mentioned cases. Mr. Gana's tackles the PDA, that phoenix-like entity rising from the ashes of the PCO.

There are also two articles contributed by Ateneo law alumni. One is a lucid exposition of the Vienna Sales Convention which provides for a uniform law for international sales of goods which is expected by the author to go into full force and effect next year. The author, Atty. Adolfo A. Azcuna, who was a cum laude graduate of Class of '62 and who took postgraduate studies in International Law in Salzburg University, Austria, is also Professor of Public and Private International Law of his alma mater and Partner of Bengzon, Zarraga, Narciso, Cudala, Pecson, Azcuna and Bengzon Law Offices. The second article is a quite informative overview of Philippine laws and regulations on trusts, written by Atty. Jose K. Manguiat, Jr., Ph. D. who belongs to Class of '57 and is currently Vice President of the Commercial Bank of Manila.

The piece on the constitutional provision on presidential immunity from suit is written by a member of Class of '84, Mr. Stephen Cu-unjieng, an honor student who also works as an apprentice at the Ozaeta, Romulo, De Leon, Mabanta, Buenaventura, Sayoc and De Los Angeles Law Offices.

Finally, in the Notes and Comments Section of the Journal, there are two contributions by members, also of Class of '84. The first is on presidential succession in cases of temporary causes by Mr. Arnedo Valera, sometime Journal staffer and currently Vice President for Internal Affairs of the Ateneo Law Student Council. The second is on a question of law in Succession (this time not presidential) by Mr. Ferdinand G. Suba, teacher of political science at the Far Eastern University and Assistant Section Editor of the Journal.

The authorship of this issue will be seen to range from the University President-elect, to the alumni and faculty of the Law School, to the bar candidate and graduating law students down to the undergraduate. It is, permitting the indulgence, an auspicious spectrum of ideas, information and views. Heaven knows what this nation needs is more ventilation of issues, questions and ideas, whether flawed or brilliant. This Journal seeks to address that need.

a. pizarro bonilla

Joaquin G. Bernas, S. J.

THE FACES AND USES OF THE "POLITICAL QUESTIONS" DOCTRINE: REFLECTIONS ON HABEAS CORPUS, THE "PCO", AND BAIL

The nation has *"no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln."* Justice Davis, *Ex parte Milligan*, 4 Wall 2, 125 (1866).

"Hemos establecido todas las garantias que impidieran que el poder ejecutivo se constituyera en dictador o se perpetuara en el poder . . ."
Mariano Jesus Cuenco, at the 1935 Constitutional Convention.

"In times of war or national emergency ––– the judiciary should be less jealous of its power and more trusting of the Executive. . . "
"For their part ––– the people can only trust and pray that, giving him their own loyalty and patriotism, the President will not fail them."
Justice de Castro, *Padilla v. Enrile*, G. R. 61388, April 20, 1983.

Justice Davis had a pessimistic view of human nature. There are American writers who believe Watergate may have proved him right. Cuenco thought that the 1935 Constitutional Convention had found a structural guarantee against dictatorship. There are Filipinos who believe Cuenco was wrong. Justice de Castro, in uncommon charismatic fashion, anchors the salvation of the nation on an unwavering faith in the presidency. It is no surprise then that *Padilla v. Enrile* splintered the Supreme Court and elicited a mixture of shock, "What's new?", and halleluiah.

The *Garcia-Padilla* decision established three principles none of them truly original: (1) when the President says that there is need to suspend the privilege of the writ of habeas corpus, acceptance in faith is the proper response (and "Praise the Lord" is optional); (2) the fourteen men, brave and true, should not touch a PCO (Presidential Commiment Order) with a ten foot pole or even longer; (3) a person covered by a PCO may

not be released on bail. My lecture therefore will be divided into three parts, with the first and largest being devoted to the foundations of charismatic faith in the Presidency.

POLITICAL OR JUSTICIABLE

The justiciability of habeas corpus decisions of the President under the Commander-in-Chief clause of the Constitution has been passed upon by the Court on three other occasions prior to *Garcia-Padilla*: *Barcelon v. Baker* [2] *in 1905, Montenegro v. Castaneda* [3] in 1952, and *Lansang v. Garcia* [4] in 1971. *Barcelon*, decided before Philippine independence, held that the American Governor-General's power to suspend the privilege, with the approval of the Philippine Commission which was the legislative body then, was not subject to judicial review because it was a political question; *Montenegro* adopted the doctrine and applied it to the power of President Quirino under the Republic; *Lansang* unanimously reversed *Barcelon* and *Montenegro* saying that the question was not political but justiciable. And now *Garcia-Padilla* has in turn reversed *Lansang* to say that, Yes, Virginia, the question is political. Naturally therefore Virginia wants to know what political questions are all about. And so do we.

It is easy enough to define political questions in the abstract. Justice Roberto Concepcion's definition in *Tañada v. Cuenco* [5] still holds good: political questions are "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government." But the fun begins when the question is asked whether in fact "full discretionary authority has been delegated to the legislative or executive branch of the government." It is here where we see the many faces of the political questions doctrine. *Baker v. Carr*, [6] a 1962 United States Supreme Court decision which is regarded by some as a definitive statement on the doctrine, describes these faces in typical legalese. Let me give it in the original court language and in translation. *Baker v. Carr* says: "Prominent on the surface of any case held to involve a political question is found":

> (a) a textually demonstrable constitutional commitment to a coordinate political department;
> *(Translation: The Constitution in black and white excludes the courts from the question and gives it to another.)*
> (b) a lack of judicially discoverable and manageable standards for resolving it;

> *(Translation: The courts would not know which end is which.)*
> (c) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
> *(Translation: The question is not one of legality but one of practical wisdom and therefore addressed to policy makers and not to judges.)*
> (d) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
> *(Translation: We are gentlemen and delicadeza sometimes dictates deference.)*
> (e) an unusual need for questioning adherence to a political decision already made;
> *(Translation: There are moments which call for blind faith.)*
> (f) the potentiality of embarassment from multifarious pronouncements by various departments on one question.
> *(Translation: Too many cooks can spoil the broth.)*

These are six faces of the political questions doctrine. We can reduce them to three, each of them representing a way of approaching constitutional law problems. There is the *textual* approach (letter "a"), which asks the question: What does the letter of the constitution say? There is the *functional* approach (letters "b" and "c"), which asks the question: Are we capable of resolving the problem posed? And there is the *prudential* or *political* approach (letters "d", 'e", and "f") which asks the question: Are there overriding considerations which impel us to defer to the executive or legislative branch? All these approaches have been used in grappling with the question whether the suspension of the privilege of the writ of habeas corpus is a political question or not.

We begin with *Barcelon v. Baker*. In arriving at a "political question" conclusion, the Court did so on a combination of all three approaches. The applicable law at that time was Section 5 of the Philippine Bill of 1902 which authorized the Governor-General, with the approval of the Philippine Commission, to suspend the privilege of the writ of habeas corpus in case of invasion, insurrection or rebellion. Hence the Court could argue *textually* that since the text of the organic act had placed discretion in the hands of the Governor-General, there it must be allowed to remain. *The functional* and *prudential* approaches were also used. *Functional:* the executive and legislative departments have the machinery for verifying the existence of those facts whereas the courts do not. *Prudential:* intereference by the courts in the decision can result in tying the hands of those charged with maintaining order. *(Montenegro v. Castañeda* is not doctrinally significant because it merely accepted and

then applied the doctrine of *Barcelon.)* When *Lansang v. Garcia* came, chief reliance was on the textual approach and the Court arrived at the conclusion that *Barcelon* must be reversed. *Lansang* argued *textually* that the grant of power to the President under Article VII, Section 10 (1935), was not absolute but was tied to two factual pre-conditions: (1) there must exist "invasion, insurrection, or rebellion" or "imminent danger thereof" and (2) "public necessity" must require the suspension of the privilege. These two pre-conditions, the Supreme Court said, provided an opening for the Court to enquire into possible transgressions of the Constitution. Moreover, the Court argued that *Barcelon* had mistakenly relied on *Martin v. Mott* [7] which involved not the suspension of the privilege of the writ but the much broader power of the President to call the militia. However, aware of the inconvenience that a narrow textual approach could entail, *Lansang* limited the review function of the Court to a very prudentially narrow test of arbitrariness. *Garcia-Padilla* replayed the *Barcelon* and *Lansang* records and the principal melody the Court heard was functional and prudential and therefore arrived again at a "political questions" conclusion. Hence, after almost 80 years, jurisprudence on the subject went full circle. Let us analyze the conflicting results.

There admittedly are certain factors which make *Garcia-Padilla's* textual approach to the question stronger than the *Barcelon* argument. First, the present Constitution has a textually broader source of constitutional power in that it makes "imminent danger" of invasion, insurrection, or rebellion sufficient ground for suspension of the privilege, whereas the Philippine Bill of 1902 did not use the phrase "imminent danger" and could thus be read to require actual invasion, insurrection, or rebellion as a factual pre-condition to the suspension of the privilege. Secondly, *Barcelon* involved the power delegated to a colonial government inferior in status to the power of a duly elected President of an Independent Republic. Nevertheless, not even these differences conclusively demonstrate a textual grant of *absolute* discretion.

Justice de Castro, in his main opinion in *Padilla* also says that the Constitutional Convention of 1935 had the opportunity to modify the *Barcelon* doctrine or to at least place a legislative check on the President's power, but that even after debate it did not. De Castro thus concludes that the constitutional text represents "the distilled wisdom of the Constitutional Convention". That may be so. But it is not clear that de Castro's interpretation of the text faithfully represents that distilled wisdom. In the instances where the Constitutional Convention of 1971 disagreed with doctrines previously established by the Supreme

Court, the Constitutional Convention introduced textual modificiations that reversed the doctrine. Thus, since the Convention was not in agreement with the Filipinization of management of public utilities represented by *King v.* Hernaez[8] and *Luzon Stevedoring v. Anti-Dummy Board*[9], the Convention, through the last sentence of Article XIV, Section 5 allowed participation of foreigners in management. Thus, too, since the interests of American private citizens in private lands erroneously acquired under the Parity Amendment were threatened by the combined effect of *Republic v. Quasha* [10] *and Philippine Banking Corporation v. Lui She*, [11] the Convention took pains to protect these interests through Article XVII, Section 11. The Convention, if it did not agree with the doctrine of *Lansang*, could also have reversed it; but it did not. Hence, which "distilled wisdom" has remained bottled for consumption?

De Castro also seeks to bolster his textual approach by appeal to the discretion bestowed on the President by the grant of extraordinary legislative power found in Amendment 6 of 1976. This is cause for serious concern. Is De Castro now suggesting that the President's exercise of his legislative power under Amendment 6 is not subject to judicial review?

On the whole, therefore, the textual argument for a "political question" conclusion hangs limp. It is in fact noteworthy that the concurring opinions in *Morales* supporting a political question conclusion all rely not on textual arguments but on functional ones. (There were no written concurrences in *Padilla* supporting reversal of *Lansang.)* Justice Makasiar argued that "only the Chief Executive is well-equipped with the intelligence services as commander-in-chief to secure the desired information as to the existence of the requirements for the proclamation of martial law or for the suspension of the privilege of the writ of habeas corpus." Justice Gutierrez added that "the question of the sufficiency of factual bases for the suspension of the privilege of the writ or the proclamation of martial law would involve an appraisal of a great variety of relevant conditions involving national security which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice."Justice Abad Santos was more blunt: "The *Lansang* doctrine is based on naivete; it demonstrates a lack of contact with reality." How so? " The answer is obvious. (The Court) must rely on the Executive Branch which has the appropriate civil and military machinery for the facts.. This was the method which had to be used in *Lansang*. This Court relied heavily on classified information supplied by the military. . . . . It was a case of the defendant judging the suit. . "

The prudential approach expressed in terms of faith in the President has only Justice de Castro as ardent sponsor. None of the other Justices comes close to his warmth of devotion. In *Garcia-Padilla* he says: "On these occasions (of crisis), the President takes absolute command, for the very life of the Nation and its government ... is in great peril. In so doing, the President is answerable only to his conscience, the people and to God. For their part, in giving him the supreme mandate as their President, the people can only trust and pray that, giving him their own loyalty with utmost patriotism, the President will not fail them." Then he appeals to the Brethren in the Court:" In times of war or national emergency, the legislature may surrender a part of its power of legislation to the President.. Would it not be as proper and wholly acceptable to lay down the principle that during such crises, the judiciary should be less jealous of its power and more trusting of the executive in the exercise of its emergency powers in recognition of the same necessity?" In *Morales* Justice de Castro even manifests quaint concern. for the sensitivities of the President by complaining that *Lansang* discriminated against the President in that the Court did not review " similar proclamations of former Chiefs Executive, Governor General Wright and President Quirino. If this is so, as it can be safely surmised that the incumbent President cannot but feel discriminated against with the pronouncement of the Lansang doctrine, rectification is called for." One could suppose that the incumbent President is appreciative of the "rectification"; one wonders however what effect is produced on a " macho" President by the solicitious and touching concern about "discrimination".

What all of these add up to is that, even if on the textual approach the position for judicial intervention is strong, it does not necessarily follow that the Court will intervene. The Court still has two kinds of escape hatches: the functional and the prudential approaches. On a number of occasions the Supreme Court has slipped through these hatches. For instance, the Constitution is textually clear on the manner of amending and revising the Constitution; but *Javellana v. Executive Secretary*[12] legitimized the 1973 Constitution by the cryptic negative blessing "that there is no further judicial obstacle to the new Constitution being considered in force and effect" after the Supreme Court found itself functionally and prudentially unable to dispute the President's finding that the new Constitution had been ratified by the Citizens Assemblies. In fact, it is possible for the Court on the basis of the same set of facts and guided by the same constitutional text initially to consider a problem political and then, after the political dust has cleared somehow, consider the same problem justiciable. This is what happened on the question of quorum in the defunct senate in *Avelino v. Cuenco.*[13] The question in *Avelino v. Cuenco* was whether there was a quorum when Cuenco was selected Senate President after the walk-out of the Avelino faction. While the Seantors were still in a growling mood, the Supreme Court said that the question was political. After the Senators calmed down, calmed down enough to show signs of willingness to accept a judicial ruling, the Supreme Court said that the question was justiciable and promptly applied simple arithmetic to declare that there was a quorum. Clearly, therefore, there is more to decision making than textual considerations. Thus it is no surprise that, in war or in warlike conditions, the pattern in the resolution of problems involving an assertive presidency when there are obstacles to a simple application of the constitutional text is that either the prudential and functional approaches dominate the reading of the constitutional text, or the resolution of the constitutional problem is postponed to a more propitious time. Martial law imposed on Hawaii during World War II was declared unconstitutional – but only after the war. As Corwin, a noted student of the American presidency observes: "Judicial intervention will not take place at all until the emergency is safely past. The Court will see to that." [14]

The show of judicial activism in the Court's stand in *Lansang v. Garcia* might look like a departure from the pattern, but it really was not. While *Lansang* possesses significant symbolic value, doctrinally it is less bold than it might appear to be. The *Lansang* Court in fact assumed very limited review jurisdiction. The Court said that the review power it was assuming was not "comparable with its power over civil or criminal cases elevated thereto by appeal.. . in which cases the appellate court has all the powers of the court of origin", nor even with its power over quasi-judicial administrative decisions where the Court is limited to asking whether there is some *evidentiary basis* for the administrative finding."[15] Rather, the court accepted the Solicitor General's suggestion that it "go *no* further than to satisfy itself *not* that the President's decision is *correct* and that public safety was endangered by the rebellion and justified the suspension of the writ, but that in suspending the writ, the Presdent did not act arbitrarily." [16] Thus, the *Lansang* choreography was straightforward: two steps forward and one and a half-step backward. The recent decision in *Garcia-Padilla* resumed the dance and led it another half-step backward to where *Barcelon* had brought it. *Morales v. Enrile* [17], decided six days after *Garcia-Padilla,* tried to coax the dancers back to *Lansang* but only four followed the cue and the remainder rested where *Padilla* had led. And there the dancers stand: the vali-

dity of the suspension of the privilege of the writ is a political question.

It is not difficult to appreciate the stance taken by the Court in *Lansang*. *Lansang* was decided at a time when it was glamorous to erect barricades within sling-shot distance from Malacanang. But the doctrine it adopted was largely a *consuelo de bobo* and an ineffectual triumph of constitutionalism *v ia* the textual approach. With a roar that warmed the hearts of activists manning the barricades the Supreme Court said in *Lansang* that the suspension of the privilege of the writ of habeas corpus was not a political but a justiciable question. But when the Court was pressed for particulars, the roar became pipsqueak and the truncheon wielders cheered. The Court yielded to the Solicitor General's suggestion that it " go *no* further than satisfy (itself) *not* that the President's decision is *correct* and that public safety was endangered by the rebellion and justified the suspension of the writ, but that in suspending the writ, the President did not act arbitrarily." But in times of crisis, real or orchestrated, will a Court dare accuse the President of arbitrariness? The chances are that it will not. The Court will more likely to see, in the words of *Baker v. Carr*. . ."an unusual need for questioning adherence to a political decision already made." Hence, the turn-about in *Garcia- Padilla* from the *Lansang* choreography comes as no surprise.

What then? Would it be better for us to return to the *Lansang* doctrine? Personally, I would prefer not to. The *Lansang* doctrine gives us a deceptive sense of security. The line between justiciability and non-justiciability drawn by *Lansang* is very thin, and the slightest wind can blow the Supreme Court across one or other side of the line. In times of crisis, whether real or orchestrated, the winds can blow hard or can seem to blow hard. In *Garcia-Padilla* the wind was hard enough to tilt the balance. So, let the court doctrine stay as is. Let it remain clearer incentive to work for a constitutional amendment that can change the Supreme Court doctrine. In 1971, while the Constitutional Convention was in session, Justice Fernando, in *Lansang* already said [18]

> (S) erious though should be given to the desirability of removing from the President his power to suspend the privilege of the writ of habeas corpus as well as the power to declare martial law ... If the privilege of the writ cannot be suspended and martial law is beyond the power of the President to declare, there is a greater likelihood as far as the rights of the individual are concerned, of the Constitution remaining at all times supreme ... How desirable it would be then, to my way of thinking, if the constitution would strip the President of such power.

(I am not sure if this last sentence is framed in large letters in the office of the Chief Justice.)

Before we leave the topic of political questions, let me make two observations. First, what of the value of the political questions doctrine for the life of the nation? The doctrine must be viewed in the context of the dynamics of separated powers. It was Justice Marshall who first asserted in *Marbury v. Madison*[19] the then revolutionary doctrine that the Court could pass on the constitutionality of the acts of the executive and of Congress. With the awesome power of judicial review thus claimed by the power that has neither money nor arms, the formulation of the political questions doctrine was, on two counts, bound to come. First, the resolution of constitutional law problems involve considerations that are political, philosophical, sociological, and historical, and which therefore do not lend themselves to a wooden type of judicial craftmanship. Constitutional law does not have the exactness of mathematics; and even in mathematics we are told that there are logical systems that are open ended. More so in constitutional law. Secondly, and on the more prosaic plain, there is something to be said for the political questions doctrine as a national safety valve. The Court of course could play with the President the game of 'chicken' which car drivers play; but the stakes would not just be two lives and two machines. Moreover, 'chicken' is not the game sober judges are wont to play.

Finally, a word about an argument of Justice Abad Santos in support of his political questions conclusion in his concurring and dissenting opinion in *Morales*. He says that the Court "should maintain a detached attitude and refrain from giving the seal of approval" lest the court be found supporting an act of the President which might "lack popular support". But can the Court escape complicity by mere silence? The nature of the power of judicial review is such that, when the Court chooses to be silent about constitutional issues brought before it, the Court by that fact is silently vocal and thereby affirms and legitimizes what it dares not reprobate. Hence, dormant or assertive, the Court must accept its share of praise or of blame. If the Court wishes not to, modestly turning away judicial eyes from an offending deed will not do.

Presidential Commitment Order

At the cutting edge of the suspension of the privilege of the writ of habeas corpus is the presidential commitment order or PCO. In a

general sense the PCO is an order of preventive detention issued by the President as Commander-in-Chief. As concretized in LOI 1211, it is an order issued by the President to his subordinates for the arrest and detention of persons committing crimes mentioned in P.D. 2045 with respect to which the privilege of the writ remains suspended by the same P.D. 2045. LOI 1211 says that the PCO will issue "(a) When resort to judicial process is not possible or expedient without endangering public order and safety; or (b) When the release on bail of the person or persons already under arrest by virtue of a judicial warrant would endanger said public order or safety.."

Three questions are posed by the PCO: (1) Does the President have the power to order arrest and detention in times of crisis? (2) Must the order of arrest and detention conform with the requirements of a valid warrant? (3) Is a person detained through a PCO entitled to bail? These questions are all touched upon in both *Garcia-Padilla* and *Morales* with the third receiving the most attention. (Justice Teehankee in fact considers the third the " crucial issue", if not the only real issue, in *Padilla.)*

The President's power of preventive detention rests on solid foundation. The crisis powers of the President as Commander - in-Chief in Article VII, Section 9, in hierarchic order are: (1) to call on the armed forces to suppress or prevent lawless violence, invasion, insurrection or rebellion; (2) to suspend the privilege of the writ of habeas corpus, (3) to impose martial law. In the concrete, LOI 1211 links the PCO with the suspension of the privilege, the second of the President's crisis powers; but, as Chief Justice Fernando notes, preventive detention can also be ordered when the Commander-in- Chief calls on the armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion. Chief jurisprudential reliance by Fernando, and also by the main opinion, is on *Moyer v. Peabody* which did not involve the suspension of the writ but the calling of the National Guard for the supression of an insurrection. The American Supreme Court said:

> This means that (the Governor) shall make the ordinary use of soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power. . . So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief . . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.

Granted however, that the President has the power to order preventive detention, is his order beyond judicial review? *Garcia- Padilla* and *Morales* say that the PCO is beyond judicial review. But can the answer really be as simple as that?

As the question has arisen in the concrete cases of *Garcia- Padilla* and *Morales* the PCO is inextricably tied to the suspension of the prilege of the writ of habeas corpus. The argument in *Garcia- Padilla* and *Morales* is that the restrictive effect of the PCO may not be enquired into by the courts through a habeas corpus action because the privelege of the writ, whose object precisely is the enquiry into the validity of a detention, has been suspended. In other words, enquiry is not possible not because the nature of the detention is preventive but because the means for enquiry, the privilege of the writ, has been suspended. Note, however, that the privilege of the writ is merely suspended; it is not forever abolished. Hence if and when the suspension of the privilege is lifted and the person is still in detention, will a habeas corpus case be entertained? Similarly, if the preventive detention is ordered on the occasion merely of the calling of the armed forces but without suspension of the privilege, will a habeas corpus case be entertained?

The Chief Justice would seem to suggest that preventive detention, for as long as it remains only preventive, is not subject to judicial review. The detention could be actionable by habeas corpus only should it continue for such a length of time as to make it punitive in character.

If the above is a correct reading of the view of the Chief Justice on the justiciability of preventive detention under circumstances where neither martial law or suspension of the privilege is in effect, it is submitted that a contrary view more generous to individual liberty is defensible. Admittedly, the language of Justice Holmes in *Moyer v. Peabody* on which the Chief Justice relies is sweeping in its affirmation of executive discretion. But executive discretion in *Moyer v. Peabody* is affirmed as possessing finality not for the purpose of blocking release of Moyer but for the purpose of protecting Peabody, a former governor, from being made to answer for action he took while governor. Holmes in fact conceded that the action taken by then Governor Peabody was "without sufficient reason" but Holmes absolved the governor of liability because the governor had acted "in good faith".

The significance of the ruling of *Moyer v. Peabody* becomes clearer

when compared with the later case of *Sterling v. Constantin.*[21] In Sterling, the object of the suit was not to make a state governor civilly or criminally liable but to enjoin him from proceeding with measures he was bent on taking pursuant to a martial law declaration and on the claim that discretionary measures taken by him were not subject to judicial review. Chief Justice Hughes, writing for the Court in *Sterling* said:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

By analogy, while the President may indeed have final discretion on whether or not to call on the armed forces or to suspend the privilege or to impose martial law, it does not follow that everything he does in the name of necessity or that everything he orders the armed forces to do is legal. The contrary position completely subverts the supremacy of the constitution. Hence, if the PCO in *Morales and Garcia-Padilla* are not subject to judicial enquiry now, it is not because they are orders of preventive detention but because the suspension of the privilege of the writ of habeas corpus temporarily prevents enquiry into their legality. In other words, if the President wishes to close off enquiry into the legality of emergency detentions, it is not enough that the detentions be characterized as preventive; the President must in addition close the venue to enquiry by suspending the privilege of the writ. Which is what in fact he has done. And since by its nature a suspension of the privilege is temporary, the exclusion of the courts from enquiry into questions of legality must also be temporary. I submit therefore that the Court in *Garcia-Padilla* and *Morales* rendered the nation a distinct disservice by creating the impression that PCO's are conclusively valid.

If then they are not conclusively valid, we come to the question of standards for measuring the legality of the detention.

The purpose of enquiry into the legality of a detention can be either for determining the criminal or civil liability of the persons responsible for the arrest and detention, or for the release of the person detained. For purposes of determining personal liability, the standard is the good or bad faith of the executive ordering the arrest. As we have seen, this was

the case in *Moyer v. Peabody.* In the language of Justice Holmes: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." In the concrete case of our constitutional system, however, for purposes of civil or criminal liability, the good or bad faith of the Executive is irrelevant. Executive immunity, for the President and for those who act on his specific instructions, is guaranteed in sweeping terms by the mantle of immunity woven by the geniuses of the Batasan. Article VII, Section 15, says: "The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or others pursuant to his specific orders during his tenure." And in case any one should be uncertain of the identity of the person for which this immunity was designed, the same provision adds: "The immunities herein provided shall apply to the incumbent President referred to in Article XVII of this Constitution." You will recall that the Supreme Court, for the benefit of the doubters, pointed out in *Aquino, Jr. v. Comelec* [22] that the incumbent President referred to in Article XVII is no other than Ferdinand the M!

Immunity of the executive from liability, however, is one thing: the legality of keeping a person under detention is another. The suspension of the privilege of the writ, while it prevents enquiry into the legality of the detention, does not legalize the detention. Once the suspension is lifted, the legality of the detention can be examined by the courts for purpose of determining whether release should be ordered. For this purpose, the standard of legality cannot be just the good faith or bad faith of the executive. It must be something more objective. Must the standard be the requirements for a valid warrant?

Justice Concepcion in *Morales* says that the PCO is a warrant issued by the President and therefore must comply with the requirements of a valid warrant "in the same manner and to the same extent as a warrant of arrest issued by a judge." This, of course, is *obiter dictum* because both *Garcia-Padilla* and *Morales* found the arrests to be justifiable as exceptions to the ordinary requirement of a warrant. Moreover, it overstates the case. The PCO can come in the form of a warrant, in which case it must conform to the requirements of a valid warrant. But the PCO can also be a simple go-signal given by the President for a warrantless arrest. It is established doctrine that warrantless arrests can be valid, and the procedural requirements, such as examination under oath, applicable to a warrant of arrest do not apply to allowable arrests without

warrant. However, the rule consecrated by the Constitution for the validity of arrests, whether the arrests be with warrant or without warrant or whether the warrant be issued by a judge or by any other responsible officer authorized by law, is that the arrest must be based on the existence of "probable cause". This is the bottom line. To require less and to say that the ultimate test for the validity of a detention is not probable cause but the good or bad faith of the executive is to trivialize personal dignity.

The Right to Bail

Garcia-Padilla and *Morales* clearly teach that in a situation where the privilege of the writ is suspended,bail should not be granted for otherwise the purpose of the suspension of the writ would be frustrated. The doctrine is a temporary acceptance of a military decision of the commander-in-chief embodied in the suspension of the privilege. As the main opinion in *Padilla* puts it: "The suspension of the privilege of the writ of habeas corpus must, indeed, carry with it the suspension of the right to bail, if the government's campaign to suppress the rebellion is to be enhanced and rendered effective." Or, as the main opinion in *Morales* says:

> Normally, rebellion being a non-capital offense is bailable. But because the privilege of the writ of *habeas corpus* remains suspended "with respect to persons at present detained as well as others who may hereafter be similarly detained for the crimes of insurrection or rebellion, subversion, conspiracy or proposal to commit such crimes, and for all other crimes and offenses committed by them in furtherance of or on the occasion thereof, or incident thereto, or in connection therewith", the natural consequence is that the right to bail for the commission of anyone of the said offenses is also suspended. To hold otherwise would defeat the very purpose of the suspension. Therefore, where the offense for which the detainee was arrested is anyone of the said offenses he has no right to bail even after the charges are filed in court.

It may be noted that the emphasis of *Padilla and Morales* is on the functional or practical reasons for making bail unavailable. The prevailing minority in *Nava v. Gatmaitan* [23] similarly emphasized the functional arguments. But in *Nava* Justices Pablo and Bautista Angelo also attempted to set up the theoretical underpinnings of the argument for denial of bail by attempting to clarify the theoretical link between the privilege of the writ and the right to bail. [24] Briefly, their argument rested on the major premise that habeas corpus is the ultimate remedy

for one who is being illegally deprived of his liberty and that *certiorari* and *mandamus* are derivative remedies from a habeas corpus action. Hence, when the privilege of the writ is suspended, access to freedom through the derivative remedies is also closed. In other words, a program may indeed be on computer file; but if the code is not made available, access to the program is not possible. Which may indeed be true if habeas corpus on the one hand and certiorari and mandamus on the other are as code to computer program. But that is not at all clear. Certiorari and mandamus issue against a court; a writ of habeas corpus is issued by a court but not against a court.

The *Nava* argument, however, can be restated by bringing into the picture the executive officer who has custody of the detainee and who has to carry out an order for the release on bail. If bail must be granted, it can only be granted after hearing for the purpose of examining the weight of the evidence justifying detention. But that precisely is the heart of the suspension of the privilege – to freeze temporarily enquiry into the justification of the detention. How then is the court to determine whether bail is due as of right if the officer in custody of the detainee is not legally bound, because of the suspension of the privilege, to present evidence in support of the detention?

I find this argument convincing. But precisely because I find it convincing, I am also convinced that once formal charges are filed bail becomes available. Why? Because the filing of formal charges entails executive waiver of the effects of the suspension of the privilege. This is necessarily so because the essential effect of the suspension of the privilege is to withhold enquiry ino the legalities of the detention, whereas the necessary effect of the filing of formal charges is to open up inquiry into the legalities of the detention. Hence, the moment the executive arm files the case in court it submits the legalities of the case to the jurisdiction of the court and thereby waives, at least as to the case filed, the essential effect of the executive suspension of the privilege which is to withhold enquiry into the legalities of the confinement. It is in the light of this impelled and *ad hoc* waiver by the executive that the argument of Justice Tuason in *Nava v. Gatmaitan,* heavily relied upon by Fernando, Teehankee, and Abad Santos, must be read. Justice Tuason said: [25]

> . . . if and when formal complaint is presented, the court steps in and the executive steps out. The detention ceases to be an executive and becomes a judicial concern. Thereupon the corresponding court assumes its role and the judicial process takes its course to the exclusion of the executive or the legislative departments. Henceforward the accused is entitled to demand all the constitutional safeguards and privileges essential to due process. . .

This is not just ritualistic *rigodon.* This is the conclusion arising by ineluctable logic from the nature of the suspension of the privilege and from the dynamics of criminal process. Moreover, it will not do to say that the executive submits to the jurisdiction of the court only the question of guilt, but not the question of physical liberty. The moment the President submits the case to the jurisdiction of the court, the President must recognize the full jurisdiction of the court. The Constitution allows the executive, through the suspension of the privilege, temporarily to exclude the courts; but the Constitution does not allow him to mingle and maim the courts.

It is interesting to note that the President himself accepts this argument based on waiver. As Justices Teehankee and Abad Santos noted in *Morales* the metropolitan newspapers of April 20, 1983 reported the President as saying 'that [Mayor] Pimentel has been charged with rebellion before the regional trial court of Cebu City and is therefore under the jurisdiction of the civil court and not only under the jurisdiction of the military by virtue of the PCO." Moreover, in a telegram to Archbishop Cronin of Cagayan de Oro City the President said that "the disposal of the body of the accused, as any lawyer will inform you, is now within the powers of the regional trial court of Cebu and not within the powers of the President." Which prompted Justice Abad Santos to say that he was "happy to be counted among the 'any lawyer' mentioned by the President." (I am not sure, however, if the President himself still wants to be counted among the 'any lawyer' he mentioned.)

The pronouncement of the President regarding Mayor Pimentel applies *mutatis mutandis* to *Padilla* and *Morales.* The significance of the President's acceptance of the Tuason argument and of the application he made of it to the Pimentel case is not only theoretical but also functional and practical. Equivalently he made the judgment that release on bail of one who has been charged in court would not be a threat to national security. Thus, the insistence of the Court that such release would frustrate the objects of the suspension of the privilege is a case of being more Catholic than the Pope. Moreover, as the majority in *Nava* and the dissents in *Padilla* and *Morales* correctly said, release on bail may be necessary for the preparation of a proper defense. By refusing to grant bail in the face of the executive judgment authorizing enquiry into the legalities of the detention, the Court, not the Executive, becomes the obstacle to due process. There may indeed be substance to the apprehension that the Court may be faced with a situation of defiance if upon the grant of bail the executive in fact obstructs release. But then the

Court will have placed responsibility where it should be and can then repeat what the aging Chief Justice Taney said when defied by President Lincoln: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome." [26]

A supplementary argument in support of the subsistence of the right to bail is the dictum that the suspension of the privilege suspends only one consititutional right and leaves all others unaffected. Reliance is had on the pronouncement in *Ex parte Milligan* [27] cited in *Nava, Padilla* and *Morales* to the effect that the framers of the American constitution "limited the suspension of one great right, and left the rest to remain forever inviolable." But this quotation must be read in context. An earlier sentence in the same paragraph says that the suspension of the privilege deprives a citizen of the right to be set at large but that it does not mean 'that he shall be tried *otherwise than by the course of common law."* If one considers that the right to bail was *at common law* considered a matter of discretion for the court and not of absolute right[28] one can see that the context of *Milligan* does not readily yield the reading that the right to bail is included among "the rest" that must "remain forever inviolable." Moreover, the use of this argument concurrently with the waiver theory in Tuason involves an inconsistency: the *Milligan* dictum is being read as holding that the right to bail is never suspended, whereas the Tuason argument presupposes its suspension and argues for its implicity, *ad hoc* restoration upon the filing of a formal charge.

Another supplementary argument used is that the loss of the right to bail implicit in the suspension of the privilege must yield to the guarantee of the right to bail *explicit* in Section 18 of Article IV. However, one could also look at the problem not as conflict between *implicit* and *explicit* but between *generat* and *special.* Section 18 of Article IV speaks of physical liberty in general, that is, in normal and abnormal times and in connection with any kind of offense; whereas the suspension of the privilege deals with physical liberty under special circumstances of emergency and in relation to specific offenses connected with the emergency. When there is conflict between a general and a special provision, the special stands as an exception to the general. But again this conclusion allows for the waiver argument of Justice Tuason: when the executive files formal charges he opens enquiry into the legalities of the case and, as to the specific case, renders the suspension of the privilege without a soul. Moreover, the public order objectives of the suspension of the privilege is protected because the effects of the suspension

remain with respect to other cases not covered by a waiver.

Conclusion

Let me conclude. It is obvious, even from the *Garcia-Padilla* decision alone that we have created an imperial presidency more imperial than the American model. From my reading of the Constitution, the question raised by *Garcia-Padilla* and *Morales* is not so much whether the President has the questioned constitutional powers. He has them. We gave them to him. Somnolently, perhaps, or in a moment of national stupor, but we did give them. Thus the important question now is whether he and those who act for him have used them and will continue to use them wisely, justly, and humanly and whether the Supreme Court will continue to be the last bulwark of our liberties. The argument that these powers are a part of a nation's arsenal for self-defense , as contended by the majority opinions in *Garcia-Padilla and* Morales is not without foundation. But it is not correct to say that every action taken in the name of self-defense is justifiable. As in the case of justifiable self-defense by individuals, collective self-defense must not be an overreaction to a national challenge. The present clamor against unmitigated PCO is not against collective self-defense as such but against a perceived disproportion between the national need and the measures taken to respond to that need.

Beyond the need for balance in the actual exercise of leadership, however, there also is need for recasting the structures of power. Even in *Lansang v. Garcia,* before presidential power reached the unprecedented heights brought about by 1973, 1976, and 1981, Justice Fernando could already conclude, almost in exasperation, that if constitutionalism would assuredly be triumphant, the grant of power to the President to suspend the privilege of the writ and to impose martial law should be stricken from the constitutional text. Or at least they must be subjected to some form of institutional check. But the Constitutional Convention of 1971 did not so think: or perhaps was not allowed to so think. And in our folly, by the Transitory Provisions of 1973 and by the amendments of 1976, we strengthened the President even more; and in 1981 we fortified his spirit further by giving him and those acting pursuant to his specific orders blanket immunity from suit thus removing whatever deterrent effect fear of civil or criminal accounting might have. Is it not time now to begin drumming up support for some measure of presidential emasculation? Faith alone after the manner of Justice de Castro's preachment will not suffice.

Justice de Castro's appeal to faith is perhaps symptomatic of the state

of the judicial soul. It shows signs of being in a debilitated state. The onset of debilitation was clearly visible in the *Javellana* decision which placed a stamp of legitimacy on an informal process of ratifying a new Constitution which set up authoritarian rule indefinite in duration as a transitional step towards a parliamentary form of government. The decision also prepared the Supreme Court logically to accept and formulate in the subsequent *Aquino, Jr.* cases an expanded martial law doctrine which only served to entrench authoritarianism ever more firmly in Philippine political life. And having once allowed the "simplification" of the amendatory process in *Javellana,* the Court soon found itself in *Sanidad* [29] scraping the constitutional parchment and scouring the interstices of the constitutional text for hidden troves of presidential constituent power that would allow the President to propose amendments to the constitution. The *Garcia-Padilla* and *Morales* decisions are of a piece with what preceded. They ride on the momentum of judicial generosity to the President and affirm presidential prerogative in excess of what is needed for the moment. Where will it ever end?

In the end, the weal or woe of a nation is in the people's hands. A nation of sheep deserves a ruler who leads by the thumping of the shepherd's crook. Have we perhaps through indifference become a nation of sheep?

NOTES

1 G. R. 61388, April 20, 1983.
2 5 Phil. 87 (1905)
3 91 Phil. 882 (1952).
4 42 SCRA 448 (1971).
5 103 Phil. 1051, 1067 (1957)
6 369 U. S. 186, 217 (1962).
7 25 U. S. (12 wheat.) 19 (1827).
8 4 SCRA 792 (1962)
9 46 SCRA 474 (1972)
10 46 SCRA 160 (1972)
11 21 SCRA 52 (1967)
12 50 SCRA 30, 141 (1973)
13 83 Phil. 17 (1949)
14 CORWIN, THE PRESIDENT: OFFICE AND POWERS 147.
15 42 SCRA at 480.
16 Id. at 481
17 G. R. 61016, April 26, 1983. Justice Hermogenes Concepcion penned the decision but, on the return to *Lansang,* he could only get the concurrences of Fernando,

Teehankee, and Aquino. The rest concurred only in the dismissal of the case.
18. 42 SCRA at 512-13.
19 5 U. S. (1 Cranch) 137 (1803)
20 212 U. S. 788, 84-85 (1909)
21 287 U. S. 378 (1932)
22 62 SCRA 275, 297 (January 31, 1975).
23 90 Phil. 172 (1951)
24 Id. at 180-185, 213-215
25. Id. at 204 The waiver by the state operates as a reverse analogue of the principle established by the Court that when a detainee posts bail he thereby waives his right to challenge any irregularity in his arrest. Callanta v. Villanueva, 77 SCRA 377 (June 20, 1977).
26 Ex Parte Merryman, 17 Fed. Cas. 144, 153 (D. Md. 1861)
27 4 Wall. 2, 123 (1866)
28 SCHWARTZ, 1 THE RIGHTS OF THE PERSON 74, and cases cited.
29 73 SCRA 333 (October 12, 1976).

OPEN LETTER TO SOLICITOR GENERAL ESTELITO P. MENDOZA, MINISTER OF JUSTICE RICARDO C. PUNO, & PRESIDENTIAL ASSISTANT FOR LEGAL AFFAIRS MANUEL M. LAZARO – RE: PCO CASES & LANSANG DOCTRINE

Dear Sirs,

I have just read your articles in the *Philippine Law Gazette* Volume 7, Nos. 7& 8, April-May, 1983, where you made the following statements:

Solicitor General Mendoza: "xxx I took pains to make a numerical count of the Justices' votes in view of the erroneous impression that the *Padilla* case was reversed six days later by the *Morales* case. This must have been due to the statement in the *Morales* case to the effect that 'we reiterate this doctrine' – referring to *Lansang.* However, careful scrutiny of the votes of the Justices in the *Morales* case will show that only the Chief Justice, Mr. Justice Teehankee and Mr. Justice Concepcion agreed to retain the rule of *Lansang.* That only makes *three* of them. But the nine Justices who had previously voted to abandon the *Lansang* rule in the *Padilla* case stuck to their position. They either merely concurred in the result of the case, meaning in the dismissal of the petition, or explained their concurrence. One Justice, Mr. Justice Aquino, who was on leave in the *Padilla* case also merely concurred in the result of the *Morales* case. Another Justice, Madam Justice Herrera, also simply concurred in the result. In her separate concurring opinion, she said that 'there should be no justification in these cases to assail whatever has been said or resolved in *Lansang v. Garcia.*' It is thus crystal clear that with nine Justices sticking to their views in the *Padilla* case, the *Lansang* doctrine was not resuscitated in the *Morales* case. The *Lansang* doctrine remains abandoned" (pp. 3-4, *supra).*

Minister Puno: (Thru Ministry Circular No. 16) "5. *The Presidential power to suspend the privilege of the writ of habeas corpus on which the authority to issue PCO is based , is not subject to judicial inquiry;*