force of laws of the state. It provides that the Philippines "adopts the generally accepted principles of international law as a part of the law of nation," Phil. Const., Art. II, Sec. 3, and that "all cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court in banc, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the Court." Ibid., Art. VIII, Sec. 10. Under those provisions, treaties would have, by constitutional mandate, the same weight and value as a statute of Congress which may supersede or be superseded by acts of Congress, depending upon the latest expression of sovereign will. Sinco, *op. cit.*, p. 301, citing U.S. v. Thompson, 258 Fed. 257, 268; Johnson v. Browne, 205 U.S. 309; U.S. v. Lee Yen Tai, 185 U.S. 213; and Moser v. United States, 341 U.S. 41.

[60] "A treaty is in its nature a contract between ... nations ..., carried into effect by the sovereign powers of the parties to the instrument." United States v. Arredondo, 6 Peters 691, 735, 8 L. ed. 547, 563 (1832).

[61] 33 L. ed. 642 (1890).

on the subject was involved, Justice Field, speaking for the Court, said: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and of other nations, is clear."[62] Justice Davis in United States v. Lariviere,[63] also said: "It cannot be doubted that the treaty-making power is ample to cover all the usual subjects of diplomacy with the different Powers."[64] The unlimited scope thus expressed, however, does not necessarily mean that the President is not subject to any limitation, because as already advanced, and as Justice Field aptly expressed, this treaty power is subject to those restraints which are found in the Constitution, as it could not have gone so far as to authorize what the Constitution forbids or alter the very character of the government.[65] Cooley has also observed that the treaty power is subject to the implied restrictions that nothing can be done under it which would change the Constitution of the country or rob a department of the government of its constitutional authority.[66]

In the field of negotiation, the Philippine President, like the United States President, is the exclusive organ. As said by Justice Sutherland, and cited with approval by text writers in the Philippines,[67] "he [the President] alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it. The President is the constitutional representative ... with regard to foreign nations. He manages our concern with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. The interference of the Senate in the direction of foreign negotiations," he said, would "impair the best security for the national safety," as the nature of transactions with foreign nations requires "caution and unity of design, and their success frequently depends on secrecy and dispatch."[68]

Executive Agreements

Viewed from the standpoint of international law, treaties and executive agreements are the same in their binding effect among the contracting powers so long as they remain within the scope of their powers in the negotiation thereof. These executive agreements are not treaties re-

[62] At 645, 33 L. ed.

[63] 93 U.S. 188, 23 L. ed. 846 (1876).

[64] At 848, 23 L. ed.

[65] Geofrey v. Riggs, *supra*, at 645, 33 L. ed.; Molden v. Joy, 21 L. ed. 523, 534 (1872); Asakura v. City of Seattle, 265 U.S. 332, 341, 68 L. ed. 1041, 1044 (1924).

[66] Cooley, Principles of Constitutional Law, pp. 117-118.

[67] Tañada and Carreon, Vol. I (1961), pp. 335-336; Tañada and Fernando, Vol. II, 4th ed., p. 1055.

[68] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 57 S. Ct. 216, 81 L. ed. 255, 262 (1936).

quiring Senate ratification, but nevertheless have the effect of treaties.[69] In the case of USAFFE Veterans v. Treasurer,[70] which involved the Romulo-Snyder Agreement, an executive agreement entered into between the Philippines and the United States concerning the reimbursement to the latter of several million dollars representing the unspent balance of what had been given to the Armed Forces of the Philippines during World War II, the Supreme Court of the Philippines, in upholding said executive agreement, held: "That the agreement is not a 'treaty' as that term is used in the Constitution, is conceded. ... However, it must be noted that a treaty is not the only form that an international agreement may assume. For the grant of the treaty-making power to the Executive and the Senate does not exhaust the power of the government over international relations. Consequently, executive agreements may be entered into with other states and are effective even without the concurrence of the Senate."

There are two classes of executive agreements: those entered into pursuant to a congressional act and those concluded upon the sole authority of the President. The case of Altman & Company v. United States,[71] where the President of the United States entered into an executive agreement with France involving tariffs,[72] negotiated by authority of Section 3 of the Tariff Act of 1897, belongs to the first class; and the case of United States v. Belmont,[73] where the United States and Russia agreed on the Litvinov Assignment when Russia nationalized all properties and assets of a Russian corporation in the United States, belongs to the second class.

The President of the United States to avoid the veto of the Senate over a treaty in many instances has resorted to international agreements, acting independently on his own constitutional powers or acting through the combined powers of the entire Congress. Thus, Texas was annexed by a joint resolution of Congress after the Senate had defeated a treaty for the purpose; the same procedure was used to avoid the treaty method in annexing Hawaii in 1898. Perhaps the Philippines would have been annexed by the same procedure had the Senate, as it threatened, eliminated the annexation provision in the Treaty of Paris of 1898. The termination of World War I in 1921 was effected by joint resolution after the Senate had defeated the Treaty of Versailles; and, in 1934, the United States was similarly able to secure membership to the International Labor Organization although the defeat of the Treaty of Versailles had prevented its membership.[74]

[69] "... although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a 'treaty'." United States v. Pink, 315 U.S. 203, 86 L. ed. 796 (1942); Altman & Co. v. United States, 224 U.S. 583, 56 L. ed. 894 (1912).

[70] G.R. No. L-10500, June 30, 1959.

[71] 56 L. ed. 894, 910 (1912).

[72] 30 Stat. 1774.

[73] 301 U.S. 324, 57 S. St. 758, 81 L. ed. 1134 (1937).

It is therefore noteworthy, that, notwithstanding the variation of the unitary and federal setup undercutting their framework of government, it is unquestionable that both in the Philippines and in the United States, the President is the sole instrument in these executive agreements and treaty negotiations. Indeed, there is nothing in the Constitution of either country which expressly authorizes the President to enter into such agreements, but the positive inherent powers of the President in matters of foreign affairs provide sufficient authority for such. And while the Constitution may also be a source of power in this field, the all-pervading status of sovereignty which the Philippines enjoys equally with the United States provides the principal fountain from which the powers flow; in other words, while the Constitution principally provides the limitations, sovereignty primarily provides the source.

It is therefore the conclusion we must make that the Philippine President, subject only to those limitations imposed by the Constitution and the preservation of the existing system of government, possesses powers in matters of foreign affairs equal to those of the United States President and should not hesitate to exercise these powers to the same extent that they have been exercised by the latter, whenever necessary.

WAR POWERS

In General

The President of the Philippines, equally with the President of the United States, is the commander-in-chief of all the armed forces,[1] charged

[74] McDougal & Laus, Treaties and Congressional-Executive or Presidential Agreements: International Instruments of National Policy, 54 Yale L. J. 181 (1945).

[1] "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law." Phil. Const., Art. VII, Sec. 10(2); "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States." U.S. Const., Art. II, Sec. 2, par. 1. Making the President commander-in-chief as well, is a reflection of the fundamental doctrine that the civilian is supreme over the military. Just as the United States Supreme Court with unmistakable clarity has said that "...the well-established purpose of the Founders (*is*) to keep the military strictly within its proper sphere, subordinate to civil authority," Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222, 1 L. ed. 2d, 1148 (1957), so has our own: "... that the defense and protection of civilians is the sole *raison d'etre* for the Armed Forces; and to the

with the duty of regulating the movements of the army, disposition of war vessels, and the planning and execution of campaigns,[2] and in this modern day and age, the launching of rockets and missiles. Until 1850, the commander-in-chief clause, as applied to the United States President, still bore a restricted meaning for the United States Supreme Court when in Fleming vs. Page,[3] which involved the denial of annexation to the United States of the port of Tampico during the Mexican war arising from its military occupation by order of the President, it was held that:

> His (the President's) duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner that he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power x x x
>
> In the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English Crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers are brought into question.[4]

The powers of the Philippine President as commander-in-chief have yet to be tested by him in the crucible of war as they have been by various Presidents of the United States, since the Philippines has been independent only since 1946.[5] Although the Commonwealth government established in 1935 was operating under the same Constitution governing the present government, with the same presidential prerogatives,[6] the Commonwealth

extent that soldiers and officers fail to keep it in mind at all times, to that extent does the Army fail in its mission." People v. Pet, CA-G.R. No. 6990-R, March 10, 1952. Indeed, we could say with the Court in Reid v. Covert (*supra*) that "We should not break faith with this nation's tradition of keeping military power subservient to civilian authority..."

[2] Tañada & Carreon, Political Law of the Philippines, Vol. 1 (1961), p. 303, citing Black's Const. Law, 3rd ed., pp. 115-116; and Willoughby, 2nd ed., Vol. III, pp. 1565-1566.

[3] 9 How 603, 13 L. ed. 276 (1850).

[4] At 281, 282, 13 L. ed.

[5] Proclamation No. 2695,, 3 CFR, 1943-1848, Comp., p. 8; Public Act 127, *supra*, Sec. 10 (a).

[6] Brodett vs. De la Rosa, 44 O.G. (3) 872 (1946).

was not[7] a sovereign, but merely a semi-sovereign state.[8] External affairs were under the United States' control and supervision, although the President could intervene at any time for the preservation of the Commonwealth and for the protection of life, liberty, and property and could call into the armed forces of the United States all military forces organized by the Commonwealth,[9] so much so that when the Japanese forces landed in 1941, the Commonwealth government sought refuge in Washington, operating in exile there until the liberation of the islands.[10]

In the event of war, the Philippine President could very well draw authority from American precedents in the expanding[11] use of his prerogatives as commander-in-chief, which together with the duty to take care that the laws be faithfully executed, has, beginning with President Lincoln, broadened presidential prerogatives in time of war.[12] Thus, President Lincoln during the Civil war amalgamated the state militia into a voluntary force,[13] called 42,034 volunteers for three years' service, added 22,714 men to the Regular Army and 18,000 to the Navy,[14] paid two million dollars from funds not appropriated by Congress and to persons not authorized to receive them, closed the Post Office to treasonable correspondence,[15] proclaimed a blockade of the Southern ports,[16] suspended the writ of habeas corpus in various places and caused the arrest and detention of persons whom "he (the commander) might deem dan-

[7] Even before independence in 1946, however, the Commonwealth participated as a signatory to the Declaration of the United Nations of January 1, 1942; United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, July 1 to 22, 1944; Agreement and Protocol Regarding Production and Marketing of Sugar, May 6, 1937; Universal Postal Convention, May 23, 1939; Agreement for United Nations Relief and Rehabilitation Administration, Nov. 9, 1943; Protocol Prolonging and International Agreement Regarding the Regulation of Production and Marketing of Sugar, August 31, 1944; International Civil Aviation Conference, November 1 to December 7, 1944. Hooven v. Evatt, 324 U.S. 652, footnote 8, p. 676 (1944).

[8] People v. Bagalawis, 44 O.G. (8) 2655 (1947).

[9] Public Act 127, *supra*, Sec. 2 (a); Sinco, *op. cit.*, p. 93.

[10] Francisco, *op. cit.*, 96-97; Malcolm, First Malayan Republic (1951), pp. 140-147.

[11] Although principally, his war powers are derived from his position as commander-in-chief, this power is not defined by the Constitution. The extent must be "determined by their nature, and by the principles of our institutions." Ex parte Milligan, 4 Wall 2, 18 L. ed. 281, 301 (1866); See Hughes War Powers Under the Constitution, ABA Rep. Vol. 42, p. 232, 240 (1917).

[12] Corwin, The President: Office and Powers, (1957), p. 229.

[13] Proclamation of April 15, 1861, Richardson, Message and Papers of the President, enlarged ed., Vol. V, pp. 3214-15.

[14] Proclamation of May 3, 1861, Richardson V, *Ibid.*, pp. 3216-17.

[15] Message to Senate and House of Representatives of May 26, 1862, Richardson V, *Ibid.*, pp. 3278-79.

[16] Proclamation of April 19, 1861, Richardson V, *Ibid.*, pp. 3215-16.

gerous to the public safety,"[17] all of which for the most part were without the least statutory authorization.[18] President Wilson,[19] during World War I, in spite of the minimization of the commander-in-chief clause by having placed more reliance on delegations of emergency powers,[20] created the Committee on Public Information, the War Industries Board, and the War Labor Board, enforced so-called "voluntary censorship" of the press, closed German wireless stations and German insurance companies, and subjected all telephone, telegraph and cable companies to regulation with respect to messages to and from abroad, without any statutory basis.[21] Because war had taken a new turn, with destructive power and magnitude far exceeding those preceding it, President Roosevelt even before the start of actual shooting war, entered into an executive agreement with Great Britain covering fifty overage destroyers in exchange for the lease of naval sites in the British West Atlantic.[22] Although this agreement was in violation of at least two statutes and represented the exercise by the President of a power clearly constitutionally belonging to Congress, then Attorney General, now Justice Jackson, upheld the agreement under

[17] Proclamation of May 10, 1861, Richardson V, *Ibid.*, pp. 3217-18; *Ibid.*, at pp. 3219, 3220, 3226. He directed the commander "to permit no person to exercise any office or authority" in certain places "which may be inconsistent with the laws and Constitution," "authorizing him (the commander) at the same time, if he shall find it necessary, to suspend there the writ of habeas corpus and to remove from the vicinity of the United States fortresses all dangerous or suspected persons." *Id.*

[18] The Lincoln era has asserted for the "President, for the first time in our history, an initiative of indefinite scope and legislative in effect in meeting... a war emergency." Corwin, The President, *op. cit.*, pp. 229, 232. Although this was a civil war, it was a war in the true sense of the term because "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other." Prize cases, 3 Black 635, 17 L. ed. 459 (1863).

[19] President Wilson was a firm believer of executive and legislative cooperation for the "whole art of statesmanship is the art of bringing the several parts of government into effective cooperation for the accomplishment of common objects..." He had the persistent idea of parliamentary form of government and in commenting on President Theodore Roosevelt's administration he said: "We must admit that he is an aggressive leader. He led Congress — he was not driven by Congress. We may not approve his methods but we must concede that he made Congress follow him." Binkley, The Powers of the President (1937), pp. 223-227.

[20] "The contrast, therefore, between the Lincolnian 'dictatorship' and the Wilsonian is not one of tenderness for customary constitutional restraints; it is one of method. The immediate basis of the former was the 'commander-in-chief' clause and insistence on the Separation of Powers principle; the immediate basis of the latter was the national legislative power and minimization of that principle." Corwin, The President, *op. cit.*, p. 237.

[21] Corwin, The President, *op. cit.*, pp. 237, 456-457, n. 24, 25.

[22] Morris, Great Presidential Decisions (1961), p. 380.

[23] U.S. Code Tit. 18, Sec. 33, June 15, 1917; Tit. 34, Sec. 493 a, July 19, 1940; Bailey, A Diplomatic History of the American People, Supplementary Chapters (1942), pp. 769-772.

the commander-in-chief clause as clearly within the power of the President.[23] Of the several purely presidentially-created offices,[24] there was the case of the Employer's Group of Motor Freight Carriers v. NWLB,[25] which reached the court seeking to annul and enjoin a directive of the National War Labor Board, one of the presidentially-created offices.[26] The United States Court of Appeals of the District of Columbia refused to grant the injunction, reasoning that at the time when the directive was issued, any action of the Board was merely "informatory", "at most advisory", so that in effect said board, in the contemplation of the court, was not an "office" wielding power, but a purely advisory body,[27] although it was actually and in fact an office with as much power as any legally created one. It was purely fictional to hold it merely advisory — the court simply chose not to disregard a presidential prerogative under the commander-in-chief clause.

The lesson of these cases unerringly points to the fact that presidential prerogative has been extended from that of merely assuming command over the armed forces to a much wider field of discretion in times of emergency. It can therefore be said that just as he possesses broad inherent powers in foreign affairs, so also does he possess the same dimension of prerogatives in the exercise of his war powers. This is understandable because the very survival of the nation is at stake, so that, dictated by necessity, such broad exertion of powers is justified.[28] The expanding use of his prerogatives is exercisable not only on military matters in the home front, the threshold of power, where coordinated war effort should be sustained so that the armies in the battlefield may succeed. The power to wage war necessarily means the power to wage war successfully, and this should embrace, therefore, every phase of the national defense effort, be it in the battlefield or at the home front.[29]

[24] Creation of offices is purely legislative in character and the right, authority and duty exercised thereby is conferred by law or the Constitution. Montana v. Hawkins, 53 A.L.R. 583 (1927).

[25] 143 F. 2d. 145 (1944).

[26] Ex. Or. No. 9017, Jan. 12, 1942, 7 Fed. Reg. 237.

[27] In support of its view the court quoted approvingly a statement by the chairman of the Board, thus: "These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the non-strike, no-lockout agreement and... to carry out the directives of the tribunal created under that agreement by the Commander-in- Chief." Employer's Group of Motor Freight Carriers, et al., v. NWLB, et al., 143 F. 2d. 145, 149.

[28] "The constitutional, presidential pattern of government... has singled out the chief executive as the chief instrument of crisis authority." Rossiter, Constitutional Dictatorship, (1948) p. 211.

[29] Hirabayashi v. United States, 320 U.S. 81, 93, 87 L. ed. 1774, 1782 (1942).

The survival of the nation is the prime consideration,[30] so that President Lincoln in his message of July 8, 1861, explaining his suspension of the writ of habeas corpus, asked: "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?"[31] It was also obviously this same consideration uppermost in the mind of President F. D. Roosevelt when he said: "I ask the Congress to take this action by the first of October. .. In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility and I will act. ... The President has the power, under the Constitution ... to take measures necessary to avert disaster which would interfere with the winning of the war."[32] In Hirabayashi v. United States,[33] involving presidential curfew regulations affecting Japanese in the West Coast during the war with Japan, the Supreme Court recognized this urgent need of the hour when in sustaining said presidential regulations without initial legislative sanction, it held that the Constitution has vested upon the President war powers which he could discharge in the exercise of broad judgment and discretion and the court will not "sit in review of the wisdom of (his) action or substitute its judgment for (his)."[34]

The President of the Philippines, because of the similarity in the presidential system of government established here,[35] may well invoke the same extension of presidential prerogative under the commander-in-chief clause not only during actual shooting war, but even immediately before. President F. D. Roosevelt entered into the "Fifty Destroyer Deal" with England more than one year before Congress approved the joint

[30] It is necessity which at times develops means which the system itself which developed it condemns, like the concept of martial rule which according to Thurman Arnold was the answer to "the paradoxical necessity of suppressing disorder by means which the common law itself has declared illegal." Quoted by Sinco, Philippine Political Law (10th ed.), p. 267.

[31] He further wrote: "Measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation," "for is it possible to lose the nation and yet preserve the Constitution?" From letter of April 4, 1864, to A. C. Hodges in 10 Complete Works of Abraham Lincoln (1894), p. 66.

[32] From Address to Congress in September, 1942, quoted by Corwin, in The War and the Constitution: President and Congress, American Political Science Rev., Vol. 37 (1943), pp. 18-25.

[33] 320 U.S. 81 L. ed. 1774 (1942).

[34] At p. 93, 320 U.S., at p. 1782, 87 L. ed.

[35] We established the "American presidential type of government" here. Villena v. Secretary, 67 Phil. 451 (1939). Presidential type of government is one in which the sovereign makes the executive independent of the legislative, both in tenure and prerogative, and furnishes him with sufficient power to prevent the legislature from trenching upon the sphere marked out by the State as executive independence and prerogative. Martin, Philippine Political Law (1961), p. 8, citing Malcolm, Government of the Philippine Islands, 15-18, who in turn cites Garner, Introduction to Political Science, 197-200.

resolution of December 11, 1941 declaring war with Germany.[36] Except for the fact that we established here a unitary system of government,[37] our system of constitutionalism is patterned in most respects after that of the United States, such[38] that a similitude of extension in presidential prerogatives in the face of grave national peril would be found acceptable.

The theory thus advanced does not imply that, following the "Lincolnian dictatorship",[39] the President could minimize or disregard Congressional delegations of powers existing on the subject, and stand alone on his own prerogatives as commander-in-chief. Although we do not find any provision in the United States Constitution expressly empowering Congress specifically to delegate emergency powers to the President, during President Wilson's time, there were theretofore unheard broad delegations of emergency powers such as the Lever Food and Fuel Control Act of August 10, 1917, delegating broad discretionary powers to regulate matters involving food and fuel to the extent of taking over mines, factories, and plants which may operate under orders of the President;[40] the Selective Service Act authorizing the President to raise the army by conscription;[41] and the Espionage Act delegating power to declare certain exports unlawful.[42] Sweeping delegations of emergency powers were also given to President F. D. Roosevelt by the Lend-Lease Act of March 11, 1941, authorizing the President to order the manufacture or otherwise procure whenever he deemed the same to be in the interest of national defense, any defense article;[43] the War Powers Act of 1941 author-

[36] President Roosevelt informed Premier Churchill on August 3, 1940, that he was turning over fifty overage destroyers in exchange for lease of British bases. Morris, Great Presidential Decisions (1961), p. 380. Joint Resolution of Congress declaring war with Germany was approved on December 11, 1941, stating: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the state of war between the United States and the Government of Germany which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Germany; and to bring the conflict to successful termination, all of the resources of the country are hereby pledged by the Congress of the United States. Approved, December 11, 1941, 3:05 p.m., E.S.T." 55 Stat. 796.

[37] See *supra*, pages 29-34.

[38] Pascual v. Secretary, G.R. No. L-10405, Dec. 29, 1960.

[39] Corwin, The President: Office and Powers (1957), pp. 229-234, 237.

[40] 40 Stat. 276 (1917); "That the President is authorized... to requisition food, feeds, fuels, etc." *Ibid.*, Sec. 10. "That... the President... is authorized to requisition and take over, for use or operation by the Government, any factory, packing house, oil pipe line, mine, etc." *Ibid*, Sec. 12.

[41] 40 Stat. 76 (1917); 40 Stat. 894 (1918) — authorizing the President to enlist men ouside of draft age.

[42] 40 State. 217 (1917).

[43] 55 State. 31.

izing him to order redistribution of functions among the executive agencies,[44] thus enabling him, among others, to consolidate agencies within the Department of Agriculture[45] and to abolish the Office of Defense Health and Welfare Services, transferring its functions to the Federal Security;[46] and the War Powers Act of 1942 authorizing the President, among others, to fix priorities in the manufacture of defense materials.[47] Like matters of foreign affairs[48] broad delegation of legislative powers due to an emergency such as war should not be subjected to the restrictions of the undue delegation doctrine.[49]

The Philippine Constitution has specifically provided that "In times of war or other national emergency, the Congress may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy."[50] It was under this provision that immediately before World War II, various grants of emergency powers and other legislations were enacted by Congress ranging[51] from presidential delegation to take over for government use any public service or enterprise,[52] to transferring the seat of government or reorganizing it by abolishing or creating new departments, subdivisions, branches, agencies or offices, or continuing in force any law or appropriations that might have lapsed during the emergency and "such other powers he may deem necessary to enable the Government to fulfill its responsibilities and to maintain and enforce its authority" — meaning he may even enact laws.[53] However,

[44] 55 Stat. 838.

[45] Ex. Or. No. 9069, Feb. 23, 1942, 7 F. R. 1409; 50 USCA App. Sec. 601, 1946 ed., p. 643.

[46] Ex. Or. No. 9338, April 29, 1943, 8 F. R. 5659; 50 USCA App. Sec. 601, 1946 ed., p. 652.

[47] 50 USCA App. Sec. 633, 1946 ed., p. 705; 54 Stat. 676; 56 Stat. 177; 58 Stat. 827; 60 Stat. 868; 61 Stat. 501.

[48] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S. Ct. 216, 81 L. ed. 255 (1936).

[49] "... the President is not only authorized but bound to resist force by force. He does not initiate the war but is bound to accept the challenge without waiting for any special legislative authority... The battles of Palo Alto and Resaca de la Palma had been fought ... without a previous formal declaration of war by Congress." Prize cases, 2 Black 635. 17 L. ed. 459, 477 (1862). According to Secretary of War Stimson, the Lend-Lease Act was "a declaration of economic war," having immediately helped England, and was the basis for the help to Russia. Morris, Great Presidential Decisions (1960), pp. 381-382.

[50] Phil. Const., Art. VI, Sec. 26.

[51] There were several of them — Com. Acts Nos. 496, 498, 499, 500, 600, 620, 671.

[52] Com. Act No. 496.

[53] Com. Act No. 671; This latter law "represents legislative abdication in its worst form," and its only justification was that "at that time the Philippines was actually at war, the occupation of Manila by the Japanese forces being barely a fortnight away." Tañada and Fernando, Vol. II, 4th ed., p. 933.

it must not be forgotten that these emergency delegations are made by Congress in discharging its responsibility equally to meet the pressing emergency and the President should therefore recognize the limitations therein imposed on his powers.[54] These limitations may "become highly maleable, and even the more specific provisions of the Bill of Rights [may] take on an unaccustomed flexibility,"[55] but the President should in good faith respect those limitations consistent with the grave imperatives of the moment.[56]

Again by reason of the similarity in the grant of power in the respective constitutions, the President of the Philippines, therefore, may exercise equally extraordinary war powers in times of national peril, as extensively as have been exercised by the United States Presidents. In the absence of a grant of emergency powers from Congress, he may rely exclusively when necessary on the commander-in-chief clause and take care clause, in order to prosecute the war to a successful conclusion. The Constitution does not thereby expressly vest upon the President additional powers in times of war, but the great crisis of the moment enables him to exercise constitutional powers more vigorously than he could in times of peace, and Congress as a matter of expediency should vest him wide discretionary statutory powers.[57]

Martial Law—

Martial law, in the comprehensive sense of the term, includes all laws having reference to or being administered by the military arm of the State. Hence, it includes: (1) military law proper, which is that body of laws created by Congress for the government of the armed forces; (2) the principles governing the conduct of military forces during war and the government of occupied territory; and (3) martial law in *sensu strictiore,* or that law having application when the military arm is called upon to aid civil authorities in the execution of its civil func-

[54] The Philippine Congress, like the U.S. Congress, is constitutionally empowered to exercise war powers, too, although there are minor variations. Thus, the Philippine Constitution requires the "concurrence of two-thirds of all the Members of each House" for Congress to declare war (Phil. Const. Art. VI, Sec. 25), which the U.S. Constitution does not require (U.S. Const., Art. I, Sec. 8, Cl. 11); and while the U.S. Constitution specifies such war powers as to raise and support armies, to provide and maintain a navy, etc., *Ibid.,* no such specific particularization is made in the Philippine Constitution.

[55] Corwin, The President, *op. cit.,* p. 236.

[56] This may in some instances be more theory than anything else because Congressional delegation of emergency powers usually vests extensive discretion upon the President.

[57] Willoughby, Const. of the U.S., Vol. 3, p. 1565, Sec. 1030; See Rossiter, Constitutional Dictatorship, (1948), p. 211.

tions without however superseding said civil authorities.[58] It is this last form of martial rule which shall be discussed.

In one sense, this may refer to the emergency measure applying within the state,[59] which "goes no further than to warn citizens of the fact that military powers have been called upon by the executive to assist him in the maintenance of law and order, and that while the emergency lasts, they must upon pain of arrest and punishment not commit any acts which will render more difficult the restoration of order and the enforcement of law."[60] The conception in this sense of martial rule is that the will of the military commander does not substitute the regime of law administered by civilian authorities. In Duncan v. Kahanamoku,[61] when Hawaii was proclaimed under martial rule immediately after the Pearl Harbor bombing, the Supreme Court in annulling the conviction of a civilian by a military court held that martial law did not mean supplanting of courts with military tribunals, its object merely to have the military aid but never to supplant civil authorities. Constitutional rights of the citizens are not affected, as held in Ex parte Milligan.[62] The Supreme Court annuled Milligan's conviction by a military tribunal on the ground of having violated his constitutional right to jury trial.

> The statement of this proposition [supplanting the will of the military over the civilian] ... if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectively renders the 'military independent of and superior to the civil power' — the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together.[63]

Under martial law, no new powers are given to the executive, no extension of arbitrary authority is recognized, no civil rights of the individual are suspended; however, during particular times of disorder requiring the assistance of the armed forces, necessity may demand the commission of acts in that particular instance which in more tranquil times would not be committed, so that the authorities may control the individual or his properties which in normal times they cannot legally do,

[58]3Willoughby, Const. of the U.S., 2nd ed., Sec. 1041, p. 1586; Ex parte Milligan, 4 Wallace 2, 18 L. ed., 281 (1866); Peralta v. Director of Prisons, 75 Phil. 285, 299-300.

[59] Sinco, Philippine Political Law, p. 296.

[60] Willoughby, Const. of the United States, Vol. 3, p. 1591.

[61] 327 U.S. 304, 66 S. Ct. 606, 90 L. ed. 688 (1946).

[62] 71 U.S. 108, 18 L. ed. 281 (1866).

[63] At 297, 18 L. ed.; at 124-125, 71 U.S.

but being in the form of a police power, necessity and necessity alone, would justify such infringement.[64]

On the other hand,[65] there is the view that martial law means the substitution of the will of the military commander, which ultimately is that of the President as commander-in-chief, for legal processes and the civilian authorities administering them.[66] According to Judge Nelson in In Re Egan,[67] " . . . it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power;" "martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander-in-chief is the legislator, judge and executor."[68] The Supreme Court in Ex parte Milligan, while holding such a conception to be inimical to civil liberties, conceded that "there are occasions when martial rule can properly be applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then on the theatre of active military operations, where war really prevails there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and the society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course."[69] Dean Sinco has this to say: "The essence of martial law ... is the substitution of the authority of the executive as military commander for the power and jurisdiction of the civil courts."[70]

Martial law is a law of necessity, so that the extent and scope of its exercise should depend on the gravity of the necessity at hand. In times of war, and in the actual theater of shooting war, the necessity being extraordinary and the perils great, martial law authorizing the substitution of the will of the military commander, and ultimately the President, as Commander-in-chief, and suspending the civil rights on life, liberty and property of the individual would seem to be justifiable.[71]

[64] Willoughby, Const. of the U.S., Vol. 3, pp. 1586, 1592.

[65] "Martial law as an instrument of emergency government on the national level is a hazy mass of concepts..." Rossiter, Constitutional Dictatorship (1948), pp. 216-217.

[66] Corwin, The President, *op. cit.*, p. 139.

[67] 8 Fed. Cas. 367 (1866).

[68] At 367, 8 Fed. Cas. There may or may not be any hearing; and if there would be any, it would be before court-martial. *Id.*

[69] *Supra*, at 127-128, 71 U.S.; at 297-298, 18 L. ed.

[70] Sinco, Philippine Political Law (10th ed.), p. 267.

[71] See Willoughby, *op. cit.* Vol. 3 pp. 1595-1597. Although the taking of property may be done by virtue of the exercise of a form of police power (Willoughby, Const. of U.S., pp. 1586-1587), yet, compensation may be allowed (U.S. v. Russell, 13 Wall. 623, 20 L. ed. 474).

Upon the other hand, in times of peace when there is serious disorder, or even in times of war, but not in the theater of active military operations, the scope of martial rule should be limited to assisting civil authorities without supplanting the will of the military commander, since the necessity is not great or extraordinary, and the civil authorities are still functioning.

The President of the Philippines, unlike the President of the United States, is specifically ordained by the Constitution to "call out such armed forces to prevent or suppress the lawless violence, invasion, insurrection or rebellion."[72] It is believed that when internal disorder amounts merely to lawless violence or even minor[73] invasion, insurrection or rebellion, such that the crisis merely requires the aid to the civil authorities by the military, without need of substituting its will for that of the civil, the President of the Philippines, may rely upon said provision alone, without need of proclaiming martial law, which under similar circumstances, however, the President of the United States may perhaps also proclaim, under the Commander-in-Chief clause.[74] Indeed, practically everything that can be done under a condition of martial law, in the conception of assisting the civil authorities, may likewise be done by the more expedient call of the armed forces, without thereby placing the populace under the psychological strain and fear of martial rule, the absence of which might contribute to the preservation or restoration of peace and order in the country.[75] But when there is "invasion, insurrection or rebellion, or imminent danger thereof" so that public safety requires the substitution of the military power for the civil and the President places his beleaguered country or any part thereof under martial law, the Philippine President, like the United States President, can assert his power to act from the commander-in-chief clause; but unlike the United States President, the Philippine President can seek further justification from the specific provision expressly so authorizing him.[76] The possible difference in effect will be stated presently.

There is therefore no difficulty in holding that in so far as the authority to proclaim martial law is concerned, the Philippine President may exercise powers similar to those of the United States President. However, there seem to be some qualifications as to the timing and reviewability of the particular exercise of that authority. It would seem martial law is subject to a more stringent requirement in the United States. The United States President cannot proclaim martial law if there is merely a "threatened invasion", because the "necessity must be actual and present; the invasion real..."[77] The Philippine President, on the other hand, may so proclaim even when there is merely "imminent danger" of invasion, insurrection or rebellion, when public safety so requires. This difference becomes more real considering that while there are decisions holding that the finding of necessity made by the United States President to justify the proclamation is binding upon the Courts,[78] there are also decisions holding that such findings are not conclusive.[79] The United States President, therefore, may be subjected to the task of having to consider the possibility of having his acts annulled by a reviewing court. This is not so in the case of the Philippine President. Since the time that the case of Martin v. Mott[80] and others of similar principle[81] were adopted in this jurisdiction in Barcelona v. Baker,[82] decided in 1905, very much previous to the present constitution, and adopted with approval under the present constitutional system in 1952 in the case of Montenegro v. Castañeda,[83] the Philippine Supreme Court has repeatedly maintained the doctrine that the findings of the President on the justification for the decree of martial law is conclusive upon it.[84] And this should be, for since this would

[72] Phil. Const., Art. VII, Sec. 10 (2).

[73] What is minor will depend upon the particular circumstances of the case.

[74] Thus far the Philippines under her present constitution, has not been placed under martial law. At times, due to unusual disorder in a locality, the President places the local police forces — but no other entity — under the control of the Philippine Constabulary, the national police, as distinguished from the Army, which may be considered a mild form of martial law. Romani, The Philippine Presidency, (1956), pp. 80-81.

[75] See Sinco, Philippine Political Law (10th ed.), pp. 267-268, citing Thurman Arnold, Martial Law, 10 Encyclopedia of the Social Sciences, p. 162.

[76] "In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may ... place the Philippines or any part thereof under martial law." Phil. Const., Art. VII, Sec. 10 (2).

[77] Willoughby, Const. of the U.S., *op. cit.*, Vol. 3, p. 1602, Sec. 1051, expounding Ex parte Milligan.

[78] Martin v. Mott, 12 Wheat. 19, 6 L. ed. 537 (1827); Moyer v. Peabody, 212 U.S. 78 (1909).

[79] Sterling v. Constantin, 287 U.S. 378, 53 S. Ct. 190, 77 L. ed. 375 (1932); Duncan v. Kahanamoku, 327 U.S. 304, 66 S. Ct. 606, 90 L. ed. 688 (1946).

[80] *Supra.*

[81] List of cases are cited in Barcelona v. Baker, 5 Phil. 87 (1905).

[82] *Ibid.*

[83] 48 O.G. (8) 3392 (1952).

[84] These cases refer to habeas corpus, but they are also cited to apply to martial law. Tañada and Carreon, Vol. I (1961 ed.), p. 307. In a recent case, the President was vested by law the discretion to determine the necessity of allowing the sale of low grade Virginia Tobacco by a government entity and the importation of high grade Virginia leaf. The President, finding the facts justifiable, gave the desired authorization. The Supreme Court refused to disturb the President's discretion on such findings. Climaco, et al. v. Macadaeg, G.R. No. L-19447, April 18, 1962. If the Court would refuse to disturb a mere statutory discretion, more so would it refuse a constitutional discretion, particularly in times of emergency. The security of the State would be at stake and if the President acted in bad faith or with partisan motives, the remedy would be impeachment or the electorate, and if the court would decide to disturb the President's finding, it would seem to be sound if the court would decide it after the emergency is over, as in Duncan v. Kahanamoku, *supra*, decided in 1946.

necessarily involve findings of facts, there is no entity better qualified or more reliable than the President considering the resources at his command to ascertain the necessity of placing the country under martial law.

However, there has been no decision squarely on this point. The opinion is advanced that this marked difference in the two countries' setup is due to the fact that while the United States President derives his powers simply from the commander-in-chief clause, the Philippine President, in addition to said clause, is specifically vested with martial rule powers by a specific constitutional mandate.[85] The specific grounds for its exercise are so clearly delineated that there is not much room for the courts to indulge in extensive interpretation, which they would have in the absence thereof. This provision was adopted bodily from the Jones Law,[86] where the Governor-General vested with similar powers was subject to the revisory powers of the President of the United States. While there are fears on the concentration of powers as being excessive because those conditions no longer obtain,[87] this nevertheless is consistent with the theory of creating a single, not plural executive, particularly important to meet the many problems of this generation.[88]

Courts Martial and Military Commissions

The President of the Philippines, like the President of the United States, is recognized to have the power as commander-in-chief, independent of legislation, to convene courts-martial to try members of the armed forces.[89] These are agencies of executive character and not a portion of the judiciary, and except to ascertain that they have been properly convened to obtain jurisdiction, and jurisdiction alone,[90] over the charge, courts are devoid of authority to sit in review over their acts, or proceedings;[91] and this is true in war as in peace.[92]

The fundamental reason for these agencies in the armed forces is to maintain discipline among its members. The Supreme Court of the Philippines, in upholding the jurisdiction of the court-martial which tried a Filipino guerilla called into the active service of the Philippine Army said: "... they are in fact simply instrumentalities of the executive power ... to aid [the President] in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives. ... It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the army."[93] James II of England endeavored but failed to maintain a large standing army because of the Petition of Rights of 1628 which by implication and usage prohibited the Crown from convening courts-martial and later actually contributed in large measure to the forcible abdication of his throne. Ever since 1690 a standing army has been rendered possible in England by Parliament's annual enactment of the Mutiny Act which, however, authorizes no other purpose than the convening of courts-martial for the discipline of the army.[94] "The rights of men in the armed forces," said Justice Vinson of the United States Supreme Court, "must perforce be conditioned to meet certain overriding demands of discipline and duty..."[95]

Premised on this fundamental basis, it would be unsound for a civilian to be tried before courts-martial for non-military offenses in times

[85] Sinco, Philippine Political Law, 10th ed., pp. 266-267.

[86] "He [Governor-General] shall be responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Islands, or summon the *posse comitatus*, or call out the militia or other locally created armed forces, to prevent or suppress lawless violence, invasion, insurrection, or rebellion; and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of habeas corpus, or place the Islands, or any part thereof, under martial law: Provided, That whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, and the President shall have power to modify or vacate the action of the Governor-General." Jones Law, Sec. 21.

[87] Sinco, *op. cit.*, pp. 266-267.

[88] A single, not a plural, executive, was created by the American founding fathers to avoid the humiliating weakness of the Continental Congress. Art. IX, pars. 5, 6, Articles of the Confederation; Myers v. United States, 272 U.S. 52, 71 L. ed. 160 (1926).

[89] Swaim v. U.S. 165 U.S. 553, 41 L.. ed. 823 (1896). The law here authorized the commander to convene court martial when he is not accuser, so that the President as commander-in-chief may convene only if the commander is the accuser. But the Supreme Court held that although the commander is not the accuser as in this case, the President as commander-in-chief may convene, independently of any legislation. *Ibid.;* Ruffy v. Chief of Staff, 75 Phil. 875 (1946); Winthrop's Military Law and Precedents, 2d Ed., p. 49.

[90] But jurisdiction as applied in this situation has assumed a broader meaning than what it was historically. The court's inquiry includes not only jurisdiction over the person and the offense but also whether or not the procedure prescribed by Congress has been observed by the military court. Kauper, Constitutional Law, Cases and Materials (1960), p. 641, citing Hiatt v. Brown, 399 U.S. 103, 70 S. Ct. 495, 94 L. ed. 691 (1950) and Whelcal v. McDonald, 340 U.S. 122, 71 S. Ct. 146, 95 L. ed. 141 (1950).

[91] One of the reasons for the confused state of judicial opinion on the applicability of constitutional safeguards in military trials is the narrow scope of reviewability traditionally afforded — i. e., through collateral attack — by the civil courts to judgments of courts-martial. Henderson, *infra*, 71 Harv. L. Rev. 293, 294 (1957).

[92] Ruffy v. Chief of Staff, *supra*; Payomo v. Foyd, 42 Phil. 788 (1922); In re Guimby, 137 U.S. 147, 11 S. Ct. 54, 34 L. ed. 636 (1890); Ognir v. Director, 80 Phil. 401 (1948).

[93] Ruffy v. Chief of Staff, 75 Phil. 875 (1946) citing Winthrop's Military Law and Precedents, 2nd ed., p. 49, footnote 24.

[94] Corwin, The President, *op. cit.* (1957), p. 140.

[95] Burus v. Wilson, 346 U.S. 137, 140, 97 L. ed. 1508, 1514 (1952).

of peace, whether at home or abroad.[96] It was obviously on this basis[97] that in Reid v. Covert,[98] the U.S. Supreme Court denied jurisdiction to the military tribunal trying a civilian dependent for a capital offense committed abroad.[99] "The business of soldiers," citing Toth v. Quarles,[100] "is to fight and prepare to fight wars, not to try civilians for their alleged crimes. Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts. Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates... Frequently, the members of the courts-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings — in short, for their future progress in the service... [They] do not and cannot have the independence of jurors drawn from the general public or of civilian judges... Military law, is in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice."[101]

[96] There are suggested remedies for trial of civilians abroad. See 71 Harv. L. Rev. 712 (1958).

[97] The U.S. Supreme Court has also dwelt lengthily on the constitutional rights to jury trial, but Mr. Chief Justice Chase, concurring in Ex parte Milligan, has asserted that none of the Bill of Rights guarantees applies to the military, and this has been exemplified in *dicta* to exclude the constitutional right to counsel, due process and freedom from double jeopardy. 70 Harv. L. Rev. 1043 (1957). Contrary assertion is made, however, that in view of historical antecedents, constitutional safeguards do apply; but the admission is still there that right to jury trial is excepted from military justice. Henderson, Court-Martial and the Constitution, 71 Harv. L. Rev. 293 (1957). But in what context would this constitutional guarantee apply before military tribunals as for example due process when the accused may be convicted based on "substantial evidence," and not "beyond reasonable doubt rule"?

[98] 354 U.S. 1, 77, S. Ct. 1222, 1 L. ed. 2d. 1148 (1957).

[99] The matter becomes complicated when it involves civilian dependents abroad, considering the famous dictum in In re Ross, 140 U.S. 453, 464 (1891), that "Constitution can have no operation in another country," and the concept developed in the "Insular Cases," Dorr v. U.S., 195 U.S. 138, 49 L. ed. 128 (1904); Rasmussen v. U.S., 197 U.S. 516, 49 L. ed.. 862 (1905), that Congress is not bound by constitutional guarantees in legislating for territories until they are duly "incorporated", although it may not deny "fundamental" rights. 71 Harv. L. Rev. 712, 718 (1958).

[100] 350 U.S. 11.

[101] At 1173, 1174, 1175, 1 L. ed. 2d. Speaking of the importance that judges be independent, Hamilton said: "... [L]iberty can have nothing to fear from the judiciary alone, but would have to fear from its union with either of the other departments; ... nothing can contribute so much to its firmness and independence as permanency in office; this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and in a great measure, as the citadel of the public justice and the public security." The Federalist, No. 78.

But may a citizen who has committed a non-military offense in time of war when civil courts are closed, be tried by a court-martial? There seems to be language in Ex parte Milligan,[102] which would sanction trial by court-martial, and this view is shared by some authorities in the Philippines. "According to Tañada and Carreon, in the latter case, however," — meaning in time of war — "it would seem that in the actual territory of war where the civil courts are actually closed and it is impossible to administer justice according to civil law, then the military authorities must of necessity govern in the affected area and the military courts may assume jurisdiction over civilians."[103]

Turning now to military commissions, why must such a body be organized, when war traditionally means the destruction of the enemy in all forms to achieve ultimate victory? Is this a body created by the victor merely to exact vindictive justice from the vanquished? Indeed, war crimes may be unjust to the loser but not to the winner; it may be wrong to the defeated but right and just to the triumphant.

But war in all its inhumanity and destruction may still be called a civilized war, where international law, customs and practices govern the conduct of belligerent armies. This is the reason why the laws of war draw a distinction between the armed forces and the peaceful populations of belligerent nations, those who are lawful and those who are unlawful combatants, and while lawful combatants are subject to capture and detention as prisoners of war by the opposing military forces, the unlawful combatants, in addition to capture and detention, are subjected to trial and punishment by military tribunals for acts committed in violation of the laws and customs of civilized warfare.[104] While prisoners of war are interned, unlawful belligerents are confined, and the relative difference between the two is a matter of military measure, disciplinary in character.[105] Indeed, a ruthless army, which thinks of warfare in primitive terms, insensible to the sufferings of an unarmed populace, can bring havoc and destruction to lives, property and national honor, leaving the stigma long after the war is over. The charge against former General Yamashita of the Imperial Japanese Forces in the Philippines, for which he was hanged, was "the deliberate plan and purpose to massacre and exterminate a large part of the civilian

[102] Quoted *supra*, page 86.

[103] Tañada & Carreon, Political Law of the Philippines, Vol. 1, (1961), p. 306.

[104] Hague Convention No. IV, Art. 1, 36 Stat. 2295; 7 Moore, Digest of International Law, Sec. 1109; 2 Hyde International Law, Secs. 54, 652; 2 Oppenhaim, International Law, Sec. 254.

[105] Yamashita vs. Styer, 75 Phil. 563 (1945).

population of Batangas province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally maltreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity," which is not denied as wanton violation of the laws of war.[106] And even the sophisticated spy who comes from the German submarine in uniform but disguises himself upon entering the country loaded with explosives and expert in the art of sabotage hoping to explode war defense industries, detracts from the norm expected in civilized warfare.[107] This is the justice which the victor exacts from the fallen enemy through the instrumentality of military commissions, so that the whole world may learn that unlawful belligerency will ultimately reap its just punishment.[108]

The President of the Philippines has been recognized to possess powers identical to those of the U.S. President in convening military commissions as commander-in-chief, independently of legislation; and as this is an aspect of waging war, this power persists even when a mere technical state of war exists,[109] including the period of an armistice, ending upon the effective date of a treaty of peace, which might even be extended beyond that by agreement.[110]

The courts in both countries, like in court-martial proceedings, are limited in their power of review to simply ascertain the jurisdiction of the

[106] In re Yamashita, 327 US 1, 90 L. ed. 499 (1945), quoted at 509. The Japanese Government, in atonement for its misdeeds, agreed to pay and are paying for a period of 20 years, reparations amounting to $550,000,000 in cash, capital goods and services. Senate Resolution No. 78, June 21, 1956.

[107] Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 1, 87 L. ed. 3 (1942).

[108] Eichmann was recently hanged by the Israel Government for the mass murder of Jews during World War II.

[109] "After cessation of armed hostilities, incidents of war may remain pending, which should be disposed as in time of war. An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemies but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." Yamashita vs. Styer, 75 Phil. 563.

[110] Kuroda v. Jalandoni, 46 O.G. (9) 4282; Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 1, 87 L. ed. 3 (1942). The Philippine Constitution, unlike the U.S. Constitution, specifically provides that "The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the nation," Phil. Const. Art. II, Sec. 3, thereby guaranteeing the enforcement of international law including those embodied in the Hague Convention and Geneva Convention to which the Philippines was not a signatory. Kuroda v. Jalandoni, 46 O.G. (9), 4282.

commission as historically known, so that the court is "not concerned with any question of the guilt or innocence of petitioners."[111]

Habeas Corpus

In the event of an impending peril to the nation, the Philippine and U.S. Constitutions have specifically provided that the writ of habeas corpus, a very valuable devise to secure the liberties of the people against illegal arrest and detention,[112] may be suspended in such places and until such time as the security of the nation requires.[113] The framers of the Constitution undoubtedly foresaw that valuable though one's liberty is, when the danger of the nation is at stake, individual liberty, however apparently unjust the restraint, must temporarily be sacrificed at the altar of national security, for otherwise it may mean the end of those enduring liberties for all.[114]

The Constitution of the Philippines states quite explicitly that the President may suspend the privilege of habeas corpus in case of invasion, insurrection or rebellion, or imminent danger thereof when public

[111] Ex parte Quirin, *supra;* "This court," said the Philippine Supreme Court, "has no power to review upon habeas corpus the proceedings of a military or naval tribunal, and that, in such case, the single inquiry, the test, is jurisdiction." Yamashita v. Styer, *supra.*

[112] The privilege of habeas corpus is the greatest of all muniments of Anglo-Saxon liberty, whereby is guaranteed, so long as it is available, prompt judicial inquiry into all cases of physical restraint and where the restraint is found to be without legal justification, the release of the party. Corwin, The President, *op. cit.*, p. 144.

[113] "In case of invasion, insurrection, or rebellion or imminent danger thereof, when public safety requires it, [the President] may suspend the privileges of the writ of habeas corpus..." Phil. Const. Art. VII; Sec. 10, (1); "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it." U. S. Const., Art. I, Sec. 9, par. 2.

[114] These are arrest and detention made by the executive without the aid of judicial processes. Nava v. Gatmaitan, G.R. No. L-4855, Oct. 11, 1951. These summary arrests of suspected persons are made without complying with the form of the IVth Amendment of the U.S. Constitution, lifted almost bodily and incorporated as paragraph (3), Section 1, Art. III of the Philippine Constitution. Summary arrests of this nature made during the Civil War resulted in the enactment of the law indemnifying the authors of such arrest against "any action or prosecution, civil or criminal," arising from such arrest. 14 Stat. 46 (1866); 12 Stat. 755 (1863). If those summary arrests were illegal, Congress would not have provided for their indemnity because Congress cannot indemnify for what it could not legally have authorized. Mitchell v. Clark, 110 U.S. 633, 28 L. ed. 279 (1884).

Referring to detention, the Supreme Court of the Philippines held, by a vote of five to four, that the suspension of the writ does not carry with it the suspension of the right to bail; but because under Section 9, par. 3 of the Judiciary Act of 1948, as amended, Rep. Act No. 296, the concurrence of at least six justices are required to pronounce a judgment, it in effect sanctioned the suspension of the right to bail during the suspension of the writ, Nava v. Gatmaitan, G.R. No. L-4853, Oct. 11, 1951.

safety requires it.[115] Note that this power is not so granted to the United States President. Story in his Commentaries[116] is of the view that it is the U.S. Congress which is vested with the authority under the Constitution thus:

> Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.

In ex parte Bollman[117] there are expressions to the effect that Congress has the right to suspend. Thus, speaking thru Justice Marshall, the Court said:

> If at any time the public safety should require the suspension of the powers vested by this act (referring to the Judiciary Act of 1789, particularly Sec. 14 thereof, granting courts power to issue writs of habeas corpus) in the courts of the United States, it is for the legislature to say so. The question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed, this court can only see its duty and must obey the laws.[118]

The said Bollman case and Story's Commentaries were cited in ex parte Merryman,[119] where President Lincoln had suspended the writ along "any military line" between New York and Washington. Chief Justice Tanney, then on circuit, wrote a protest opinion when his order to bring forth the prisoner was disobeyed, arguing that only Congress possessed the power to suspend the privilege, since "The only power ... which the President possesses, where the life, liberty or property of a private citizen is concerned, is the power and duty ... 'that he shall take care that the laws be faithfully executed' ... as they are expounded and adjudged by the coordinate branch of the government to which that duty is assigned by the Constitution," namely, the judicial department.[120] Furthermore, he argued, the clause is found in Article I of the Constitution which deals primarily with legislative power, and that in England, citing Blackstone, only Parliament may suspend the writ.[121] Corwin, however, while admitting that the consensus of opinion today

[115] *Supra.*

[116] 3 Story, Commentaries, Sec. 1336, quoted in Ex parte Merryman. 17 Fed. Cas. 144, 151-152 (1861).

[117] 4 Cr. 75, 101, 2 L. ed. 554 (1807).

[118] At 561, 563, 2 L. ed., at 94, 101, 4 Cr.

[119] 17 Fed. Cas. 144 (1861).

[120] At 149, 17 Fed. Cas.

[121] At 148, 150-151, 17 Fed Cas.

is that Congress has the suspending power,[122] concurs with the view that considering that the executive is not a subordinate of the judiciary but a coordinate branch which is the "most active of all," "the most constantly in action"; that while other departments were sworn to support the Constitution, the President was sworn to "preserve, protect and defend it"; that the constitutional clause itself stood "in the place of an act of Parliament," thereby dispensing with any further Congressional authorization, and that considering that his power to declare martial law should carry with it the power to suspend the writ, Professor Randal's[123] view is sound. Thus,

> In a future crisis the Presidential power to suspend would probably be just as much an open question as during the Civil War. As to the actual precedent of that war, the outstanding fact is that the Chief Executive 'suspended the writ,' and that, so far as legal consequences were concerned, he was not restrained in so doing by Congress nor by the courts,

which in effect vests the suspending power upon the President, as it is of "critical importance of any course of reasoning [that] the initiative is attributed to the President in the presence of emergency conditions, whether at home or abroad."[124]

While in the United States the location of the suspending power is not well-settled, in the Philippines, there is no doubt whatsoever as to the seat of this power. The criticism is that the vesting constitutionally of such suspending power upon the President has made the "office hardly distinguishable from that of a dictator."[125] But did not President Lincoln save the Union and end slavery for all times with the suspending power as among those great powers he exercised to achieve his goal?[126] "It is no answer that such power may be abused, for there is no power which is not susceptible of abuse."[127] Underlying emergency has led the Supreme Court of the Philippines to hold, in a case of great significance, where communist suspects committing acts of rebellion, insurrection and sedition in 1950 had been arrested during the period when the writ was suspended, that the findings of necessity, which are factual findings,

[122] Same effect — Willoughby, Constitutional Law of the United States, Vol. 3, 2nd ed.., pp. 1613-1615; Black, Const. Law, 4th ed., pp. 703-704.

[123] Randall, Constitutional Problems under Lincoln (1926), pp. 136-137.

[124] Corwin, The President, *op. cit.*, pp. 145-147.

[125] Sinco, Philippine Political Law, 10h ed., p. 265.

[126] "In times of peace the people look most to their representatives; but in war to the executive only..." Jefferson to Rodney, Feb. 10, 1910, The Writings of Thomas Jefferson (1853), p. 500, quoted in Rossiter, Constitutional Dictatorship (1948), p. 218.

[127] Martin v. Mott, 12 Wheat. 19, 32, 6 L. ed. 537, 541, (-827).

leading to the presidential suspension of the writ[128] cannot be inquired into by the court, as the President with the instrumentalities at his command has access to information on the peace and order of the country which the court is not in a position to know.[129] Similarly, U.S. President Roosevelt's curfew order just after the war broke out, when the Japanese still had the upperhand in the Pacific, was not set aside, as the Court admitted that it could not have reviewed presidential findings on necessity leading to the issuance of said curfew order,[130] and while the authority of the military tribunal to try civilians was set aside in the Hawaii martial law case, which in effect sanctioned the Court's authority to review the presidential findings of necessity, yet this case was decided well after the war was over.[131]

Since the predominant concern in the exercise of presidential powers of both countries during an emergency such as war is the grave peril of the nation from destruction, incursions into doctrinal, constitutional institutions and civil liberties are sanctioned or tolerated to achieve the higher good, the preservation of the nation. Certainly, constitutional guarantees of rights cannot be said to have been unduly violated for these may not even see the dawn of a new day should our nation under the present constitutional framework perish — and indeed it would be tragic if it must perish — simply because of the fear in the danger of abuse by the over-extension of presidential powers. Constitutional limitations should assume an "unaccustomed flexibility" during this grave period of abnormal conditions, for laws, including the Constitution, are made to serve and protect the nation and its population, not to hamper their integrity.

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[128] The requisites are invasion, insurrection or rebellion or imminent danger thereof and the public safety requires it. Phil. Const., Art. VII, Sec. 10 (2). In the Bill of Rights, a provision on the writ says: "The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, or rebellion, when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist." Phil. Const., Art. III, Sec. 1 (14). While "imminent danger" is not a ground for suspension in the later Article, the Supreme Court in reconciling these two provisions, held that in view of the fact that the position of the article providing "imminent danger" as a ground for suspension is later than the other, and therefore the latest expression of the sovereign will, the same shall prevail and therefore imminent danger is also a ground for suspension. Montenegro v. Castañeda, 48 O.G. (8) 3392 (1952).

[129] Montenegro v. Castañeda, 48 O.G. (8) 3392 (1952). It cited Barcelon v. Baker, 5 Phil. 87 (1905), decided during the regime of the Jones Law, *supra*, which in turn cited Martin v. Mott, *supra*.

[130] Hirabayashi v. U.S., 320 U.S. 81, 93, 87 L. ed. 1774, 1782, (1943).

[131] Duncan v. Kahanamoku, 327 U.S. 304, 66 S. Ct. 606, 90 L. ed. 688 (1946).

DOMESTIC AFFAIRS

In General

It is the fundamental doctrine well embodied in both the Philippine and the United States constitutional systems that separation of powers lies at the core of both governmental setups. While there is nothing in either constitution expressly and specifically stating that there must be a separation of powers into the three departments of government, the physical constitutional allocation of powers writes the doctrine into the foundation of the system. Thus, it can readily be seen that the Philippine Constitution provides for the legislative department in Article VI, the executive department in Article VII, and the judicial department in Article VIII, and that the American Constitution provides for the legislative department in Article I, the executive department in Article II, and the judicial department in Article III.

The underlying reason for establishing this principle of government is the fear that arbitrary rule and abuse of authority would inevitably result from a concentration of the three powers of govenment in the same person, body of persons, or organ, so that pursuant to the idea of Montesquieu given in his famous work "The Spirit of Laws",[1] which is considered to have been responsible for the excellence of the English system of government, the separation of powers doctrine was adopted.[1a] Its underlying purpose is to protect the governed from arbitrary, autocratic rule. In the words of Justice Brandeis, "The doctrine of separation of powers was adopted by the Convention of 1787, to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of powers among the three departments, to save the people from autocracy."[2] Echoing a parallel view, Chief Justice Paras in the case of Rodriguez and Tañada vs. Gella,[3] said: "Much as it is imperative in some cases to have prompt official action, deadlocks in and slowness of democratic processes must be preferred to concentration of powers in any one man or group of men for obvious reasons."

While saving the people from arbitrary rule is an underlying purpose, however, the doctrine is also designed to secure governmental

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[1] Britannica, Great Books, Vol. 38, pp. 69-75.

[1a] Sinco, Philippine Political Law; 10th ed., p. 131, citing U.S. v. Bull, 15 Phil. 7, 27; and Kilburn v. Thompson, 103 U.S. 168.

[2] Myers v. United States, 272 U.S. 52, 293, 71 L. ed. 160, 242-243 (1926).

[3] 49 O.G. 465, 471 (1953).

action; to obtain efficiency and prevent despotism.[4] The U.S. Supreme Court in Reid v. Covert,[5] observed that "Ours is a government of divided authority on the assumption that in division there is ... strength ..." It is for this reason that separation of powers does not mean complete and absolute separation; rather, the constitutional structure being a complicated system, overlappings of governmental functions are recognized as being unavoidable and inherent necessities to obtain governmental coordination.[6] The U.S. Supreme Court, speaking thru Justice Holmes, in a case of Philippine origin, said: "It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinctions between legislative and executive action with mathematical precision and divide the branches into water-tight compartments," for otherwise "our government could not go on."[7] Indeed, government is established among men not merely to save the people from autocracy but also to serve, to secure the general welfare and promote the well-being of all the people.

It is in this context, torn between the duty of saving the people and of serving them, that we shall examine the scope of presidential powers in domestic affairs.

In accordance with the separation of powers doctrine, the President vested under the constitution of both countries with the executive power, the Congress with the legislative power and the Supreme Court and inferior courts with the judicial power. Hence, the constitution says that "The Executive power shall be vested in a President ...,"[8] and he shall "take care that the laws be faithfully executed."[9] The Philippine Supreme Court, in Government vs. Springer, speaking thru Justice Malcolm,[10] said: "The vesting of the executive power in the President was essentially a grant of the power to execute the laws;" similarly, the United States Supreme Court, speaking thru Justice Black, in the leading case of Youngstown Sheet & Tube Co. vs. Sawyer,[11] involving President Roosevelt's order of seizure to solve a labor dispute, said: "The

[4] People v. Rosenthal, 68 Phil. 328, 343 (1939).

[5] 1 L. ed. 2d 1148, 1176 (1957).

[6] C.J.S., pp. 293-294; Arnault v. Pecson, 87 Phil. 418, 426 (1959).

[7] Springer v. P.I., 277 U.S. 189, 210, 72 L. ed. 845, 852, 853 (1928).

[8] Phil. Const., Art. VII, Section 1; U.S. Const., Art. II, Sec. 1.

[9] Phil. Const., Art. VII, Section 10, (1); U.S. Const., Section 3; Planas v. Gil, 67 Phil. 62, 80 (1939), citing Cunningham v. Neagle, 135 U.S. 1; 34 L. ed. 55. The take care clause was described by President Benjamin Harrison as "the central idea of the office." Harrison, This Country of Ours, p. 98 (1897).

[10] 50 Phil. 259, 285 (1927). Same effect. Myers v. U.S., *supra*, at 166, 71 L. ed.; Rodriguez & Tafiada v. Gella, 49 O.G. 465; Lacson v. Roque, 49 O.G. 93; Jones v. Borra, G.R. No. L-6715, Oct. 30, 1953.

[11] 343 U.S. 579, 72 S. Ct. 863, 96 L. ed. 1153 (1952).

President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Mr. Justice Tuason of the Philippine Supreme Court, in the case where President Quirino ordered the suspension of the elective City Mayor of Manila, charged with libel and contempt for having used strong language in criticizing a Judge who had acquitted his Assistant Chief of Police whom the Mayor had charged with malversation, annulled the presidential order of suspension, saying: "There is neither statutory nor constitutional provision granting the President sweeping authority to remove municipal officials."[12] Former U.S. President, and later Chief Justice of the U.S. Supreme Court William Howard Taft advocated the principle that "... the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its existence," which "must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof."[13] Indeed,[13a] this is the quintessence of a "government of laws and not of men"—the denial of arbitrary governmental action and the affirmation of the supremacy of law, stated by Mr. Justice Matthews of the United States Supreme Court thus:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civiliza-

[12] Lacson v. Roque, 49 O.G. 93, 98 (1953).

[13] Taft, Our Chief Magistrate and His Powers, pp. 139-140.

[13a] An authority in constitutional law, in reviewing the cases of Neagle (135 U.S. 1, 10 S. Ct. 658 (1890), Debs (158 U.S. 564, 15 S. Ct. 900 (1895), and Midwest Oil Company (236 U.S. 459, .5 S. Ct. 309 (1915), frequently cited as sanctioning broad extension of presidential powers, concluded "that in the area of domestic affairs except as the Constitution specifically conferred authority on the President in such matters as appointments, etc., the supremacy of the legislative power was the basic premise in passing on claims of executive prerogatives." (Kauper, The Steel Seizure Case: Congress, the President and the Supreme Court, 51 Mich. L. Rev. 141, 150 (1952).

> tion under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material rights essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails as being the essence of slavery itself.[14]

We are merely participants in a revolution instituted in 1612, when King James of England, offended by the independence of his judges, declared; "Then I am to be under the law — which is treason to affirm!" to which Chief Justice Coke replied, "The King ought not to be under any man but he is under God and the Law."[15] Two centuries later, this was echoed in the United States in 1882, when Justice Samuel Miller declared that: "No man ... is so high that he is above the law ... all the officers of the government ... are creatures of the law, and are bound to obey it."[16]

But aside from these principles or theories of government there is the basic objective of their existence—to serve and promote the general welfare and well-being of all the people. The wisdom of the founding fathers is best expressed in the preamble of the Constitution,[17] thus: "The Filipino people, imploring the aid of Divine Providence, in order to establish a government that shall embody their ideals, conserve and develop the patrimony of the nation, promote the general welfare, and secure to themselves and their posterity the blessings of independence under a regime of justice, liberty, and democracy, do ordain and promulgate this Constitution." The United States Constitution in similar vein states: "We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The President faces certain problems during his administration which demand outright and immediate solution in order to effectively promote the general welfare, but for which Congress had not provided. Faced with urgent problems at hand, the President would certainly be doing a grave injustice to his people if he were to wait for the slow, ponderous processes of Congress before he may act while the multitude, especially the poor, are suffering without immediate speedy solution in sight.[18] Both countries have established a single, not a plural executive, and in the United States, its purpose was to avoid the humilating weakness that was the Continental Congress operating under the Articles of Confederation,[19] and in the Philippines, the "framers ...deliberately accepted the risks to liberty that might come from a strong executive, because they saw in him a unifying central authority suited to the peculiar conditions of the Philippines, which ... is broken up into many islands inhabited by people, of the same race, it is true, but speaking a babel of languages, cut off from each other in greater or less degree by inadequate means of communication and transportation, possessing a gamut of cultures ranging all the way from the primitive culture of remnants of headhunters to the sophistication of cosmopolitan effates and practicing religions as divergent as the Christian and the Mohammedan."[20] Both countries therefore desired to establish a strong executive in the President, which is not without reason. The promotion of public welfare is the paramount duty and objective that a President worthy of the trust should earnestly desire. Under urgent, peculiar, and pressing circumstances, the President would be justified in following the Stewardship theory of President Theodore Roosevelt, which advocates a residuum of presidential powers so long as it is not prohibited by specific provisions of the constitution or the laws.[21] It was

[14] Yick Wo v. Hopkins, 118 U.S. 356, 369-370, 30 L. ed. 220, 226 (1866).

[15] 12 Coke 63 (as to its verity, 18 Eng. Hist. Rev. 664-675); 1 Campbell, Lives of the Chief Justice (1849), 272, quoted by Rivera, Law of Public Administration, p. 259 (1955).

[16] United States v. Lee, 106 U.S. 196, 22, 27 L. ed. 171, 182 (1882).

[17] The preamble which is to the constitution what the enacting clause is to a statute, performs not merely a formal but a real and substantive function. Sinco, Philippine Political Law, 10 ed., p. 78.

[18] "Yet he is, at the same time if not in the same breath, the voice of the people, the leading formulator and expounder of public opinion ... While he acts as political leader of some, he serves as moral spokesman for all. Well before Woodrow Wilson had come to the Presidency, but not before he had begun to dream of it, he expressed the essence of this role:

> 'His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interests. If he rightly interprets the national thought and boldly insists upon it, he is irresistible; and the country never feels the zest for action so much as when its President is of such insight and calibre'." Rossiter, The American Presidency (1956), pp. 17-18.

[19] Myers v. U.S., 272 U.S. 52, 116117, 47 S. Ct. 21, 71 L. ed. 160, 166 (1926).

[20] Tañada & Carreon, Philippine Political Law, Vol. 1, pp. 276-277 (1961).

[21] "The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the

with this concept of presidential powers that President Macapagal issued Administrative Order No. 2 cancelling some 350 "midnight" or "last minute" ad-interim appointments made by then outgoing President Garcia at the eve of termination of the latter's term whose appointments were allegedly conditioned that they would immediately qualify, as in fact many qualified, as the outgoing President's alleged desire was to subvert the policies of the incoming administration. There is nothing in the constitution or the laws specifically authorizing a presidential order such as this, but as there is none prohibiting it, the Supreme Court declined to disregard Presidential Administrative Order No. 2, thus upholding presidential powers under the doctrine aforesaid.[22] This was sanctioning broad presidential powers because as to those who had already taken the oath, although they had not yet entered upon the performance of their duties, this was dismissal from office without cause.[23] The very advocate in fact, of restricted presidential powers, Chief Justice Taft, when called upon to pen the decision in the case of Myers vs. United States,[24] involving the presidential dismissal without cause of a postmaster who held office with a definite statutory term of years, before the expiration of such term, did not abide by the doctrine of restricted presidential powers, and sanctioned said removal relying on the grant of executive power to the President under Article II, and on the constitutional grant of the appointing power which was deemed to carry with it the implied power of removal. In both cases cited, presidential action was sustained in order that the president may carry out his program and policies to better serve

people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I have declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the law. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct or constitutional or legislative prohibition. I did not care a rap for mere form and show of power; I cared immensely for the use that could be made of the substance." Theodore Roosevelt: An Autobiography, p. 357 (1913). President Taft challenged this concept: "My judgment is that the view of . . . Mr. Roosevelt, ascribing an undefined residuum of power to the President is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character, doing irremediable injustice to private right." Taft, Our Chief Magistrate and His Powers, p. 3 (1925).

[22] Aytona v. Castillo, G.R. No. L-19313; January 20, 1962.

[23] "No officer or employee in the Civil Service shall be removed or suspended except for cause as provided by law." Phil. Const., Art. XII, Sec. 4.

[24] 272 U.S. 52, 47 S. Ct. 21, 71 L. ed. 160 (1926).

the interest of the public by having men loyally serving his administration without fear of sabotage. President Taft, seeing that public oil lands were fast being patented so that to allow the same to continue unrestricted would deplete said public oil lands, ordered the withdrawal of the same from public sale. This presidential action was sustained by the Supreme Court.[25] Obviously, the paramount need of safeguarding public welfare by saving valuable oil lands to public ownership was the moving factor in the presidential action, and the Supreme Court found presidential powers inspite of the absence of direct legislation authorizing it, as in fact his action was apparently even contrary to specific legislation on the matter.

Such specific presidential acts are not legislative rules; they are purely executive acts, which although not laws in themselves, presuppose a law authorizing him to perform them, for which reason and necessity require the finding that said power be implied due to the exigencies of the situation. As said by Chief Justice Vinson in his dissenting opinion in the Youngstown case:

> This does not mean an authority to disregard the wishes of Congress on the subject, when the subject lies within its control and when those wishes have been expressed, and it certainly does not involve the slightest semblance of a power to legislate, much less to 'suspend' legislation already passed by Congress. It involves the performance of specific acts, not of a legislative but purely of an executive character — acts which are not in themselves laws, but which presuppose a 'law' authorizing him to perform them. This law is not expressed either in the Constitution, or in the enactment of Congress, but reason and necessity compel that it be implied from the exigencies of the situation.[26]

It is not merely the practical urgency of the moment that justifies such an extension of presidential powers. While there are certain powers which are exclusive to Congress like appropriating monies, and powers exclusive to the executive like the appointing power,[27] there are powers which are common to both[28] upon which the executive can act until Congress has acted because while the President acts in accordance with law, he does so not because he is an agent of Congress but because

[25] United States v. Midwest Oil Co., 236 U.S. 459, 59 L. ed. 673 (1915).

[26] Youngstown Sheet & Tube Co. v. Sawyer, 26 ALR 2d 1378, 1434-1435.

[27] Springer v. P.S., 227 U.S. 189 (1928). Congress may, however, appoint officials if necessary to discharge their functions or to maintain their independent existence. Machem, Law of Public Offices and Officers, Sec. 103.

[28] ". . . here is a broad twilight zone between the field of what is distinctly and exclusively legislative and what is necessarily executive in character." Hart, The Ordinance Making Powers of the President of the United States, p. 120 (1925). There is nothing in the constitution expressly requiring that each department should be completely independent from each other.

the Constitution directs him to do so.[29] An early example of this pattern of departmental relationship was set in the Flying Fish case,[30] where Chief Justice Marshall denied the President the right to order seizure of vessels bound from the French port, because Congress had acted in the same field of power:

> It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication. American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to the seizure of vessels bound, or sailing to a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port.[31]

Similarly, in the extradition case where President Adams had ordered the issuance of warrant of arrest of one Jonathan Robbins to carry into effect the extradition provisions of the Jay Treaty, Chief Justice Vinson found presidential powers until Congress had acted, thus:

> This action was challenged in Congress on the ground that no specific statute prescribed the method to be used in executing the treaty. John Marshall, then a member of the House of Representatives, in the course of his successful defense of the President's action, said: 'Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.[32]

Likewise, President Washington issued the first Neutrality Proclamation without congressional sanction and it was only in 1794[33] when Congress enacted one that subsequent neutrality proclamations were based on said law. Likewise until Congress acted, the President governed conquered territories,[34] and no better example can be cited than when President Mckinley was governing the Philippines without Congressional

[29] Corwin, The Steel Seizure Case: A Judicial Brick Without Straw, 53 Colum. L. Rev. 53, 61, citing Brief for Appellant, pp. 75-77; and U.S. v. Midwest Oil Co., 236 U.S. 459 (1915).

[30] Little v. Barreme, 2 Cranch 170 U.S. (1804).

[31] Little v. Barreme, 2 Cranch 170, quoted in Youngstown Sheet v. Sawyer, *supra*, and Justice Clark adding: "I know of no subsequent holding of this Court to the contrary." 96 L. ed. 1153, 1212 (1952).

[32] Quoted by Corwin, A Judicial Brick Without Straw, 53 Colum. L. Rev. 53, 58.

[33] 1 Stat. 381 (1794).

[34] Corwin, *Ibid.*, at 58-59.

authorization until the passage of the Act of 1902,[35] wherein the United States Congress ratified the acts of the President in organizing the government under his war powers, so that in conjunction with the Instructions of April 7, 1900,[36] constituted the organic laws of the Philippines.[37] Justice Clark in the Youngstown case likewise asserted this doctrine when he denied presidential powers in the steel seizure case because of the presence of three statutes on the matter, namely, the Defense Production Act of 1950, the Labor Management Relations Act, and the Selective Service Act of 1948, thus pre-empting the field.[38]

Indeed, to the exercise of broad presidential powers, the Philippine President can make a better claim than the United States President. The fundamental difference of unitary and federal system of government becomes relevant here. The United States federal government is endowed merely with enumerated powers, leaving the reserved still vested in the States composing the Union.[39] Internal sovereignty is vested by the people upon the federal government, not directly, but thru the instrumentality of the various states as units composing the Union, so that we see amendments to the constitution being approved or ratified not directly by the people but by the "Legislatures of three-fourths of the several States or by Conventions in three-fourths thereof . . .,"[40] and the President being elected not by direct popular vote, but by an electoral college chosen by each State" . . . in such Manner as the Legislature thereof may direct. . ."[41] This is not so in the case of the Philippine Presidency which operates within the context of a unitary system, by which internal sovereignty is vested not thru the medium of the provinces or municipalities as separate units but by direct acts of the people; so that contrary to the system followed in the United States Presidency, the Philippine President is elected by direct popular vote[42] and amendments are ratified or approved not thru the instrumentality of any agency, but by the direct

[35] Act of U.S. Congress of July 1, 1902, printed in 1 P.A.L. 49.

[36] Printed in Public Laws of the Philippine Commission, Vol. I, p. LXII.

[37] U.S. v. Bull, 15 Phil. 7, 26 (1910).

[38] Youngstown Sheet & Tube Co. v. Sawyer, 96 L. ed. 1153, 1212-1215 (1952).

[39] United States v. Curtiss Export Corp., 299 U.S. 304, 57 S. Ct. 216, 81 L. ed. 255 (1936); U.S. Const., Tenth Amendment.

[40] U.S. Const., Art. V. The preamble of the Philippine Constitution itself has ruled out the theory of conventional sovereignty when the sentence starts wih "The Filipino People," instead of "We the people" as in the United States Constitution. *Supra*, note 18, p. 117. The Philippine Constitution specifically provided the "sovereignty resides in the people and all government authority emanates from them." Art. II, Section 1.

[41] U.S. Const., Art. II, Sec. 1, par. 2.

[42] Phil. Const., Art. VII, Sec. 2.

votes of the people, the sovereign.[43] The unitary set-up is further reflected in the fact that the Philippine President, unlike the United States President, is by specific constitutional mandate vested with the power of "control of all the executive departments, bureaus or offices," and of "general supervision over all local governments as may be provided by law."[44] "In the United States, the President, under the Federal Constitution, has no power of control over the heads of executive departments and offices; he may not, unless expressly authorized by legislation, review their official acts and substitute his judgment and discretion for theirs. What he can do, and that is all upon the sole basis of the United States constitution, is that as the executive, he may take such steps as may be necessary to see that they perform their duties and carry out such orders as are given to them by the law."[45]

Consistent therefore with the purposes of government, to serve the people while protecting them from arbitrary rule, the Presidents of both countries should ordinarily observe the doctrine of separation of powers and follow the restricted theory of presidential powers advocated by President Taft; but practical urgency in the face of absence of congressional support may justify an extension of presidential powers whenever the welfare of the people so demands it. The courts may exert a moderating influence over presidential acts of the latter category in order to forestall any danger to autocratic rule without, however, rendering ineffective the means necessary to achieve the primordial goal.

Appointing Power

Neither president can discharge his functions as executive alone. He must have the assistance of men to carry them out efficiently. As Justice Malcolm observed in Government of the Philippines vs. Springer,[46] where the Supreme Court of the Philippines annulled portions of the law

[43] Phil. Const., Art. XV; "During the debate on the Executive Power it was the almost unanimous opinion that we have invested the Executive with rather extraordinary prerogatives. There is much truth in this assertion. x x x We have thought it prudent to establish an executive power which, subject to the fiscalization of the Assembly, and of public opinion, will not only know how to govern but will actually govern, with a firm and steady hand, unembarrassed by vexatious interferences by other departments or by unholy alliances with this and that social group." Valedictory Speech of the President of the Convention, Claro M. Recto, printed in Aruego, The Framing of the Philippine Constitution, Vol. II, Appendix L, pp. 1063, 1066.

[44] Phil. Const., Art. VII, Sec. 10 (1).

[45] Tañada & Carreon, Political Law of the Philippines, Vol. 1, p. 296 (1961), citing Willoughby, Principles of Public Administration, pp. 36-37; Sinco, Philippine Political Law, 10th ed., p. 243, citing Kendall v. United States, 12 Peters 524; Contra, see Corwin, The President: Office and Powers, pp. 83-84 (1957).

[46] 50 Phil. 259 (1927).

vesting the power to vote all the shares of stocks owned by the Government in the National Coal Company exclusively in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives, because Congress cannot by law appoint the President and Speaker to an office, quoting Myers vs. U.S.,[47] which quoted Madison,[48] thus: "The vesting of the executive power in the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court ... As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible."[49]

Both presidents were vested by susbtantially similar constitutional provisions with the power of appointment[50]. Actually, however, the nature of this power itself, by the operation of the tri-partite system of government, would vest upon the president this appointing power even if there were no constitutional provision specifically so empowering him.[51] This

[47] *Supra.*

[48] The Federalist, Nos. 47, 76.

[49] At 285, 50 Phil.

[50] "The President shall nominate and with the consent of the Commission on Appointments, shall appoint the heads of the executive departments and bureaus, officers of the Army from the rank of colonel, of the Navy and air forces from the rank of captain or commander, and all other officers of the Government whose appointments are not herein otherwise provided for, and those whom he may be authorized by law to appoint; but the Congress may by law vest the appointment of inferior officers, in the President alone, in the courts, or in the heads of departments." Phil. Const., Art. VII, Sec. 10 (3). The Philippine President also appoints with the Commission's consent, ambassadors, other public ministers and consuls, *Ibid.*, Sec. 10, (7), the Auditor General, *Ibid.*, Art. XI, Sec. 1, Justices of the Supreme Court and Judges of Inferior Courts, *Ibid.*, Art. VIII, Sec. 5, and the Commission on Elections, Ibid., Art. X, Sec. 1. The United States Constitution likewise provides that "He [the President] shall...nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U. S. Const., Art. II, Sec. 2, Cl. 2.

[51] The President of the Philippines may make appointments during the recess. Phil. Const., Art. VII, Sec. 10, (4). This is not so under the U.S. Constitution where only vacancy occuring during the recess of the Senate may be filled by the President. U. S. Const., Art. II, Sec. 2.

has been the common view held by the United States and the Philippine Supreme Courts, ever since the earlier years of American occupation, and up to this day.[52] Congress may provide for the qualifications of appointees which the President may make, but it cannot limit presidential discretion in the nomination and appointment. Thus, a law unlawfully limiting Presidential discretion in appointment by providing for the drawing of lots as a means of determining the district to which judges of first instance may be assigned by the President has been declared unconstitutional.[53] There is no conflict between the Congressional power to prescribe qualifications and the Presidential power to appoint so long as the qualifications thus prescribed do not limit selection and trench upon executive choice as to be in effect legislative designation.[54] In the case of Manalang v. Quitoriano,[55] it was held that:

> Congress cannot, either appoint the Commissioner of the National Employment Service, or impose upon the President the duty to appoint any particular person to said office. The appointing power is the exclusive prerogative of the President, upon which no limitations may be imposed by Congress, except those resulting from the need of securing the concurrence of the Commission of Appointments and from the exercise of the limited legislative power to prescribe the qualifications to a given appointive office.[56]

While the President may possess the appointing power, his appointment nevertheless, must be made to an office. Historically, it was a royal prerogative in England to create offices as well as to appoint men to them, and at the outset the appointing power and the office to which the appointment would be made were indistinguishable.[57] In time, however, certain recurrent and naturally coherent duties came to be assigned more or less permanently, so that there emerged the concept of "office" as an institution distinct from the person holding it and capable of persisting beyond his incumbency.[58] Not all the royal prerogatives of the British Crown, however, were meant to be vested in the American Presidency, as there are acts clearly legislative which were, and still are, exercised by the British Crown; it is not the prerogatives of the British Crown

[52] Springer v. Government, 50 Phil. 259 (1927); Springer v. Government, 277 U.S. 189, 72 L. ed. 845 (1928).

[53] Concepcion v. Paredes, 42 Phil. 599 (1921).

[54] Myers v. U.S., 272 U.S. 52, 128, 71 L. ed. 160, 171 (1926).

[55] 50 O.G. (6), 2515 (1954).

[56] At 2520, 50 O.G.

[57] Corwin, The President: Office and Power, pp. 69-70 (1957). "Wherever the right of granting and creating new offices is vested in the King, as the head and fountain of justice, he must use proper words for that purpose; as in the erection of a new office, the words 'erigimus,' 'constitutimus,' etc., must be made use of; and it hath been adjudged that the word 'concessimus' is not sufficient, unless there be an office already in being." Dew v. Judges, 3 Am. Dec. 639, 648 (1808).

[58] Corwin, *Ibid.*, p. 70.

therefore that should foreshadow those of the Philippine and United States Presidency, but rather "our own Constitution and form of government must be our only guide."[59]

The Constitution and laws of each country have provided for the establishment of offices.[60] The offices of the Presidency, the Vice-Presidency, and the Supreme Courts of both countries, whose members are appointed by the President, are constitutional creations.[61] The various executive departments are creatures of law.[62] For a position to be an office, it is essential that it should have been created by the Constitution or statutes of the sovereign, or that the sovereign power should have delegated the right to create the position,[63] because primarily, the creation of offices is a legislative function.[64]

While appointing power is essentially executive, just as the power of creating offices is essentially legislative, consistent with the theory of presidential prerogatives in matters of domestic affairs as already advanced, the presidents of both countries may, under certain conditions, where the urgency of the situation so demands, establish the very offices to which their appointments may be made.[65] The various grounds of justification already advanced require no further elaboration here.

In matters of domestic affairs, therefore, both Presidents, by the similitude of constitutional mandate and forms of their governments, are primarily vested with the duty as executives, to "take care that the laws be faithfully executed," and having due regard to the tripartite system of government, the Philippine President, like the United States President, should primarily seek his powers either from the law or the Constitution. However, in the face of Congressional inaction, pressed by the urgent needs of the situation, broader presidential prerogatives may constitutionally be possible.

CONCLUSION

There is no appreciable difference in the presidential powers of both presidents. The system of government established here and in the United

[59] Hart, The Ordinance Making Powers of the President of the United States, pp. 116-117 (1925).

[60] See Hart, *Ibid.*, pp. 204-205; Willoughby, Constitution of the United States, Col. 3, 2nd ed., p. 1510.

[61] See Corwin, The President, *supra*, pp. 70-71.

[62] Philippines — Sec. 75, Revised Administrative Code; U.S. — 5 USCA, 1927 ed., Secs. 151, 181, 241, 291, 361, etc.

[63] Paton vs. Board of Health, 127 Cal. 388, 59 Pac. 702 (1899); See Ann. Cas. 1917D 320.

[64] Cochnower v. United States, 248 U.S. 405, 407, 63 L. ed. 328, 330 (1919).

[65] The Program Implementation Agency created by Pres. Macapagal is an example Ex. Or. No. 17, Aug. 24, 1962, 58 O.G. (38) 6077.

States is the same — the presidential type. In fact, no less than the President of the United States himself approved the Philippine Constitution in compliance with the Tydings-McDuffie Act or Independence Law approved by the United States Federal Congress, said presidential approval being a prerequisite to the submission of the constitution to the people for ratification. The Independence Law specifically provided that the Philippine Constitution should establish a republican form of government containing a bill of rights, which is the hallmark of the American system of government.

It could therefore be expected that there would not be a marked departure from the American prototype in locating presidential prerogatives in the Philippine Presidency. In matters of foreign affairs, the status of sovereignty which is inherent in independent nations and the constitutions which in major aspects bear substantial resemblance, underlie presidential prerogatives so that the Philippines, being an infant republic, would profit immensely from American experience and precedents derived from the exercise of broad inherent powers on external affairs. In the exercise of his war powers in times of war, the Philippine President can seek enlightened guidance in American experience, because necessity alone undercuts the whole fabric of presidential war powers for both countries. The common objective of assuring national survival is the stone of the arch upon which presidential war powers rest, and whether national survival is Filipino or American, presidential prerogatives as a means to assure that survival would flow in the same direction and from the same source. Whether as commander-in-chief commanding the armed forces in the field, or directing matters in the home front, the Philippine President will find strength in the conviction that, like the American President, he too may exercise broad powers, and while Congressional delegations may aid him, they should never unnecessarily restrict him. In matters of domestic affairs, the President of the Philippines, like the President of the United States, must scale the balance between the urgent duty to serve his people and the equally urgent duty to save his people from arbitrary rule. But he must, if he is to carry the trust with devotion and loyalty. While as a rule the tripartite system must be observed, and a government of laws and not of men should be the beacon guide, certain periods of a president's administration may demand the exercise of broad presidential prerogatives, and within this context the Philippine President may claim powers greater than those exercised by the American President on the principal justification that we have established here a unitary and not a federal system of government, the internal sovereignty of the nation being vested, not upon the instrumentalities of provinces or municipalities, but directly upon

the national government. This has resulted in vesting, to the national government, unlike the United States federal government which is one of enumerated powers, the total and absolute internal sovereignty by the Filipino people. Provinces and municipalities, unlike the States of the Union do not hold any reserved powers, but merely exercise powers coming from the National government. Moreover, unlike the United States President, the Philippine President is vested by specific constitutional mandate with the power of control over all the executive departments, bureaus and offices, thus making him an effective chief over the vast administrative setup. Indeed, it is due to these differences that the Philippine President may rightfully exercise presidential powers even broader than those exercised by the United States President.