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G.R. No. 252578 – ATTY. HOWARD M. CALLEJA, ET AL., *petitioners,* **v. EXECUTIVE SECRETARY, ET AL.,** *respondents;*

G.R. No. 252579 – REP. EDCEL C. LAGMAN, *petitioner,* **v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 252580 - MELENCIO S. STA. MARIA, et al., *petitioners,* **v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 252585 – BAYAN MUNA PARTY-LIST REPRESENTATIVES CARLOS ISAGANI T. ZARATE, ET AL., *petitioners,* **v. PRESIDENT RODRIGO DUTERTE, ET AL.,** *respondents;*

G.R. No. 252613 – RUDOLF PHILIP B. JURADO, *petitioner,* **v. THE ANTI-TERRORISM COUNCIL, ET AL.,** *respondents;*

G.R. No. 252623 – CENTER FOR TRADE UNION AND HUMAN RIGHTS (CTUHR), ET AL., *petitioners,* **v. HON. RODRIGO R. DUTERTE, ET AL.,** *respondents;*

G.R. No. 252624 – CHRISTIAN S. MONSOD, ET AL., *petitioners,* **v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

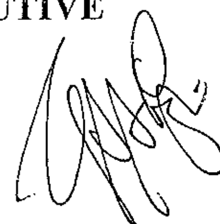
G.R. No. 252702 – FEDERATION OF FREE WORKERS (FFW-NAGKAISA) HEREIN REPRESENTED BY ITS NATIONAL PRESIDENT ATTY. JOSE SONNY MATULA, ET AL., *petitioners,* **v. OFFICE OF THE PRESIDENT OF THE REPUBLIC OF THE PHILIPPINES, ET AL.,** *respondents;*

G.R. No. 252726 – JOSE J. FERRER, JR., *petitioner,* **v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 252733 – BAGONG ALYANSANG MAKABAYAN (BAYAN) SECRETARY GENERAL RENATO REYES, JR., ET AL., *petitioners,* **v. H.E. RODRIGO R. DUTERTE, ET AL.,** *respondents;*

G.R. No. 252736 – ANTONIO T. CARPIO, ET AL., *petitioners,* **v. ANTI-TERRORISM COUNCIL, ET AL.,** *respondents;*

G.R. No. 252741 – MA. CERES P. DOYO, ET AL., *petitioners,* **v. SALVADOR MEDIALDEA, IN HIS CAPACITY AS EXECUTIVE SECRETARY, ET AL.,** *respondents;*



G.R. No. 252747 – NATIONAL UNION OF JOURNALISTS OF THE PHILIPPINES, ET AL., *petitioners,* **v. ANTI-TERRORISM COUNCIL, ET AL.,** *respondents;*

G.R. No. 252755 – KABATAANG TAGAPAGTANGGOL NG KARAPATAN REPRESENTED BY ITS NATIONAL CONVENER BRYAN EZRA C. GONZALES, ET AL., *petitioners,* **v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 252759 – ALGAMAR A. LATIPH, ET AL., *petitioners,* **v. SENATE, REPRESENTED BY ITS PRESIDENT, VICENTE C. SOTTO III, ET AL.,** *respondents;*

G.R. No. 252765 – THE ALTERNATIVE LAW GROUPS, INC. (ALG), *petitioner, v.* **EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 252767 – BISHOP BRODERICK S. PABILLO, ET AL., *petitioners,* **v. PRESIDENT RODRIGO R. DUTERTE, ET AL.,** *respondents;*

G.R. No. 252768 – GENERAL ASSEMBLY OF WOMEN FOR REFORMS, INTEGRITY, EQUALITY, LEADERSHIP AND ACTION (GABRIELA), INC., ET AL., *petitioners,* **v. PRESIDENT RODRIGO ROA DUTERTE, ET AL.,** *respondents;*

UDK 16663 – LAWRENCE A. YERBO, *petitioner,* **v. OFFICES OF THE HONORABLE SENATE PRESIDENT, ET AL.,** *respondents;*

G.R. No. 252802 – HENDY ABENDAN OF CENTER FOR YOUTH PARTICIPATION AND DEVELOPMENT INITIATIVES, ET AL., *petitioners,* **v. HON. SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 252809 – CONCERNED ONLINE CITIZENS REPRESENTED AND JOINED BY MARK L. AVERILLA, ET AL., *petitioners,* **v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 252903 – CONCERNED LAWYERS FOR CIVIL LIBERTIES (CLCL) MEMBERS RENE A.V. SAGUISAG, ET AL., *petitioners,* **v. PRESIDENT RODRIGO ROA DUTERTE, ET AL.,** *respondents;*

G.R. No. 252904 – BEVERLY LONGID, ET AL., *petitioners,* **v. ANTI-TERRORISM COUNCIL, ET AL.,** *respondents;*

G.R. No. 252905 – CENTER FOR INTERNATIONAL LAW (CENTERLAW), INC., ET AL., *petitioners,* v. SENATE OF THE PHILIPPINES, ET AL., *respondents;*

G.R. No. 252916 – MAIN T. MOHAMMAD, ET AL., *petitioners,* v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL., *respondents*;

G.R. No. 252921 – BRGY. MAGLAKING, SAN CARLOS CITY, PANGASINAN SANGGUNIANG KABATAAN (SK) CHAIRPERSON LEMUEL GIO FERNANDEZ CAYABYAB, ET AL., *petitioners,* v. RODRIGO R. DUTERTE, ET AL., *respondents*;

G.R. No. 252984 – ASSOCIATION OF MAJOR RELIGIOUS SUPERIORS IN THE PHILIPPINES (REPRESENTED BY ITS CO-CHAIRPERSONS, FR. CIELITO R. ALMAZAN OFM AND RSR MARILYN A. JAVA RC AND ITS CO-EXECUTIVE SECRETARIES, FR. ANGELITO A. CORTEZ OFM AND SR. CRISVIE T. MONTECILLO, DSA), ET AL., *petitioners,* v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL., *respondents;*

G.R. No. 253018 – UNIVERSITY OF THE PHILIPPINES (UP)-SYSTEM FACULTY REGENT DR. RAMON GUILLERMO, ET AL., *petitioners,* v. H.E. RODRIGO R. DUTERTE, ET AL., *respondents;*

G.R. No. 253100 – PHILIPPINE BAR ASSOCIATION, *petitioner,* v. THE EXECUTIVE SECRETARY, ET AL., *respondents;*

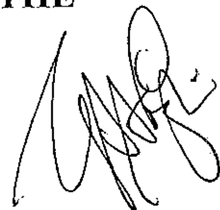
G.R. No. 253118 – BALAY REHABILITATION CENTER, INC. (BALAY), ET AL., *petitioners,* v. RODRIGO R. DUTERTE, IN HIS CAPACITY AS PRESIDENT OF THE REPUBLIC OF THE PHILIPPINES, ET AL., *respondents*;

G.R. No. 253124 – INTEGRATED BAR OF THE PHILIPPINES, ET AL., *petitioners,* v. SENATE OF THE PHILIPPINES, ET AL., *respondents;*

G.R. No. 253242 – COORDINATING COUNCIL FOR PEOPLE'S DEVELOPMENT AND GOVERNANCE, INC. (CPDG), ET AL., *petitioners,* v. RODRIGO R. DUTERTE, ET AL., *respondents;*

G.R. No. 253252 – PHILIPPINE MISEREOR PARTNERSHIP, INC., ET AL., *petitioners,* v. EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL., *respondents;*

G.R. No. 253254 – PAGKAKAISA NG KABABAIHAN PARA SA KALAYAAN (KAISA KA) ACTION AND SOLIDARITY FOR THE



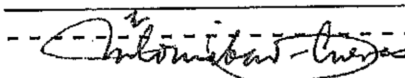
EMPOWERMENT OF WOMEN (ASSERT-WOMEN), ET AL., *petitioners,* **v. ANTI-TERRORISM COUNCIL, ET AL.,** *respondents*;

G.R. No. 254191 (UDK 16714) – ANAK MINDANAO (AMIN) PARTY-LIST REPRESENTATIVE AMIHILDA SANGCOPAN, ET AL., *petitioners,* **v. THE EXECUTIVE SECRETARY HON. SALVADOR C. MEDIALDEA, ET AL.,** *respondents;*

G.R. No. 253420 – HAROUN ALRASHID ALONTO LUCMAN, JR., ET AL., *petitioners,* **v. SALVADOR C. MEDIALDEA IN HIS CAPACITY AS EXECUTIVE SECRETARY, ET AL.,** *respondents.*

Promulgated:

December 7, 2021

x-  - - - x

CONCURRING AND DISSENTING OPINION

> **"The challenge to our liberties comes frequently not from those who consciously seek to destroy our system of government, but from men of goodwill—good men who allow their proper concerns to blind them to the fact that what they propose to accomplish involves an impairment of liberty."**
>
> **- Justice William O. Douglas, A Living Bill of Rights**[1]

CAGUIOA, *J.*:

This case involves a statute that unapologetically encroaches on protected freedoms. Unlike most laws that were previously challenged before the Court, Republic Act (R.A.) No. 11479,[2] or the Anti-Terrorism Act of 2020 (ATA), unabashedly breaches fundamental liberties — as these breaches are plainly written in the law itself. Respondents do not refute this. They argue only that without the requisite intent to commit terrorism,[3] the exercise of civil and political rights remain unburdened.[4]

From the numerous and voluminous submissions of the parties, the issues in this case can be distilled down to the following questions:

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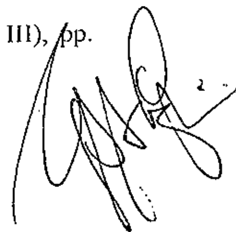
1 Cited in the Dissenting Opinion of then Associate Justice Claudio S. Teehankee in *In Re: Ilagan v. Enrile*, No. L-70748, October 21, 1985, 139 SCRA 349, 391. Emphasis supplied; italics omitted.

2 AN ACT TO PREVENT, PROHIBIT AND PENALIZE TERRORISM, THEREBY REPEALING REPUBLIC ACT NO. 9372, otherwise known as the "HUMAN SECURITY ACT OF 2007," approved on July 3, 2020.

3 Memorandum for Respondents (Vol. I), p. 283.

4 Memorandum for Respondents (Vol. II), p. 288-291; Memorandum for Respondents (Vol. III), pp. 634-635.



(1) Whether petitioners present an actual or justiciable controversy;

(2) Whether a penal statute, such as the ATA, may be facially challenged;

(3) Whether the ATA infringes fundamental rights guaranteed under the Constitution; and

(4) Whether the ATA violates the principle of separation of powers.

The majority partially grants the petitions and declares as unconstitutional the following provisions of the ATA:[5] (1) the qualifying clause (denominated as the "Not Intended Clause" in the *ponencia*) in Section 4[6] that carved out an exception to the exercise of civil and political rights;[7] and (2) the second mode of designation in Section 25.[8] At the same time, the majority declares as constitutional a portion of Section 4[9] (as delineated by the *ponencia*), Sections 5,[10] 6,[11] 8,[12] 9,[13] 10,[14] 12,[15] the first[16] and third[17] modes of designation in Section 25, and Section 29.[18]

I join the majority in declaring unconstitutional the foregoing provisions of the ATA. I write this Separate Opinion to expound on my reasons for agreeing with the majority, my objections to the constitutionality of the third mode of designation and Section 29, and to dispute the unwarranted narrow application of facial challenges to cases involving free speech.

I.

The issues raised in the consolidated petitions warrant review under the Court's expanded certiorari jurisdiction.

Foremost, I agree with the *ponencia* that except for two (2) petitions challenging the ATA,[19] the requirements for judicial review were met.[20]

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5 *Ponencia*, p. 229.
6 [Definition of] Terrorism.
7 The proviso reads: "x x x which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety." The *ponencia* describes this as the "Not Intended Clause."
8 Designation of Terrorist Individual, Groups of Persons, Organizations or Associations.
9 [Definition of] Terrorism.
10 Threat to Commit Terrorism.
11 Planning, Training, Preparing, and Facilitating the Commission of Terrorism.
12 Proposal to Commit Terrorism.
13 Inciting to Commit Terrorism.
14 Recruitment to and Membership in a Terrorist Organization.
15 Providing Material Support to Terrorists.
16 Automatic adoption of the United Nations Security Council Consolidated List.
17 Designation by the Anti-Terrorism Council.
18 Detention Without Judicial Warrant of Arrest.
19 The *ponencia* dismisses *Yerbo v. Offices of the Honorable Senate President* (UDK 16663) and *Balay Rehabilitation Center Inc. v. Duterte* (G.R. No. 253118).

Petitioners invoke the Court's expanded *certiorari* jurisdiction under Section 1, Article VIII, of the 1987 Constitution, which, although more expansive in scope, is still, in itself, an exercise of judicial power. As such, the following requirements of justiciability must still apply: (1) the existence of an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have legal standing or *locus standi;* (3) the question of constitutionality must be raised at the earliest possible opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.[21] As stated at the outset, I agree that all four requirements have been established.

In the recent case of *Pangilinan v. Cayetano*,[22] the Court reiterated that "[t]he clause articulating expanded *certiorari* jurisdiction requires a *prima facie showing of grave abuse of discretion in the assailed governmental act which, in essence, is the actual case or controversy.*"[23] Thus, it is unnecessary for petitioners to, as the OSG submits, establish both a *prima facie* case of grave abuse of discretion and an actual case of controversy. Here, the opposing claims of petitioners and the OSG on whether the ATA violates the provisions of the Constitution, *i.e.*, the provisions on fundamental rights, separation of powers, and undue delegation of legislative power, among others, constitute a *prima facie* case of grave abuse of discretion, which impels the Court to exercise its expanded *certiorari* jurisdiction.

The controversy before the Court is also ripe for adjudication. As held in *Francisco, Jr. v. House of Representatives*[24] (*Francisco, Jr.*) to satisfy the requirement of ripeness, "it is a prerequisite that something had by then been accomplished or performed by either branch before a court may come into the picture." Here, the enactment of the law which contains provisions that contravene the Constitution is enough for the Court to exercise judicial review.

The invocation of the political question doctrine is also unavailing. A political question is still justiciable when there are constitutional limits on the powers or functions conferred upon the political bodies, as with the Congress in this case. Thus, although the Court may not inquire upon the wisdom or policy behind the enactment of the ATA, it nevertheless has a beholden duty to ensure that the limits on the power of Congress have not been exceeded and the sanctity of the Constitution is upheld. This is

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I fully agree with the reasons of the *ponencia* as regards the dismissal of the *Yerbo* petition, which is completely lacking not only in form, but in substance. Likewise, I concur with respect to the dismissal of the *Balay Rehabilitation Center* petition, as petitioners therein anchor their arguments on essentially factual matters that are beyond the purview of this Court's power of judicial review. Thus, my concurrence with the *ponencia* in relation to the requirements for judicial review pertains to the thirty-five consolidated petitions.

[20] *Ponencia*, pp. 55-67.

[21] See *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Association, Inc.*, G.R. Nos. 207132 & 207205, December 2016, 812 SCRA 452, 492; *Francisco, Jr. v. House of Representatives*, G.R. Nos. 160261, etc., November 10, 2003, 415 SCRA 44, 133.

[22] G.R. Nos. 238875, 239483 & 240954, March 16, 2021.

[23] Id. at 61. Italics supplied.

[24] Supra note 21.

accomplished through the Court's exercise of its expanded *certiorari* jurisdiction.

As well, petitioners have legal standing.

A party must generally show that (1) he will personally suffer some actual or threatened injury because of the allegedly illegal conduct of the government; (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable action.[25] Moreover, the injury claimed must be real, and not imagined, superficial, or insubstantial.[26]

I fully agree with the *ponencia* that petitioners were able to establish an actual or threatened injury as a result of the ATA's implementation.[27] The Anti-Terrorism Council (ATC), one of the respondents in several of the petitions, issued numerous resolutions[28] in the exercise of its authority to designate terrorist individuals, groups, organizations, or associations under Section 25. Among those designated by the ATC as a terrorist individual is Rey Claro Cera Casambre, a petitioner in G.R. No. 252767, who the ATC considers a member of the Communist Party of the Philippines (CPP).[29] This evidently demonstrates that the ATA is in full force and effect, and its consequences are neither imaginary nor speculative.

Furthermore, since the enactment of the ATA, several spokespersons of the National Task Force to End Local Communist Armed Conflict (NTF-ELCAC) have issued statements that affiliate certain individuals — *particularly, those who came before the Court to challenge the ATA* — as members of a designated terrorist organization. Lt. Gen. Antonio Parlade, Jr. (General Parlade), prior to his resignation as spokesperson of the NTF-ELCAC,[30] called petitioner Carlos Zarate[31] (Zarate) and several others in his

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25 *Roy III v. Herbosa*, G.R. No. 207246, November 22, 2016, 810 SCRA 1, 35.

26 Id. at 35.

27 *Ponencia*, pp. 63-64.

28 ATC Resolution No. 12 (2020), Designating the Communist Party of the Philippines and the New People's Army also known as Bagong Hukbong Bayan (CPP/NPA) as Terrorist Organizations, Associations, and/or Groups of Persons (December 9, 2020) available at <https://www.officialgazette.gov.ph/downloads/2020/12dec/20201209-ATC-12-RRD.pdf>; ATC Resolution No. 13 (2020), Designation of Islamic State East Asia, Maute Group, Daulah Islamiyah, and Other Associated Groups as Terrorist Organizations, Associations, and/or Groups of Persons (December 9, 2020) available at <https://www.officialgazette.gov.ph/downloads/2020/12dec/20201209-ATC-13-RRD.pdf>; ATC Resolution No. 20 (2021), Designating the 20 Individuals Affiliated with the Local Terrorist Groups, which are Designated under Anti-Terrorism Council Resolution No. 13 (2020), as Terrorists (June 23, 2021), available at <https://www.officialgazette.gov.ph/downloads/2021/06jun/20210623-ATC-Resolution-20.pdf>; ATC Resolution No. 21 (2021), Designating the National Democratic Front (NDF) also known as the National Democratic Front of the Philippines (NDFP) as a Terrorist Organization/Association dated 23 June 2021 (June 23, 2021), available at <https://www.officialgazette.gov.ph/downloads/2021/06jun/20210623-ATC-Resolution-21.pdf>.

29 Designation of Central Committee Members of the Communist Party of the Philippines and the New People's Army also known as Bagong Hukbong Bayan (CPP/NPA), which was Designated under Anti-Terrorism Council Resolution No. 12 (2020), as Terrorists (April 21, 2021), available at <https://www.officialgazette.gov.ph/downloads/2021/04apr/20210421-ATC-RESO-17-RRD.pdf>.

30 Priam Nepomuceno, Philippine News Agency, "Parlade quits as NTF ELCAC spox but will continue fight vs. Reds," available at <https://www.pna.gov.ph/articles/1145578>.

31 Petitioner in G.R. No. 252585.

Facebook post as "CPP representatives and colleagues, including NUPL."[32] In the same Facebook post, he stated that "individuals, groups, and organizations opposing [the ATA]"[33] have an agenda, and that while activism should be welcomed, only "legitimate activists"[34] should be protected.[35]

Another spokesperson of the NTF-ELCAC, Undersecretary Lorraine Badoy (Undersecretary Badoy), was likewise reported to have identified petitioner Zarate and the other representatives from the Makabayan Bloc as "high ranking party members of the [CPP]."[36] She even posted this statement on the Facebook page of the NTF-ELCAC.[37] She also called the League of Filipino Students[38] a "known front" of the CPP.[39]

The National Security Adviser, General Hermogenes Esperon, Jr., appears to share the same sentiments as the spokespersons of the NTF-ELCAC when he identified the "members from the Alliance of Concerned Teachers, Anakbayan, [Kilusang Mayo Uno], Bagong Alyansang Makabayan, GABRIELA, and several others" as allies of Jose Maria Sison.[40] Even Solicitor General Calida, in his opening statement during the oral arguments, insinuated that several of the petitioners are affiliated with the CPP.[41]

To reiterate, both General Esperon and Undersecretary Badoy were spokespersons of the NTF-ELCAC at the time they issued these statements.[42] The NTF-ELCAC, while a distinct and separate agency from the ATC, is mainly composed of the same members constituting the ATC —

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32 Antonio Parlade, Facebook Post dated January 16, 2021 at <https://www.facebook.com/antonio.parladejr/posts/3605232892888246>; see also Manifestation and Motion [Re: Possible Intimidation Prior to Oral Arguments] dated January 22, 2021, filed by petitioners in G.R. No. 252736.

33 Id.

34 Id.

35 Memorandum for Petitioners (Cluster I), pp. 61-62.

36 Gabriel Pabico Lalu, Inquirer.net, "Badoy Insists Makabayan Reps are CPP NPA Execs; Gaite says explain pork barrel," available at <https://newsinfo.inquirer.net/1332050/badoy-insists-makabayan-reps-are-cpp-npa-execs-gaite-says-explain-pork-instead>.

37 Id.

38 One of the petitioners in G.R. No. 252733, Joanna Marie Gaspar Robles, is the Deputy Secretary General of the League of Filipino Students.

39 Xave Gregorio, Philstar.com, "NTF-ELCAC spox baselessly red-tags CNN Philippines for sharing student org's donation drive," available at <https://www.philstar.com/headlines/2020/11/14/2056851/ntf-elcac-spox-baselessly-red-tags-cnn-philippines-sharing-student-orgs-donation-drive>; see also Petition of *Bayan v. Duterte* G.R. No. 252733, pp. 25-39.

40 TSN, Oral Arguments, May 12, 2021, p. 101.

41 OSG Opening Statement, p. 16, par. 83: "On March 30, 2021—less than a month ago—a PNP contingent raided a CPP-NPA armory in Sta. Rosa, Laguna. Like in Mindoro, the police officers, too, found a cache of high-powered firearms and explosives, which included improvised anti-personnel and claymore mines. Likewise discovered in the armory were subversive documents, streamers, campaign paraphernalia of **Congressman Colmenares, Bayan Muna and Gabriela**, and training materials on advanced revolutionary warfare." (emphasis supplied)

42 See Office of the President Executive Order (E.O.) No. 70, INSTITUTIONALIZING THE WHOLE-OF-NATION APPROACH IN ATTAINING INCLUSIVE AND SUSTAINABLE PEACE, CREATING A NATIONAL TASK FORCE TO END LOCAL COMMUNIST ARMED CONFLICT, AND DIRECTING THE ADOPTION OF A NATIONAL PEACE FRAMEWORK, December 4, 2018 available at <https://www.officialgazette.gov.ph/downloads/2018/12dec/20181204-EO-70-RRD.pdf>.

the primary agency tasked with the implementation of the ATA.[43] Meanwhile, General Esperon is a member of both the NTF-ELCAC and the ATC. It is thus reasonable to construe their statements as indicative of the manner by which the ATA will be enforced.

At this juncture, it bears emphasizing that membership in a terrorist organization,[44] or providing material support to terrorists,[45] are punishable acts under the ATA. Petitioners, having been accused to be associated with the CPP — a designated terrorist organization — are especially vulnerable to being prosecuted pursuant to these provisions. Furthermore, those who may not be considered "legitimate" activists or dissenters may be prosecuted for expressing views that are aligned with those identified as terrorists. As the fear of prosecution under the ATA is patently imminent, petitioners' claim of a credible threat of prosecution[46] was correctly given merit.[47]

At any rate, the Court had, in the past, relaxed the requirement of standing on the ground of transcendental importance. As will be discussed in further detail below, petitioners have demonstrated that the issues raised in the consolidated petitions are of transcendental importance, thereby justifying the liberal application of the legal standing requirement.

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43 Section 45 of R.A. No. 11479 creates the Anti-Terrorism Council (ATC). Its members are: (1) the Executive Secretary, who shall be its Chairperson; (2) the National Security Adviser who shall be its Vice Chairperson; and (3) the Secretary of Foreign Affairs; (4) the Secretary of National Defense; (5) the Secretary of the Interior and Local Government; (6) the Secretary of Finance; (7) the Secretary of Justice; (8) the Secretary of Information and Communications Technology; and (9) the Executive Director of the Anti-Money Laundering Council (AMLC) Secretariat as its other members.

Meanwhile, the NTF-ELCAC is composed of the President of the Republic of the Philippines, as Chair; the National Security Adviser, as Vice-Chair; and the following as members:

a. Secretary, Department of the Interior and Local Government;
b. Secretary, Department of Justice;
c. Secretary, Department of National Defense;
d. Secretary, Department of Public Works and Highways;
e. Secretary, Department of Budget and Management;
f. Secretary, Department of Finance;
g. Secretary, Department of Agrarian Reform;
h. Secretary, Department of Social Welfare and Development;
i. Secretary, Department of Education;
j. Director General, National Economic and Development Authority;
k. Director General, National Intelligence Coordinating Agency;
l. Director General, Technical Education and Skills Development Authority;
m. Presidential Adviser on the Peace Process;
n. Presidential Adviser for Indigenous Peoples' Concerns;
o. Chief of Staff, Armed Forces of the Philippines;
p. Director General, Philippine National Police;
q. Chairperson, National Commission on Indigenous Peoples;
r. Secretary, Presidential Communications Operations Office; and
s. Two (2) Representatives from the private sector.

Except for the private sector representatives, the members may designate an alternate, with a rank not lower than an Assistant Secretary, to represent their respective offices in the Task Force, provided that the alternate must be fully authorized to decide on behalf of the member. The names of the alternates shall be submitted to the National Secretariat.

The Private Sector Representatives, with a term of one (1) year each, shall be appointed by the President upon the recommendation of the Task Force. (E.O. No. 70, Sec. 3)

44 R.A. No. 11479, Sec. 10.

45 Id., Sec. 12.

46 See *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. Nos. 178552, etc., 632 SCRA 146, 177, citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

47 *Ponencia*, p. 64.

The question of constitutionality has also been raised at the earliest possible opportunity.

The earliest opportunity to raise a constitutional issue is in the pleadings before a competent court that can resolve the same, such that, if it was not raised in the pleadings before said competent court, it cannot be considered at the trial, and, if not considered in the trial, it cannot be considered on appeal.[48] Here, petitioners immediately filed their respective petitions directly with the Court to assail the constitutionality of the ATA right after the passage of said law. They did not institute any other proceedings before a court of competent jurisdiction where the constitutional issue could have been threshed out. The case before the Court is, in other words, the earliest opportunity for petitioners to raise the issue of the constitutionality of the ATA.

Finally, it is beyond cavil that the consolidated petitions before the Court center on the constitutionality of the ATA. The question of constitutionality is not raised merely as an ancillary argument, but the very issue for which the Court's exercise of its power of judicial review has been invoked. It is, therefore, the *lis mota* of the case.

Considering that the requirements for judicial inquiry have been met, I agree with the *ponencia* that thirty-five (35) of the consolidated petitions present a justiciable case before the Court.

II.

Petitioners' direct recourse to the Court is justified.

I also agree that the issues raised in the consolidated petitions warrant direct recourse to the Court.

In the case of *Gios-Samar, Inc. v. Department of Transportation and Communications*[49] (*Gios-Samar*), the Court discussed the general rule on the doctrine of hierarchy of courts and the recognized exceptions thereto. *Gios-Samar* emphasized that the Court may only take cognizance of cases brought before it by direct recourse if any of the exceptions enumerated in the case of *The Diocese of Bacolod v. Commission on Elections*[50] (*Diocese*) exists **and** if the nature of the question is purely legal. Stated otherwise, if the case filed directly before the Court raises factual issues, direct recourse to the Court is improper **regardless** of the invocation or existence of the recognized exceptions in *Diocese*. The factual issues must first be tried before the lower courts through the presentation of evidence.

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[48] *The Province of Nueva Vizcaya v. CE Casecnan Water and Energy Company, Inc.*, G.R. No. 241302, February 1, 2021, p. 9, citing *Estarija v. Ranada*, 525 Phil. 718, 729-730 (2006), further citing *Matibag v. Benipayo*, 429 Phil. 554 (2002).

[49] G.R. No. 217158, March 12, 2019, 896 SCRA 213.

[50] G.R. No. 205728, January 21, 2015, 747 SCRA 1.

The existence of questions of fact which are indispensable to the resolution of the legal issues was the basis of the dismissal of the petition in *Gios-Samar*. There, petitioner questioned the constitutionality of the bundling of the projects for the development, operations, and maintenance of several airports, and sought to enjoin respondents from bidding out the bundled projects. Invoking transcendental importance, petitioner therein filed its petition for prohibition directly with the Court. The Court in *Gios-Samar* found that "petitioner's arguments against the constitutionality of the bundling of the projects are inextricably intertwined with underlying questions of fact, the determination of which require the reception of evidence. The Court, however, is not a trier of facts. We cannot resolve these factual issues at the first instance."[51]

This is ***not*** the case in the present consolidated petitions.

To note, the Court's ruling in *Gios-Samar* merely reiterates that the Court will refuse to resolve legal issues, regardless of the allegation or invocation of compelling reasons, when there exists a need to determine a factual issue that is indispensable for their resolution. As reiterated time and again, the Court is *not* a trier of facts. ***However*, said ruling does not serve as basis to preclude the Court from affording direct relief in cases where "serious and important reasons" necessitate the resolution of legal issues.** This much is clear from the Court's subsequent ruling in *Joint Ship Manning Group, Inc. v. Social Security System*[52] (*Joint Ship*).

In *Joint Ship,* petitioners therein assailed the validity of Section 9-B of R.A. No. 11199, otherwise known as the Social Security Act of 2018, which mandates compulsory Social Security System (SSS) coverage for Overseas Filipino Workers (OFWs). Section 9-B constitutes manning agencies as agents of their principals, and employers of sea-based OFWs; holds them jointly and severally liable with their principal with respect to civil liabilities arising from violation of R.A. No. 11199; and holds persons having direct control, management and direction of manning agencies criminally liable for any act or omission penalized thereunder.

Petitioners filed a Petition for *Certiorari* and Prohibition challenging Section 9-B for being violative of the requirements of substantive due process, and the principle of equal protection of laws. Speaking on the justiciability of the issues raised in the petition, the Court emphasized that the mere passage of the law does not *per se* justify a direct attack against its constitutionality. In addition, there must be an immediate or threatening injury to petitioners as a result of the challenged action.

Hence, in *Joint Ship,* the Court, speaking through Chief Justice Alexander Gesmundo, observed that petitioners failed to allege that they already sustained or are immediately in danger of sustaining direct injury

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[51] *Gios-Samar, Inc. v. Department of Transportation and Communications*, supra note 49, at 233.
[52] G.R. No. 247471, July 7, 2020.

from R.A. No. 11199. ***Nevertheless***, **the Court allowed petitioners to seek direct relief from the Court as the petition presented a case of first impression, and the issues involved public welfare and the advancement of public policy**. The Court held:

> Nevertheless, the Court, through the years, has allowed litigants to seek from it direct relief upon allegation of "serious and important reasons." *Diocese of Bacolod v. Commission on Elections* [(*Diocese*)] summarized these circumstances in this wise:
>
> > (1) when there are genuine issues of constitutionality that must be addressed at the most immediate time;
> >
> > (2) when the issues involved are of transcendental importance;
> >
> > (3) cases of first impression;
> >
> > (4) the constitutional issues raised are better decided by the Court;
> >
> > (5) exigency in certain situations;
> >
> > (6) the filed petition reviews the act of a constitutional organ;
> >
> > (7) when petitioners rightly claim that they had no other plain, speedy, and adequate remedy in the ordinary course of law that could free them from the injurious effects of respondents' acts in violation of their right to freedom of expression; [and]
> >
> > (8) the petition includes questions that are "dictated by public welfare and the advancement of public policy, or demanded by the broader interest of justice, or the orders complained of were found to be patent nullities, or the appeal was considered as clearly an inappropriate remedy."
>
> It must be clarified, however, that the presence of one or more of the so-called "serious and important reasons" is not the only decisive factor considered by the Court in deciding whether to permit the invocation, at the first instance, of its original jurisdiction over the issuance of extraordinary writs. Rather, it is the nature of the question raised by the parties in those "exceptions" that enables us to allow the direct action before the Court.
>
> In this case, the Court finds that petitioners may seek direct relief because of the existence of two of the exceptions, particularly: (1) that this case is of first impression; and (2) that present issue involves public welfare and the advancement of public policy, or demanded by the broader interest of justice. The assailed law concerns the welfare of OFWs, the modern-day Filipino heroes, and the grant of social protection in their favor. For the first time, the social security membership and contributions of OFWs, specifically, the seafarers, are mandated by law. Indeed, the Court must ensure that this social security must be for the welfare of the seafarers and, at the same time, not unduly oppressive to other

> stakeholders, such as the manning agencies and foreign ship owners. Accordingly, the petition should be discussed on its substantive aspect.[53]

The issues raised in the consolidated petitions warrant the exact same treatment. On this score, I echo the *ponencia*'s finding that the issues involved are of transcendental importance.[54] Moreover, the consolidated petitions raise genuine issues of constitutionality that must be addressed at the most immediate time. Thus, I agree that deviation from the strict application of the doctrine of hierarchy of courts is permitted, if not completely warranted, in the present case.

A. Transcendental Importance

In *Francisco, Jr.*, the Court enumerated the determinants of transcendental importance as follows:

> There being no doctrinal definition of transcendental importance, the following determinants formulated by former Supreme Court Justice Florentino P. Feliciano are instructive: (1) the character of the funds or other assets involved in the case; (2) the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and (3) the lack of any other party with a more direct and specific interest in raising the questions being raised. x x x[55]

Explicit in the above pronouncement is the Court's recognition that "transcendental importance" eludes definition. Contrary to respondents' posturing,[56] these determinants of transcendental importance are not to be taken as rigid enclosures within which all cases of transcendental importance must fit. The Court should not be emasculated by the determinants it recognized in earlier cases as these serve as mere guideposts rather than strict parameters that must be satisfied with exactitude in all cases. To illustrate, cases such as *Imbong v. Ochoa, Jr.*[57] (*Imbong*) and *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*[58] (*SPARK*) did not even mention these determinants despite the Court's recognition that these cases are of transcendental importance.

In fact, a closer scrutiny on the origin of these "determinants" would yield the realization that these factors were merely used in Justice Feliciano's Concurring Opinion in *Kilosbayan, Inc. v. Guingona*[59] as "considerations of principle" which justified the acceptance and exercise of jurisdiction by the Court in that particular case, thus:

> This is not, however, to say that there is somewhere an overarching juridical principle or theory, waiting to be discovered, that permits a ready

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53 *Joint Ship Manning Group, Inc. v. Social Security System*, supra note 52, at 9-10. Citations omitted.
54 *Ponencia*, p. 65.
55 *Francisco, Jr. v. House of Representatives*, supra note 21, at 139. Citations omitted.
56 Respondents' Memorandum, Part I, pp.110-114.
57 G.R. Nos. 204819, etc., April 8, 2014, 721 SCRA 146.
58 G.R. No. 225442, August 8, 2017, 835 SCRA 350.
59 G.R. No. 113375, May 5, 1994, 232 SCRA 110.

> answer to the question of when, or in what types of cases, the need to show *locus standi* may be relaxed in greater or lesser degree. To my knowledge, no satisfactory principle or theory has been discovered and none has been crafted, whether in our jurisdiction or in the United States. I have neither the competence nor the opportunity to try to craft such principle or formula. It might, however, be useful to attempt to indicate the considerations of principle which, in the present case, appear to me to require an affirmative answer to the question of whether or not petitioners are properly regarded as imbued with the standing necessary to bring and maintain the present petition.
>
> Firstly, the character of the funds or other assets involved in the case is of major importance. x x x
>
> A second factor of high relevance is the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government. x x x
>
> A third consideration of importance in the present case is the lack of any other party with a more direct and specific interest in raising the questions here being raised. x x x
>
> In the examination of the various features of this case, the above considerations have appeared to me to be important and as pressing for acceptance and exercise of jurisdiction on the part of this Court. It is with these considerations in mind that I vote to grant due course to the Petition and to hold that the Contract of Lease between the PCSO and PGMC in its present form and content, and given the present state of the law, is fatally defective.[60]

From the disquisition above, it is readily apparent that these determinants may only be used to point out the existence of transcendental importance in some cases. They were never meant to be a mechanical checklist that categorically determines the existence of transcendental importance in **all** cases. The absence of any or all of these determinants surely cannot deprive the Court from exercising its jurisdiction in cases where transcendental importance is undeniably present, such as the instant case.

To emphasize, a cursory assessment of the issues raised in the consolidated petitions clearly indicate that they are of transcendental importance.

The ATA was enacted in line with the State's policy "to protect life, liberty, and property from terrorism" with recognition that terrorism is "inimical and dangerous to the national security of the country and to the welfare of the people."[61] Ultimately, in enacting the ATA, the State seeks to protect itself, its country and its people, against terrorism, both on the national and international scale. In spite of these altruistic ideals, petitioners argue that the ATA violates several provisions of the Constitution.

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60 Id. at 154-157.
61 R.A. No. 11479, Sec. 2.

To name a few, petitioners claim that the ATA violates: Article III, Section 1 on the right to due process; Article III, Section 2 on the right against unreasonable searches and seizure; Article III, Section 3 on the right to privacy of communication and correspondence; Article III, Section 4 on the right to freedom of speech and expression; Article III, Section 5 on the right to freedom of religion; Article III, Section 14 on the accused's right to be presumed innocent; and, Article VIII and Article VII on separation of powers. Some of the petitioners also allege that the ATA is violative of the State's international obligations.

At this juncture, *Gios-Samar*'s discussion on the doctrine of hierarchy of courts as a filtering mechanism is worth noting, thus:

> **I**
>
> ***The doctrine of hierarchy of courts as a filtering mechanism***
>
> The doctrine of hierarchy of courts operates to: (1) prevent inordinate demands upon the Court's time and attention which are better devoted to those matters within its exclusive jurisdiction; (2) prevent further over-crowding of the Court's docket; and (3) prevent the inevitable and resultant delay, intended or otherwise, in the adjudication of cases which often have to be remanded or referred to the lower court as the proper forum under the rules of procedure, or as the court better equipped to resolve factual questions.
>
> Strict adherence to the doctrine of hierarchy of courts is an effective mechanism to filter the cases which reach the Court. As of December 31, 2016, 6,526 new cases were filed to the Court. Together with the reinstated/revived/reopened cases, the Court has a total of 14,491 cases in its docket. Of the new cases, 300 are raffled to the Court *En Banc* and 6,226 to the three Divisions of the Court. The Court *En Banc* disposed of 105 cases by decision or signed resolution, while the Divisions of the Court disposed of a total of 923 by decision or signed resolution.
>
> These, clearly, are staggering numbers. The Constitution provides that the Court has original jurisdiction over five extraordinary writs and by our rule-making power, we created four more writs which can be filed directly before us. There is also the matter of appeals brought to us from the decisions of lower courts. Considering the immense backlog facing the court, this begs the question: *What is really the Court's work? What sort of cases deserves the Court's attention and time?*
>
> We restate the words of Justice Jose P. Laurel in *Angara* that the Supreme Court is the final arbiter of the Constitution. Hence, direct recourse to us should be allowed only when the issue involved is one of law. x x x[62] (Emphasis and italics in the original)

Notwithstanding this, the Court also underscored in *National Federation of Hog Farmers, Inc. v. Board of Investments*[63] the importance of not filtering out cases of transcendental importance ***because this allows the***

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[62] *Gios-Samar, Inc. v. Department of Transportation and Communications*, supra note 49, at 290-291. Citations omitted.

[63] G.R. No. 205835, June 23, 2020.

<u>Court to exercise its role of clarifying broad doctrines laid down in the past</u>, viz.:

Finally, this Court repeats a statement made in *Gios-Samar*:

> Critically, the nuances of the cases we find justiciable signal our philosophy of adjudication. **Even as we try to filter out and dispose of the cases pending in our docket, this Court's role is not simply to settle disputes. This Court also performs the important public function of clarifying the values embedded in our legal order anchored on the Constitution, laws, and other issuances by competent authorities.**
>
> As this Court finds ways to dispose of its cases, it should be sensitive to the quality of the doctrines it emphasizes and the choice of cases on which it decides. Both of these will facilitate the vibrant democracy and achievement of social justice envisioned by our Constitution.
>
> Every case filed before this Court has the potential of undoing the act of a majority in one (1) of the political and co-equal departments of our government. Our Constitution allows that its congealed and just values be used by a reasonable minority to convince this Court to undo the majority's action. In doing so, this Court is required to make its reasons precise, transparent, and responsive to the arguments pleaded by the parties. The trend, therefore, should be to clarify broad doctrines laid down in the past. The concept of a case with transcendental importance is one (1) of them.
>
> Our democracy, after all, is a reasoned democracy: one with a commitment not only to the majority's rule, but also to fundamental and social rights.
>
> Even as we recall the canonical doctrines that inform the structure of our Constitution, we should never lose sight of the innovations that our fundamental law has introduced. We have envisioned a more engaged citizenry and political forums that welcome formerly marginalized communities and identities. Hence, we have encoded the concepts of social justice, acknowledged social and human rights, and expanded the provisions in our Bill of Rights.
>
> **We should always be careful that in our desire to achieve judicial efficiency, we do not filter cases that bring out these values.**
>
> This Court, therefore, has a duty to realize this vision. The more guarded but active part of judicial review pertains to situations where there may have been a deficit in democratic participation, especially where the hegemony or patriarchy ensures the inability of discrete and insular minorities to participate fully. While this Court should

presume representation in the deliberative and political forums, it should not be blind to present realities.[64] (Emphasis supplied)

Indeed, if the purpose of the doctrine of hierarchy of courts is to act as a filtering mechanism to keep the Court's focus on more important matters, it goes without saying that this filtering mechanism should not mechanically and blindly filter out cases of transcendental importance, such as the instant case, which allow the Court to exercise its bounden duty to clarify doctrines that shape how our Constitution is interpreted.

B. Genuine Issues of Constitutionality

The consolidated petitions allege, among others, serious threats or violations of the constitutional rights to free speech and expression, due process, privacy, association and assembly, and the presumption of innocence. Such violations will result in the transgression of fundamental rights, disrupt the balance of power between co-equal branches of the government, and affect the State's capacity to comply with its international obligations, and fulfill its duty to protect its citizens, sovereignty, and borders against the perils of terrorism. Simply put, the legal issues presented herein will not only affect the lives of the public, but also the domestic and international affairs of the State. It is only appropriate that the legal issues in these consolidated petitions be resolved by the Court now.

The OSG argues that none of the exceptions invoked by petitioners can be appreciated to warrant direct resort to this Court, as the consolidated petitions raise factual issues which the Court cannot inquire into pursuant to *Gios-Samar*. In particular, the OSG claims that several petitioners[65] raise "factual matters and assumptions, most of which are about the alleged likelihood of 'red-baiting', 'terrorist-tagging', or 'red tagging' that will supposedly ensue upon the implementation of the [ATA]."[66] This argument lacks merit.

It is apt to reiterate the distinction between questions of fact and questions of law, thus:

> x x x A question of law arises when there is doubt as to what the law is on a certain state of facts, while **there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts.** For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. Thus, the test

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64 Id. at 35-36. Citations omitted.

65 Namely, FFW, et al., BAYAN, et al., NUJP, et al., Kabataang Tagapagtanggol ng Karapatan, et al., Latiph, et al., GABRIELA, et al., Pabillo, et al., Abendan, et al., Concerned Online Citizens, et al., and Mohammad, et al.

66 OSG's Memorandum, Vol. I, p. 127.

of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, **it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact.** x x x[67] (Emphasis in the original)

Based on the foregoing parameters, it is clear that the substantive issues raise pure questions of law.[68]

Contrary to the OSG's assertions, the substantive issues do not present questions of fact. The resolution of these issues rests merely on what the Constitution and prevailing law provide, and does not require the examination of facts as established by evidence. In fact, the issue of red-baiting or red-tagging is immaterial to the resolution of these substantive issues. The Court only has to examine the assailed provisions of the ATA against the provisions of the Constitution and relevant jurisprudence. For instance, in determining whether Sections 5 to 14 of the ATA violate the fundamental rights enshrined in the Constitution and the constitutional prohibition against *ex post facto* laws and bills of attainder, the Court only has to refer to and apply said provisions in the Constitution and the corresponding case law. Unlike in *Gios-Samar,* the Court need not address any underlying factual questions before it can resolve the constitutional issues raised herein.

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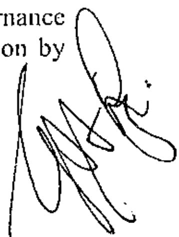
67 J. *Lazaro-Javier*, Dissenting Opinion in *Gatmaytan v. Misibis Land, Inc.*, G.R. No. 222166, June 10, 2020, pp. 10-11, citing *Tongonan Holdings and Development Corporation v. Escaño, Jr.*, 672 Phil. 747, 756 (2011).

68 Culled from the Court's Advisory dated November 23, 2020, these substantive issues are summarized, as follows: (1) Whether Section 4 defining and penalizing the crime of "terrorism" is void for vagueness or overbroad; (2) Whether Sections 5 to 14 defining and penalizing threats to commit terrorism, planning, training, preparing, and facilitating terrorism, conspiracy, proposal, inciting to terrorism, material support, and other related provisions are void for vagueness or overbroad and violative of the prohibition against ex post facto laws and bills of attainder; (3) Whether the uniform penalties for all acts under Sections 4 to 14 violate the prohibition against the imposition of cruel, degrading, or inhuman punishment; (4) Whether surveillance under Section 16 violates the constitutional rights to due process, against unreasonable searches and seizures, to privacy of communication and correspondence, freedom of speech and expression, freedom of religion, and accused's right to be presumed innocent; (5) Whether judicial authorization to conduct surveillance under Section 17 violates the constitutional right unreasonable searches and seizures, and forecloses the remedies under the rules on amparo and habeas data; (6) Whether the powers granted to the ATC are unconstitutional; (7) Whether Section 27 of R.A. No. 11479 on preliminary and permanent orders of proscription violates the prohibition against ex post facto laws and bills of attainder, and unconstitutionally punishes mere membership in an organization; (8) Whether the detention period under Section 29 of R.A. No. 11479 contravenes the Constitution, the Revised Penal Code, the Rules of Court and international obligations against arbitrary detention; (9) Whether the restriction under Section 34 violates the constitutional rights to travel, against incommunicado detention, to bail and R.A. No. 9745; (10) Whether Sections 35 to 36 in relation to Section 25 on the Anti-Money Laundering Council's authority violate separation of powers (judicial), as well as the constitutional right to due process, and right against unreasonable searches and seizures; (11) Whether Section 49 on the extra-territorial application of R.A. No. 11479 violates the freedom of association and the prohibition against ex post facto laws and bills of attainder; (12) Whether Section 54 on the ATC and Department of Justice's power to promulgate implementing rules and regulations constitutes an undue delegation of legislative power for failure to meet the completeness and sufficient standard tests; (13) Whether Section 26 repealing R.A. No. 9372 (Human Security Act) violates the constitutional mandate to compensate victims of torture or similar practices and right to due process; (14) Whether R.A. No. 11479 violates the Indigenous Peoples and Moros' rights to self-determination and self-governance under the Constitution; (15) Whether the House of Representatives gravely abused its discretion by passing House Bill No. 6875 in violation of the constitutionally prescribed procedure.



Clearly, the substantive issues raised here are pure questions of law which the Court may take cognizance of at the first instance, in view of the concurrence of special and important circumstances consistent with the Court's previous ruling in *Joint Ship.* Direct recourse to the Court on the grounds of transcendental importance and the existence of genuine issues of constitutionality is therefore proper in this case considering that there are no disputed facts, and the issues involved here are ones of law.

The Court is not unmindful of the May 17, 2021 statement to this Court of the esteemed *amicus curiae,* retired Associate Justice Francis H. Jardeleza, to the effect that all the petitions should be dismissed "due to the absolute dearth of facts in the present case record," *viz.*:

> Your Honors, my point is this. As for the matters of record, save for the petitions of Guring (sic.) and Ramos, and possibly of the three others in the Negros Occidental case, none, none of the petitioners in these cases has claimed direct, personal, or constitutional injury, or has alleged actual prosecution under the ATA, as to be entitled to relief. **While a case for "pre-enforcement review" of a criminal statute is possible, the same is allowed solely on the grounds of vagueness.** None, I repeat, none of the petitioners has sought to avail of this exception. I humbly submit that, following this Court's ruling in *Southern Hemisphere Network vs. the Anti-Terrorism Council*, all 37 petitions should be dismissed. This is of course, without prejudice to the continuation of all the other cases cited by the Solicitor General. In fact, if the Solicitor General is correct, there are three other cases, not before this Court, where there are other direct injury plaintiffs. I therefore agree with the Court's denial of the petition of Messrs. Guring (sic.) and Ramos.
>
> Your Honors, the Supreme Court is not a trier of facts. Cases presenting factual issues, such as the veracity of the allegations of torture of petitioners Gurung and Ramos, must first be tried, under the doctrine of hierarchy of courts, and following the rules of evidence before, first, the trial courts, and then on appeal, by the Court of Appeals. Petitioners cannot short-circuit this process by simply invoking the "transcendental or paramount" importance of their cases. This is the Court's clear ruling in *GIOS-Samar vs. Department of Trade and Communications*. Second, and for the avoidance, for the complete avoidance of doubt, the issues raised by petitioners against the ATA are, repeat, are very important. The ATA implicates civil liberties dear to all of us. There is, however, an absolute dearth of facts in the present case record, as of the moment, to support a ruling against the ATA, at this time. The ATA is an act of Congress that supports the presumption of constitutionality. I stress the word presumptively, for when, and if, constitutional lines are crossed, as borne out by the facts, we know, I know, where the Court's heart lies.[69] (Emphasis and underscoring supplied)

I respectfully differ with Justice Jardeleza's appreciation of the present petitions before the Court. I believe that not only is a pre-enforcement review of the ATA imperative in this case — especially since the vagueness of the ATA provisions has been squarely raised as an issue,

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[69] TSN, Oral Arguments, May 17, 2021, pp. 21-22.

which is recognized by Justice Jardeleza as possible – but such review may be done by the Court precisely because the consolidated petitions only raise questions of law which the Court is competent to resolve.

Notwithstanding the foregoing, I find it imperative to stress that while I join the *ponencia* in finding that direct recourse to the Court in this particular case is proper, I take exception to the view that such direct recourse is warranted only insofar as is necessary to resolve the constitutional issues which delve into the effects of the assailed provisions on freedom of speech and its cognate rights. As will be explained in further detail below, I submit that the Court may take cognizance of facial challenges, such as the one mounted by petitioners herein, against criminal statutes that violate, impair, or otherwise regulate fundamental rights.

III.

Facial challenges vis-a-vis as-applied challenges.

The *ponencia* dedicates much of its discussions on the various applications of the facial and as-applied challenge in the U.S. Supreme Court (SCOTUS). The *ponencia* then points out that while the SCOTUS had, in its recent decisions, recognized facial challenges outside the First Amendment, this Court "has consistently adhered to the scope of facial challenges relative only to free speech cases."[70] On this basis, the *ponencia* proffers that this Court's ruling in *Imbong* did not unduly expand the area in which a facial challenge operates. The *ponencia* maintains that *Imbong* — in decreeing that statutes regulating free speech, religious freedom, "and other fundamental rights" may be the subject of a facial challenge — merely referred to the cognate rights of the freedom of expression.[71]

With due respect, I disagree.

A facial challenge has been characterized as "an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operation to the parties, but also on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech or activities."[72] On the other hand, an as-applied challenge has been described as an action involving "extant facts affecting real litigants."[73]

Whether a challenge is facial or as-applied often informs the outcome of an attack on the validity of a statute or regulatory measure. When

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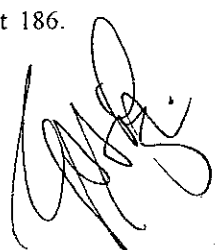
[70] *Ponencia*, p. 74.
[71] Id. at 78.
[72] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* supra note 46, at 186. Emphasis and underscoring omitted.
[73] Id. Underscoring omitted.



confronted with a facial challenge, the Court does not waver in expressing its disfavor against challenges of this type — emphasizing the difficulty in mounting a facial challenge and describing the limited circumstances when it should be allowed. It is usual for the Court to reject facial challenges, especially when it concerns penal statutes such as the ATA. The rejection is grounded on a variety of reasons. *First,* the statute subject of the facial challenge does not regulate speech, only conduct.[74] *Second*, unlike an as-applied challenge where there are actual facts on which the Court could rule upon, the resolution of a facial attack requires the Court to speculate on the prospective application of the challenged statute.[75] *Third,* the facial invalidation of a challenged statute is "considered as 'manifestly strong medicine,' to be used 'sparingly and only as a last resort'."[76]

These justifications, oft-repeated in cases mounting facial challenges to a statute or regulatory measure, became well-entrenched standards in the Court's adjudication of constitutional issues. I respectfully submit, however, that the Court did not adhere to these standards as a manifest departure from the rulings of the SCOTUS recognizing facial challenges pursuant to rights other than freedom of expression.[77] Rather, the Court was mistaken in framing the resolution of facial challenges exclusively through the lens of justiciability, resulting in the swift denial of petitions on the pretext of prematurity.

Neither has the Court consistently adhered to its own rationale for disfavoring facial challenges. On several occasions, the fact that a facial challenge was mounted on a statute was not a significant consideration for the Court. In some cases, the Court deemed that the challenge was as-applied, but a facial analysis was used to uphold or strike down the measure. Thus, instead of illuminating the scope of a facial and as-applied challenge, the Court's rulings only serve to confuse.[78] On these premises, I submit that the Court again missed the opportunity to adopt a consistent and coherent framework for facial and as-applied challenges. I discuss below the reasons for abandoning the current principles governing facial challenges, which the majority unfortunately fails to appreciate.

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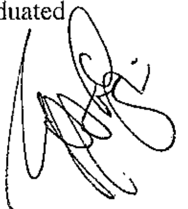
74 *Estrada v. Sandiganbayan*, G.R. No. 148560, November 19, 2001, 369 SCRA 394; *Romualdez v. Sandiganbayan*, G.R. No. 152259, July 29, 2004, 435 SCRA 371; *David v. Arroyo*, G.R. Nos. 171396, etc., May 3, 2006, 489 SCRA 160; *Spouses Romualdez v. COMELEC*, G.R. No. 167011, April 30, 2008, 553 SCRA 370; *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, supra note 46; *Disini v. Secretary of Justice*, G.R. No. 203335, February 18, 2014; *Falcis III v. Civil Registrar General*, G.R. No. 217910, September 3, 2019; *Madrilejos v. Gatdula*, G.R. No. 184389, September 24, 2019, 920 SCRA 475.

75 *Estrada v. Sandiganbayan*, id.; *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, id.

76 *Estrada v. Sandiganbayan*, id.; *Romualdez v. Sandiganbayan*, supra note 74; *David v. Arroyo*, supra note 74; *Spouses Romualdez v. COMELEC*, supra note 74; *Madrilejos v. Gatdula*, supra note 74; *Nicolas-Lewis v. COMELEC*, G.R. No. 223705, August 14, 2019, 913 SCRA 515.

77 *Cf. Ponencia*, pp. 71-72.

78 See Solomon F. Lumba, *Understanding Facial Challenges*, 89 PHIL. L.J. 596 (2015). Solomon Lumba is an Assistant Professor at the University of the Philippines College of Law. He obtained his Bachelor of Laws in 2001 from the University of the Philippines, where he graduated Cum Laude.



A. A facial challenge should not be limited to speech-regulating measures.

The *ponencia* declares that "the Court has not deviated from the principle that [a facial challenge] is permitted only when freedom of expression and its cognate rights are affected."[79] This is not accurate, for an examination of the relevant jurisprudence reveals the contrary.

In *Estrada v. Sandiganbayan*[80] (*Estrada*), former President Joseph E. Estrada challenged the constitutionality of R.A. No. 7080, otherwise known as the Plunder Law, for failing to provide a statutory definition of the terms describing the prohibited conduct. The petition therefore raised the vagueness and overbreadth of the Plunder Law, anchored on the violation of the right of the accused to be informed of the nature and cause of the accusation against him, and the fundamental right to due process.[81]

The Court categorically ruled against the law's alleged vagueness, deeming the text of the law sufficiently certain in describing the proscribed conduct. Ironically, however, *Estrada* further went on to state that "the allegations that the Plunder Law is vague and overbroad do not justify a facial review of its validity."[82] Adopting the Separate Opinion of then Associate Justice Vicente V. Mendoza (Justice Mendoza), the majority in *Estrada* stated that the vagueness doctrine as a ground for facial challenges, may only be applied to free speech cases, not criminal statutes. This pronouncement, albeit arguably a mere *obiter*,[83] later gained significance as the Court reiterated this principle in the succeeding cases involving the constitutionality of a penal law or a non-speech regulating measure.

Associate Justice Santiago M. Kapunan (Justice Kapunan) strongly dissented against the majority ruling in *Estrada*. Among the matters he particularly disagreed with was the submission of Justice Mendoza. Justice Kapunan pointed out the erroneous premise of adopting the principle that facial challenges may only be mounted when the right implicated concerns the freedom of expression:

> It has been incorrectly suggested that petitioner cannot mount a "facial challenge" to the Plunder Law, and that "facial" or "on its face" challenges seek the total invalidation of a statute. Citing *Broadrick v. Oklahoma*, it is also opined that "claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words" and that "overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." For this reason, it is argued further that "on its face invalidation of statutes has been described

[79] *Ponencia*, p. 73.
[80] Supra note 74.
[81] Id. at 435.
[82] Id. at 440.
[83] *J.* Tinga, Dissenting Opinion in *Spouses Romualdez v. COMELEC*, supra note 7, at 469.

> as 'manifestly strong medicine,' to be employed 'sparingly and only as a last resort.'" ' **A reading of *Broadrick*, however, shows that the doctrine involved therein was the doctrine of overbreadth. Its application to the present case is thus doubtful considering that the thrust at hand is to determine whether the Plunder Law can survive the vagueness challenge mounted by petitioner.** A noted authority on constitutional law, Professor Lockhart, explained that "the Court will resolve them (vagueness challenges) in ways different from the approaches it has fashioned in the law of overbreadth." **Thus, in at least two cases, the U.S. courts allowed the facial challenges to vague criminal statutes even if these did not implicate free speech.**
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> In *Kolender v. Lawson*, petitioners assailed the constitutionality of a California criminal statute which required persons who loiter or wander on the streets to provide a credible and reasonable identification and to account for their presence when requested by a peace officer under circumstances that would justify a valid stop. **The U.S. Supreme Court held that said statute was unconstitutionally vague on its face within the meaning of the due process clause of the Fourteenth Amendment because it encourages arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reasonable identification."** *Springfield vs. Oklahoma* on the other hand involved a challenge to a Columbus city ordinance banning certain assault weapons. The court therein stated that a criminal statute may be facially invalid even if it has some conceivable application. It went on to rule that the assailed ordinance's definition of "assault weapon" was unconstitutionally vague, because it was "fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge."[84] (Emphasis and underscoring supplied)

Immediately following *Estrada,* the Court in *Romualdez v. Sandiganbayan*[85] (*Romualdez*) was asked to rule on the constitutionality of Section 5 of R.A. No. 3019, or the Anti-Graft and Corrupt Practices Act, for being vague and impermissibly broad. The Court reiterated that the vagueness and overbreadth doctrines only apply to free speech cases.

While Associate Justice Dante O. Tinga (Justice Tinga) concurred with the majority that the assailed provision does not suffer from the vice of vagueness, he raised serious objections against echoing the *Estrada* ruling. He found it "mystifying why the notion that the doctrine applies only to 'free-speech' cases has gained a foothold with this Court."[86] He then adamantly argued that a vagueness challenge on a penal law should not be denied simply by virtue of the fact that the law is criminal in nature and the challenge to the statute is characterized as a facial attack.[87]

Four (4) years later, the Court in *Spouses Romualdez v. COMELEC*[88] (*Spouses Romualdez*) was confronted with a vagueness challenge to Section

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[84] *Estrada v. Sandiganbayan*, supra note 74, at 530-531. Citations omitted.
[85] Supra note 74.
[86] *J.* Tinga, Separate Opinion in *Romualdez v. Sandiganbayan*, supra note 74, at 401.
[87] Id. at 401-403.
[88] Supra note 74.

45(j) of R.A. No. 8189, or The Voter's Registration Act of 1996. Petitioners therein were charged under this provision, in relation to Section 10(g) and Section 10(j) of the same law, for allegedly making false or untruthful statements in their application for registration as new voters. According to petitioners, the assailed provision penalizes the violation of *any* of the provisions of R.A. No. 8189. As such, it failed to provide fair notice of the punishable conduct, in contravention of the due process clause and Section 14, Article III of the Constitution.

As in *Estrada* and *Romualdez,* the Court held that the facial invalidation of a law is not appropriate for criminal statutes. Reiterating his earlier opinion, Justice Tinga dissented in *Spouses Romualdez* and lamented that the majority failed to correct the Court's erroneous reading of American jurisprudence on the application of the void-for-vagueness doctrine as a tool for facially challenging the validity of penal statutes. He also called the attention of the majority against relying on Justice Mendoza's concurring opinion in *Estrada*. He pointed out that in the Resolution to the motion for reconsideration in *Estrada*, Justice Mendoza submitted another Separate Opinion, clarifying that the doctrines of strict scrutiny, overbreadth, and vagueness are not totally inapplicable to criminal statutes, *viz.*:

> Before discussing these cases, let it be clearly stated that, when we said that "the doctrines of strict scrutiny, overbreadth and vagueness are analytical tools for testing 'on their faces' statutes in free speech cases or, as they are called in American law, First Amendment cases [and therefore] cannot be made to do service when what is involved is a criminal statute," we did not mean to suggest that the doctrines do not apply to criminal statutes at all. They do, although they do not justify a facial challenge, but only an as-applied challenge, to those statutes. Parties can only challenge such provisions of the statutes as applied to them. **Neither did we mean to suggest that the doctrines justify facial challenges only in free speech or First Amendment cases. To be sure, they also justify facial challenges in cases under the Due Process and Equal Protection Clauses of the Constitution with respect to so-called "fundamental rights."** In short, a facial challenge, as distinguished from as-applied challenge, may be made on the ground that, because of vagueness or overbreadth, a statute has a chilling effect on freedom of speech or religion **or other fundamental rights**. But the doctrines cannot be invoked to justify a facial challenge to statute where no interest of speech or religion or fundamental freedom is involved, as when what is being enforced is an ordinary criminal statute like the Anti-Plunder law.[89] (Emphasis and underscoring supplied)

The Court's pronouncements in these cases readily show that its doctrinal ruling in *Estrada*, which limited the application of facial challenges to speech-regulating measures, was premised on a faulty interpretation of cases decided by the SCOTUS. Indeed, the SCOTUS only recently

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[89] Id. at 467-468, citing *J.* Vicente V. Mendoza, Separate Opinion in *Estrada v. Sandiganbayan*, G.R. No. 148560, (Resolution on the Motion for Reconsideration), January 29, 2002 available at <https://www.chanrobles.com/scresolutions/resolutions/2002/january/148560.php>.

acknowledged in *City of Los Angeles v. Patel*[90] (*Patel*) that facial challenges may be brought under the Fourth Amendment against statutes authorizing warrantless searches. But even prior to *Patel,* the SCOTUS had allowed facial challenges pursuant to rights other than free speech. Aside from *Kolender v. Lawson*[91] (*Kolender*), facial challenges to non-speech regulating measures were resolved in *Roe v. Wade,*[92] *Chicago v. Morales,*[93] and *Lanzetta v. New Jersey,*[94] among others.[95] Justice Kapunan, in his dissent in *Estrada*, as well as Justice Tinga, in his separate opinions in *Romualdez* and *Spouses Romualdez*, pointed out the danger of adopting a mistaken reading of U.S. jurisprudence on facial challenges.

But even with these persuasive opinions, the Court has repeatedly echoed this doctrine. When the constitutionality of R.A. No. 9372, or the Human Security Act (*HSA*) — the predecessor statute of the ATA — was challenged "for being intrinsically vague and impermissibly broad," the Court ruled in *Southern Hemisphere* that there was no justiciable controversy. The Court further held that a facial invalidation of a criminal statute on the ground of vagueness and overbreadth is improper. If the vagueness challenge is pursuant to a claim of violation of due process, *Southern Hemisphere* dictates that this is allowable only in cases as-applied to a particular defendant.[96]

Then, in *Disini v. Secretary of Justice*[97] (*Disini*) the Court reiterated that penal statutes have an inherent chilling effect, which by itself, does not justify an on-its-face invalidation of the law. Allowing facial challenges for this reason may prevent the State from enacting laws against socially harmful conduct. *Disini* emphasized that the only exception to this rule is when the assailed statute involves free speech.

In the recent case of *Imbong*, the Court described the SCOTUS's facial challenge as a "First Amendment Challenge." Although the Court continued to mischaracterize the nature of facial challenges decided by the SCOTUS,[98] the Court also significantly stated that unlike the SCOTUS, the

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[90] 576 U.S. ___ (2015) (Slip Op., p. 4).

[91] 461 U.S. 352 (1983). (A criminal statute that requires persons who loiter to provide "credible and reliable" identification was declared unconstitutional for violating the Due Process Clause of the Fourteenth Amendment).

[92] 410 U.S. 113 (1973). (A statute criminalizing abortion was struck down for violating the right to privacy) cited in Solomon F. Lumba, supra note 78.

[93] 527 U.S. 41 (1999). (A facial challenge against an ordinance prohibiting individuals from loitering in public places was allowed because "vagueness permeates the text of the ordinance").

[94] 306 U.S. 451 (1939). (A statute punishing any person known to be a member of a gang was struck down for being vague and repugnant to the Due Process Clause).

[95] See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Calif. L. Rev. 915 (2011) available at <https://dash.harvard.edu/bitstream/handle/1/11222673/01_fallon.pdf?sequence=1>; Fallon stated in his seminal survey of U.S. jurisprudence on facial challenges that the U.S. Supreme Court has pronounced statutes invalid for violating the Free Speech Clause and religion clauses of the First Amendment, the right to travel, the Fourteenth Amendment Privileges or Immunities Clause, the Eighth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause (99 Calif. L. Rev. 936-939 [2011]).

[96] Id.

[97] Supra note 74.

[98] *See* Solomon F. Lumba, supra note 78, at 605.

scope of facial challenges in this jurisdiction was expanded "to cover statutes not only regulating free speech, but also those involving religious freedom, ***and other fundamental rights***":

> In United States (*US*) constitutional law, a *facial challenge*, also known as a First Amendment Challenge, is one that is launched to assail the validity of statutes concerning not only *protected speech*, but also all other rights in the First Amendment. These include **religious freedom, freedom of the press**, and the **right of the people to peaceably assemble**, and to **petition the Government for a redress of grievances**. After all, the fundamental right to religious freedom, freedom of the press and peaceful assembly are but component rights of the right to one's freedom of expression, as they are modes which one's thoughts are externalized.
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> In this jurisdiction, the application of doctrines originating from the U.S. has been generally maintained, albeit with some modifications. **While this Court has withheld the application of facial challenges to strictly penal statutes, it has expanded its scope to cover statutes not only regulating free speech, but also those involving religious freedom, and other fundamental rights**. The underlying reason for this modification is simple. For unlike its counterpart in the U.S., this Court, under its expanded jurisdiction, is mandated by the Fundamental Law not only to settle actual controversies involving rights which are legally demandable and enforceable, but also **to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government**. Verily, the framers of Our Constitution envisioned a proactive Judiciary, ever vigilant with its duty to maintain the supremacy of the Constitution.
>
> **Consequently, considering that the foregoing petitions have seriously alleged that the constitutional human rights to life, speech and religion and other fundamental rights mentioned above have been violated by the assailed legislation, the Court has authority to take cognizance of these kindred petitions and to determine if the RH Law can indeed pass constitutional scrutiny**. To dismiss these petitions on the simple expedient that there exist no actual case or controversy, would diminish this Court as a reactive branch of government, acting only when the Fundamental Law has been transgressed, to the detriment of the Filipino people.[99] (Additional emphasis and underscoring supplied)

Notably, the *ponencia* interprets this portion of the *Imbong* ruling differently. The *ponencia* opines that the phrase "other fundamental rights" was only made "in reference to freedom of expression and its cognate rights (such as religious freedom)."[100]

Regrettably, this reading of the *ponencia* is totally unwarranted and completely belied by a plain reading of the aforementioned portion of the decision in *Imbong*. The *ponencia*'s position, to which the majority agrees, completely fails to consider that the petitioners in *Imbong* alleged serious

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[99] *Imbong v. Ochoa, Jr.*, supra note 57, at 281-283. Citations omitted.

[100] *Ponencia*, p. 76.

violations of the equal protection clause, as well as their rights to life, speech, and privacy. They also alleged that the penal provisions of R.A. No. 10354, otherwise known as the Responsible Parenthood and Reproductive Health Act of 2012 (RH Law), should be struck down for being vague, in violation of their right to due process. The Court further found that there was an actual case or controversy "because medical practitioners or medical providers are in danger of being criminally prosecuted x x x for vague violations thereof, particularly public health officers who are threatened to be dismissed from the service with forfeiture of retirement and other benefits."[101] Clearly, a holistic reading of *Imbong* belies the majority position. The Court could not have referred only to the cognate rights of free speech when it ruled that the scope of facial challenges has been expanded to cover "other fundamental rights."

Furthermore, in my view, the *Imbong* ruling already signaled a momentous shift from the Court's limited application of facial challenges. It recognized that the expanded power of judicial review envisions a proactive Judiciary, and the Court should not simply dismiss facial challenges against penal statutes by the mere expedient that no person had yet been charged with a violation of said penal law. Whether a penal statute regulates speech or not does not have any material effect on the justiciability of the issue. **A penal statute, *when repugnant to the Constitution*, becomes ripe for judicial review by its mere enactment**:[102]

> x x x In the unanimous en banc case *Tañada v. Angara*, this Court held that when an act of the legislative department is seriously alleged to have infringed the Constitution, settling the controversy becomes the duty of this Court. **By the mere enactment of the questioned law or the approval of the challenged action, the dispute is said to have ripened into a judicial controversy even without any other overt act.** Indeed, even a singular violation of the Constitution and/or the law is enough to awaken judicial duty. x x x[103] (Emphasis supplied)

Likewise, it bears noting that the Court's uneven application of rules on facial challenges stemmed from its misplaced reliance on *Broadrick v. Oklahoma*,[104] which involved a claim for facial overbreadth. But while the doctrines of vagueness and overbreadth are related, it is possible for either to operate on an entirely different plane. As Justice Tinga explained in his Separate Opinion in *Romualdez*:

> A fundamental flaw, to my mind, in the analysis employed by the *ponencia* and some of the separate opinions in *Estrada* is the notion that the "vagueness" and "overbreadth" doctrines are the same and should be accorded similar treatment. This is erroneous.

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[101] *Imbong v. Ochoa, Jr.*, supra note 57, at 281.
[102] *Pimentel, Jr. v. Aguirre*, G.R. No. 132988, July 19, 2000, 336 SCRA 201, 222.
[103] Id. at 222. Citations omitted.
[104] 413 U.S. 601 (1973) cited in *Estrada v. Sandiganbayan*, supra note 74, at 530.

Mr. Justice Kapunan, in his dissenting opinion in *Estrada*, offers a correct distinction between "vagueness" and "overbreadth":

> A view has been proffered that "vagueness and overbreadth doctrines are not applicable to penal laws." These two concepts, while related, are distinct from each other. On one hand, the doctrine of overbreadth applies generally to statutes that infringe upon freedom of speech. *On the other hand, the "void-for-vagueness" doctrine applies to criminal laws, not merely those that regulate speech or other fundamental constitutional right.* x x x The fact that a particular criminal statute does not infringe upon free speech does not mean that a facial challenge to the statute on vagueness grounds cannot succeed.
>
> This view should be sustained, especially in light of the fact that the "void for vagueness" doctrine has long been sanctioned as a means to invalidate penal statutes.[105]

Thus, if the vague statute purports to regulate speech and other forms of expression, the ambiguity "operates to inhibit the exercise of [those] freedoms."[106] This is the same as the "chilling effect" that results from the operation of an overbroad statute or regulation. It is in this sense that the vagueness and overbreadth doctrines are related. But while overbreadth is applicable only to free speech cases, this is not the case for the void-for-vagueness doctrine.

When a statute or regulation suffers from the vice of vagueness, it fails to provide "fair notice" of the prescribed or prohibited **conduct**.[107] **A vague statute or regulation is then deemed primarily offensive to the right to due process because persons are not apprised of what conduct to avoid**, while "law enforcers [are granted] unbridled discretion in carrying out its provisions and become an arbitrary flexing of the Government muscle."[108] As the Court ruled in *People v. Dela Piedra:*[109]

> Due process requires that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what **conduct** on their part will render them liable to its penalties. A criminal statute that **"fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,"** or is so indefinite that **"it encourages arbitrary and erratic arrests and convictions,"** is void for vagueness. **The constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning.**[110] (Emphasis and underscoring supplied)

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105 *Romualdez v. Sandiganbayan*, supra note 74, at 398.

106 *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972); *See* Mark L. Rienzi, Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes, 2002 Utah L. Rev. 381, 389-390 available at <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1183&context=scholar>.

107 See *J.* Tinga, Dissenting Opinion in *Spouses Romualdez v. COMELEC*, supra note 74, at 461-462.

108 Id. at 398.

109 G.R. No. 121777, January 24, 2001, 350 SCRA 163.

110 Id. at 175-176.

The Court in *SPARK* even acknowledged the due process underpinnings of the vagueness doctrine, by citing Justice Tinga's Dissenting Opinion in *Spouses Romualdez*:

> Essentially, petitioners only bewail the lack of enforcement parameters to guide the local authorities in the proper apprehension of suspected curfew offenders. *They do not assert any confusion as to what conduct the subject ordinances prohibit or not prohibit but only point to the ordinances' lack of enforcement guidelines*. The mechanisms related to the implementation of the Curfew Ordinances are, however, matters of policy that are best left for the political branches of government to resolve. **Verily, the objective of curbing unbridled enforcement is not the sole consideration in a void for vagueness analysis; rather, petitioners must show that this perceived danger of unbridled enforcement stems from an ambiguous provision in the law that allows enforcement authorities to second-guess <u>if a particular conduct is prohibited or not prohibited</u>. In this regard, that ambiguous provision of law contravenes due process because agents of the government cannot reasonably decipher what conduct the law permits and/or forbids.** In *Bykofsky v. Borough of Middletown*, it was ratiocinated that:
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>> A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on *ad hoc* and subjective basis, and vague standards result in erratic and arbitrary application based on individual impressions and personal predilections.
>
> As above-mentioned, petitioners fail to point out any ambiguous standard in any of the provisions of the Curfew Ordinances, but rather, lament the lack of detail on how the age of a suspected minor would be determined. Thus, without any correlation to any vague legal provision, the Curfew Ordinances cannot be stricken down under the void for vagueness doctrine.[111] (Emphasis and underscoring supplied; italics in the original)

It should be emphasized that the due process clause serves as a check against arbitrary State intrusions on the personal security of every individual.[112] While there are several provisions in the Constitution that guarantee this right, its protection is primarily embodied in Section 1, Article III, which imposes a positive obligation on the State to ensure that "[n]o person shall be deprived of life, liberty, or property **without due process of law.**"[113]

Indeed, there is no question that Congress has plenary powers to legislate a penal law, including a more "responsive" statute to address the perils of terrorism. The soundness of this policy is clearly beyond the purview of the Court's judicial review. However, the due process clause

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[111] *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, supra note 58, at 391-392.

[112] See *City of Manila v. Laguio, Jr.*, G.R. No. 118127, April 12, 2005, 455 SCRA 308; see also *J.* Tinga, Dissenting Opinion in *Spouses Romualdez v. COMELEC*, supra note 74.

[113] 1987 CONSTITUTION, Art. III, Sec. 1.

guarantees that any restriction on the protected civil liberties should be within the bounds of fairness.[114] **This, to my mind, is the appropriate lens through which a vagueness challenge should be assessed – *i.e.* whether the legislature transgressed the due process guarantee by failing to provide adequate notice of the forbidden conduct, or to establish minimal guidelines to govern law enforcement.**[115]

In this respect, the Court has the correlative duty to guard against the arbitrary deprivation of liberty that could result from an ambiguous penal statute.[116] For this reason, it is incongruous to limit the application of the vagueness doctrine to cases involving free speech,[117] as this severely undermines the Court's role in safeguarding the right to due process. **To my mind, the due process guarantee is as fundamental as the freedom of expression,**[118] ***especially when penal statutes such as the ATA are involved*.**

Relatedly, a vague penal law, even if it does not involve speech, may also be facially challenged for violating the principle of separation of powers. As further explained below, in several SCOTUS cases, a landmark of which is *Sessions v. Dimaya*[119] (*Sessions*), the void-for-vagueness doctrine was held to be a corollary of, apart from the due process guarantee of notice, the principle of separation of powers. This is because the doctrine recognizes the exclusive duty of Congress to define the conduct proscribed by law.[120] Compared to a violation of the due process clause, a violation of the separation of powers as brought about by a vague law does not necessitate that individuals be deprived of life, liberty or property. **The undue delegation of legislative powers effected by the mere passing of a vague law is sufficient to constitute a violation of the Constitution.**

In his dissent in *Sessions*, Justice Clarence Thomas (Justice Thomas) questioned the use of the vagueness doctrine by the SCOTUS to invalidate a federal removal statute, as he deemed it unclear whether such statutes could violate the Due Process Clause. He opined that the vagueness doctrine is really a way to enforce the separation of powers – specifically the doctrine

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114 See *Ynot v. Intermediate Appellate Court,* No. L-74457, March 20, 1987, 148 SCRA 659.

115 See Holding Legislatures Constitutionally Accountable Through Facial Challenges by Caitlin Borgmann, City University of New York (CUNY), 2009, accessed at <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1138&context=cl_pubs>.

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116 See *Chicago v. Morales,* 527 U.S. 41 (1999).

117 See Bernas, S.J., Joaquin G., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 136 (2003 ed.); Fr. Joaquin G. Bernas also opines that: "while indeed the defect of 'overbreadth' as an analytical tool is applicable only to cases involving speech, this is not so about 'vagueness.' Vagueness and overbreadth are distinct from each other. An overbroad law does not need to lack clarity or precision, but a vague law does. Laws which do not involve speech can be declared invalid for 'vagueness.' Thus, for instance, *Lanzetta v. New Jersey* (306 U.S. 451 [1939]) invalidated a statute for vagueness because it criminalized being a member of a 'gang.'

118 See *J.* Jardeleza, Separate Opinion in *Versoza v. People,* G.R. No. 184535, September 3, 2019.

119 584 U.S. ____ (2018), 138 S. Ct. 1204 (2018).

120 Id.

of non-delegation, which does not depend upon the requirements of due process. Hence, impermissible delegations violate the Vesting Clauses in the US Constitution and not just delegations that deprive individuals of life, liberty or property, thus:

> Instead of a longstanding procedure under *Murray's Lessee*, **perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation.** x x x **("Vague statutes have the effect of delegating lawmaking authority to the executive").** Madison raised a similar objection to the Alien Friends Act, arguing that its expansive language effectively allowed the President to exercise legislative (and judicial) power. x x x And this Court's precedents have occasionally described the vagueness doctrine in terms of **nondelegation.** x x x ("A vague law impermissibly delegates basic policy matters"). But they have not been consistent on this front.
>
> I agree that the Constitution prohibits Congress from delegating core legislative power to another branch. x x x **But I locate that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause. ("[T]hat there was an improper delegation of authority . . . has not previously been thought to depend upon the procedural requirements of the Due Process Clause"). In my view, impermissible delegations of legislative power violate this principle, not just delegations that deprive individuals of "life, liberty, or property."** x x x[121] (Emphasis supplied)

Logically, from a separation-of-powers perspective, a vague law is void upon its enactment. There need not be a "chilling effect" which, following the majority's reasoning, is confined only to free speech cases. Neither is there a need to prove that the law is void in all possible cases as, in fact, there can be no set of circumstances under which a law constituting an unconstitutional delegation of legislative functions may be valid. **To emphasize, a vague law that violates the separation of powers among the three (3) branches of government is already unconstitutional in that respect; <u>hence, there is no more need to determine the nature and character of the rights alleged to be actually or potentially violated by the law</u>.**

Conceptually, locating the constitutional foundation of the vagueness doctrine (due process or separation of powers) clarifies who the doctrine aims to protect. Due process protects individuals from deprivation of life liberty and property without fair notice, as well as against the "arbitrary flexing of government muscle."[122] On the other hand, the doctrine of separation of powers protects the public in general, by preventing the concentration of power in one branch of government, so that it cannot "[lord] its power over the other branches or the citizenry," as well as by providing checks and balances on each of said branches.[123] The separation of powers which, specifically, prevents undue delegation of legislative powers

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[121] Id. Citations omitted.
[122] See *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, supra note 58, at 390.
[123] See *Belgica v. Ochoa*, G.R. Nos. 208566, etc., November 19, 2013, 710 SCRA 1, 107.

likewise protects the democratic process in that it ensures that every statute remains to be "the product of an open and public debate among a large and diverse number of elected representatives [of the people]."[124]

Again, in these lights, the mere existence in our statute books of a vague law that violates the principle of separation of powers already betrays the public and the democratic process that the principle aims to protect. There is already, in this sense, an injury to the public that gives rise to an actual controversy and a case "ripe" for determination by the courts. Any member of the public gains a standing to sue and it becomes absurd for the Court to observe an as-applied approach because all persons, regardless if they are parties to the case or not, are equally injured by the enactment of the unconstitutionally vague law.

B. It is unnecessary to require actual harm in facial challenges against a penal statute on the grounds of vagueness or overbreadth.

In *Southern Hemisphere,* the Court held that the overbreadth doctrine must "necessarily apply a facial type of invalidation in order to plot areas of protected speech, inevitably almost always under situations not before the court, that are impermissibly swept by the substantially overbroad regulation."[125] This conclusion follows from the chilling effect of an overbroad statute or regulation, which could deter aggrieved third parties from initiating a suit.[126]

While *Southern Hemisphere* applies to overbreadth challenges against a regulation involving speech, the same logic, in my view, should apply to the void-for-vagueness doctrine. The test for vagueness, as enunciated in *Estrada,* entails an examination of the text or language of the challenged statute:

> The test in determining whether a criminal statute is void for uncertainty is **whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.** It must be stressed, however, that the "vagueness" doctrine merely requires a reasonable degree of certainty for the statute to be upheld — not absolute precision or mathematical exactitude, as petitioner seems to suggest. Flexibility, rather than meticulous specificity, is permissible as long as the metes and bounds of the statute are clearly delineated. An act will not be held invalid merely because it might have been more explicit in its wordings or detailed in its provisions, especially where, because of the nature of the act, it would be

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[124] *Justice Neil Gorsuch concurring in part and concurring in the judgment of Sessions v. Dimaya,* supra note 119; see also *United States v. Davis,* 588 U.S. ___ (2019), 139 S. Ct. at 2323, 2325 (2019).

[125] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* supra note 46, at 187. Underscoring omitted.

[126] *David v. Macapagal-Arroyo,* supra note 74, at 238.

impossible to provide all the details in advance as in all other statutes.[127] (Emphasis supplied)

As such, if the law is not "utterly vague on its face," or is merely couched in "imprecise language," it does not suffer from the vice of vagueness. *Romualdez* also instructs that there is nothing vague in a penal provision or statute that is able to answer the basic query "What is the violation?"[128] In several instances, as in *Spouses Romualdez*[129] and *SPARK*,[130] the Court remarked that petitioners were unable to point to a word or provision that allegedly does not provide fair warning of what is prohibited or required.

Evidently, by its very nature, it is unnecessary for the Court to await an actual, live case to determine whether a statute is vague on its face. Requiring petitioners to establish a constitutional violation — by demonstrating actual injury from the application of a vague statute — is irrelevant in a vagueness analysis. The statute or regulation remains to be the subject of the inquiry. Whether it violates the right to due process or the principle of separation of powers is answered by examining the face of the statute or regulation itself, not the facts presented by the parties.[131]

The respective petitioners in *Estrada, Romualdez,* and *Spouses Romualdez* challenged the constitutionality of the penal statutes under which they were charged, on the grounds of vagueness. **Notably, even with extant facts involving actual parties, and the declaration that facial invalidation is inappropriate for penal statutes, the Court nonetheless resolved the issue of vagueness by looking at the very language of the laws themselves**. The Court construed the natural, plain, and ordinary acceptation of the words of the law, and arrived at the meaning of the challenged penal statutes by examining the legislative intent. In all of these cases, the particular factual circumstances of the petitioners were not among the considerations of the Court.

Clearly, whether the ground invoked is vagueness or overbreadth, the Court must necessarily examine the validity of the law or regulation on its face. These tests are therefore unsuitable to an as-applied challenge, and the only essential consideration is the enactment of a statute or regulation inconsistent with the Constitution.

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[127] *Estrada*, supra note 74, at 440. Citation omitted.

[128] *Romualdez*, supra note 74, at 386.

[129] *Spouses Romualdez*, supra note 74.

[130] *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, supra note 58, at 390.

[131] *People v. Dela Piedra*, supra note 109; see also *Lanzetta v. New Jersey*, supra note 94; see Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010) at <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1364&context=facpub>.

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C. The severability of statutes allows the Court to undertake a facial analysis without necessarily ruling on the wholesale invalidation of the law.

While I agree that the facial invalidation of a statute or provision should be sparingly decreed by the Court, a facial challenge does not preclude the partial invalidation of the challenged law. This holds especially true in laws that contain a separability provision, which creates a presumption that the provisions are severable. The Court explained in *Tatad v. Secretary of the Department of Energy*[132] (*Tatad*) as follows:

> We come to the submission that the provisions on 4% tariff differential, minimum inventory and predatory pricing are separable from the body of R.A. No. 8180, and hence, should alone be declared as unconstitutional. In taking this position, the movants rely heavily on the separability provision of R.A. No. 8180. We cannot affirm the movants for to determine whether or not a particular provision is separable, the courts should consider the intent of the legislature. It is true that the most of the time, such intent is expressed in a separability clause stating that the invalidity or unconstitutionality of any provision or section of the law will not affect the validity or constitutionality of the remainder. **Nonetheless, the separability clause only creates a presumption that the act is severable. It is merely an aid in statutory construction. It is not an inexorable command. A separability clause does not clothe the valid parts with immunity from the invalidating effect the law gives to the inseparable blending of the bad with the good. The separability clause cannot also be applied if it will produce an absurd result. In sum, if the separation of the statute will defeat the intent of the legislature, separation will not take place despite the inclusion of a separability clause in the law.**[133] (Emphasis supplied)

To recall, in *Disini*, the Court declared only certain provisions of the Cybercrime Prevention Act void, while other provisions were upheld. The Court further narrowed the application of some provisions by declaring them void only insofar as it is stated in the dispositive portion. The ruling in *Imbong* likewise declared specific provisions of the RH Law unconstitutional. Meanwhile, in this case, the majority proclaims only certain provisions of the ATA unconstitutional. Indeed, the Court has broad discretion on whether a partial invalidation would suffice even when a facial challenge is mounted against the statute. The wholesale invalidation of a law does not always proceed from a facial challenge.

On these premises, I submit that the distinction between a facial and as-applied challenge should be less relevant in the Court's consideration of a constitutional issue. While there may be cases that can benefit from the

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[132] G.R. Nos. 124360 & 127867, December 3, 1997, 282 SCRA 337.

[133] Id. at 354. Citations omitted.

requirement of actual facts, it is inaccurate to characterize a facial challenge against a non-speech regulating measure as premature. Again, it must be emphasized that the ripeness of a facial challenge is not hinged on whether it regulates speech or not. The Court has an abundance of rules concerning justiciability. The presence of an actual case or controversy is therefore independently determinable from the grounds invoked by the parties to question the constitutionality of the statute or ordinance.

Finally, the Court should revisit its policy of skepticism over facial challenges that do not concern free speech. The nonchalant but categorical disapproval of a facial attack on a penal statute, on the ground that it is not a speech-regulating measure, is patently inconsistent with the role of the Court in the protection of fundamental freedoms. **Purely procedural concerns should not serve as a pretext for the Court to evade its function in the system of checks and balances. When fundamental rights other than freedom of speech are violated by a law, this Court has the *duty* to hold the legislature accountable.**[134]

IV.

Propriety of the strict scrutiny test

The strict scrutiny test originated from the SCOTUS,[135] subsequently adopted in the country's legal system through the jurisprudence promulgated by the Court. Its modern iteration states that a piece of legislation will be upheld against a constitutional challenge only if it is necessary or narrowly tailored to promote a compelling governmental interest.[136]

The test has a wide application in constitutional law. The SCOTUS applied the test in cases involving challenges under the Equal Protection Clause to statutes that discriminate based on race or other suspect classifications.[137] It is also the baseline rule for assessing laws that regulate speech on the basis of content[138] and to challenge a statute on grounds of violations of the right to due process and equal protection of laws when the statutes restrict the exercise of fundamental rights.[139] The test also applies to

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[134] Holding Legislatures Constitutionally Accountable Through Facial Challenges by Caitlin Borgmann, City University of New York (CUNY), 2009, accessed at <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1138&context=cl_pubs>.

[135] Richard H. Fallon, Jr. *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007), available at <https://www.uclalawreview.org/strict-judicial-scrutiny/>.

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[136] Id. at 1268, citing *Johnson v. California*, 543 U.S. 499, 505 (2005); *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[137] Id. at 1268-1269.

[138] Id. at 1269.

[139] Id.

statutes that impose substantial burdens on freedom of association and those that single out religiously motivated conduct for governmental regulation.[140]

In the Philippines, while the test is used primarily in equal protection cases,[141] the Court has also expanded its use, similar to the SCOTUS, to assess the validity of laws dealing with the regulation of speech, gender, or race, as well as other fundamental rights.[142]

As regards equal protection cases involving constitutional rights, the SCOTUS used the strict scrutiny test in determining the validity of a statute that regulated the exercise of a constitutional right of interstate movement in *Shapiro v. Thompson*.[143] The SCOTUS struck down a law where a State or District denied welfare assistance to residents who have not resided in the state or district for at least one year immediately preceding their application for assistance. In its analysis, the SCOTUS found that since the classification made by the statute touched on the constitutional right of interstate movement, a stricter standard was used to measure its constitutionality: a classification which penalizes the exercise of a constitutional right is unconstitutional, unless it is shown that it is necessary to promote a compelling governmental interest. The SCOTUS found that the law failed this test. It ruled:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. x x x
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> x x x x
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> x x x But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.[144] (Italics supplied)

Locally, the strict scrutiny test was also applied in a similar case involving the right to travel. In *SPARK*, the Court declared that since "the right to travel is a fundamental right in our legal system, guaranteed no less by our Constitution, [then] the strict scrutiny test [was] the applicable test."[145] The Court used the twin requirements of (a) the state having a compelling state interest; and (b) the means employed by the state in achieving the state interest was the least restrictive to constitutional rights

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[140] Id.

[141] See *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582, April 8, 2010, 618 SCRA 32 and *Republic v. Manalo*, G.R. No. 221029, April 24, 2018, 862 SCRA 580.

[142] *Disini, Jr. v. Secretary of Justice*, supra note 74.

[143] 394 U.S. 618 (1969).

[144] *Shapiro v. Thompson*, id. at 633-634. Citations omitted.

[145] *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, supra note 58, at 411-412. Citations omitted.

(*least restrictive means standard*) or the most narrowly drawn to avoid conflicts to constitutional rights (*narrowly drawn standard*), in determining the constitutionality of certain curfew ordinances enacted by local governments. Ultimately, the Court declared the curfew ordinances unconstitutional for having failed the least restrictive means/narrowly drawn standards in the strict scrutiny test. The Court found that the curfew ordinances unduly restricted the minors' fundamental freedoms, and the ordinances failed to take into account "the reasonable exercise of the minors' rights of association, free exercise of religion, rights to peaceably assemble, and of free expression, among others."[146]

The validity of laws and regulations involving the right to vote had also been examined through the strict scrutiny test. In the case of *Kabataan Party-List v. COMELEC,*[147] the Court used the strict scrutiny test to determine the constitutionality of the mandatory biometrics registration for voters as a procedural requisite to be able to vote. The Court eventually ruled in favor of the law's constitutionality, as it found that the "assailed regulation on the right to suffrage was sufficiently justified as it was indeed *narrowly tailored to achieve the compelling state interest* of establishing a clean, complete, permanent and updated list of voters, and was demonstrably the *least restrictive means in promoting that interest.*"[148]

The SCOTUS similarly used the test in determining the validity of a statute that regulated the right to vote in *Kramer v. Union Free Sch. Dist. No. 15*[149] In the said case, the SCOTUS struck down a statute imposing an additional requirement for participating in district and school board elections. The statute required that for a person to vote, the person should own or lease a real property, or is a parent or has custody of a child enrolled in the local public schools. Petitioner therein neither owned nor leased a property, nor had a child enrolled in the public school system; he was living in the house of his parents. In analyzing whether the law was unconstitutional, the SCOTUS characterized the right to vote as preservative of other basic civil and political rights. Since the statute results in a discrimination in who may participate in political affairs or in the selection of public officials, the SCOTUS applied a close and exacting examination of the statute. The SCOTUS conducted this close and exacting examination by determining the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification:

> x x x The sole issue in this case is whether the *additional* requirements of § 2012 – requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections – violate the

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[146] Id. at 424.
[147] G.R. No. 221318, December 16, 2015, 777 SCRA 574.
[148] Id. at 609. Italics supplied.
[149] 395 U.S. 621 (1969).

> Fourteenth Amendment's command that no State shall deny persons equal protection of the laws.
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> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." X x x And, in this case, we must give the statute a close and exacting examination. "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." X x x This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.[150] (Italics supplied)

The SCOTUS ruled that the classifications must be tailored so that the exclusion of a certain class is necessary to achieve an articulated state goal. As applied to the case, the SCOTUS found that the limitation imposed by the statute did not promote a compelling state interest as it permitted the inclusion of many persons who had, at best, a remote and direct interest, and excluded others that had a distinct and direct interest in school meeting decisions. Thus:

> Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the laws depends, *inter alia,* on whether all those excluded are, in fact, substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.[151]

For claims of violation of the right to due process, the SCOTUS, in *Washington v. Glucksberg*[152] ruled that it is important to determine that what is at stake is a fundamental right, as the right to due process forbids the government from infringing on such fundamental right unless the infringement is narrowly tailored to serve a compelling state interest. Fundamental rights are those that are deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.[153] As the SCOTUS ruled:

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150 Id. at 625-626. Citations omitted.
151 Id. at 632.
152 521 U.S. 702 (1997).
153 Id. at 720-721; citations removed.

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," x x x ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," x x x. Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. X x x Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decision making," x x x that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the *Fourteenth Amendment* "forbids the government to infringe . . . 'fundamental' liberty interests at *all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." x x x[154]

The SCOTUS found that the right to assistance to commit suicide was not a fundamental right considering the nation's history; as in fact, such right has consistently and almost universally been rejected. [155] Given this, the SCOTUS merely used the rational basis test instead of the strict scrutiny test.

The SCOTUS further ruled that the statute banning and criminalizing assisted suicide was valid as the State had an interest in preserving the life of those that can still contribute to society and enjoy life,[156] protecting the integrity and ethics of the legal profession,[157] protecting the interests of vulnerable groups,[158] and that the "State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia."[159]

Another fundamental right involved in cases where the strict scrutiny test was applied was the right to privacy, as illustrated in the cases of *Ople v. Torres*[160] (*Ople*), *City of Manila v. Laguio, Jr.*[161] (*Laguio*), and *White Light Corp. v. City of Manila.*[162] In *Ople,* the Court categorically said that: "[i]ntrusions into the right [to privacy] must be accompanied by proper safeguards and well-defined standards to prevent unconstitutional invasions x x x [and] *any law or order that invades individual privacy will be subjected by this Court to strict scrutiny.*"[163] In *Laguio*, the Court struck down as unconstitutional a city ordinance which banned, among others, *karaoke bars,* dance halls, motels, and inns for the purpose of promoting and protecting social and moral values of the community from the alarming increase of prostitution in the area. It then explained:

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154 Id. at 720-721; citations removed.
155 Id. at 723.
156 Id. at 729.
157 Id. at 731.
158 Id. at 732.
159 Id.
160 G.R. No. 127685, July 23, 1998, 293 SCRA 141.
161 Supra note 111.
162 G.R. No. 122846, January 20, 2009, 576 SCRA 416.
163 *Ople v. Torres,* supra note 158, at 169. Italics supplied.

Liberty in the constitutional sense not only means freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is the beginning of all freedom—it is the most comprehensive of rights and the right most valued by civilized men.

Indeed, the right to privacy as a constitutional right was recognized in *Morfe*, **the invasion of which should be justified by a compelling state interest.** *Morfe* accorded recognition to the right to privacy independently of its identification with liberty; in itself it is fully deserving of constitutional protection. **Governmental powers should stop short of certain intrusions into the personal life of the citizen.**[164] (Emphasis supplied)

For free speech cases, particularly content-based regulation of speech, the SCOTUS in *United States v. Playboy Entertainment Group, Inc.*,[165] struck down a statute that "required cable television operators who provide channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m."[166]

In determining the constitutionality of the statute, the SCOTUS used the strict scrutiny test as it ruled that when a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest.[167] The SCOTUS further ruled that "[w]hen the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. "Content-based regulations are presumptively invalid[.]"[168] The SCOTUS went on to explain that:

This is for good reason. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." x x x Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.[169]

In ruling that the statute was unconstitutional, the SCOTUS ruled the "case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a

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164 *City of Manila v. Laguio, Jr.*, supra note 111, at 338-339. Citations omitted.
165 529 U.S. 803 (2000).
166 Id. at 806.
167 Id. at 813.
168 Id. at 817. Citation omitted.
169 Id. Citation omitted.

blanket ban if the protection can be accomplished by a less restrictive alternative."[170]

For the SCOTUS, when a statute regulates speech by reason of content, special consideration or latitude is not given to the government, even if it characterizes the regulation merely as a burden rather than suppression, or that the speech is not important.[171] As the SCOTUS ruled:

> Basic speech principles are at stake in this case. When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression. We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause. If television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address. It must do so, however, in a way consistent with First Amendment principles. Here the Government has not met the burden the First Amendment imposes.[172]

Similar to the above, the Court also applies the strict scrutiny test to determine the constitutionality of a law that regulates speech on the basis of its content. In *Soriano v. Laguardia*,[173] the Court, citing *Chavez v. Gonzales*,[174] distinguished between content-neutral and content-based regulations of speech, and explained that "[a] content-based restraint is aimed at the contents or idea of the expression, whereas a content-neutral restraint intends to regulate the time, place, and manner of the expression under well-defined standards tailored to serve a compelling state interest, without restraint on the message of the expression. Courts subject content-based restraint to strict scrutiny."[175]

In *Divinagracia v. Consolidated Broadcasting System, Inc.*,[176] the Court was faced with the question of whether the National Telecommunications Commission (NTC) had the power to cancel certificates of public convenience (CPC) it had previously issued to broadcast media companies on the ground that the latter had violated the terms of their legislative franchises. While the question was, at first glance, a matter merely of determining the powers of an administrative agency, the Court observed that a ruling on the matter has implications on the rights to

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170 Id. at 814.
171 Id. at 826.
172 Id. 826-827.
173 G.R. Nos. 164785 & 165636, April 29, 2009, 587 SCRA 79.
174 G.R. No. 168338, February 15, 2008, 545 SCRA 441.
175 *Soriano v. Laguardia*, supra note 173, at 103-104.
176 G.R. No. 162272, April 7, 2009, 584 SCRA 213.

free expression and a free press. The Court found that as it stood, broadcast stations, unlike print media, were already subjected to a regulatory framework that necessarily restrains their content. Newspapers, for instance, could publish their content daily without the restraint of having a government agency like the NTC possibly suspending their operations or imposing on them a fine because of their content. The possibility of the same government agency having the power to cancel a CPC would, therefore, be a possible death sentence to broadcast media's ability to exercise their constitutional rights to free speech, expression, and of the press. The Court then expounded:

> This judicial philosophy aligns well with the preferred mode of scrutiny in the analysis of cases with dimensions of the right to free expression. **When confronted with laws dealing with freedom of the mind or restricting the political process, of laws dealing with the regulation of speech**, gender, or race **as well as other fundamental rights** as expansion from its earlier applications to equal protection, **the Court has deemed it appropriate to apply "strict scrutiny" when assessing the laws involved or the legal arguments pursued that would diminish the efficacy of such constitutional right**. <u>The assumed authority of the NTC to cancel CPCs or licenses, if sustained, will create a permanent atmosphere of a less free right to express on the part of broadcast media. So that argument could be sustained, it will have to withstand the strict scrutiny from this Court.</u>
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> Strict scrutiny entails that the presumed law or policy must be justified by a compelling state or government interest, that such law or policy must be narrowly tailored to achieve that goal or interest, and that the law or policy must be the least restrictive means for achieving that interest. It is through that lens that we examine petitioner's premise that the NTC has the authority to cancel licenses of broadcast franchisees.[177] (Emphasis and underscoring supplied)

From the foregoing survey of domestic and foreign jurisprudence, the *ponencia* was, therefore, correct in its use of the strict scrutiny test in determining the constitutionality of the provisions of the ATA, considering that the provisions, directly or indirectly, regulate speech on the basis of its content, and have serious implications on the right to due process.

V.

Section 4, except the "Not Intended Clause" in its proviso, is constitutional

I likewise agree with the majority that Section 4, except the "Not Intended Clause" in the *proviso*, is constitutional. Only the *proviso* of Section 4 — *i.e.*, "which are not intended to cause death or serious physical

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[177] Id. at 245.

harm to a person, to endanger a person's life, or to create serious risk to public safety," — is rightly declared unconstitutional such that Section 4, as delineated by the *ponencia*, would now state:

> SECTION 4. *Terrorism.* — Subject to Section 49 of this Act, terrorism is committed by any person who, within or outside the Philippines, regardless of the stage of execution:
>
> (a) Engages in acts intended to cause death or serious bodily injury to any person, or endangers a person's life;
>
> (b) Engages in acts intended to cause extensive damage or destruction to a government or public facility, public place or private property;
>
> (c) Engages in acts intended to cause extensive interference with, damage or destruction to critical infrastructure;
>
> (d) Develops, manufactures, possesses, acquires, transports, supplies or uses weapons, explosives or of biological, nuclear, radiological or chemical weapons; and
>
> (e) Release of dangerous substances, or causing fire, floods or explosions
>
> when the purpose of such act, by its nature and context, is to intimidate the general public or a segment thereof, create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety, shall be guilty of committing terrorism and shall suffer the penalty of life imprisonment without the benefit of parole and the benefits of Republic Act No. 10592, otherwise known as "An Act Amending Articles 29, 94, 97, 98 and 99 of Act No. 3815, as amended, otherwise known as the Revised Penal Code": **Provided, That, terrorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights[.]** ~~, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety~~. (Emphasis and strikethrough supplied.)

That said, I find the *ponencia*'s framework, in reaching this conclusion, to be restrictive.

I agree with the *ponencia*'s observation that Section 4 of the ATA consists of two parts: the main part and the *proviso*. The *ponencia* correctly observes that the main part, which enumerates the acts constituting terrorism, as plainly worded, pertains to conduct only. There is, in this regard, no material difference between the ATA and its predecessor, R.A. No. 9372 or the HSA. What is only different this time is that the act committed under the ATA need not be an act punishable under any of the

cited provisions of the Revised Penal Code (*RPC*), or under any of the enumerated special penal laws.[178]

Furthermore, under the HSA, the act committed should sow and create a condition of widespread and extraordinary fear and panic among the populace, for the purpose of coercing the government to give in to an unlawful demand. These elements are absent in the ATA, but notably, they were recast and broadened as any of the purposes of the predicate acts under the ATA. Hence, in a similar fashion to the HSA, the proscribed acts under the ATA should be for the purpose of creating an atmosphere or spreading a message of fear, or intimidating the general public or a segment thereof. In addition, the purposes of the predicate acts under the ATA may also be to provoke or influence by intimidation the government or any international organization, or seriously destabilize or destroy the fundamental political, economic, or social structures of the country, or create a public emergency or seriously undermine public safety.

Be that as it may, while the acts and purposes of terrorism have been expanded under the main part of Section 4 of the ATA, like the HSA, what is clearly regulated remains conduct and not speech or "spoken words." It is also well to point out that the main part of Section 4 of the ATA did away with the communicative component of the prohibition in the HSA, the lone purpose of which was coercing the government to give in to an unlawful demand. To recall, the Court in *Southern Hemisphere* ruled that any attempt at singling out or highlighting this communicative component cannot recategorize the unprotected conduct into a protected speech. The Court held so because before any of the qualifying phrases in the other elements of the crime, including its only purpose, can be triggered into operation, there must first be a predicate crime actually committed.[179]

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[178] See *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, supra note 46, at 190.

[179] The Court elaborated:

> Petitioners' notion on the transmission of message is entirely inaccurate, as it unduly focuses on just one particle of an element of the crime. Almost every commission of a crime entails some mincing of words on the part of the offender like in declaring to launch overt criminal acts against a victim, in haggling on the amount of ransom or conditions, or in negotiating a deceitful transaction. An analogy in one U.S. case illustrated that the fact that the prohibition on discrimination in hiring on the basis of race will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating speech rather than conduct.
>
> Utterances not elemental but inevitably *incidental to* the doing of the criminal conduct alter neither the intent of the law to punish socially harmful **conduct** nor the essence of the whole act as **conduct** and not speech. This holds true a *fortiori* in the present case where the expression figures only as an inevitable incident of making the element of coercion perceptible.
>
> > "[I]t is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the *conduct* was, *in part*, initiated, *evidenced*, or carried out *by means of language*, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies

Petitioners, to be fair, do not advance the same argument in the *Southern Hemisphere* case — that the acts contemplated under Section 4 of the ATA nevertheless have a communicative element to them and are thus, also speech-related. Rather, petitioners argue that speech is implicated because of the *proviso* and its qualifying clause (the "Not Intended Clause") in Section 4.

According to petitioners, "Section 4, together with Sections 6, 9, 10 and 12 of the ATA, directly punishes constitutionally-protected speech and conduct. Most egregious is Section 4 of the ATA which penalizes with life imprisonment 'exercises of civil and political rights' when committed with intent 'to cause death or serious physical harm to any person, to endanger a person's life, or to create a serious risk to public safety.'"[180] While petitioners are correct that the *proviso* pertains to and implicates speech and speech-related conduct, their fears that these are proscribed under Section 4 have been effectively abated with the majority's decision to excise the problematic qualifying phrase in the *proviso*. As it will now stand, the *proviso* in Section 4 will ***unqualifiedly*** exclude advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights from the definition of terrorism. Simply put, the main part will reach only permissibly regulated conduct, while the *proviso* will exclude constitutionally protected speech and speech-related conduct.

As mentioned earlier, the *ponencia* has delimited a facial analysis only to statutes that affect free speech and its cognate rights. As such, the *ponencia* is of the view that a facial challenge against the main part of Section 4 should not be entertained. Nonetheless, to guide the bench, bar, and public, the *ponencia* deems it prudent to clarify some of the alleged mistaken notions of petitioners with the main part of Section 4. Ultimately, therefore, and quite notably, what the *ponencia* has done is to conduct a facial analysis of the main part of Section 4 and concludes that it is neither vague nor overbroad. To this conclusion and the *ponencia's* explanation, I have no disagreement.

However, as I had discussed earlier, I respectfully disagree with the *ponencia*'s restrictive interpretation of when a facial challenge, particularly a void-for-vagueness challenge, of a penal statute may be had. Again, to my mind, a facial challenge is not limited to a statute that infringes only on free speech and its cognate rights. Regardless of whether conduct or speech is involved, for so long as a fundamental right is implicated, a penal statute is always susceptible to a facial challenge.

Considering that petitioners have sufficiently demonstrated that the main part of Section 4 implicates one's fundamental rights to due process

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deemed injurious to society. x x x (Emphasis, italics and underscoring in the original) Id. at 191-192.

[180] Petitioners' Memorandum dated June 26, 2021, Cluster II, p. 21.

and equal protection for being vague, as well as the fundamental precept of separation of powers, the Court may conduct a facial analysis against the assailed provision.

A. The main part of Section 4 of the ATA is not vague.

I agree with the majority that the main part of Section 4 is not impermissibly vague.

A statute or act suffers from the defect of vagueness when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application.[181] It is repugnant to the Constitution because it violates due process for failure to accord persons fair notice of the conduct to avoid.[182] This principle of legality, reflected in the maxim *nulla poena sine lege* (no penalty without a law), provides that the criminal act must be legislated in advance, and not crafted *ad hoc* to capture a particular person's conduct.[183]

Furthermore, a vague statute is unacceptable because it gives law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle.[184] Only proper institutional actors — namely, legislatures — may define the content of the criminal law. Basic policy matters should not be impermissibly delegated to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. Citizens should not have to run the risk of violating laws that are effectively created on the spot by the enforcement decisions of police officers, or the courts.[185]

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181 *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, supra note 58, at 390, citing *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, supra note 46.

182 Id.

183 Ryan McCarl, Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's Void-for-Vagueness Doctrine, 42 Hastings Const. L.Q. 73 (2014), available at <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1987&=&context=hastings_constitutional_law_quaterly&=&sei-redir=1&referer=https%253A%252F%252Fscholar.google.com%252Fscholar%253Fhl%253Den%2526as_sdt%253D0%25252C5%2526q%253DIncoherent%252Band%252BIndefensible%25253A%252BAn%252BInterdisciplinary%252BCritique%252Bof%252Bthe%252BSupreme%252BCourt%252527s%252BVoid-for-Vagueness%252BDoctrine%2526btnG%253D#search=%22Incoherent%20Indefensible%3A%20An%20Interdisciplinary%20Critique%20Supreme%20Courts%20Void-for-Vagueness%20Doctrine%22>.

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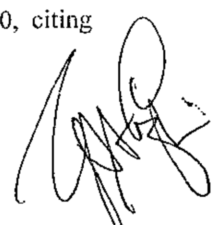
184 *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, supra note 58, at 390, citing *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, supra note 46.

185 Ryan McCarl, supra note 183.



Thus, upon closer inspection, the vagueness doctrine rests on the twin constitutional pillars of due process and separation of powers.[186]

According to petitioners, the following provisions and terms under the main part of Section 4 are problematic:

1. Section 4(a) is vague as the *actus reus* is unclear. It punishes so long as there is "intent" to "cause death or serious bodily injury to any person".

2. Unconstitutional vagueness also taints the phrase "endangers a person's life" in Section 4(a) because "risk" of harm varies from person to person. "Endanger" means to put someone at risk of harm. However, "risk" of harm varies from person to person.

3. Section 4(b) is vague as "extensive damage or destruction" has no ascertainable standards under the ATA.

4. Section 4(c) is vague because the terms "extensive" and "interference" are not defined.

5. Section 4 (d) is vague because it does not provide any standards that can narrow the scope of the prohibited acts because the phrase "of biological, nuclear, radiological or chemical weapons" exists independently of "weapons, explosives".

6. Section 4(e) does not define what "dangerous substances" consist of. Like in *Johnson v. United States*[187] (*Johnson*), Section 4(e) does not prescribe the magnitude and quality of danger a substance must possess to be considered "dangerous".[188]

In all of the foregoing, petitioners argue that law enforcers are effectively given a very wide discretion in the definition and determination of these allegedly vague terms in the course of enforcement. Petitioners add that while the phrase "when the purpose of such act, by its nature and context" aims to contextualize the coverage of the definition of terrorism, it requires a law enforcer to discern the *"nature and context"* of any person's act to determine whether the act was committed with any of the terroristic purposes provided by Section 4. However, "*nature and context*" are, by themselves, complicated concepts, and a law enforcer, who is trained neither in law nor psychology, cannot be expected to make a correct determination thereof.[189]

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[186] *United States v. Davis*, supra note 124.
[187] 576 U.S. 591 (2015).
[188] Petitioners' Memorandum dated June 26, 2021, Cluster II, pp. 22-25.
[189] Id. at 26-27.

As jurisprudential support, petitioners notably cited the case of *Johnson* which struck down a statute found to be vague because of the lack of specific standards, which rendered its applicability as a matter of "guesswork and intuition." They also cite *Kolender* to argue that the vagueness of Section 4 impermissibly entrusted "lawmaking to the moment-to-moment judgment of the policeman on his beat."[190]

Indeed, *Kolender* acknowledges that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement."[191] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[192] The problem of vagueness attendant in *Kolender* and *Johnson* (as well as in *Sessions* and *Davis),* however, is absent in this case.

To recall, in *Kolender,* the SCOTUS facially invalidated a criminal statute, § 647(e) of the California Penal Code Ann., which required persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio.*[193] The SCOTUS held the statute as unconstitutionally vague by failing to clarify what was contemplated by the requirement that a suspect provide a "credible and reliable" identification. It contained no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, § 647(e) vested virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. During the oral arguments, the appellants (police officers) did, in fact, confirm that a suspect violates § 647(e) unless "the officer [is] satisfied that the identification is reliable."[194]

Hence, whether an offender has violated the assailed statute in *Kolender* is a question that is entirely dependent on the *subjective* assessment of law enforcement. Again, it was brought to light during the oral arguments in said case that in giving examples of how suspects would satisfy the identification requirement, the police officers "explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him, or could satisfy the identification requirement simply by reciting his name and address."[195] This highly subjective assessment, which can possibly lead to a capricious exercise by policemen, was the very same evil that the

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[190] Id. at 27, citing *Kolender v. Lawson,* supra note 91, at 360.
[191] *Kolender v. Lawson,* id. at 358.
[192] Id.
[193] 392 U.S. 1 (1968).
[194] *Kolender v. Lawson,* supra note 91, at 360.
[195] Id.

SCOTUS averted in the earlier cases of *Coates v. City of Cincinnati*[196] (*Coates*), *Papachristou v. Jacksonville*[197] (*Papachristou*), and *Smith v. Goguen*[198] (*Smith*).

Coates was the famous case involving a Cincinnati, Ohio ordinance which made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by. . . ."[199] Besides ruling that the ordinance was a violation of the constitutional right of free assembly and association, the SCOTUS also found it unconstitutionally vague because it subjected the exercise of the right of assembly to an unascertainable standard. Conduct that annoys some people does not annoy others. As with *Kolender*, enforcing the assailed ordinance in *Coates* would entirely depend upon whether a policeman was annoyed. Thus, the SCOTUS concluded that the ordinance was vague not in the sense that it required a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct was specified at all.[200]

Similarly, in *Papachristou,* an archaic vagrancy ordinance deemed certain individuals[201] as vagrants and meted the punishment of fine or imprisonment upon their conviction. The SCOTUS held the ordinance unconstitutionally vague not only for lack of fair notice, but also for encouraging arbitrary and erratic arrests and convictions. According to the SCOTUS, the ordinance made criminal activities which, by modern standards, were normally innocent and cast a large net to increase the arsenal of the police in the state's objective of crime prevention. Elaborating on the unfettered discretion the ordinance placed into the hands of the police, the SCOTUS relevantly expressed:[202]

> Those generally implicated by the imprecise terms of the ordinance -- poor people, nonconformists, dissenters, idlers -- may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting

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196 402 U.S. 611 (1971).
197 405 U.S. 156 (1972).
198 415 U.S. 566 (1974).
199 *Coates v. City of Cincinnati*, supra note 196, at 615.
200 Id. at 614.
201 The assailed ordinance defined "Vagrants" as "[r]ogues and vagabonds, or dissolute persons who go about begging; common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children." *Papachristou v. Jacksonville*, supra note 197, at 171.
202 *Papachristou v. Jacksonville*, id. at 165-166.

> officials, against particular groups deemed to merit their displeasure." x x x It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk . . . only at the whim of any police officer." x x x[203]

In *Smith,* the provision in question involved a flag-misuse statute that subjected to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States..."[204] The SCOTUS acknowledged that in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the legislature to make criminal every informal use of the flag. However, the statutory language of the assailed provision failed to draw reasonably clear lines between the kinds of non-ceremonial treatment that were criminal and those that were not. Textually, the SCOTUS said, it was sufficiently **unbounded** to prohibit "any public deviation from formal flag etiquette..."[205] and thereby allowed policemen, prosecutors, and juries to pursue their personal predilections.[206]

As well, quite interestingly, the SCOTUS in *Smith* likewise noted the appellant's (sheriff) candid confession during the oral arguments before the Court of Appeals, to wit:

> "[A]s counsel [for appellant] admitted, a war protestor who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion who, caught in the same rainstorm while returning from an 'America -- Love It or Leave It' rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude, would *not* be prosecuted." x x x Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.[207]

On the other hand, in this case, the interpellation of Associate Justice Rosmari D. Carandang to the OSG during oral arguments is illuminating. The following establishes the unequivocal standards apparent in Section 4 itself, in stark contrast with the damning admissions made by the concerned law enforcers in *Kolender* and *Smith*:

> **ASSOCIATE JUSTICE CARANDANG:**
>
> Okay. So, that's very, very clear. Consider this example ha? A man was carrying a grenade around Quiapo church while a mass was being held. A bystander shows he was carrying and shouted "Granada!" And this led to a hundred of people going into panic. He was then apprehended by the police. Now, based on the facts presented, can the man be prosecuted under Section 4 or can you cite a fact that proves

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203 Id. at 170. Citations omitted.
204 *Smith v. Goguen*, supra note 198, at 566.
205 Id. at 575.
206 Id.
207 Id. at 575-576.

that the purpose is to commit terrorism and the nature and context of such purpose? Simply a man holding a grenade.

ASSISTANT SOLICITOR GENERAL RIGODON:
Based, Your Honor, on the example, that is not sufficient to charge him with terrorism. Because there is no evidence as to what is his intent in carrying that grenade; and secondly, there is also no evidence as to the purpose for carrying that grenade, Your Honor.

ASSOCIATE JUSTICE CARANDANG:
Next question. If that guy would want really to throw the grenade just to kill his enemies whom he see there attending mass in Quiapo church, will he be punished under the anti-terrorism law or can he be punished under other special laws?

ASSISTANT SOLICITOR GENERAL RIGODON:
I think, based on the example, Your Honor, he can only be punished for either murder or homicide, Your Honor. Because it is not clear that the purpose is included in those which the law prohibits under the second paragraph of Section 4, Your Honor.

ASSOCIATE JUSTICE CARANDANG:
Okay. Since he was arrested *in flagrante delicto*, can the officer or the police officer or the government agent distinguish between, can he distinguish between terrorism and possession of hand grenade in that specific case? At that point in time that he was arrested, can the police officer distinguish?

ASSISTANT SOLICITOR GENERAL RIGODON:
No, Your Honor, because intent is a mental state of mind and therefore unless the police can secure as personal knowledge on what the specific intent of that person at that precise moment in time, it would not be possible to charge him or to apprehend him for violation of the terrorism law, Your Honor.

ASSOCIATE JUSTICE CARANDANG:
At most, initially?

ASSISTANT SOLICITOR GENERAL RIGODON:
Illegal possession of explosives, Your Honor.

ASSOCIATE JUSTICE CARANDANG:
Or maybe if he threw the bomb or the grenade, murder or whatever? Common crimes?

ASSISTANT SOLICITOR GENERAL RIGODON:
Yes, Your Honor.

ASSOCIATE JUSTICE CARANDANG:
So, you are in effect, admitting that from the example given, the enforcement officers are now given such a wide discretion in apprehending the suspects based only on his own perception of terrorism?

> **ASSISTANT SOLICITOR GENERAL RIGODON:**
> Because the law requires, Your Honor, under a warrantless arrest that the apprehending officer must have personal knowledge. Therefore, if that police officer does not have personal knowledge on the intent of that person or the purpose of that person in carrying that grenade, then he cannot validly arrest him without a warrant for violation of Section 4 of the ATA, Your Honor. He can only apprehend him for violation of common crimes, Your Honor.[208]

The foregoing shows that, unlike the US cases discussed above, there is here no clear equivalent subjective assessment or unfettered discretion given to law enforcement to make arrests based on their personal predilections. This is so because — to underscore — the enumerated acts in the main part of Section 4 are not, and should not be, divorced from the purposes in the succeeding paragraph, as well as from the elements of "nature and context." As aptly noted by the *ponencia*:

> A textual review of the main part of Section 4 shows that its first and second components provide a clear correlation and a manifest link as to how or when the crime of terrorism is produced. When the two components of the main part of Section 4 are taken together, they create a demonstrably valid and legitimate definition of terrorism that is general enough to adequately address the ever-evolving forms of terrorism, but neither too vague nor too broad as to violate due process or encroach upon the freedom of speech and expression and other fundamental liberties.
>
> x x x x
>
> Thus, "nature" in Section 4 cannot be reasonably interpreted to mean "instinct, appetite, desire," "a spontaneous attitude," "external world in its entirety," because such definitions would render the word "nature" absurd in connection with the other terms in Section 4. Therefore, "nature," as used in Section 4, can only refer to the inherent character of the act committed. By a similar process of elimination, "context" can only refer to the interrelated conditions in which any of the acts enumerated in Section 4(a) to (e) was committed. These are the standards which law enforcement agencies, the prosecution, and the courts may use in determining whether the purpose of or intent behind any of the acts in Section 4(a) to (e) is to intimidate the public or a segment thereof, create an atmosphere or spread a message of fear, to provoke or influence by intimidation the government or any international organization, etc.[209] (Emphasis omitted)

Indeed, petitioners' insistence as to the lack of definition of the various terms employed in the main part, which allegedly makes them vague, deserves scant consideration. The rule is well-settled that a statute is not rendered uncertain and void merely because general terms are used therein, or because of the employment of terms without defining them.[210] In *Estrada*, the Court labelled as pure sophistry therein petitioner's rationalization that the Plunder Law was impermissibly vague and overbroad

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[208] TSN, Oral Arguments, April 27, 2021, pp. 48-50.
[209] *Ponencia*, pp. 92-98.
[210] *Estrada v. Sandiganbayan*, supra note 74, at 435.

for its failure to provide the statutory definition of various terms. The Court held that there is no positive constitutional or statutory command requiring the legislature to define each and every word in an enactment. Congress is not restricted in the form of expression of its will, and its inability to so define the words employed in a statute will not necessarily result in the vagueness or ambiguity of the law so long as the legislative will is clear, or at least, can be gathered from the whole act.[211]

It would be frivolous to claim that people of common intelligence will be confused as to whether their contemplated actions would fall under the main part of Section 4 or not. As plainly constructed, the main part sets out the acts which may constitute terrorism, defined by the intent behind them, the causes or effect they may lead to, and the purposes why they are carried out. Further to these, the nature and context of the offenses play an important part. All of these factors figure into the whole definition of the crime of terrorism. The apparent desire is to circumscribe the offense to unprotected conduct, but ensure, at the same time, that the ATA will remain flexible enough and enduring, in consonance with the ever-evolving nature of terrorism.

The need to balance out considerations of human rights and law enforcement is an old and familiar subject. In the craftsmanship of laws, this need is also a fixture. In dealing with such, *Colten v. Kentucky*[212] instructs that "[t]he root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."[213] To be sure, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision."[214]

In another case, *U.S. v. Williams*[215] (*Williams*) the SCOTUS shot down the void-for-vagueness challenge against a provision of a law which criminalized, in certain specified circumstances, the pandering or solicitation of child pornography. Specifically, the alleged vague and standardless phrases in the statute read: "in a manner that reflects the belief" and "in a

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[211] Id.
[212] 407 U. S. 104 (1972).
[213] Id. at 110.
[214] *Smith v. Goguen,* supra note 198, at 581. See also Robinson, Paul H., "Fair Notice and Fair Adjudication: Two Kinds of Legality" (2005). Faculty Scholarship at Penn Law. 601, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1600&context=faculty_scholarship:>. "Uncertain statutory language has been upheld when the subject matter would not allow more exactness and when greater specificity in language would interfere with practical administration."

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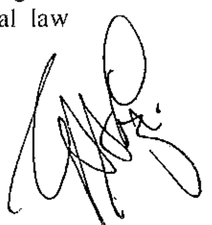
[215] 553 U.S. 285 (2008).



manner ... that is intended to cause another to believe."[216] The SCOTUS debunked the claims that these phrases left the public "with no objective measure to which behavior can be conformed."[217] The Court of Appeals, in invalidating the provision, relied on hypothetical cases which tried to paint a picture that it can cover innocent acts. The SCOTUS found it erroneous to rely on such hypothetical, so-called close cases. Close cases, according to the SCOTUS, can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.[218] It further elucidated in this wise:

> **What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.** x x x
>
> **There is no such indeterminacy here. The statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicates in a manner intended to cause another so to believe. Those are clear questions of fact. Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is "annoying" or "indecent."** Similarly true or false is the determination whether a particular formulation reflects a belief that material or purported material is child pornography. To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. "But **courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred."** x x x **And they similarly pass every day upon the reasonable import of a defendant's statements—whether, for example, they fairly convey a false representation, see, *e.g.*, 18 U. S. C. §1621 (criminalizing perjury), or a threat of physical injury, see, *e.g.*, §115(a)(1) (criminalizing threats to assault federal officials). Thus, the Eleventh Circuit's contention that §2252A(a)(3)(B) gives law enforcement officials "virtually unfettered discretion" has no merit.** x x x No more here than in the case of laws against fraud, conspiracy, or solicitation.[219] (Emphasis and underscoring supplied)

In this case, petitioners argue that the element of intent in the main part of Section 4, particularly with regard to the paragraph on "intent" to "cause death or serious bodily injury to any person," gives law enforcers free rein to charge people as terrorists by simply claiming that an act was

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[216] Id. at 304-305.
[217] Id. at 305.
[218] Id. at 305-306.
[219] Id. at 306-307. Citations omitted.

committed with "intent," regardless of the outcome or context.[220] This argument has no leg to stand on. As explained in *Williams*, the question of possession of intent is one of fact or a true-or-false determination, and not one of subjective judgment. In the ultimate analysis, the nature and context of the conduct proscribed by Section 4 sufficiently provide fair notice of what acts are considered terrorism.

In relation further to the scienter requirement[221] of most of the provisions in the main part of Section 4, it is also well to point out that a scienter requirement may, in fact, mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.[222] This makes sense because a criminal statute that includes a criminal intent (or *mens rea)* requirement is less likely to encompass morally innocent conduct, and so more likely to accord with people's intuitions about what conduct is illegal.[223]

As likewise expounded in our own case in *Valenzuela v. People,*[224] which the *ponencia* also cited,[225] it is from the concurrence of the *actus reus* with the *mens rea*, as they find expression in the criminal statute, that the felony is produced:

> x x x As a postulate in the craftsmanship of constitutionally sound laws, it is extremely preferable that the language of the law expressly provide when the felony is produced. Without such provision, disputes would inevitably ensue on the elemental question whether or not a crime was committed, thereby presaging the undesirable and legally dubious set-up under which the judiciary is assigned the legislative role of defining crimes. Fortunately, our Revised Penal Code does not suffer from such infirmity. From the statutory definition of any felony, a decisive passage or term is embedded which attests when the felony is produced by the acts of execution. For example, the statutory definition of murder or homicide expressly uses the phrase "shall kill another," thus making it clear that the felony is produced by the death of the victim, and conversely, it is not produced if the victim survives.[226]

Again, under pain of repetition, aside from the above elements of *actus reus* or overt acts and *mens rea* or criminal intent, the purpose of the offense is also an element under the main part of Section 4, thereby mitigating further any vice of vagueness. The commission of direct, overt acts establishes the criminal intent of the accused. As with a common crime under the RPC, direct, overt acts have to always be present before an attempted crime of terrorism can be made. This is the import behind the

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220 Petitioners' Memorandum dated June 26, 2021, Cluster II, pp. 22-23.

221 *Ponencia*, p. 129, citing Black's Law Dictionary, 9th ed., p. 1463: Scienter is the degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission, or the fact of an act having been done knowingly.

222 *Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, at 499 (1982).

223 Ryan McCarl, supra note 183.

224 G.R. No. 160188, June 21, 2007, 525 SCRA 306.

225 *Ponencia*, pp. 91-92.

226 *Valenzuela v. People*, supra note 217, at 322-323.

phrase "regardless of the stage of execution" found in the main part of Section 4. The ATA merely seeks to punish the acts under the main part of Section 4 whether they will be in the attempted, frustrated or consummated stage. The commission of overt acts signals the beginning of an offense and gives rise to the "subjective phase" or that period occupied by the acts of the offender over which he has control – that period between the point where he begins and the point where the last act performed by the offender should result in the consummated crime. If between these two points the offender is stopped by reason of any cause outside of his own voluntary desistance, the subjective phase has not been passed and it is an attempt. If he is not so stopped but continues until he performs the last act, it is frustrated.[227]

Verily, petitioners are mistaken when they argue that the phrase "regardless of the stage of execution" weaponizes Section 4 to be wielded against any person who can be tagged as a terrorist even though that person has not presented any danger to society. Petitioners' argument that the phrase criminalizes mere thought and inception of an idea through said phrase is puerile. As succinctly put by the *ponencia*, "[n]o law can punish a man for what he thinks, imagines, or creates in his mind. Mental acts are not punishable even if they would constitute a crime had they been carried out. Mere intention producing no effect can never be a crime."[228] To this I add, in order to be punishable under the main part of Section 4, there must always be an overt act that shows the unavoidable connection, or the logical and natural relation of the cause of the act committed and its effect. Absent these, what obtains is an attempt to commit an indeterminate offense, which is not a juridical fact from the standpoint of the RPC, and certainly not from the ATA's either.[229]

Significantly, it is also well to point out that in maintaining that the phrase "regardless of the stage of execution" is impermissibly vague, petitioners argue that the *proviso* in Section 4 makes advocacy, protest, dissent, and other similar exercises punishable when there is allegedly some criminal intent behind them, without however requiring that the overt acts themselves manifest said intent in any way. Thus, petitioners conclude, lawful exercises of civil and political rights are made criminal when there is some supposedly illegal intent behind them regardless of whether this intent is translated into action. So, too, petitioners have notably cited hypothetical cases which involve exercises of speech and speech-related conduct in their attempt to demonstrate the alleged vagueness of Section 4. But considering that the *ponencia* has drawn a bright-line between the main part of Section 4 and its *proviso* as being purely conduct and speech, respectively, coupled with the striking down of the "Not Intended Clause" in the *proviso*, petitioners are now left hard-pressed to maintain these arguments.[230]

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227 See *People v. Listerio,* G.R. No. 122099, July 5, 2000, 335 SCRA 40, 62-63.

228 *Ponencia,* p. 96. Emphasis, italics and underscoring omitted. Citations omitted.

229 See *Rait v. People* G.R. No. 180425, July 31, 2008, 560 SCRA 785, 791.

230 See *Smith v. Goguen,* supra note 198, at 573: "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."

I go back, at this juncture, to petitioners' citation of *Johnson* in asserting that Section 4, being standardless, renders its applicability a matter of "guesswork and intuition." The ruling in this U.S. case, as well as in the succeeding cases of similar nature, *i.e.*, *Sessions* and *Davis,* concerns the validity of residual clauses in the statutes subject of said cases. Both *Johnson* and *Davis* involved statutes that increased prison sentences for offenders who were also convicted for or involved in a violent crime. In defining what constitutes a violent crime, there was an "elements clause" and a "residual clause", with the latter serving as a catch-all provision, encompassing any conduct that constitutes a serious risk. These respective residual clauses, in italics below, read as follows:

In *Johnson*:

> The Armed Career Criminal Act of 1984 (ACCA) defines "violent felony" as follows:
>
> "any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*."[231]

In *Davis*:

> x x x According to 18 U. S. C. §924 (c) (3), a crime of violence is "an offense that is a felony" and
>
> "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(B) *that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*."[232]

Sessions, on the other hand, involved the eligibility for deportation of aliens found to have an aggravated felony conviction under the Immigration and Nationality Act (*INA*). The INA defines "aggravated felony" by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. According to one item on that long list, an aggravated felony includes a "crime of violence" as defined in 18 U. S. C. §16. As with ACCA and 18 U. S. C. §924 (c) (3) in *Johnson* and *Davis,* 18 U. S. C. §16 defines a "crime of violence" in the following manner, with the residual clause again in italics:

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231 Supra note 185, at Slip Op., p. 2.
232 Supra note 123, at 2324.

"(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

"(b) any other offense that is a felony and *that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*"

The SCOTUS in all three cases ruled that the residual clauses produced more unpredictability and arbitrariness than the due process clause tolerates. In all three cases, the statutes required the courts to use a framework known as the "categorical approach," as opposed to one that was case-specific. Under the categorical approach, a court assesses whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."[233] The statutes, however, created grave uncertainty about how to estimate the "risk" posed by a crime because they tied the judicial assessment of said risk to a hypothesis about the ordinary case of the crime, or what usually happens when the crime is committed, not to real-world facts or statutory elements.[234] Thus, *Johnson* asked rhetorically, "How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"[235] On top of this, assessing "potential risk" seemingly required the judge to imagine how the idealized ordinary case of the crime would subsequently play out.[236]

The vagueness of the residual clauses was further compounded by the absence of a standard to determine what level of risk was substantial.[237] *Sessions*, it must be emphasized, held that the application of a substantial risk standard (or a serious potential risk in *Johnson*) to real-world conduct is constitutional. But given the categorical framework approach, or the application of the standard to a "judge-imagined abstraction," the problem of vagueness arises. Without a reliable way to discern what the idealized ordinary version of any offense looked like, no one could tell how much risk the offense generally posed. The combined indeterminacy on how to

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[233] *Johnson v. United States*, supra note 187 (slip op., at 4).

[234] Id. (slip op., at 5-6); See also Canaparo, GianCarlo, Judicial Courage: Justice Gorsuch Ventures Out on His Own While Preserving Scalia's Principles, Legal Memorandum No. 255, The Heritage Foundation, November 15, 2019; available at <https://www.heritage.org/sites/default/files/2019-11/LM255.pdf>.

[235] Id. (slip op., at 5).

[236] Id. In illustrating how speculative the judicial assessment might be under the residual clause, *Johnson* cited the following example from a previous case, *James v. United States*, 550 U. S. 192 (2007):

> Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner . . . may give chase, and a violent encounter may ensue." The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

[237] Id. (slip op., at 9); See also Canaparo, GianCarlo, supra note 227.

measure the risk posed by a crime, with the indeterminacy about how much risk it takes for the crime to qualify as a violent felony, rendered the residual clauses to be unpredictable and arbitrary.[238]

Significantly, the language of the statutes in *Johnson, Sessions,* and *Davis* required courts to look at the elements and the nature of the offense rather than at the particular facts relating to a petitioner's crime.[239] The meaning of "offense" was always used in the statutes in the generic sense, "say, the crime of fraud or theft in general,"[240] and **not** as something that can "refer to '<u>specific acts</u> in which an offender engaged on a specific occasion.'"[241] This was evident, according to the SCOTUS, with the connection between the residual clauses and the elements clauses that always preceded them. Since the elements clauses always referred directly to generic crimes, the term "offense" is naturally expected to retain that same meaning in connection with the residual clauses. After all, "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning."[242]

The problem that beset *Johnson, Sessions,* and *Davis* is absent in this case. Section 4 of the ATA does not textually require courts to employ a categorical approach framework. Section 4 of the ATA does not plainly employ generic terms or refer to generic crimes, but only specific acts an offender may be engaged in a specific occasion. Consequently, it does not require courts to imagine any idealized ordinary case, but rather to consider the underlying conduct of an offender or to ask about the specific way in which the offender committed a crime.[243] Corollary to this, the alleged vague terms used in the main part of Section 4, specifically "endangers a person's life," "extensive damage or destruction," "extensive interference," "seriously destabilize or destroy," and "seriously undermine," among others, may pass constitutional muster under the case-specific framework. *Johnson, Sessions* and *Davis* notably conceded that the unclear threshold of risk (serious potential risk or substantial risk) spelled out in the statutes, on its own, would not have violated the void-for-vagueness doctrine. The SCOTUS observed that many perfectly constitutional statutes use imprecise terms like "serious potential risk" or "substantial risk." The problem came from layering such a standard on top of the requisite "ordinary case" inquiry.[244]

B. Section 4 is not overbroad.

Having established that Section 4 does not suffer from the vice of vagueness, I now turn to the petitioners' claim that the same provision is overbroad.

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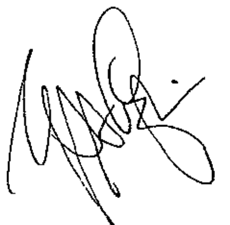
238 See *Johnson v. United States*, supra note 187 (slip op., at 6).
239 *United States v. Davis*, supra note 124, at 2329.
240 Id. at 2328.
241 Id.
242 Id.
243 *Sessions v. Dimaya*, supra note 119 (slip op., at 12).
244 Id. (slip op., at 8).



A statute or regulation is considered void for overbreadth when it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to State regulations may not be achieved by means that sweep unnecessarily broadly and thereby invade the area of protected freedoms.[245] In order for an overbreadth challenge to succeed, the "overbreadth of a statute must not only be **real,** but **substantial** as well, judged in relation to the statute's plainly legitimate sweep."[246] In measuring the substantiality of a statute's overbreadth, the ruling of the United States Court of Appeals, First Circuit in *Magill v. Lynch*[247] is instructive:

> x x x Measuring the substantiality of a statute's overbreadth apparently requires, *inter alia*, a rough balancing of the number of valid applications compared to the number of potentially invalid applications. x x x Some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is probable. The question is a matter of degree; it will never be possible to say that a ratio of one invalid to nine valid applications makes a law substantially overbroad. Still, an overbreadth challenger has a duty to provide the court with some idea of the number of potentially invalid applications the statute permits. Often, simply reading the statute in the light of common experience or litigated cases will suggest a number of probable invalid applications. x x x[248]

Substantial overbreadth is not satisfied merely because a litigant can point to one or a few hypothetical fact patterns under which application of the statute would be unconstitutional.[249] Courts, rather, should consider a statute's application to real-world conduct after a demonstration, from the text of the law and from actual fact, that there is a realistic danger that the statute itself will significantly compromise recognized constitutional freedoms of parties not before the court.[250]

In demonstrating the alleged overbreadth of Section 4, petitioners have alleged the following supposed invalid applications of Section 4, *to wit*:

> x x x Consider for example two rallies held in Padre Faura: the first one was organized by a group assailing the validity of the ATA, while the second rally was held in support of the ATA. The anti-ATA rally was quickly dispersed allegedly on account of the danger posed by COVID-19, while the other rally was permitted to continue until the

[245] *Chavez v. Commission on Elections*, G.R. No. 162777, August 31, 2004, 437 SCRA 415, 425.

[246] See *Broadrick v. Oklahoma*, supra note 104, at 615.

[247] 560 F.2d 22 (1977).

[248] Id. at 30 (1977). Citations omitted.

[249] Pierce, Christopher A. (2011) "The 'Strong Medicine' of the Overbreadth Doctrine: When Statutory Exceptions Are No More than a Placebo," Federal Communications Law Journal: Vol. 64: Iss. 1, Article 6. , available at <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1608&=&context=fclj&=&sei-redir=1&referer=https%253A%252F%252Fscholar.google.com%252Fscholar%253Fhl%253Den%2526as_sdt%253D0%25252C5%2526q%253D%252522overbreadth%252Bmust%252Bbe%252Bsubstantial%252522%2526btnG%253D#search=%22overbreadth%20must%20substantial%22>.

[250] Id.

> end. Both rallies are based on the same fundamental right of assembly under the Constitution, but each received a different treatment. The disparity is attributable to how law enforcers had interpreted the phrase "endangers a person's life" in Section 4(a). The ambiguity of the provision made possible the selective enforcement of the law.
>
> x x x Section 4(a) is over broad because it can penalize the exercise of the constitutional right to assembly as allegedly "endangering" a person's life. **Suppose in the rally mentioned above, the people become highly emotional and there are unified cries for the President to step down, would this call be considered inciting to commit terrorism, and the assembly a mass action that creates a serious risk to public safety, hence terrorism? If there happens to be violence during the dispersal because of the heavy-handed manner by which law enforcers have treated the protesters, would law enforcers be guilty of terrorism as they have acted to endanger another person's life?**
>
> x x x x
>
> x x x **Section 4(b) is also overbroad because "extensive damage or destruction" is not limited to physical or material damage. It may technically include reputational damage to the Government. Thus, Section 4(b) can penalize legitimate criticism as "terrorism" because it may "extensively damage" the reputation of the Government.** x x x
>
> x x x x
>
> x x x Section 4(c) also suffers from overbreadth. **In failing to define the parameters of the term "interference," the prohibition can disingenuously cover any form of dissent, chilling constitutionally protected speech or assemblies to petition the government for redress of grievances. For example, advocacy in the defense of Philippine sovereignty in the West Philippine Sea may be considered as "interference" with a critical infrastructure as it strains the Government's diplomatic relations with China.**[251] (Emphasis supplied)

These examples, however, are clearly forms of advocacy, protest, dissent, or exercises of civil and political liberties, which are exercises of free speech and expression. To reiterate, the *ponencia* has astutely made the delineation that the main part of Section 4 refers to conduct, while the *proviso* or the exception clause refers to speech and speech-related conduct, or symbolic speech. Indeed, the clause that "the purpose of such act, by its nature and context," especially when read along the *proviso* or exception clause, clearly circumscribes the definition of terrorism to acts or pure conduct that are constitutionally subject to regulation. In light of the *ponencia's* delineation, coupled with the ruling to nullify the qualifying phrase in the *proviso*, it can no longer be validly argued that Section 4 unnecessarily sweeps broadly and invades the protected area of freedom of speech and expression. As I had earlier stated, the *proviso* in Section 4 will

[251] Petitioners' Memorandum dated June 26, 2021, Cluster II, pp. 23-24.

now **expressly and unqualifiedly** exclude advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights from the definition of terrorism. Thus, the holding of the SCOTUS in the seminal case of *Broadrick* is apropos:

> It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. x x x But the plain import of our cases is, at the very least, that **facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, <u>attenuates</u> as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.** Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face, and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. x x x To put the matter another way, **particularly <u>where conduct and not merely speech is involved</u>, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.** It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied. x x x[252] (Emphasis and underscoring supplied)

VI.

Section 4, without the "Not Intended Clause," is not so vague as to violate the principle of separation of powers.

The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in the framing of our Constitution. Each department of the government has exclusive cognizance of matters placed within its jurisdiction, and is supreme within its own sphere.[253] The legislative department has the power to legislate or make laws; the executive department possesses the power to execute or enforce laws; and the judicial department is in charge of interpreting and applying laws.[254]

As the powers are exclusive to each branch of government, the legislature has no authority to execute or construe the law, the executive has

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[252] *Broadrick v.* Oklahoma, supra note 104, at 615-616. Citations omitted.

[253] *Echegaray v. Secretary of Justice,* GR No. 132601, October 12, 1998, 297 SCRA 754, 783-784.

[254] See 1987 CONSTITUTION, Art. VI, Sec. 1; Art. VII. Sec. 1; and Art. VIII, Sec. 1.

no authority to make or construe the law, and the judiciary has no power to make or execute the law.[255]

Broadly speaking, there is a violation of the separation of powers principle when one branch of government unduly encroaches on the domain of another. SCOTUS decisions instruct that the principle of separation of powers may be violated in two (2) ways: firstly, "[o]ne branch may **interfere impermissibly** with the other's performance of its constitutionally assigned function"; and "[a]lternatively, the doctrine may be violated when one branch **assumes a function** that more properly is entrusted to another." In other words, there is a violation of the principle when there is impermissible (a) **interference** with and/or (b) **assumption** of another department's functions.[256]

Hence, as I previously mentioned, a vague law which forces the judicial and executive branches of government to define it and consequently interfere with and/or assume the functions of the legislature is unconstitutional for violating the doctrine of separation of powers. A law that casts a net large enough to catch all possible offenders and leaves the courts to step inside and decide who could be rightfully detained substitutes the judicial for the legislative department.[257]

Sessions had the occasion to categorically declare that the void-for-vagueness doctrine is a corollary of the separation of powers principle which requires that the Congress – and not the executive or judicial branch – define the conduct proscribed by law, thus:

> "The prohibition of vagueness in criminal statutes," our decision in *Johnson* explained, is an "essential" of due process, required by both "ordinary notions of fair play and the settled rules of law." x x x The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have "fair notice" of the conduct a statute proscribes. x x x **And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries and judges.** x x x **In that sense, the doctrine is a corollary of the separation of powers — requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.** x x x **"[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department"** x x x.[258] (Emphasis supplied; citations omitted)

Justice Neil Gorsuch (Justice Gorsuch), in his separate opinion, extensively discussed this doctrine. Concurring that the INA's residual

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[255] *Belgica v. Ochoa*, supra note 123, at 107.
[256] Id. at 108, citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-446 and 451-452 (1977) and *United States v. Nixon*, 418 U.S. 683 (1974), which in turn was cited in Justice Powell's concurring opinion in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
[257] *Sessions v. Dimaya*, supra note 119 (slip op., at 5).
[258] Id. (slip op., at 4-5).

clause is unconstitutionally vague for the reasons identified in *Johnson,* Justice Gorsuch begins by saying that vague laws invite arbitrary power by leaving the people in the dark about what they demand and allowing prosecutors and courts to make it up. He concludes that the void for vagueness doctrine, *if properly conceived,* serves as an expression of due process and separation of powers principles under the American Constitution, as vague laws threaten to transfer legislative powers to the judiciary and the executive, thus:

> **Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers.** The Constitution assigns "[a]ll legislative Powers" in our federal government to Congress. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. x x x Meanwhile, the Constitution assigns to judges the "judicial Power" to decide "Cases" and "Controversies." That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events. x x x
>
> **From this division of duties, it comes clear that legislators may not "abdicate their responsibilities for setting the standards of the criminal law,"** x x x **by leaving to judges the power to decide "the various crimes includable in [a] vague phrase."** x x x **For "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,] [t]his would, to some extent, substitute the judicial for the legislative department of government."** x x x **Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.** x x x[259] (Emphasis supplied; citations omitted)

Justice Gorsuch then goes on to explain the important and practical reason behind the proscription against undue delegation of legislative powers — that only the duly-elected representatives of the people craft statutes and make an act a crime, in accordance with the "hard business" of statutory enactment. He notes that a statute is a product of an open and public debate among a large and diverse number of elected representatives and concludes that because of these policies, the more important aspect of the vagueness doctrine is not the due process requirement of notice, but the preservation of the separation of powers, thus:

> **These structural worries are more than just formal ones. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected**

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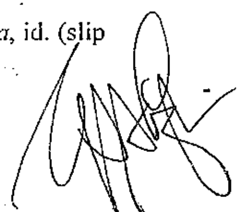
[259] Justice Neil Gorsuch concurring in part and concurring in the judgment in *Sessions v. Dimaya*, id. (slip op., at 7-9).



> **judges and prosecutors free to "condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it."** x x x **Nor do judges and prosecutors act in the open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies.** x x x **("A vague statute delegates to administrators, prosecutors, juries, and judges the authority of *ad hoc* decision, which is in its nature difficult if not impossible to hold to account,** because of its narrow impact"). For just these reasons, Hamilton warned, while "liberty can have nothing to fear from the judiciary alone," it has "every thing to fear from" the union of the judicial and legislative powers. x x x No doubt, too, for reasons like these **this Court has held "that the *more important* aspect of vagueness doctrine 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement'" and keep the separate branches within their proper spheres.**[260] (Emphasis supplied; italics in the original)

Sessions did not elaborate on the separation of powers aspect of the vagueness doctrine. It is in the subsequent case of *Davis* that the SCOTUS explicitly discussed and recognized the separation of powers underpinnings of the void-for-vagueness doctrine, through the *ponencia,* this time, of Justice Gorsuch:

> **Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers.** x x x Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. x x x **Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime."** x x x **Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.** x x x[261] (Emphasis supplied)

In our jurisdiction, the Court has consistently emphasized that the vagueness doctrine is premised on due process considerations of fair notice.[262] Be that as it may, the Court in *People v. Siton*[263] notably began its discussion on the vagueness doctrine by recognizing the exclusive power of the legislature to define crimes and prescribe penalties therefor. Indeed, in cases raising the issue of vagueness, the Court almost always referenced the need to constrain law enforcement – a separation of powers issue. Our jurisprudence is replete with cases justifying the vagueness doctrine on the twin grounds of (1) violating the due process clause; and (2) giving the law's enforcers unbridled discretion.[264] As declared in *Imbong*:

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[260] Id. (slip op., at 9). Citations omitted.

[261] *United States v. Davis*, supra note 124, at 2325. Citations omitted.

[262] See, for instance, *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, supra note 58; *Celdran v. People*, G.R. No. 220127, November 21, 2018 Unsigned Resolution); *People v. Dela Piedra*, supra note 109.

[263] G.R. No. 169364, September 18, 2009, 600 SCRA 476.

[264] See, for instance, *People v. Dela Piedra*, supra note 109; *People v. Nazario*, No. L-44143, August 31, 1988, 165 SCRA 186; *Romualdez v. Sandiganbayan*, supra note 74.

> A statute or act suffers from the defect of vagueness when it lacks comprehensible standards that men of common intelligence must necessarily guess its meaning and differ as to its application. It is repugnant to the Constitution in two respects: (1) it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of the conduct to avoid; and (2) it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle. x x x[265] (Emphasis supplied)

In other words, while the Court has rhetorically invoked due process, it has likewise implicitly integrated the principle of separation of powers in justifying the doctrine of vagueness. In some cases, the role that separation of powers takes and the element of undue delegation of legislative powers are better articulated, thus:

> Verily, the objective of curbing unbridled enforcement is not the sole consideration in a void for vagueness analysis; rather, petitioners must show that this perceived danger of unbridled enforcement stems from an ambiguous provision in the law that allows enforcement authorities to second-guess if a particular conduct is prohibited or not prohibited. In this regard, that ambiguous provision of law contravenes due process because agents of the government cannot reasonably decipher what conduct the law permits and/or forbids. In *Bykofsky v. Borough of Middletown*, it was ratiocinated that:
>
>> A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, and vague standards result in erratic and arbitrary application based on individual impressions and personal predilections.[266] (Emphasis supplied)

Hence, the main point in proscribing vague laws, apart from upholding the right to due process, is to preserve the sanctity of the separation of powers among the three (3) equal branches of government by preventing undue delegation of legislative powers. The doctrine ensures that legislation – that is, the making of a law[267] – is left to the legislative branch. It "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries and judges."[268]

In his dissenting opinion in *Spouses Romualdez*, Justice Tinga observed that the integration of the separation of powers in the vagueness doctrine appears to have been first explicitly recognized in domestic case law by citing American Constitutional law jurists,[269] thus:

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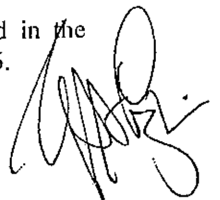
[265] Supra note 57, at 357. Citations omitted.

[266] *Samahan ng mga Progresibong Kabataan SPARK v. Quezon City*, supra note 58.

[267] See Separate Opinion of Justice Thomas in *Sessions v. Dimaya*, supra note 119.

[268] *Sessions v. Dimaya*, id. (slip op., at 4-5).

[269] K. SULLIVAN AND G. GUNTHER, CONSTITUTIONAL LAW (14th ed.) at 1829 cited in the Dissenting Opinion of Justice Tinga in *Spouses Romualdez v. COMELEC*, supra note 74, at 476.



Consider the lucid explanation of Gunther and Sullivan, which integrates the principles established by American jurisprudence on that point:

> "The concept of vagueness under the [freedom of expression clause in the] First Amendment [of the U.S. Constitution] draws on the procedural due process requirement of adequate notice, under which a law must convey 'sufficient definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge*, 341 U.S. 223 (1951) A law will be void on its face for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385 (1926). One of the purposes of this requirement is to ensure fair notice to the defendant. But the ban on vagueness protect not only liberty, but also equality and the separation of executive from legislative power through the prevention of selective enforcement. See *Smith v. Goguen* (415 U.S. 566): "We have recognized that the more important aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine — the requirement that legislatures set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement."[270] (Emphasis and underscoring supplied)

That said, in resolving issues of vagueness, the Court is tasked with construing a statute in a fairly possible way to save it from being unconstitutional. The SCOTUS notably pronounced in *Davis* that respect for due process and separation of powers demand that courts not construe criminal statutes to penalize conduct which they do not clearly proscribe in order to save Congress the trouble of writing a new law.[271] In other words, saving a vague statute through construction must not come at the expense of the doctrine of separation of powers and due process rights. When Congress passes a vague law, the role of the courts under the Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.[272]

In the end, the subject law in *Davis* was struck down as unconstitutionally vague because "even [if it] was *possible* to read the statute to impose additional punishment, it was impossible to say that Congress x x x intended that result, or that the law gave [defendants] fair warning that the x x x mandatory penalties of [the subject law] would apply to their conduct."[273]

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[270] Id. Citations omitted.
[271] *United States v. Davis*, supra note 124, at 2333.
[272] Id. at 2323.
[273] Id.

On this score, I qualify the rather sweeping pronouncement in the *ponencia* that the Court can resort to the various aids to statutory construction, such as the legislative deliberations, to narrowly construe the terms of the ATA, and, thus, limit their application,[274] as a way to save them from being declared unconstitutional. I agree, ***but add*** that the law itself must not be so vague as to leave one to second-guess what the true intent of the legislature really is. The legislative intent must still be clearly discernible from the face of the statute and any judicial construction of the terms and provisions of the law must be in line with it. Otherwise, any attempt by the Court to save the law from unconstitutionality would amount to defining or crafting it in the guise of statutory construction and in violation of the doctrine of separation of powers.

In the case of the ATA, it is clear from the separability clause that Congress intended for the constitutional provisions of the law to survive, in the event that "any part or provision of this Act is declared unconstitutional or invalid."[275] As earlier pointed out in *Tatad*, however, it is also true that a separability clause only creates a presumption of severability, which is by no means absolute. The separability clause cannot be applied if it will produce an absurd result or will defeat the intent of the legislature.[276] Here, in the case of the ATA, no such absurdity or defeat of the legislative intent is attendant if the "Not Intended Clause" is struck down.

The main policy thrust of the ATA is to expand the definition of terrorism to make it more responsive to the present times, such that the act of terrorism need not be in pursuit of a political, religious, ideological, or social objective.[277] In deciding on this expansion, the legislature was guided by the experience of law enforcement in the implementation of the ATA's predecessor statute, the HSA. Mindful of how expansive the definition of terrorism under the ATA may cover, the legislature then guaranteed that an act of terrorism is characterized — and hence, delimited — by its intent or purpose. This is clear from the plain language of Section 4 and from the legislative deliberations. The unbending intent is to exclude legitimate exercises of expression and dissent from the definition of terrorism. The following exchanges during the Senate deliberations are illuminating:

> **Senator Drilon**. x x x
>
> Now, let me cite some specific example[s] and try to draw an opinion from the good sponsor. Currently, we see a lot of rallies, protests in Hong Kong. That kind of protests has led to the collapse of the economy of Hong Kong practically. The anti-government protests have gone on for six months and have really harmed the economy. Now, assuming for the sake of argument, that something similar happens here, would that act or the act of the protesters be considered as an act of

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[274] See *Ponencia*, p. 94.

[275] R.A. No. 11479, Sec. 55.

[276] *Tatad v. Secretary of the Department of Energy*, supra note 132, at 354.

[277] TSN, Senate Deliberations, January 21, 2020, pp. 16-17.

terrorism because they are compelling the government to do something by force or intimidation?

Senator Lacson. No, Mr. President. It will not be included because the fundamental rights are always respected even in this proposed measure.

Senator Drilon. Yes, but suppose as in Hong Kong, there were instances of violence.

Senator Lacson. But we are always bound by the purpose, Mr. President. If the purpose is enumerated, then...

Senator Drilon. The purpose in Hong Kong is to force the Hong Kong government...

Senator Lacson. To allow them to exercise their fundamental rights, their freedom, even to choose their leaders, to exercise suffrage. If that is the purpose, it does not constitute an act of terrorism, Mr. President.

Senator Drilon. All right. Mr. President, it is good that we have this on record because this would guide us in attempting to make clearer the provisions here so that it does not lead to an overarching or overreach in terms of the exposure to crimes of terrorism.

Senator Lacson. We are grateful that the gentleman is pointing this out, so that we can further enlighten our colleagues that such acts, no matter how violent, if the purpose is not as enumerated under the proposed measure, then those are not acts of terrorism.[278]

x x x x

Senator Hontiveros. x x x

x x x If, for example, a labor group threatens to strike or to conduct work stoppage, and said strike or work stoppage may be argued by some to result in major economic loss, even destroy the economic structure of the country, could members of this labor group be considered terrorists?

Senator Lacson. Mayroon pong proviso rito na basta legitimate exercise of the freedom of expression or mag-express ng dissent, hindi po kasama rito, hindi mako-cover. Explicitly provided po iyan sa Section 4, iyong last paragraph po. Nandiyan.

Senator Hontiveros. Salamat po, Mr. President. Siyempre laging sasabihin ng labor group kung mag-i-strike or magwo-work stoppage na, "Ito legitimate expression namin."

Senator Lacson. If I may read for the record.

Senator Hontiveros. Yes, Mr. President.

Senator Lacson. "PROVIDED, THAT, TERRORIST ACTS AS DEFINED UNDER THIS SECTION SHALL NOT COVER LEGITIMATE EXERCISES OF THE FREEDOM OF EXPRESSION

[278] TSN, Senate Deliberations, December 17, 2019, pp. 49-50.

AND TO PEACEABLY ASSEMBLE, INCLUDING BUT NOT LIMITED TO ENGAGING IN ADVOCACY, PROTEST, DISSENT OR MASS ACTION WHERE A PERSON DOES NOT HAVE THE INTENTION TO USE OR URGE THE USE OF FORCE OR VIOLENCE OR CAUSE HARM TO OTHERS." Guaranteed po iyon, Mr. President.

Senator Hontiveros. Salamat po sa garantiyang iyan, Mr. President. Pero gaya po ng sinabi ko kanina, siyempre laging sasabihin ng ating mga kababayang manggagawa kapag nagwelga sila, kapag nag-work stoppage sila na ito ay legitimate expression, freedom of expression, at freedom of association iyong karapatan ng paggawa. Pero kung kunwari sa welga nila or work stoppage nila sasabihin ng Department of Labor and Employment, halimbawa, na dahil sa welgang ito o dahil sa work stoppage na ito ay magkakaroon ng serious or major economic loss, o kung sasabihin na ang work stoppage or welga na ito would actually destroy the economic structure of the country, kung ganoong klaseng claims ang gawin, puwede bang magamit itong panukalang batas para ituring silang mga terorista?

Senator Lacson. Unang-una po, we are bound by the intent or motive, iyong purpose po, at saka kung wala naman pong violence na nangyari ay hindi naman po puwedeng makasuhan under this proposed measure.

Senator Hontiveros. Thank you, Mr. President. Indeed, the intent, very clearly articulated also in the bill, is important.

Lastly, on that question of violence, what if in the process of strike or work stoppage nagkaroon ng dispersal, nagkaroon ng karahasan? The good chairman of the Committee on Labor, Employment and Human Resources Development could cite a few examples of recent incidents na dininig nila sa komite. Kung magkaroon ng violence not instigated by the workers but in the course of the strike or work stoppage, could this bill be stretched to determine that they are terrorists?

Senator Lacson. Hindi po kasi, unang-una, hindi naman iyon ang intent. Ang intent ng mga nagprotesta, mga laborers ay mag-strike, mag-express ng kanilang sariling dissent o iyong expression ng kanilang pagprotesta sa puwedeng sabihin na nating mga bad labor practices. So, hindi po papasok dito sa probisyong ito. Malinaw po iyon.[279] (Italics omitted)

Hence, the construction given by the *ponencia* is in accordance with the legislative intent as shown above and, therefore, does not amount to usurpation of legislative functions nor reduce Section 4, excepting the "Not Intended Clause," to suffer from unconstitutional vagueness that violates the separation of powers doctrine.

Likewise, far from producing an absurd result, the construction of the *ponencia* conversely amplifies the intent of the legislature to protect the legitimate exercise of expression and dissent by defining the contours of Section 4. By making sure that speech and the exercise of civil and political

[279] TSN, Senate Deliberations, January 22, 2020, pp. 9-12.

rights are clearly and expressly excluded from the definition of terrorism, law enforcement and the courts would not have to guess as to the application of Section 4. For this purpose, even if the court were to strike down the "Not Intended Clause," the spirit of the ATA prevails and the rest of the provisions should subsist. Obviously, this would not be the case if the Court were to strike down the main part or the whole of Section 4.

VII.

The qualifying "Not Intended Clause" in the proviso in Section 4 is unconstitutional for being vague and overbroad, and for failing the strict scrutiny test.

A scrutiny of the original *proviso* in Section 4 readily reveals how it offers an insufficient and ineffective assurance that will allow protected speech and speech-related conduct to remain unpunished. Stating that terrorism "shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety" is really nothing more than paying lip service and does not remove the threat of a chilling effect.

For one, respondents during oral arguments admitted that this *proviso* is a matter of defense. Respondents, through the OSG, confirmed during oral arguments that once the prosecution has established the commission of any of the acts mentioned in Section 4(a) to 4(e) and the purpose behind it, it becomes incumbent upon the accused to raise as a defense that they are merely exercising their civil or political rights.[280] Indeed, as worded, Section 4 provides that the prosecution has the burden to prove that the acts under Section 4(a) to 4(e) were committed with intent. However, to *thereafter* burden the accused to *also* prove that they are lawfully exercising their civil or political rights *without* intent to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety, renders the burden of proof required from the prosecution utterly inutile and illusory. This is tantamount to erroneously placing the burden of proof to the defendant all along, and is an impermissible shift in the burden of evidence.

Significantly, the burden to prove that the acts in question fall within the exception of Section 4 cannot be placed with the offender. The danger that this concept brings to the exercise of free speech has been recognized in the leading case of *Speiser v. Randall*[281] (*Speiser*). The assailed law in said case required claimants for a tax exemption, as a prerequisite to

[280] TSN, Oral Arguments, April 27, 2021, p. 52; TSN, Oral Arguments, May 4, 2021 p. 64.
[281] 357 U.S. 513 (1958).

qualification, to sign a statement on their tax returns declaring an oath that they "do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities."[282] The SCOTUS found the law as a discriminatory denial of a tax exemption for engaging in speech; hence, a limitation on free speech. Consequently, the SCOTUS found it crucial to scrutinize the *procedures* by which California has sought to restrain speech.[283]

The oath in *Speiser* was part of a larger procedural scheme whereby the applicant was charged with the burden of demonstrating eligibility for the exemption by proving that he was not a person who advocated such violent overthrow.[284] In its analysis, the SCOTUS held that the allocation of the burden of proof in the case fell short of the requirements of due process. It noted how the appellants had explained the principal feature of the procedure of the law as placing the affirmative burden of proof to the taxpayers:

> x x x [I]t is their burden to show that they are proper persons to qualify under the self-executing constitutional provision for the tax exemption in question—i.e., that they are not persons who advocate the overthrow of the government of the United States or the State by force or violence or other unlawful means or who advocate the support of a foreign government against the United States in the event of hostilities. . . . [T]he burden is on *them* to produce evidence justifying their claim of exemption. x x x
>
> x x x
>
> It is, of course, within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105. "[O]f course the legislature may go a good way in raising ... [presumptions] or in changing the burden of proof, but there are limits .... [I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79, 86. The legislature cannot "place upon all defendants in criminal cases the burden of going forward with the evidence .... [It cannot] validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not

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282 Id. at 515.
283 357 U.S. 513, at. 521 (1958).
284 Fear, Risk and the First Amendment: Unraveling the Chilling Effect by Frederick Schauer; College of William & Mary Law School William & Mary Law School Scholarship Repository (1978) available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2010&context=facpubs>.

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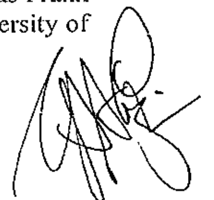

> permissible." *Tot* v. *United States*, 319 U. S. 463, 469. Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." *Morrison* v. *California*, 291 U. S. 82, 88-89. x x x[285]

In the same vein, in the famous case of *New York Times v. Sullivan*[286] (*New York Times*) the SCOTUS likewise placed the burden to the plaintiff, a public official, to prove that the offender had actual malice in making the defamatory statement against the plaintiff's official conduct. Government can only allow libel plaintiffs to recover damages as a result of such speech if and only if the speaker had "actual malice" — that is, the speaker must have known that the speech was false, or he must have been recklessly indifferent to its truth or falsity. This standard means that the speaker is protected against libel suits unless he knew that he was lying or he was truly foolish to think that he was telling the truth.[287]

To recall, the assailed rule of liability under the Alabama law on libel in *New York Times* provided that unless the defendant can discharge the burden of proving the truth of the facts upon which his or her fair comment is based, general damages are presumed and may be awarded without proof of pecuniary injury. In ruling against the validity of this truth-as-a-defense rule and the presumption created in favor of the plaintiff, the SCOTUS had in mind the danger of self-censorship if it were to rule otherwise. Thus:

> x x x A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount— leads to a comparable "self-censorship." **Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.** Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, *e. g., Post Publishing Co.* v. *Hallam*, 59 F. 530, 540 (C. A. 6th Cir. 1893); *see also* Noel, Defamation of Public Officers and Candidates. 49 Col. L. Rev. 875, 892 (1949). **Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."** *Speiser* v. *Randall, supra*, 357 U.S., 526. **The rule thus dampens the vigor and limits the variety of**

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285 *Speiser v. Randall*, supra note 281, at 521-524.

286 376 U.S. 254 (1964).

287 See *Guinguing v. CA*, G.R. No. 128959 September 30, 2005, citing Cass Sunstein, Democracy and the Problem of Free Speech (1995 ed.) at 9-10.

> **public debate. It is inconsistent with the First and Fourteenth Amendments. The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"— that is, with knowledge that it was false or with reckless disregard of whether it was false or not.** x x x
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> x x x x
>
> We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is "presumed." Such a presumption is inconsistent with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions," *Bailey* v. *Alabama,* 219 U. S. 219, 239; **"the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff ...."** x x x[288] (Emphasis supplied)

In the same manner, the SCOTUS likewise imposed as a requirement in criminal obscenity prosecutions that the offender was aware of the nature and character of the materials, and therefore had the knowledge of the unlawfulness of the act and had the intention to commit it.[289] In *Smith v. California,*[290] a bookseller in Los Angeles was convicted for violating a municipal ordinance "which [made] it unlawful 'for any person to have in his possession any obscene or indecent writing, [or] book...[i]n any place of business where...books...are sold or kept for sale.'" Since the definition of the offense in the ordinance did not include any requirement that the person charged have any knowledge of the contents of the book or material, the SCOTUS construed the ordinance as imposing "strict" liability.[291] It explained:

> x x x But the question here is as to the validity of this ordinance's elimination of the scienter requirement —an elimination which may tend to work a substantial restriction on the freedom of speech and of the press. **Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. The States generally may regulate the allocation of the burden of proof in their courts, and it is a common procedural device to impose on a taxpayer the burden of proving his**

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288 *New York Times v. Sullivan,* supra note 286, at 279-284.

289 See Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the Chilling Effect, supra note 284, citing *Smith v. California,* 361 U.S. 147 (1959).

290 361 U.S. 147 (1959).

291 Id. at 148-149. The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet; Jeffrey E. Faucette, Duke Law Journal, Vol. 44:1155. (1995).

entitlement to exemptions from taxation, but where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application. *Speiser* v. *Randall,* 357 U. S. 513. See *Near* v. *Minnesota, supra,* at 712-713. It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98. Cf. *Staub* v. *City of Baxley,* 355 U. S. 313. And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Winters* v. *New York,* 333 U. S. 507, 509-510, 517-518. x x x

x x x x

x x x **By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.** It has been well observed of a statute construed as dispensing with any requirement of scienter that: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." *The King* v. *Ewart,* 25 N. Z. L. R. 709, 729 (C. A.). **And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.**[292] (Emphasis and underscoring supplied)

[292] Id. at 150-154. The Supreme Court later refined the level of scienter necessary for a constitutionally permissible obscenity prosecution in *Mishkin v. New York* [383 U.S. 502 (1966)] *and Hamling v. United States* [418 U.S. 87 (1974)]. In *Mishkin,* the Court upheld a conviction under a New York state obscenity law that was interpreted as requiring that the defendant be "aware of the character of the material.'" In *Hamling,* the Court held that "[i]t is constitutionally sufficient that the prosecution show that a defendant had *knowledge of the contents* of the materials he distributed, and that he *knew the character and nature of the materials;*" The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet, id.

In the present case, respondents maintain that the prosecution has the burden to prove the case against the offender and that it would be only because of his or her defense that he or she has to prove, in turn, that the act in question falls under any of the exceptions in Section 4. The trouble with this procedure, however, lies in the fact that in order to prove the exception, the offender has to show that it was not his or her intent to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety, **which is the very same thing the prosecution is (and should be) burdened with initially.** ***The procedure under Section 4 therefore goes against the constitutional imperative to regard the right to free speech as inherent in every person, subject only to a valid regulation from the State***. As aptly explained in *Speiser:*

> The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. **The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.** x x x[293] (Emphasis and underscoring supplied)

In sum, the reassurance proffered by the respondents that the coverage of what constitutes terrorism under the ATA will not include "advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights" ***would be, as it is, betrayed*** by the very phrase "which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety" — as this clearly operates to carve out an *exception* to the said exceptions in the *proviso* of Section 4. Since the scienter requirement of the law is, by all accounts, ultimately reduced as the obligation of the offender to establish, the prohibition overreaches and casts a chilling effect on protected speech and expression.

To be sure, the reassurance of respondents as to how Section 4 would operate flies in the face of its plain language. In *U.S. v. Stevens*,[294] the SCOTUS shot down a parallel reassurance made by the US Government that the assailed law will only be construed to apply to constitutionally unprotected conduct. Thus:

> **Not to worry, the Government says: The Executive Branch construes §48 to reach only "extreme" cruelty, x x x and it "neither has brought nor will bring a prosecution for anything less." x x x The Government hits this theme hard, invoking its prosecutorial**

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[293] *Speiser v. Randall*, supra note 281, at 526. Notably, Justice Douglas, with whom Justice Black agrees, also stated in his concurring opinion that:

> If one conspires to overthrow the Government, he commits a crime. To make him swear he is innocent to avoid the consequences of a law is to put on him the burden of proving his innocence. That method does not square with our standards of procedural due process, as the opinion of the Court points out.

[294] 559 U.S. 460 (2010), 130 S. Ct. 1577 (2010).

> **discretion several times. <u>But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.</u>** Cf. *Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 473.
>
> **This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret §48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex."** x x x No one suggests that the videos in this case fit that description. **<u>The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading</u>.**
>
> Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 516, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009). "[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 884, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). We "'will not rewrite a ... law to conform it to constitutional requirements,'" *id.,* at 884-885, 117 S.Ct. 2329 (quoting *Virginia v. American Booksellers Assn., Inc.,* 484 U.S. 383, 397 (1988); omission in original), for doing so would constitute a "serious invasion of the legislative domain," *United States v. Treasury Employees,* 513 U.S. 454, 479, n. 26, (1995), and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place," *Osborne,* 495 U.S., at 121. **<u>To read § 48 as the Government desires requires rewriting, not just reinterpretation.</u>**[295] (Emphasis and underscoring supplied)

The majority therefore correctly strikes down the qualifying "Not Intended Clause" in the *proviso* for being unconstitutional.

VIII.

Section 9, or inciting to commit terrorism, is not unconstitutional.

Petitioners argue that Section 9 on Inciting to Commit Terrorism follows the unconstitutionality of Section 4, being a mere by-product of the latter. They argue that Section 9 punishes incitement, which necessarily includes speech; and because of its deterrent effect, it is presumed unconstitutional as a prior restraint which can only be overcome by showing a compelling state interest and its achievement through the least intrusive means.[296] In contrast, the majority finds that Section 9 is reasonably and

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295 Id. at 1591-1592.

296 Memorandum for the Petitioners (June 26, 2021, Cluster II), p. 35.

narrowly drawn and is the least restrictive means to achieve the declared compelling state purpose.[297]

I agree with the majority.

Indeed, Section 9 is intricately related to Section 4 because it makes reference to the latter in defining the punishable act:

> SEC. 9. *Inciting to Commit Terrorism.* — Any person who, without taking any direct part in the commission of *terrorism*, shall incite others to the execution of any of the acts specified in Section 4 hereof by means of speeches, proclamations, writings, emblems, banners or other representations tending to the same end, shall suffer the penalty of imprisonment of twelve (12) years. (Underscoring supplied)

With the striking down of the "Not Intended Clause," the *ponencia* categorically affirms that all persons are "free to protest, dissent, advocate, peaceably assemble to petition the government for redress of grievances, or otherwise exercise their civil and political rights, without fear of being prosecuted as terrorists under the ATA."[298] With the removal of the "Not Intended Clause," Section 4 ceases to suffer from constitutional infirmity; and in the same vein, petitioners' argument that Section 9 follows the unconstitutionality of Section 4 no longer has any leg to stand on.

In construing the specifics of Section 9, the *ponencia* makes reference to the Senate deliberations, which show that the provision was "intended to operate only within a narrow and confined area of speech where restrictions are permitted, and only within the confines of the intent-purposes parameters of Section 4."[299] Hence, statements may be penalized as an incitement if the speaker clearly intended the hearers to perform any of the punishable acts and for the purposes stated in Section 4.[300] In support of this, the *ponencia* cites the IRR, which states in part:

> **Rule 4.9. Inciting to Commit Terrorism**
>
> x x x x
>
> In determining the existence of reasonable probability that speeches, proclamations, writings, emblems, banners, or other representations would help ensure success in inciting the commission of terrorism, the following shall be considered:
>
> a. ***Context***
> Analysis of the context should place the speech, proclamations, writings, emblems, banners, or other representations within the social and political context prevalent at the time the same was made and/or disseminated;

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[297] *Ponencia,* p. 128.
[298] Id. at 114. Emphasis omitted.
[299] Id. at 125. Emphasis omitted.
[300] Id. at 126.

b. ***Speaker/actor***
The position or status in the society of the speaker or actor should be considered, specifically his or her standing in the context of the audience to whom the speech or act is directed;

c. ***Intent***
What is required is advocacy or intent that others commit terrorism, rather than the mere distribution or circulation of material;

d. ***Content and form***
Content analysis includes the degree to which the speech or act was provocative and direct, as well as the form, style, or nature of arguments deployed in the speech, or the balance struck between the arguments deployed;

e. ***Extent of the speech or act***
This includes such elements as the reach of the speech or act, its public nature, its magnitude, the means of dissemination used and the size of its audience; and

f. ***Causation***
Direct causation between the speech or act and the incitement.

Any such person found guilty therefor shall suffer the penalty of imprisonment of twelve (12) years. (Emphasis supplied)

I agree with the *ponencia* that these guidelines serve as safeguards to ensure that not all forms of provocation or passionate advocacy or criticism against the government shall be penalized as incitement under the law.[301]

In arguing that Section 9 is unconstitutional, petitioners maintain that said provision fails to satisfy the two-pronged test in the U.S. case of *Brandenburg v. Ohio*[302] *(Brandenburg), i.e.,* that the advocacy (1) must be directed to inciting or producing imminent lawless action; and (2) is likely to incite or produce such action (the *Brandenburg Test*). According to petitioners, Section 9 is nothing more than a legislative overreach that is patently void for suppressing protected speech.[303]

For context, *Brandenburg* involved the constitutionality of a criminal statute which sought to punish the mere advocacy of violence as a means in furtherance of reform. In particular, the accused who was a leader of the Ku Klux Klan was convicted under the Ohio Criminal Syndicalism Statute for advocating the necessity, duty, and propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reforms; and for voluntarily assembling with a group formed to teach or advocate the doctrines of criminal syndicalism.[304] The SCOTUS sustained the challenge against the statute and ruled that the advocacy of

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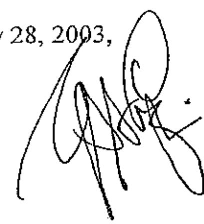
301 Id. at 125.
302 395 U.S. 444 (1969).
303 Memorandum for the Petitioners (June 26, 2021, Cluster II), p. 36.
304 *MVRS Publications v. Islamic Da'wah Council of the Philippines*, G.R. No. 135306, January 28, 2003, 396 SCRA 210, 233.



illegal action becomes punishable only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[305] The relevant portions of the decision are quoted herein:

> The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal.Penal Code §§ 11400-11402, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California,* x x x (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. *Cf. Fiske v. Kansas,* x x x (1927). But *Whitney* has been thoroughly discredited by later decisions. *See Dennis v. United States,* x x x (1951). **These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.** As we said in *Noto v. United States,* x x x (1961),
>
> "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."
>
> x x x **A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.** x x x
>
> Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.
>
> **Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.** The contrary teaching of *Whitney v. California, supra,* cannot be

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305 Id. at 233.

supported, and that decision is therefore overruled.[306] (emphasis supplied, citations omitted)

The *Brandenburg Test* has been applied in the case of *Hess v. Indiana,*[307] where the appellant, an Indiana University protester, was convicted for violating the Indiana disorderly conduct statute for shouting: "We'll take the fucking street again (or later)" during the anti-war demonstration on their college campus. The Indiana Supreme Court placed primary reliance on the trial court's finding that appellant's statement was intended to incite further lawless action on the part of the crowd in his vicinity, and was likely to produce such action. The SCOTUS reversed appellant's conviction and ruled that such profanity was protected following the *Brandenburg Test* since the speech amounted to nothing more than advocacy of illegal action at some indefinite future time, which is not sufficient to punish appellant's speech. In conclusion, the SCOTUS held that **since there was no evidence, or rational inference from the import of the language, that appellant's words were intended to produce, and likely to produce, imminent disorder, his words could not be punished by the State on the ground that they had a "tendency to lead to violence."**[308]

Another case where the SCOTUS applied the *Brandenburg Test* is *NAACP v. Claiborne Hardware Co.*[309] The case arose from the boycott of white merchants in Claiborne County, Mississippi, organized by the National Association for the Advancement of Colored People (NAACP), in order to secure compliance by civil and business leaders with a list of demands in furtherance of equality and racial justice. Respondents (white merchants) filed for injunctive relief and damages against petitioners (the NAACP and a number of individuals who participated in the boycott, including Charles Evers who was a principal organizer of the boycott). The lower court, as affirmed by the Mississippi Supreme Court, found the boycott unlawful and petitioners liable for damages resulting from the boycott on the ground that they had agreed to use force, violence, and threats to effectuate the same.[310]

In reversing the Mississippi Supreme Court, the SCOTUS found that the nonviolent elements of petitioners' activities are entitled to protection under the First Amendment and that they are not liable in damages for the consequences of their nonviolent, protected activity. As regards Charles Evers and the speeches he made in connection with the boycott, the SCOTUS applied the *Brandenburg Test* and found that the speech was protected, *to wit*:

> The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth

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[306] *Brandenburg v. Ohio*, supra note 302, at 447-449.
[307] 414 U.S. 105 (1973).
[308] Id. at 107-109.
[309] 458 U.S. 886 (1982).
[310] Id. at 894-895.

> in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however -- with the possible exception of the Cox incident -- the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. **Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."**[311] (Emphasis supplied)

The Philippine Supreme Court has recognized the *Brandenburg Test* in the 1985 case of *Salonga v. Paño,*[312] involving then Senator Jovito Salonga (*Salonga*), who was implicated for the bombings that occurred in Metro Manila in the months of August, September, and October 1980. He was likewise linked to subversive groups, with the prosecution's witness claiming that he allegedly supported a violent struggle in the country if reforms were not instituted. While the case was ultimately dismissed for mootness due to the prosecutor's dropping of the subversion case against Salonga, the Court nevertheless discussed the merits of the case and ruled that the prosecution failed to produce evidence that would establish any link between Salonga and subversive organizations. The alleged opinion of Salonga – that violent struggle is likely unless reforms are instituted – by no means shows either advocacy of or incitement to violence or furtherance of the objectives of a subversive organization. The following pronouncements in *Salonga* are enlightening:

> The prosecution has not come up with even a single iota of evidence which could positively link the petitioner to any proscribed activities of the Movement for Free Philippines or any subversive organization mentioned in the complaint. Lovely had already testified that during the party of former Congressman Raul Daza which was alleged to have been attended by a number of members of the MFP, no political action was taken but only political discussion. Furthermore, **the alleged opinion of the petitioner about the likelihood of a violent struggle here in the Philippines if reforms are not instituted, assuming that he really stated the same, is nothing but a legitimate exercise of freedom of thought and expression. No man deserves punishment for his thoughts.** *Cogitationis poenam nemo meretur*. And as the late Justice Oliver W. Holmes stated in the case of U.S. v. *Schwimmer*, 279 U.S. 644, ". . . if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate."

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[311] Id. at 928.
[312] No. L-59524, February 18, 1985, 134 SCRA 438.

> We have adopted the concept that freedom of expression is a "preferred" right and, therefore, stands on a higher level than substantive economic or other liberties. The primacy, the high estate accorded freedom of expression is a fundamental postulate of our constitutional system. (Gonzales v. Commission on Elections, 29 SCRA 835). As explained by Justice Cardozo in *Palko v. Connecticut* (302 U.S. 319) this must be so because the lessons of history, both political and legal, illustrate that freedom of thought and speech is the indispensable condition of nearly every other form of freedom. Protection is especially mandated for political discussions. **This Court is particularly concerned when allegations are made that restraints have been imposed upon mere criticisms of government and public officials. Political discussion is essential to the ascertainment of political truth. It cannot be the basis of criminal indictments.**
>
> x x x x
>
> In the case before us, there is no teaching of the moral propriety of a resort to violence, much less an advocacy of force or a conspiracy to organize the use of force against the duly constituted authorities. The alleged remark about the likelihood of violent struggle unless reforms are instituted is not a threat against the government. Nor is it even the uninhibited, robust, caustic, or unpleasantly sharp attack which is protected by the guarantee of free speech. **Parenthetically, the American case of *Brandenburg v. Ohio* (395 U.S. 444) states that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. The words which petitioner allegedly used according to the best recollections of Mr. Lovely are light years away from such type of proscribed advocacy.**
>
> **Political discussion even among those opposed to the present administration is within the protective clause of freedom of speech and expression. The same cannot be construed as subversive activities per se or as evidence of membership in a subversive organization.** x x x[313] (Emphasis supplied)

To be sure, the offense of inciting lawless action is not novel. The Revised Penal Code penalizes inciting to war under Article 118, inciting to rebellion or insurrection under Article 138, and inciting to sedition under Article 142. Accordingly, the *Brandenburg Test* is customarily used as a yardstick for determining whether speech has a reasonable probability or likelihood of producing such lawless action. These standards, as the *ponencia* aptly observed, are reflected in Rule 4.9 of the IRR, which merely supplied the guidelines for when speech has a reasonable probability of success in inciting the commission of terrorism.[314] By contextualizing the utterances and requiring an assessment of its likelihood to cause terrorism, a sufficiently narrow criteria for the punishable speech is drawn.

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[313] Id. at 458-460.

[314] *Ponencia*, pp. 126-127.

At this juncture, I quote petitioners' misgivings as regards Section 9:

> x x x Section 9 must be voided for being overbroad. Due to the wide net cast by the provision, all forms of expression may now be deemed criminal. This would render obsolete the well-established distinctions between protected and unprotected speech, and base criminal liability solely on audience reception. For example, musicians like Bob Dylan and Rage Against the Machine, who typically perform political songs, could be held liable under Section 9 if their music inspired an actual uprising – even if they had no intention to cause the same. Political commentators could be arrested and jailed for actions of others who claimed they had acted at the "incitement" of persons who made public statements in mass media, even if such public statements were constitutionally protected. Law or political science professors who engage their students on socialism, Marxism, or even liberation theology where inevitably the concept of "armed struggle" will be part of the discussion could be held liable under Section 9, despite the constitutional guarantee of academic freedom.[315]

The fears put forward by petitioners are understandable, especially in times where legitimate dissents against the government are continuously being attacked and hindered. Nevertheless, these fears should now be allayed by the delineation made by the *ponencia* of Section 4 — which now categorically upholds the right to protest, dissent, advocate, peaceably assemble to petition the government for redress of grievances, or otherwise exercise civil and political rights, without fear of being prosecuted as terrorists under the ATA — as well as the guidelines provided in the IRR and the *Brandenburg Test.* This much has been recognized and acknowledged by the *ponencia*, which I support:

> **Together, the foregoing guidelines serve as an effective safeguard which ensures that not all forms of provocation or passionate advocacy or criticism against the Government shall be penalized as incitement under the law. The context, speaker, intent, content and form, and the extent of the speech or act shall all be considered to ensure that the incitement is not only grave, but may very well be imminent.** For example, when a humble teacher posts on social media that he will give fifty million pesos to the one who kills the President, he may not be punished for inciting to commit terrorism in the absence of a showing that the statements made were clearly directed to inciting an imminent act of terrorism and is likely to lead to terrorism. The position of the speaker also appears not likely to influence others to commit terrorism.
>
> **Accordingly, the Court finds that, as construed, Section 9 is reasonably and narrowly drawn and is the least restrictive means to achieve the declared compelling state purpose.**[316] (Emphasis supplied)

In sum, I concur with the *ponencia* that speech can be penalized as inciting to commit terrorism under Section 9 only if it is (1) a direct and explicit – not merely vague, abstract, equivocal – call to engage in terrorism;

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315 Memorandum for the Petitioners (June 26, 2021, Cluster II), pp. 36-37.
316 *Ponencia*, p. 128.

(2) made with intent to promote terrorism; and (3) directly and causally responsible for increasing the actual likelihood of terrorist attacks.[317] In my opinion, this formulation, coupled with the guidelines provided in the IRR and the literature on the *Brandenburg Test*, are sufficient to ensure that the enforcement of Section 9 does not unlawfully infringe on protected speech.

IX.

By extension, the entire provision of Section 10 is likewise constitutional.

In upholding the constitutionality of Section 4, particularly the main part that defined the proscribed conduct, it necessarily follows that the entire provision of Section 10 is also neither vague nor overbroad. The phrase in Section 10, which states that a group, organization, or association should be "organized for the purpose of engaging in terrorism", must be read in relation to Section 4, as it is now delineated by the *ponencia*. Following the same parameters of *actus reus* and *mens rea* in Section 4, there are clear standards by which a person can determine whether an organization, association or group is engaged for such purpose. For these reasons, I agree with the majority's holding that Section 10 is constitutional.

X.

Designation and proscription under the ATA

In the State's quest for a multi-pronged approach at combatting terrorism, the ATA establishes a system of identifying individuals and groups of persons as terrorists as an aid, not only in the prosecution of terrorism, but also as a measure aimed at its prevention. To this end, Section 25 of the ATA provides for the domestic designation of terrorist individuals, groups of persons, organizations, or associations, as such:

> SEC. 25. *Designation of Terrorist Individual, Groups of Persons, Organizations or Associations.* – Pursuant to our obligations under United Nations Security Council Resolution (UNSCR) No. 1373, the ATC shall automatically adopt the United Nations Security Council Consolidated List of designated individuals, group of persons, organizations, or associations designated and/or identified as a terrorist, one who finances terrorism, or a terrorist organization or group.
>
> Request for designations by other jurisdictions or supranational jurisdictions may be adopted by the ATC after determination that the proposed designee meets the criteria for designation of UNSCR No. 1373.
>
> The ATC may designate an individual, groups of persons, organization, or association, whether domestic or foreign, upon a finding of probable cause that the individual, groups of persons, organization, or

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[317] Id. at 123.

> association commit, or attempt to commit, or conspire in the commission of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act.
>
> The assets of the designated individual, group of persons, organization, or association above-mentioned shall be subject to the authority of the Anti-Money Laundering Council (AMLC) to freeze pursuant to Section 11 of Republic Act No. 10168.
>
> The designation shall be without prejudice to the proscription of terrorist organizations, associations, or groups of persons under Section 26 of this Act.

Parsing Section 25, three modes of designation are provided: (1) the ATC's automatic adoption of the United Nations (UN) Security Council (UNSC) Consolidated List; (2) approval of requests from other jurisdictions; and (3) designation by the ATC. Such designation goes beyond bestowing upon a person or group a nomenclature attached to terrorism. With it comes a sanction in the form of freezing the assets of the person or group designated, following Section 11 of R.A. No. 10168.[318]

In addition to designation, the ATA likewise provides for the proscription of terrorist organizations, associations, or group of persons under Section 26, which provides:

> SEC. 26. *Proscription of Terrorist Organizations, Association, or Group of Persons.* – Any group of persons, organization, or association, which commits any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act, or organized for the purpose of engaging in terrorism shall, upon application of the DOJ before the authorizing division of the Court of Appeals with due notice and opportunity to be heard given to the group of persons, organization or association, be declared as a terrorist and outlawed group of persons, organization or association, by the said Court.
>
> The application shall be filed with an urgent prayer for the issuance of a preliminary order of proscription. No application for proscription shall be filed without the authority of the ATC upon the recommendation of the National Intelligence Coordinating Agency (NICA).

Unlike the designation provided under Section 25, which extends to both individuals and groups, proscription under Section 26 is limited to terrorist organizations, associations, or groups of persons. Moreover, proscription is a judicial proceeding commenced by an application filed by the Department of Justice (DOJ) before the CA.[319] The ATA reinforces Section 26 by introducing a preliminary order of proscription under Section 27 and requests for proscription from foreign jurisdictions under Section 28:

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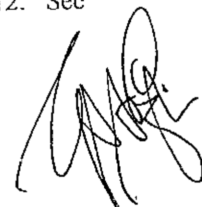
[318] Otherwise known as "THE TERRORISM FINANCING PREVENTION AND SUPPRESSION ACT OF 2012." See R.A. No. 11479, Sec. 29.

[319] R.A. No. 11479, Sec. 26.



> SEC. 27. *Preliminary Order of Proscription.* – Where the Court has determined that probable cause exists on the basis of the verified application which is sufficient in form and substance, that the issuance of an order of proscription is necessary to prevent the commission of terrorism, he/she shall, within seventy-two (72) hours from the filing of the application, issue a preliminary order of proscription declaring that the respondent is a terrorist and an outlawed organization or association within the meaning of Section 26 of this Act.
>
> The court shall immediately commence and conduct continuous hearings, which should be completed within six (6) months from the time the application has been filed, to determine whether:
>
> (a) The preliminary order of proscription should be made permanent;
>
> (b) A permanent order of proscription should be issued in case no preliminary order was issued; or
>
> (c) A preliminary order of proscription should be lifted. It shall be the burden of the applicant to prove that the respondent is a terrorist and an outlawed organization or association within the meaning of Section 26 of this Act before the court issues an order of proscription whether preliminary or permanent.
>
> The permanent order of proscription herein granted shall be published in a newspaper of general circulation. It shall be valid for a period of three (3) years after which, a review of such order shall be made and if circumstances warrant, the same shall be lifted.
>
> SEC. 28. *Request to Proscribe from Foreign Jurisdictions and Supranational Jurisdictions.* – Consistent with the national interest, all requests for proscription made by another jurisdiction or supranational jurisdiction shall be referred by the Department of Foreign Affairs (DFA) to the ATC to determine, with the assistance of the NICA, if proscription under Section 26 of this Act is warranted. If the request for proscription is granted, the ATC shall correspondingly commence proscription proceedings through DOJ.

Petitioners launch a challenge against the foregoing system of designation and proscription on the grounds that Sections 25, 26, 27, and 28 have a chilling effect on the freedoms of speech, expression, assembly, association and other allied rights.[320] In resolving this challenge, the *ponencia* holds that the provisions in question are susceptible to a facial challenge[321] and proceeds to weigh these provisions upon the scales of the overbreadth doctrine and the strict scrutiny test.[322] Against these standards, I respectfully submit that only the first of the three modes of designation withstands constitutional muster.

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[320] *Ponencia*, pp. 145-146; Petitioners' Memorandum (Cluster 3), p. 41; Petitioners' Memorandum (Cluster 4), p. 24; Petitioners' Memorandum (Cluster 2), p. 46.

[321] Id. at 155.

[322] Id. at 155-156.

I begin my analysis with the nature of petitioners' claim of chilling effect. A chilling effect occurs when individuals seeking to engage in a constitutionally protected activity are deterred from doing so by governmental regulation not specifically directed at that protected activity.[323] Deterrence is at its core, as an indirect result of a government regulation directed at an altogether different activity. In other words, petitioners proffer the argument that because of the ATA's regime of terrorist designation, there is an incidental effect of deterring constitutionally protected activities, *i.e.* the fundamental rights of speech, expression, assembly, association and their cognate rights. Hence, the "chilling" effect.

The chilling effect, therefore, is a result of the application of a statute which deters people from exercising certain rights for fear of punishment.[324] In dealing with a statute which purportedly has a chilling effect, the overbreadth doctrine necessarily factors in the analysis. Under this doctrine, litigants may bring a facial challenge to a statute that is "overbroad", reaching both protected and unprotected speech, even if the litigant may be properly prosecuted under a more narrowly drawn statute.[325] This is essential in any challenge of this nature since without this doctrine, any person whose speech is protected may be deterred, or "chilled", and lose the opportunity to challenge the overbroad law. Again, a law may be struck down as unconstitutional under the overbreadth doctrine if it achieves a governmental purpose by means that are unnecessarily broad and thereby invade the area of protected freedoms.[326]

So pernicious is the phenomenon of chilling that its application extends beyond those statutes that suffer the vice of overbreadth. The chilling effect may also exhibit in statutes that are vague and uncertain. While vagueness is a due process consideration, an uncertainty in the law's scope carries the same pervasive evil in its incidental effects – a person who would otherwise engage in protected speech would self-censor for fear of government regulation since he or she is left unaware of the contours and remedies of the vague law.[327] Hence, the application of this doctrine upon which the questioned provisions are to be measured is also warranted.

Measured against the standards of the void-for-vagueness doctrine, I reach the same conclusion as that of the majority — that the first mode of

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323 Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," supra note 284, at 693.

324 See id. at 688.

325 See Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

326 See *Chavez v. Commission on Elections*, supra note 245, at 425.

327 Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1653 (2013) available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3481&context=wmlr>; see also *New York Times v. Sullivan*, supra note 286, at 279; see also *Citizens United v. FEC*, 558 U.S. 310, 324 (2010); Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71, 78 (2009) available at <https://www.uclalawreview.org/who-can-sue-over-government-surveillance/>; Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE RELIGION GENDER & CLASS 375, 376 (2007) <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1134&context=rrgc>.

designation withstands the constitutional challenge.[328] In arriving at the ultimate analysis in favor of its constitutionality, the political context and the legal milieu behind the Consolidated List and its automatic adoption by a number of UN member states provide much needed guidance.

Acting on its Chapter VII[329] authority under the UN Charter, The UNSC adopted Resolution 1267[330] on October 15, 1999 addressing the concerns raised over the use of the Afghan territory "for the sheltering and training of terrorists and planning of terrorist acts."[331] Under Resolution 1267, a Sanctions Committee was tasked with monitoring the implementation of measures decided against the Taliban, Usama Bin Laden, and individuals affiliated with him. These measures were further strengthened and reaffirmed in a number of subsequent Resolutions[332] imposing sweeping sanctions in the form of travel and arms band and the freezing of assets. Notably, the subsequent Resolution 1526[333] broadened the scope of these sanctions to include "funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [Sanctions] Committee, including those in the Al-Qaida organization..." Based on information provided by member states, the Sanctions Committee maintained a Consolidated List of individuals and entities designated as terrorists.

Following the September 11, 2001 attacks against the United States, the UNSC passed Resolution 1373 in 2001 which imposed upon member states obligations of a general character concerning the prevention and punishment of the financing of terrorist activities in addition to other obligations aiming at the prevention and repression of terrorist acts. Under this regime, the designation and the standing sanctions such as the freezing of assets and travel bans were extended to members of any terrorist group.

In response to mounting criticisms, mostly on the lack of mechanisms aimed at satisfying due process considerations, the Sanctions Committee

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328 R.A. No. 11479, Sec. 25, par. 1.

329 See Article 25 of the UN Charter which requires all member states "to accept and carry out decisions of the UNSC; See also Article 103 of the UN Charter which demands all member states to defer to their Charter responsibilities over other international obligations. [Taken together, these ensure that UNSC Resolutions made pursuant to the UNSC powers under Chapter VII of the UN Charter are binding on all member states of the UN.

330 S.C. Res. 1267 U.N. Doc. S/RES/1267 (Oct. 15, 1999).

331 Id.

332 These are Resolution 1333 S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); Resolution 1363 S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001) ; Resolution 1373 (S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) ; Resolution 1390 S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002) ; Resolution 1452 (S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002) ; Resolution 1455 (S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003) ; Resolution 1526 (S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004) ; Resolution 1566 (S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004) ; Resolution 1617 (S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005) ; Resolution 1624 (S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005) ; Resolution 1699 (S.C. Res. 1699, U.N. Doc. S/RES/1699 (Aug. 8, 2006)) ; Resolution 1730 (S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006)) ; Resolution 1735 (S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006)) ; Resolution 1822 (S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008)) ; Resolution 1904 (S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

333 Resolution 1526 (S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004)

adopted guidelines in 2002. Substantial amendments were issued under Resolutions 1730 (2006) and 1735 (2006). These Resolutions established a central office which handles delisting requests from targets by passing along such requests to the concerned states, *i.e.,* the designating state and the state of the petitioner's residence and citizenship and informing the petitioner of the ultimate decision made by the Sanctions Committee.[334]

In the same vein, Resolution 1822 (2002) was adopted urging member states to view delisting petitions in a timely manner and to update the Sanctions Committee of developments on the status of delisting petitions.[335] This Resolution likewise directed the Sanctions Committee to conduct periodic reviews of targets to ensure that the listings remained appropriate and encouraged the Sanctions Committee to continue ensuring that fair and clear procedures exist for placing individuals on the Consolidated List and for removing them.[336]

Finally, the Sanctions Committee adopted the *Guidelines of the Committee for the Conduct of its Work*[337] in 2018, outlining the decision-making process of the Sanctions Committee, as well as outlining the process of listing which requires multilateral acceptance among member states.

At this juncture, I wish to point out two (2) critical legal findings:

First, the foregoing UNSC Resolutions adopted under Chapter VII of the UN Charter bind the Philippines and other member states of the UN.[338] However, it goes without saying that the implementation of the measures enacted by the UNSC relies entirely on the member states. Since most of the obligations envisaged by the relevant UNSC resolutions require domestic translation, their implementation and efficacy will greatly depend on the extent to which states incorporate them properly into their domestic legal orders and subsequently enforce them by means of their internal law enforcement machinery. One such instance is the automatic incorporation of the Consolidated List. In fact, a handful of states provide for this automatic incorporation, automatically forming part of the domestic legal order, such as the Republic of Angola[339] and the Republic of Belarus.[340]

Second, inasmuch as UNSC Resolution 1373 and the prior resolutions are binding on the Philippines, so are the subsequent resolutions providing for a mechanism for review, the updating of the Consolidated List, and

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334 Resolution 1730 (S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006)..

335 Resolution 1822 (S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008).

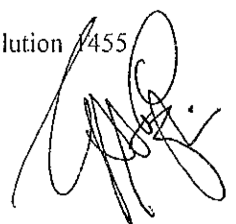
336 Id., par. 28.

337 Available at <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/guidelines_of_the_committee_for_the_conduct_of_its_work_0.pdf>

338 *Ponencia*, pp. 154-155.

339 See Report of the Republic of Angola Pursuant to Paragraph 6 of Security Resolution 1455 (2003), S/AC.37/2003/(1455)/3 at 4.

340 See Report of the Republic of Belarus on the Implementation of Security Council Resolution 1455 (2003) S/AC.37/2003/(1455)/25, at 2.



petitions for delisting. Mirroring these international commitments, Rule 6.9 of the ATA IRR recognizes the different avenues for delisting petitions: (1) through a delisting request submitted to the Sanctions Committee coursed through the government; (2) through a delisting request directly submitted by the person designated to the Office of the Ombudsperson, an office created pursuant to UNSC Resolution 1904 (2009).

Therefore, understanding and taking cognizance of the entire regime of designation under this first mode in its entirety, effectively debunks the petitions for its invalidation on a perceived chilling effect. **The adoption of the Consolidated List, and the mechanisms that come with it, are not unnecessarily broad as to invade constitutionally protected freedoms. Extending this reasoning, no protected speech is incidentally deterred or chilled by the automatic designation.**

Neither can the first mode be struck down for being vague under due process considerations. As discussed, mechanisms for the listing, delisting, review, and updating of the Consolidated List have been adopted precisely to address the necessity for due process. The ATC and domestic law enforcers do not have unbridled discretion on the matter. In fact, no discretion is ever exercised under the first mode. The designation and the attendant procedures of review and delisting happen on the international level, spearheaded by the Sanctions Committee after a multi-state consensus.

The same mantle of constitutionality, however, cannot be extended to the second and third modes of designation under Section 25 of the ATA. Thus, while I agree with the majority in finding the second mode unconstitutional, I respectfully differ as to the third mode of designation. To my mind, ***both*** **the second and third modes suffer the vices of being both overbroad and vague and have the effect of incidentally deterring protected speech.**

The second mode of designation grants power to the ATC to act upon requests for designation by other jurisdictions.[341] On the other hand, the third mode of designation also grants the ATC the power to designate any individual, group of persons, organization, or association, whether domestic or foreign, upon a finding of probable cause that there is a commission, an attempt to commit, or a conspiracy in the acts defined and penalized under Sections 4 to 12 of the ATA.

This grant of powers to the ATC is both unbridled and unchecked. Section 25 of the ATA is silent as to the standards and guidelines when acting upon requests for designations. Likewise problematic is the ATA's silence on any remedial measure it affords to a person or group sought to be designated. A common thread running through the second and third modes is the absence of remedial measures that would satisfy the requirements of the

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[341] R.A. No. 11479, Sec. 25, 2nd par.

due process clause. It does not provide notice of the designation, an opportunity to rebut the factual accusations, nor the opportunity to be heard before an unbiased tribunal.

In all, the second and third modes: (1) lack necessary mechanisms that would afford due process protection over targeted individuals sought to be designated; and (2) give unbridled and unchecked discretion to the ATC in its determination as to whether or not a person or group of persons should be designated as a terrorist. For these reasons, the Court should not bestow upon these modes the mantle of constitutionality. These two modes are both overbroad and vague at the same time. As such, I join the majority in striking down the second mode of designation, and in addition thereto, I vote that the third mode should likewise be declared unconstitutional.

XI.

Section 29 of the ATA infringes on the exclusive power of judges to issue warrants, in violation of the principle of separation of powers.

Petitioners submit that Section 29 of the ATA violates the fundamental principle of separation of powers as it empowers the ATC, an executive office, to issue a written authorization, which serves as the basis for taking into custody a person suspected of committing any terrorist activity.[342]

On the other hand, the respondents contend that there is no violation of the separation of powers because Section 29 of the ATA does not authorize the ATC to issue warrants of arrest.[343] The OSG argues that the written authorization is a mere law enforcement tool to allow the arresting officer to detain a person arrested pursuant to a valid warrantless arrest for a period within that contemplated under Section 29, which is fourteen (14) days, extendible for another ten (10) days.[344] It is only the extended period of fourteen (14) days, says the OSG, that Section 29 seeks to implement – a period which is reasonable, given the special nature of the crime of terrorism.

Fundamental to the consideration of the issue on whether Section 29 of the ATA violates the principle of separation of powers is Article III, Section 2 of the 1987 Constitution, which provides that only judges, and no one else, may validly issue warrants of arrest and search, *viz.:*

> Section 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of

[342] Petitioners' Memorandum dated June 26, 2021, Cluster II, p. 49.
[343] OSG's Memorandum, Vol. II, p. 506.
[344] Id. at 513-514.

> whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue **except upon probable cause to be determined personally by the judge** after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[345] (Emphasis supplied)

Jurisprudence is replete with decisions that invalidate laws and decrees that conflict with Article III, Section 2 of the 1987 Constitution. This is so because a statute may be declared unconstitutional because it is not within the legislative power to enact; or it creates or establishes methods or forms that infringe constitutional principles; or its purpose or effect violates the Constitution or its basic principles.[346]

In *Salazar v. Achacoso*,[347] the Court declared unconstitutional Article 38, paragraph (c)[348] of the Labor Code, which granted the Secretary of Labor and Employment the power to cause arrest and detention, because the Labor Secretary is not a judge, thus:

> [I]t is only a judge who may issue warrants of search and arrest. x x x.
>
> x x x [T]he Secretary of Labor, not being a judge, may no longer issue search or arrest warrants. Hence, the authorities must go through the judicial process. To that extent, we declare Article 38, paragraph (c), of the Labor Code, unconstitutional and of no force and effect.[349]

Similarly, the Court ruled that the Presidential Anti-Dollar Salting Task Force and mayors had no authority to issue judicial warrant as this power is reserved for the judges or the Judiciary:

> *Presidential Anti-Dollar Salting Task Force v. Court of Appeals*[350]
>
> **We agree that the Presidential Anti-Dollar Salting Task Force exercises, or was meant to exercise, prosecutorial powers, and on that ground, it cannot be said to be a neutral and detached "judge" to determine the existence of probable cause for purposes of arrest or search.** xxx xxx xxx To permit him to issue search warrants and indeed, warrants of arrest, is to make him both judge and jury in his own right, when he is neither. That makes, to our mind and to that extent, Presidential Decree No. 1936 as amended by Presidential Decree No. 2002, unconstitutional.[351] (Emphasis supplied)

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345 1987 CONSTITUTION, Art. III, Sec. 2.

346 *Sabio v. Gordon*, G.R. Nos. 174340, 174318 & 174177, October 17, 2006, 504 SCRA 704, 730.

347 G.R. No. 81510, March 14, 1990, 183 SCRA 145.

348 Article 38, paragraph (c) of the Labor Code, reads:
(c) The Secretary of Labor and Employment or his duly authorized representatives shall have the power to cause the arrest and detention of such non-licensee or non-holder of authority x x x.

349 *Salazar v. Achacoso*, supra note 347, at 149-152. Citations omitted.

350 G.R. No. 83578, March 16, 1989, 171 SCRA 348.

351 Id. at 366-367.

Ponsica v. Ignalaga[352]

x x x **Section 143 of the Local Government Code, conferring this power on the mayor has been abrogated, rendered *functus officio* by the 1987 Constitution** which took effect on February 2, 1987, the date of its ratification by the Filipino people. xxx xxx xxx The constitutional proscription has thereby been manifested that thenceforth, the function of determining probable cause and issuing, on the basis thereof, warrants of arrest or search warrants, may be validly exercised only by *judges,* this being evidenced by the elimination in the present Constitution of the phrase, "such other responsible officer as may be authorized by law" found in the counterpart provision of said 1973 Constitution — who, aside from judges, might conduct preliminary investigations and issue warrants of arrest or search warrants.[353] (Emphasis supplied; italics in the original)

Based on the foregoing discussion, I agree with petitioners' stance that Section 29 of the ATA violates the principle of separation of powers because the written authority mentioned therein directly violates Article III, Section 2 of the 1987 Constitution. ***The constitutional infirmity is readily apparent on the face of Section 29***, which reads:

SEC. 29. *Detention Without Judicial Warrant of Arrest.* — The provisions of Article 125 of the Revised Penal Code to the contrary notwithstanding, **any law enforcement agent or military personnel, who, having been duly authorized in writing by the ATC has taken custody of a person suspected of committing any of the acts** defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act, shall, without incurring any criminal liability for delay in the delivery of detained persons to the proper judicial authorities, deliver said suspected person to the proper judicial authority within a period of fourteen (14) calendar days counted from the moment the said suspected person has been apprehended or arrested, detained, and taken into custody by the law enforcement agent or military personnel. The period of detention may be extended to a maximum period of ten (10) calendar days if it is established that (1) further detention of the person/s is necessary to preserve evidence related to terrorism or complete the investigation; (2) further detention of the person/s is necessary to prevent the commission of another terrorism; and (3) the investigation is being conducted properly and without delay.

Immediately after taking custody of a person suspected of committing terrorism or any member of a group of persons, organization or association proscribed under Section 26 hereof, the law enforcement agent or military personnel shall notify in writing the judge of the court nearest the place of apprehension or arrest of the following facts: (a) the time, date, and manner of arrest; (b) the location or locations of the detained suspect/s and (c) the physical and mental condition of the detained suspect/s. The law enforcement agent or military personnel shall likewise furnish the ATC and the Commission on Human Rights (CHR) of the written notice given to the judge.

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[352] No. L-72301, July 31, 1987, 152 SCRA 647.
[353] Id. at 662-663. Citations omitted.

The head of the detaining facility shall ensure that the detained suspect is informed of his/her rights as a detainee and shall ensure access to the detainee by his/her counsel or agencies and entities authorized by law to exercise visitorial powers over detention facilities.

The penalty of imprisonment of ten (10) years shall be imposed upon the police or law enforcement agent or military personnel who fails to notify any judge as provided in the preceding paragraph.[354] (Emphasis supplied)

Relevant to Section 29 is Section 45 of the ATA, which lists the members of the ATC from whom the written authority to detain emanates. Notably, the ATC is composed of cabinet members from the Executive branch of the government:

SEC. 45. *Anti-Terrorism Council.* — An Anti-Terrorism Council (ATC) is hereby created. The members of the ATC are: (1) the Executive Secretary, who shall be its Chairperson; (2) the National Security Adviser who shall be its Vice Chairperson; and (3) the Secretary of Foreign Affairs; (4) the Secretary of National Defense; (5) the Secretary of the Interior and Local Government; (6) the Secretary of Finance; (7) the Secretary of Justice; (8) the Secretary of Information and Communications Technology; and (9) the Executive Director of the Anti-Money Laundering Council (AMLC) Secretariat as its other members.

x x x x

The majority, however, agrees with the respondents that the written authority under Section 29 is not in any way akin to a warrant of arrest. The majority, through the *ponencia,* stresses that when Section 29 is harmonized with the provisions of Rule 9.1 and Rule 9.2[355] of the ATA's IRR, it is clear that the ATC issues a written authorization to law enforcement agents only to permit the extended detention of a person arrested after a valid warrantless arrest is made under Rule 9.2.[356] In arriving at this conclusion, the *ponencia* explains:

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354 R.A. No. 11479, Sec. 29.

355 Rule 9.1, in relation to Rule 9.2 of the IRR of the ATA, clarifies that the authority in writing referred to in Section 29 is to be issued by the ATC in case of warrantless arrests done in the following circumstances:

A law enforcement officer or military personnel may, without a warrant, arrest:

a. a suspect who has committed, is actually committing, or is attempting to commit any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act in the presence of the arresting officer;

b. a suspect where, based on personal knowledge of the arresting officer, there is probable cause that said suspect was the perpetrator of any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act, which has just been committed; and

c. a prisoner who has escaped from a penal establishment or place where he is serving final judgment for or is temporarily confined while his/her case for any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act is pending, or has escaped while being transferred from one confinement to another.

356 *Ponencia,* p. 205.

> x x x [T]here is an apparent need to clarify the meaning of Section 29 insofar as the parties insist on varying interpretations. On this point, the Court abides by the principle that if a statute can be interpreted in two ways, one of which is constitutional and the other is not, then the Court shall choose the constitutional interpretation. As long held by the Court:
>
> > Every intendment of the law should lean towards its validity, not its invalidity. The judiciary, as noted by Justice Douglas, should favor that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality.
>
> Notably, it has also been stated that "laws are presumed to be passed with deliberation [and] with full knowledge of all existing ones on the subject"; therefore, as much as possible, the Constitution, existing rules and jurisprudence, should be read into every law to harmonize them within the bounds of proper construction.
>
> Accordingly, with these in mind, the Court's construction is that under Section 29, **a person may be arrested without a warrant by law enforcement officers or military personnel for acts defined or penalized under Sections 4 to 12 of the ATA <u>but only under any of the instances contemplated in Rule 9.2, *i.e.*, arrest *in flagrante delicto*, arrest in hot pursuit, and arrest of escapees, which mirrors Section 5, Rule 113 of the Rules of Court</u>**. Once arrested without a warrant under those instances, **<u>a person may be detained for up to 14 days, *provided* that the ATC issues a written authority in favor of the arresting officer pursuant to Rule 9.1</u>**, upon submission of a sworn statement stating the details of the person suspected of committing acts of terrorism and the relevant circumstances as basis for taking custody of said person. **If the ATC does not issue the written authority, then the arresting officer shall deliver the suspected person to the proper judicial authority within the periods specified under Article 125 of the RPC — the prevailing general rule.** The extended detention period — which, as will be explained in the ensuing discussions, is the crux of Section 29 — is therefore deemed as an exception to Article 125 of the RPC based on Congress' own wisdom and policy determination relative to the exigent and peculiar nature of terrorism and hence, requires, as a safeguard, the written authorization of the ATC, an executive agency comprised of high-ranking national security officials.[357] (Emphasis and underscoring in the original)

Following the above, two succeeding events will trigger the power of the ATC to issue a written authority to detain a person up to fourteen (14) days. *First*, the law enforcement officer or military personnel makes a warrantless arrest for acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the ATA. *Second*, the arresting officer submits a sworn statement stating the details of the person suspected of committing acts of terrorism and the relevant circumstances as basis for taking custody of the said person. Upon the submission of the sworn statement, the ATC then determines whether to issue a written authority in favor of the arresting officer for the extension of the detention period. If the ATC issues a written

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[357] Id. at 201-202. Citations omitted.

authority, the arrested person may be detained for up to fourteen (14) days. If the ATC does not issue a written authority, the arrested person must be delivered to the proper judicial authority within thirty-six (36) hours as provided by Article 125 of the RPC.[358]

A. Rule 9.1 of the IRR should be declared invalid for being ultra vires.

With due respect, I submit that the foregoing interpretation of the *ponencia* is without legal basis.

Firstly, the construction crafted by the *ponencia* is possible only if Rule 9.1 of the IRR is taken into consideration. Under the second paragraph of Rule 9.1, the arresting officer is charged with the duty to submit a sworn statement to the ATC to substantiate the extension of the detention period up to fourteen (14) days. The last two paragraphs of Rule 9.1,[359] taken together,

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[358] Article 125 of the RPC provides:

> Article 125. *Delay in the delivery of detained persons to the proper judicial authorities.* - The penalties provided in the next preceding article shall be imposed upon the public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of: twelve (12) hours, for crimes or offenses punishable by light penalties, or their equivalent; eighteen (18) hours, for crimes or offenses punishable by correctional penalties, or their equivalent; and thirty-six (36) hours, for crimes or offenses punishable by afflictive or capital penalties, or their equivalent.
>
> In every case, the person detained shall be informed of the cause of his detention and shall be allowed upon his request, to communicate and confer at any time with his attorney or counsel.
>
> Since the penalties imposed in Sections 4,5,6,7,8,9,10,11, and 12 of the ATA are either imprisonment of 12 years or life imprisonment without the benefit of parole, the 36-hour limit under Article 125 applies.

[359] **Rule 9.1. Authority from ATC in relation to Article 125 of the Revised Penal Code**

Any law enforcement agent or military personnel who, having been duly authorized in writing by the ATC under the circumstances provided for under paragraphs (a) to (c) of Rule 9.2, has taken custody of a person suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Act shall, without incurring any criminal liability for delay in the delivery of detained persons under Article 125 of the Revised Penal Code, deliver said suspected person to the proper judicial authority within a period of fourteen (14) calendar days counted from the moment the said suspected person has been apprehended or arrested, detained, and taken into custody by the law enforcement agent or military personnel. The period of detention may be extended to a maximum period of ten (10) calendar days if it is established that (a) further detention of the person/s is necessary to preserve the evidence related to terrorism or complete the investigation, (b) further detention of the person is necessary to prevent the commission of another terrorism, and (c) the investigation is being conducted properly and without delay.

The ATC shall issue a written authority in favor of the law enforcement officer or military personnel upon submission of a sworn statement stating the details of the person suspected of committing acts of terrorism, and the relevant circumstances as basis for taking custody of said person.

If the law enforcement agent or military personnel is not duly authorized in writing by the ATC, he/she shall deliver the suspected person to the proper judicial authority within the periods specified under Article 125 of the Revised Penal Code, provided that if the law enforcement agent or military personnel is able to secure a written authority from the ATC prior to the lapse of the periods specified under Article 125 of the Revised Penal Code, the period provided under paragraph (1) of this Rule shall apply.

grant the ATC with discretion to issue a written authority after the warrantless arrest, on the basis of such sworn statement. Thus, the *ponencia* concludes that the "issuance of the authorization *after the arrest* is implied by the requirement under Rule 9.1 of the IRR for the arresting officer to submit a sworn statement stating the details of the person suspected of committing acts of terrorism and the relevant circumstances as basis for taking custody of the said person without a judicial warrant."[360]

However, there is nothing in Section 29 of the ATA which mandates the arresting officer to submit a sworn statement to the ATC, stating the details of the person suspected of committing acts of terrorism and the relevant circumstances for taking custody of the said person. It is likewise silent on the discretion of the ATC to issue a written authority allowing the extension of the detention period of a person suspected of committing acts of terrorism for up to fourteen (14) days after the warrantless arrest of said person and on the basis of the arresting officer's sworn statement.

Secondly, nowhere in Section 29 of the ATA is there any clear reference to Rule 113 of the Rules of Court about warrantless arrests. The reference is, once more, found in the IRR. Rule 9.1 clarifies that the authority in writing referred to in Section 29 is to be issued by the ATC in case of warrantless arrests provided for under Rule 9.2, to wit:

> **Rule 9.2. Detention of a suspected person without warrant of arrest**
> A law enforcement officer or military personnel may, without a warrant, arrest:
>
> a. a suspect who has committed, is actually committing, or is attempting to commit any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act in the presence of the arresting officer;
> b. a suspect where, based on personal knowledge of the arresting officer, there is probable cause that said suspect was the perpetrator of any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act, which has just been committed; and
> c. a prisoner who has escaped from a penal establishment or place where he is serving final judgment for or is temporarily confined while his/her case for any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act is pending, or has escaped while being transferred from one confinement to another.

Section 29 of the ATA, therefore, is evidently incomplete in all its essential terms and conditions. It speaks of a detention without a judicial warrant of arrest or, otherwise stated, a detention effected after a warrantless arrest. Furthermore, the written authority issued by the ATC refers to the detention period of fourteen (14) days. Thus, on its own, Section 29 does not lend to the interpretation of the *ponencia* that the ATC issues a written

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[360] *Ponencia*, p. 205. Italics in the original

authority on a case-by-case basis after a valid warrantless arrest and in light of the sworn statement of the arresting officer.

The only requirements imposed by Section 29 on the law enforcement agent or military personnel is to notify in writing the judge of the court nearest the place of apprehension or arrest of the following facts: (a) the time, date, and manner of arrest; (b) the location or locations of the detained suspect/s; and (c) the physical and mental condition of the detained suspect/s. Copies of such written notice given to the judge must be furnished to the ATC and the Commission on Human Rights (CHR). Evidently, the written notice to be furnished to the ATC under Section 29 is different from the sworn statement to be submitted to the ATC in Rule 9.1 of the IRR. The purpose of the former is merely to inform the ATC of the circumstances surrounding the arrest of a particular person and his or her present location and condition; whereas the latter serves as the ATC's basis to determine the propriety of granting a written authority to extend the detention period of the arrested person up to fourteen (14) days.

The last two paragraphs in Rule 9.1[361] are therefore ultra vires because they introduce substantial amendments to Section 29. In so doing, the IRR rearranged and modified the sequence of events that will lead to the ATC's issuance of a written authority in favor of the arresting officer. Rule 9.1 clearly does not merely "fill in the details." To the contrary, it completely amends the law.

It is basic that an IRR cannot amend an act of Congress, for IRRs are solely intended to carry out, not to supplant or to modify, the law.[362] The ATA's IRR cannot and should not have expanded Section 29 for the spring can neither rise higher than nor boast of replenishing its own source. The IRR, through Rules 9.1 and 9.2, can neither correct the law it seeks to implement by filling in the substantive gaps in Section 29 for this is an impermissible attempt to remedy the constitutional infirmity of Section 29 itself. When a gap in the law exists, such as under Section 29, the remedy is for Congress to amend the same and not for this Court to augment or qualify it under the guise of statutory construction.

The foregoing being the case, I am of the view, different from that of the *ponencia*'s, that there is here an undue delegation of legislative power to

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[361] **Rule 9.1.** x x x

The ATC shall issue a written authority in favor of the law enforcement officer or military personnel upon submission of a sworn statement stating the details of the person suspected of committing acts of terrorism, and the relevant circumstances as basis for taking custody of said person.

If the law enforcement agent of or military personnel is not duly authorized in writing by the ATC, he/she shall deliver the suspected person to the proper judicial authority within the periods specified under Article 125 of the Revised Penal Code, provided that if the law enforcement agent or military personnel is able to secure a written authority from the ATC prior to the lapse of the periods specified under Article 125 of the Revised Penal Code, the period provided under paragraph (1) of the Rule shall apply.

[362] *Lokin, Jr. v. Commission on Elections*, G.R. Nos. 179431-32 & 180443, June 22, 2010, 621 SCRA 385, 405.

the ATC and the DOJ.[363] This cannot be done, as the ATC and the DOJ cannot perform law-making powers or decide what the law shall be. In one case,[364] the Court held, "[t]he true distinction x x x is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."[365]

In order for the delegation of legislative power to be valid, it is essential that the law satisfies the *completeness test* and the *sufficient standard test*. The law must be complete in all its essential terms and conditions when it leaves the legislature so that there will be nothing left for the delegate to do when it reaches him, except to enforce it. If there are gaps in the law that will prevent its enforcement unless they are first filled, the delegate will then have been given the opportunity to step in the shoes of the legislature and exercise a discretion essentially legislative in order to repair the omissions. This is an invalid delegation, and the Court has not hesitated to strike down an administrative regulation that dangerously ventures into law-making.[366]

In *Tatad v. Secretary of the Department of Energy*,[367] the Court found that E.O. No. 392 constituted a misapplication of R.A. No. 8180 because the executive department rewrote the standards set forth in the law when it considered the extraneous factor of depletion of the oil price stabilization fund (OPSF) – a factor not found in R.A. No. 8180 in fully deregulating the downstream oil industry:

> x x x [T]he Executive department failed to follow faithfully the standards set by R.A. No. 8180 when it considered the extraneous factor of depletion of the OPSF fund. The misappreciation of this extra factor cannot be justified on the ground that the Executive department considered anyway the stability of the prices of crude oil in the world market and the stability of the exchange rate of the peso to the dollar. By considering another factor to hasten full deregulation, the Executive department rewrote the standards set forth in R.A. [No.] 8180. The Executive is bereft of any right to alter either by subtraction or addition the standards set in R.A. No. 8180 for it has no power to make laws. To cede to the Executive the power to make law is to invite tyranny, indeed, to transgress the principle of separation of powers. The exercise of delegated power is given a strict scrutiny by courts for the delegate is a mere agent whose action cannot infringe the terms of agency. In the cases at bar, the Executive co-mingled the factor of depletion of the OPSF fund with the

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[363] R.A. No. 11479, Section 54 reads:

> SECTION 54. Implementing Rules and Regulations. — The ATC and the DOJ, with the active participation of police and military institutions, shall promulgate the rules and regulations for the effective implementation of this Act within ninety (90) days after its effectivity. x x x

[364] *People v. Vera*, 65 Phil. 56 (1937).

[365] Id. at 117.

[366] *Guingona, Jr. v. Carague*, G.R. No. 94571, April 22, 1991, 196 SCRA 221, 234.

[367] G.R. Nos. 124360 & 127867, November 5, 1997, 281 SCRA 330.

> factors of decline of the price of crude oil in the world market and the stability of the peso to the US dollar. On the basis of the text of E.O. No. 392, it is impossible to determine the weight given by the Executive department to the depletion of the OPSF fund. It could well be the principal consideration for the early deregulation. It could have been accorded an equal significance. Or its importance could be nil. In light of this uncertainty, we rule that the early deregulation under E.O. No. 392 constitutes a misapplication of R.A. No. 8180.[368]

In *Lokin, Jr. v. COMELEC*[369] (*Lokin, Jr.*), the Court invalidated Section 13 of COMELEC Resolution No. 7804 for being contrary to Section 8 of R.A. No. 7941 or the Party-List System Act, holding that:

> The COMELEC, despite its role as the implementing arm of the Government in the enforcement and administration of all laws and regulations relative to the conduct of an election, has neither the authority nor the license to expand, extend, or add anything to the law it seeks to implement thereby. The IRRs the COMELEC issues for that purpose should always accord with the law to be implemented, and should not override, supplant, or modify the law. It is basic that the IRRs should remain consistent with the law they intend to carry out.
>
> Indeed, administrative IRRs adopted by a particular department of the Government under legislative authority must be in harmony with the provisions of the law, and should be for the sole purpose of carrying the law's general provisions into effect. The law itself cannot be expanded by such IRRs, because an administrative agency cannot amend an act of Congress.[370]

The Court also significantly held in *Lokin, Jr.* that the following test should be applied in examining the validity of IRRs:

> To be valid, therefore, the administrative IRRs must comply with the following requisites to be valid [sic]:
>
> 1. Its promulgation must be authorized by the Legislature;
> 2. It must be within the scope of the authority given by the Legislature;
> 3. It must be promulgated in accordance with the prescribed procedure; and
> 4. It must be reasonable.[371]

Here, the above second requisite in *Lokin, Jr.* has not been met for Rule 9.1, in relation to Rule 9.2, unduly expanded Section 29 of the ATA. Section 29 should be read literally because its language is plain and free from ambiguity. An administrative agency tasked to implement a statute may not construe it by expanding its meaning where its provisions are clear and unambiguous.[372]

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368 Id. at 353-354.
369 Supra note 362.
370 Id. at 411. Citations omitted.
371 Id. at 404. Citations omitted.
372 Id. at 407.

In the same vein, even where the courts should be convinced that the legislature really intended some other meaning, and even where the literal interpretation should defeat the very purposes of the enactment, the explicit declaration of the legislature is still the law, from which the courts must not depart. When the law speaks in a clear and categorical language, there is no reason for interpretation or construction, but only for application. Hence, while I agree with the principle that the Court must favor the construction of legislation that would survive the test of constitutionality, to permit the interpretation of the *ponencia* and, thereby, allow Rule 9.1 to amend and modify Section 29 under the guise of saving the latter provision from constitutional infirmity, would be to open the floodgates for other administrative bodies to amend, expand, and modify laws in absolute derogation of the principle of separation of powers underpinning the stability of our Government.

B. Section 29 is unconstitutional because it infringes on the power of judges to issue warrants.

As regards the nature of the written authority by the ATC referred to in Section 29, it is also my view that the same is akin to a judicial warrant in the 1987 Constitution. Again, a plain reading of the phrase in Section 29 — "duly authorized in writing by the ATC" — confirms this, as the phrase shows that it modifies the act of taking custody "of a person suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act." The written authorization is therefore required before a law enforcement agent or military personnel takes custody of an individual. Simply put, the written authorization from the ATC allows any law enforcement agent or military personnel to take custody of a person suspected of committing any of the acts under the ATA. In effect, Section 29 empowers the ATC — an executive office — to issue warrants of arrest even though the Constitution and jurisprudence make it abundantly clear that only judges may do so.

At this juncture, the definition of the term "arrest" under the Rules of Criminal Procedure finds relevance:

> SECTION 1. *Definition of Arrest.* — Arrest is the taking of a person into custody in order that he may be bound to answer for the commission of an offense.[373]

It can be gleaned from the definition above that to arrest means to take a person into custody. It is effected by an actual restraint of the person to be arrested or by that person's voluntary submission to the custody of the one

[373] RULES OF COURT, Rule 113, Sec. 1.

making the arrest.[374] "To take a person into custody" is the same language employed in Section 29. Ineluctably, the written authority issued by the ATC to take custody of suspected terrorists is literally a written authority to effect an arrest. It is disingenuous to argue that it merely authorizes the prolonged period of detention after a valid warrantless arrest.

Former Chief Justice Reynato S. Puno, in his opening statement as *amicus curiae* in this case, stated the following relevant points — which I completely agree with:

> The question that confronts us is whether the ATA erodes the protection of existing rights of arrested persons. Consider the following:
>
> 1. The warrant is issued by the ATC, an executive functionary. Under present legal regime, a warrant of arrest is issued by a judge. And it is issued by a judge, upon application by a prosecutor who has independently evaluated the evidence of guilt of the respondent in the exercise of quasi-judicial function. These two (2) levels of protection appear to have been taken away and given to the ATC, a body that cannot exercise judicial power.[375]

While Section 45 states that "[n]othing herein shall be interpreted to empower the ATC to exercise any judicial or quasi-judicial power or authority", Section 29 nonetheless does just that by granting the ATC a power exclusively vested in the courts. When the ATC issues a written authority to a law enforcement agent or military personnel, the latter takes custody of suspected terrorists, who are consequently deprived of their freedom of action in a significant way.[376] Thus, the written authority has the same effect as a warrant of arrest: taking a person into custody, resulting in deprivation of liberty.

Since the written authority is **a *disguised* judicial warrant** that, again, only judges can issue, it follows that the principle of separation of powers is indeed violated.

In *Soliven v. Makasiar*,[377] the Court held that the present Constitution underscores the exclusive and personal responsibility of the issuing judge to satisfy himself of the existence of probable cause. Verily, the judge has the exclusive role of determining whether a warrant would be issued. The function of the judge to issue a warrant of arrest upon the determination of probable cause is exclusive.[378] In other words, the issuance of a warrant calls for the exercise of judicial discretion on the part of the issuing magistrate.[379]

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[374] *Luz v. People*, G.R. No. 197788, February 29, 2012, 667 SCRA 421, 429.
[375] Position Paper of Former Chief Justice Reynato S. Puno as *amicus curiae*, pp. 13-14.
[376] See *Magtoto v. Manguera*, Nos. L-37201-02, L-37424, L-38929, March 3, 1975, 63 SCRA 4, 35.
[377] Nos. L-82585, 82827, 83979, November 14, 1988, 167 SCRA 393.
[378] *Tagastason v. People*, G.R. No. 222870, July 8, 2019, 907 SCRA 621, 627.
[379] *Placer v. Villanueva*, Nos. L-60349-62, December 29, 1983, 126 SCRA 463, 469.

Even if it is conceded, for the sake of argument, that the written authority is merely a law enforcement tool necessary for the *continued* detention of suspected terrorists following a valid warrantless arrest, the same conclusion would actually be reached. There is still a violation of the fundamental principle of separation of powers.

In the relevant case of *Sayo v. Chief of Police of Manila*[380] (*Sayo*), a policeman arrested the petitioners and thereafter filed with the city fiscal a formal complaint for robbery. However, five (5) days after, petitioners continued to be in detention and the fiscal had not yet released or filed against them an Information with the proper courts. This caused petitioners to file a petition for *habeas corpus* before this Court, which was then faced with the principal issue — is the city fiscal of Manila a judicial authority within the meaning of the provisions of Article 125 of the RPC?

Answering in the negative, the Court emphasized that only justices or judges are vested with the judicial power to order the detention or confinement of a person charged with having committed a public offense, and that without a warrant of commitment duly issued by such judicial officers, the detention of a person arrested for more than the period fixed under the law would be illegal and in violation of the Constitution, thus:

> Taking into consideration the history of the provisions of the above quoted article, the precept of our Constitution guaranteeing individual liberty, and the provisions of Rules of Court regarding arrest and *habeas corpus*, we are of the opinion that the words "judicial authority", as used in said article, mean the courts of justices or judges of said courts vested with judicial power to order the temporary detention or confinement of a person charged with having committed a public offense, that is, "the Supreme Court and such inferior courts as may be established by law". (Section 1, Article VIII of the Constitution.).
>
> x x x x
>
> Besides, [S]ection 1(3), Article III, of our Constitution provides that "the right of the people to be secure in their persons . . . against unreasonable seizure shall not be violated, and **no warrant [of arrest, detention or confinement] shall issue but upon probable cause, to be determined by the judge** after examination under oath or affirmation of the complainant and the witness he may produce." **Under this constitutional precept no person may be deprived of his liberty, except by warrant of arrest or commitment issued upon probable cause by a *judge* after examination of the complainant and his witness.** And the judicial authority to whom a person arrested by a public officer must be surrendered cannot be any other but a court or judge who alone is authorized to issue a warrant of commitment or provisional detention of the person arrested pending the trial of the case against the latter. **Without such warrant of commitment, the detention of the person arrested for more than six hours would be illegal and in violation of our Constitution.**[381] (Emphasis supplied)

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[380] 80 Phil. 859 (1948).

[381] Id. at 865-867.

It bears noting that *Sayo* was decided under the 1935 Constitution,[382] which, similar to the present 1987 Constitution, reserved the issuance of warrants of arrest exclusively to judges. As discussed in the *ponencia*, the 1935 and 1987 Constitutions differ from the 1973 Constitution[383] which empowered judges and "such other responsible officer as may be authorized by law" to issue such arrest warrants, thereby leading to the notorious and much-abused Arrest, Search and Seizure Orders (ASSOs) by the Secretary of National Defense during Martial Law.[384]

To stress, the Court in *Sayo* had categorically declared that a warrant of commitment, the purpose of which is to authorize the continued detention of a person arrested beyond the period fixed under the RPC, may only be validly issued by a judicial officer pursuant to Article III of the Constitution. The act of a non-judicial officer such as a city fiscal of ordering such extension is unconstitutional. Similarly, here, the order for the continued detention of suspected terrorists under Section 29 issued by the ATC, assuming this to be the proper interpretation of Section 29, nonetheless offends the Constitution.

Furthermore, *Sayo* construed the Constitutional guarantee against unreasonable seizures under Section 2, Article III,[385] as extending to all orders which effect the confinement of a person, regardless if such confinement is made before or after an arrest (or to extend the effects of an arrest). This interpretation is not difficult to fathom. As the *ponencia* correctly explains, Section 2 reinforces the Constitutional principle of separation of powers and its mandate under Section 1, Article III, that no person should be deprived of his property or liberty without due process of law.[386] Hence, the point of Section 2 is to guard against any kinds of deprivation of liberty, except upon a proper finding of probable cause by a judicial officer.

Moreover, under such argument that the written authorization in Section 29 would only be for continued detention, the same would be

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[382] Article III, Section 1(3) of the 1935 Constitution provided:

> (3) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.

[383] Article IV, Section 3 of the 1973 Constitution provided:

> SEC. 3. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall not be violated, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge, or such other responsible officer as may be authorized by law, after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.

[384] *Ponencia*, pp. 194-195.

[385] 1935 CONSTITUTION, Art. III, Sec. 1(3).

[386] See *Ponencia*, p. 196.

analogous to a **commitment order**, which is also issued ***<u>only by judges</u>***, pursuant to Rule 112 of the Rules of Court:

> SEC. 6. *When warrant of arrest may issue.* — (a) *By the Regional Trial Court.* — Within ten (10) days from the filing of the complaint or information, the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence. He may immediately dismiss the case if the evidence on record clearly fails to establish probable cause. If he finds probable cause, he shall issue a warrant of arrest, **or a commitment order if the accused has already been arrested** pursuant to a warrant issued by the judge who conducted the preliminary investigation or when the complaint or information was filed pursuant to section 7 of this Rule. In case of doubt on the existence of probable cause, the judge may order the prosecutor to present additional evidence within five (5) days from notice and the issue must be resolved by the court within thirty (30) days from the filing of the complaint of information.
>
> x x x x (Emphasis supplied)

In *Escañan v. Monterola II*[387] (*Escañan*), the Court held that a clerk of court who issues a warrant of arrest and authority to order a person's immediate detention usurps a purely judicial function, thus:

> x x x As it were, the issuance of the warrant for the arrest of a convicted person and the authority to order his immediate detention is purely a judicial function. **The clerk of court, unlike a judge, has no power to order either the commitment or the release of persons charged with penal offenses. In ordering the arrest of the accused and confinement in police custody, therefore, respondent clerk of court unduly usurped the judicial prerogative of the judge.** Such usurpation is equivalent to grave misconduct.[388] (Emphasis supplied)

Likewise, in *Carandang v. Base*[389] (*Carandang*), the Court ruled that a clerk of court who issues a commitment order also acts out of line:

> **The Court finds that by issuing a commitment order, respondent arrogated upon herself a judicial function.**
>
> > ". . . The Clerk of Court, unlike a judicial authority, has no power to order either the commitment or the release on bail of person charged with penal offenses. The Clerk of Court may release an order 'upon the order of the Judge' or 'by authority of the Judge', but under no circumstance should the clerk make it appear that the judge signed the order when in fact, the judge did not." x x x[390] (Emphasis supplied; italics omitted)

Escañan and *Carandang* thus instruct that the issuance of a commitment order is a judicial function. Hence, the continued detention of

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[387] A.M. No. P-99-1347, February 6, 2001, 351 SCRA 228.
[388] Id. at 236. Citation omitted.
[389] A.M. No. P-08-2440, March 28, 2008, 550 SCRA 44.
[390] Id. at 51. Citations omitted.

suspected terrorists by virtue merely of a written authority from the ATC and in the absence of a commitment order issued by a judge violates Rule 112 of the Rules of Criminal Procedure and encroaches on a judicial function. The OSG's insistence that the written authorization does not constitute an authority to arrest but only an authority to detain[391] is accordingly puerile, and cannot save Section 29 from its constitutional infirmity.

Finally, it is well to point out that the grant of written authority by the ATC may be issued *even **prior** to any warrantless arrest.* If the OSG's theory is to be believed, there would be no reason for the ATC to issue a written authority to merely extend the period of detention when no detention has even commenced. Logically and sequentially, the written authority should not be issued prior to a warrantless arrest, for how would the police or the ATC even divine that an *in flagrante delicto* or hot pursuit arrest would occur, let alone that it would be proper to extend the resulting detention by fourteen (14) days?

In fine, a plain reading of Section 29 shows that a written authority from the ATC is first issued, and it is on this basis that a law enforcement agent or military personnel will take custody of suspected terrorists. Clearly, this written authority takes the place of a judicial warrant. This means that the continued detention of suspected terrorists is based solely on a written authority issued by an executive office.

Accordingly, I submit that Section 29 of the ATA is unconstitutional because it infringes on the power of judges to issue warrants, thus, violating the fundamental principle of separation of powers. The respondents' assertion — seemingly adopted by the *ponencia* — that the written authority pertains only to the extended detention of persons validly arrested in a valid warrantless arrest, does not save it from infirmity: there is still a violation of the principle of separation of powers, as the written authority functions similarly to a commitment order that only a judicial officer can issue.

XII.

Section 29 authorizes the arrest of a suspect on the basis of evidence less than probable cause

The OSG advances that Section 29 continues to be bound by the standard of probable cause necessary to effect a "hot pursuit" arrest under Section 5(b) of Rule 113.[392] Contrary to the OSG's arguments, however, what is clear from the text of Section 29 is that it gives the ATC an almost unlimited authority to cause the detention of a suspect well beyond the

391 OSG's Memorandum, Vol. IV, p. 61.
392 Id.

periods provided in Article 125 of the RPC upon a mere suspicion, a standard lower than that of probable cause as contemplated in Rule 113, Section 5 of the Rules of Court.

Any discussion on warrantless arrests must first acknowledge that warrantless arrests are the exception — and a very limited exception at that — to the general rule that any arrest can only be made pursuant to a warrant issued by a judge upon his or her personal determination of the existence of probable cause.[393] The Court, in the exercise of its Constitutional power to promulgate rules concerning the protection and enforcement of constitutional rights,[394] carved out of the general rule the three (3) exceptions in Rule 113, Section 5 — *in flagrante delicto* arrests, "hot pursuit" arrests, and arrests of an escaped prisoner. In the first and second instances, probable cause is the fundamental requirement.

Probable cause as the gauge for propriety of warrantless arrests is a settled concept in jurisprudence. In *Vaporoso v. People*,[395] the Court said:

> Based on the foregoing provision, there are three (3) instances when warrantless arrests may be lawfully effected. These are: (*a*) an arrest of a suspect *in flagrante delicto*; (*b*) an arrest of a suspect where, based on personal knowledge of the arresting officer, there is probable cause that said suspect was the perpetrator of a crime which had just been committed; and (*c*) an arrest of a prisoner who has escaped from custody serving final judgment or temporarily confined during the pendency of his case or has escaped while being transferred from one confinement to another.
>
> In warrantless arrests made pursuant to Section 5 (b), Rule 113, it is required that at the time of the arrest, an offense had in fact just been committed and the arresting officer had personal knowledge of facts indicating that the accused had committed it. **Verily, under Section 5 (b), Rule 113, it is essential that the element of personal knowledge must be coupled with the element of immediacy**; otherwise, the arrest may be nullified, and resultantly, the items yielded through the search incidental thereto will be rendered inadmissible in consonance with the exclusionary rule of the 1987 Constitution. In *People v. Manago*, the Court held:
>
> > In other words, the clincher in the element of "personal knowledge of facts or circumstances" is the required element of immediacy within which these facts or circumstances should be gathered. This required time element acts as a safeguard to ensure that the police officers have gathered the facts or perceived the circumstances within a very limited time frame. **This guarantees that the police officers would have no time to base their probable cause finding on facts or circumstances obtained after an exhaustive investigation.**

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393 1987 CONSTITUTION, Art. III, Sec. 2.
394 Id., Art. VIII, Sec. 5.
395 G.R. No. 238659, June 3, 2019.

> The reason for the element of the immediacy is this as the time gap from the commission of the crime to the arrest widens, the pieces of information gathered are prone to become contaminated and subjected to external factors, interpretations and hearsay. On the other hand, with the element of immediacy imposed under Section 5 (b), Rule 113 of the Revised Rules of Criminal Procedure, the **police officer's determination of probable cause would necessarily be limited to raw or uncontaminated facts or circumstances, gathered as they were within a very limited period of time**. The same provision adds another safeguard with the requirement of probable cause as the standard for evaluating these facts of circumstances before the police officer could effect a valid warrantless arrest. x x x[396] (Emphases supplied; emphasis and underscoring in the original omitted)

Further, in *People v. Tudtud*,[397] the Court explained:

> The question, therefore, is whether the police in this case had probable cause to arrest appellants. Probable cause has been defined as:
>
> > an actual belief or reasonable grounds of suspicion. The grounds of suspicion are reasonable when, in the absence of actual belief of the arresting officers, the suspicion that the person to be arrested is probably guilty of committing the offense, **is based on actual facts, *i.e.*, supported by circumstances sufficiently strong in themselves to create the probable cause of guilt of the person to be arrested.** A reasonable suspicion therefore must be founded on probable cause, coupled with good faith of the peace officers making the arrest.
>
> The long-standing rule in this jurisdiction, applied with a great degree of consistency, is that "reliable information" alone is not sufficient to justify a warrantless arrest under Section 5 (a), Rule 113. **The rule requires, in addition, that the accused perform some overt act that would indicate that he "has committed, is actually committing, or is attempting to commit an offense."**[398] (Emphasis supplied)

In sum, if the arrest is to be done under Rule 113 Section 5(a), referring to *in flagrante delicto* arrests, the person arrested must have, in the presence of or within view of the arresting officer, actually done an overt act indicating that he or she has just committed, is actually committing, or is attempting to commit a crime.[399] If arrest is to be done under Rule 113, Section 5(b), or the so-called "hot pursuit" arrests, the arresting officers must have a reasonable belief based on actual facts perceived or observed immediately after the commission of the offense.[400]

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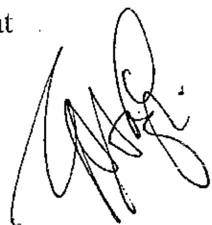
396 Id. at 6-7.
397 G.R. No. 144037, September 26, 2003, 416 SCRA 142.
398 Id. at 155. Citation omitted.
399 *Veridiano v. People*, G.R. No. 200370, June 7, 2017, 826 SCRA 382, 400.
400 Id.

Evidently, Section 29 of the ATA which, by its plain language, authorizes the taking into custody "of a person *suspected* of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of [the] Act" falls way short of the standard of probable cause which would validate a warrantless arrest under Rule 113, Section 5 of the Rules of Court. Mere suspicion by itself, or a hunch entertained by even the most seasoned of law enforcement agents, is not enough for a warrantless arrest.

On this ground alone, Section 29 of the ATA is already hopelessly invalid for being contrary to the rules on warrantless arrests. But even if the OSG's theory — that Section 29 does not go against Rule 113 of the Rules of Court but merely authorizes the longer 14-day period of detention — is given credence, Section 29 would still be invalid.

First, neither the law nor the IRR provide parameters for the issuance of a written authority to detain for the initial fourteen (14) days. The interpellation by Associate Justice Amy C. Lazaro-Javier (Justice Lazaro-Javier) to Assistant Solicitor General Marissa B. Dela Cruz-Galandines (ASG Galandines) during the oral arguments of this case is on point:

> **ASSOCIATE JUSTICE LAZARO-JAVIER:**
> Now, does the law provide specific parameters or standards to be applied by the ATC in evaluating the evidence and in deciding whether to grant applications for detention authority?
>
> **ASSISTANT SOLICITOR GENERAL GALANDINES:**
> The law enforcement agents or the military personnel must be able to convince the ATC and present probable cause that the continued detention of the detainee is needed so that further terrorist attack, terrorist's acts could be prevented, that the continuous detention is necessary to prevent, is necessary to preserve the evidence and that the detention, is being, the detention and investigation is being conducted in an orderly manner, Your Honor.
>
> **ASSOCIATE JUSTICE LAZARO-JAVIER:**
> Yes. You were speaking of the extension. Right?
>
> **ASSISTANT SOLICITOR GENERAL GALANDINES:**
> Yes, Your Honor.
>
> **ASSOCIATE JUSTICE LAZARO-JAVIER:**
> And the law specifies the standard probable cause. **I am asking you about the initial grant of the detention authority. What is the standard imposed by the law, if any?**
>
> **ASSISTANT SOLICITOR GENERAL GALANDINES:**
> Your Honor, we submit it is probable cause, Your Honor.
>
> **ASSOCIATE JUSTICE LAZARO-JAVIER:**
> Why? Is it specified in the law? Just like how the law specifies that probable cause for extension? Is the standard to be followed?



ASSISTANT SOLICITOR GENERAL GALANDINES:

It is not specified in the law, Your Honor. But we submit that it is probable cause because said suspected person, to justify the continued detention of said suspected person, Your Honor, without incurring any criminal liability, Your Honor.

ASSOCIATE JUSTICE LAZARO-JAVIER:

Yes. You're again speaking of the extension, we're on the same page. Aren't we?

ASSISTANT SOLICITOR GENERAL GALANDINES:

I...(interrupted)

ASSOCIATE JUSTICE LAZARO-JAVIER:

I was speaking of the initial grant of up to fourteen (14) days.

ASSISTANT SOLICITOR GENERAL GALANDINES:

Yes.

ASSOCIATE JUSTICE LAZARO-JAVIER:

The law itself does not provide any standard. Okay, so please, treat this in your memorandum.

ASSISTANT SOLICITOR GENERAL GALANDINES:

We will do so, Your Honor.

ASSOCIATE JUSTICE LAZARO-JAVIER:

Okay, very well. Is the grant of detention authority ministerial on the part of the ATC?

ASSISTANT SOLICITOR GENERAL GALANDINES:

No, Your Honor. It is not ministerial, Your Honor.

ASSOCIATE JUSTICE LAZARO-JAVIER:

So what are the possible grounds for denying an application of detention authority?

ASSISTANT SOLICITOR GENERAL GALANDINES:

Your Honor, the ATC may deny the grant of detention authority if the law enforcement agents or the military personnel could not show that there is a necessity to preserve the, there was actually no evidence to preserve. Or the detention is not, the continued detention is not necessary because there is no, because it would not prevent the commission of any other crime. So... (interrupted)

ASSOCIATE JUSTICE LAZARO-JAVIER

So again, Ms. Madam Assistant Solicitor General, you were again speaking of the extension and I was asking you about **the initial grant or denial of an application for detention authority**. x x x[401] (Emphasis and underscoring supplied)

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[401] TSN, Oral Arguments, May 11, 2021, pp. 48-50.

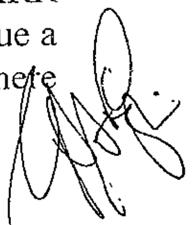
Indeed, the grounds cited by ASG Galandines refer only to the 10-day extension of the period of detention after the initial 14-day detention. Section 29 states in part:

> The period of detention may be extended to a maximum period of ten (10) calendar days if it is established that (1) further detention of the person/s is necessary to preserve evidence related to terrorism or complete the investigation; (2) further detention of the person/s is necessary to prevent the commission of another terrorism; and (3) the investigation is being conducted properly and without delay.

Similarly, Rule 9.1 of the IRR states:

> **Rule 9.1. Authority from ATC in Relation to Article 125 of the Revised Penal Code.**
>
> Any law enforcement agent or military personnel who, having been duly authorized in writing by the ATC under the circumstances provided for under paragraphs (a) to (c) of Rule 9.2, has taken custody of a person suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Act shall, without incurring any criminal liability for delay in the delivery of detained persons under Article 125 of the Revised Penal Code, deliver said suspected person to the proper judicial authority within a period of fourteen (14) calendar days counted from the moment the said suspected person has been apprehended or arrested, detained, and taken into custody by the law enforcement agent or military personnel. **The period of detention may be extended to a maximum period of ten (10) calendar days if it is established that (a) further detention of the person/s is necessary to preserve the evidence related to terrorism or complete the investigation, (b) further detention of the person is necessary to prevent the commission of another terrorism, and (c) the investigation is being conducted properly and without delay.**
>
> The ATC shall issue a written authority in favor of the law enforcement officer or military personnel upon submission of a sworn statement stating the details of the person suspected of committing acts of terrorism, and the relevant circumstances as basis for taking custody of said person.
>
> If the law enforcement agent or military personnel is not duly authorized in writing by the ATC, he/she shall deliver the suspected person to the proper judicial authority within the periods specified under Article 125 of the Revised Penal Code, provided that if the law enforcement agent or military personnel is able to secure a written authority from the ATC prior to the lapse of the periods specified under Article 125 of the Revised Penal Code, the period provided under paragraph (1) of this Rule shall apply. (Emphasis supplied)

Clearly, the law and the IRR do not state the goal of the fourteen (14)-day extended period of detention, the grounds upon which it may be authorized by the ATC, and upon what considerations the ATC may disallow the same. As worded, Section 29 of the law and Rule 9 of the IRR seem to be providing for a ministerial duty on the part of the ATC to issue a written authority to law enforcers based only on the latter's mere



representation that the person arrested is suspected of committing any of the acts penalized in Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the ATA.

Relevantly, the Senate deliberations on the ATA would reveal that the legislative intent of the 14-day period is to allow the police to gather additional evidence and essentially beef up its case against the detained person.[402] The intent seems reasonable at first blush; given the gravity of the crime, the body of evidence necessary to secure a conviction for terrorism would be significantly larger and more complex than what would be necessary for more familiar or lesser crimes.

But the same cannot be presumed of any and all prosecutions for acts of terrorism. It must be remembered that what is ultimately at stake is the liberty of a human being with inherent dignity who is at the mercy of the state's law enforcement agents. The ATA must burden those enforcing it with the duty to prove that the 14-day period is necessary on a case-by-case basis; otherwise, it will become a convenient excuse for delaying the delivery of a detained person to the proper judicial authorities. At the very least, law enforcement agents should be able to reasonably demonstrate the following: (a) why they would not be able to complete their evidence within a shorter period of time; (b) what information or evidence they expect to recover within the said period; and (c) what means they intend to employ in order to obtain said evidence. Without these parameters, the unscrupulous among law enforcement agents would embark on fishing expeditions while the detained person languishes for fourteen (14) days in police or military custody.

Second, <u>even if it is assumed that the IRR cured the lack of reference to Rule 113 in the law, ***it is still doubtful whether the warrantless arrests referred to in the IRR would be done upon meeting the threshold of probable cause***</u>. To recall, Rule 9.2 of the IRR states:

> **Rule 9.2** ***Detention of a Suspected Person without Warrant of Arrest***
>
> A law enforcement officer or military personnel may, without a warrant, arrest:
>
> a. a suspect who has committed, is actually committing, or is attempting to commit any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act in the presence of the arresting officer;
>
> b. a suspect where, **based on personal knowledge of the arresting officer**, there is probable cause that said suspect was the perpetrator of any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12 of the Act, which has just been committed; and
>
> c. a prisoner who has escaped from a penal establishment or place where he is serving final judgment for or is temporarily confined while his/her case for any of the acts defined and penalized under Sections 4,

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[402] TSN, Senate Deliberations, January 22, 2020, pp. 28-36.

5, 6, 7, 8, 9, 10, 11, or 12 of the Act is pending, or has escaped while being transferred from one confinement to another. (emphasis supplied)

The similarity of the above provision to Rule 113, Section 5 of the Rules of Court is undoubtedly striking, except for a phrase in Section 5(b):

SEC. 5. *Arrest without warrant; when lawful.* – A peace officer or a private person may, without a warrant, arrest a person:

a. When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

b. When an offense has in fact just been committed and he has **probable cause to believe based on personal knowledge of facts or circumstances** that the person to be arrested has committed it; and

c. When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another. (Emphasis and underscoring supplied)

Notably, while Rule 9.2 of the IRR seems to paraphrase Rule 113, it **modifies** Section 5(b) by omitting the phrase "**personal knowledge of facts and circumstances.**" While seemingly inconsequential, the reference to facts and circumstances echoes the doctrine in jurisprudence requiring that "personal knowledge" by police officers should be grounded on facts which they actually and personally observe:

Rule 113, Section 5(b) of the Rules of Court pertains to a hot pursuit arrest. The rule requires that an offense has just been committed. It connotes "immediacy in point of time." That a crime was in fact committed does not automatically bring the case under this rule. An arrest under Rule 113, Section 5(b) of the Rules of Court entails a time element from the moment the crime is committed up to the point of arrest.

Law enforcers need not personally witness the commission of a crime. **However, they must have personal knowledge of facts and circumstances indicating that the person sought to be arrested committed it.**

People v. Gerente illustrates a valid arrest under Rule 113, Section 5(b) of the Rules of Court. In *Gerente*, the accused was convicted for murder and for violation of Republic Act No. 6425. He assailed the admissibility of dried *marijuana* leaves as evidence on the ground that they were allegedly seized from him pursuant to a warrantless arrest. On appeal, the accused's conviction was affirmed. This Court ruled that the warrantless arrest was justified under Rule 113, Section 5(b) of the Rules of Court. The police officers had **personal knowledge of facts and circumstances indicating that the accused killed the victim**:

The policemen arrested Gerente only some three (3) hours after Gerente and his companions had killed Blace. They

> saw Blace dead in the hospital and when they inspected the scene of the crime, they found the instruments of death: a piece of wood and a concrete hollow block which the killers had used to bludgeon him to death. The eye-witness, Edna Edwina Reyes, reported the happening to the policemen and pinpointed her neighbor, Gerente, as one of the killers. *Under those circumstances,* ***since the policemen had personal knowledge of the violent death of Blace and of facts indicating that Gerente and two others had killed him,*** *they could lawfully arrest Gerente without a warrant.* If they had postponed his arrest until they could obtain a warrant, he would have fled the law as his two companions did. x x x

The requirement that law enforcers must have personal knowledge of facts surrounding the commission of an offense was underscored in *In Re Salibo v. Warden.*

In Re Salibo involved a petition for *habeas corpus*. The police officers suspected Datukan Salibo (Salibo) as one (1) of the accused in the Maguindanao Massacre. Salibo presented himself before the authorities to clear his name. Despite his explanation, Salibo was apprehended and detained. In granting the petition, this Court pointed out that Salibo was not restrained under a lawful court process or order. Furthermore, he was not arrested pursuant to a valid warrantless arrest:

> It is undisputed that petitioner Salibo presented himself before the Datu Hofer Police Station to clear his name and to prove that he is not the accused Butukan S. Malang. When petitioner Salibo was in the presence of the police officers of Datu Hofer Police Station, he was neither committing nor attempting to commit an offense. *The police officers had no personal knowledge of any offense that he might have committed.* Petitioner Salibo was also not an escapee prisoner. x x x

In this case, petitioner's arrest could not be justified as an *in flagrante delicto* arrest under Rule 113, Section 5(a) of the Rules of Court. He was not committing a crime at the checkpoint. Petitioner was merely a passenger who did not exhibit any unusual conduct in the presence of the law enforcers that would incite suspicion. **In effecting the warrantless arrest, the police officers relied solely on the tip they received. Reliable information alone is insufficient to support a warrantless arrest absent any overt act from the person to be arrested indicating that a crime has just been committed, was being committed, or is about to be committed.**

The warrantless arrest cannot likewise be justified under Rule 113, Section 5(b) of the Revised Rules of Criminal Procedure. The law enforcers had no personal knowledge of any fact or circumstance indicating that petitioner had just committed an offense.

A hearsay tip by itself does not justify a warrantless arrest. Law enforcers must have personal knowledge of facts, based on their observation, that the person sought to be arrested has just committed a crime. This is what gives rise to probable cause that would justify a

> **warrantless search under Rule 113, Section 5(b) of the Revised Rules of Criminal Procedure.**[403] (Emphasis and underscoring supplied; italics in the original)

From the above, the significance of the phrase "personal knowledge of facts and circumstances" is clear: for there to be probable cause to effect an arrest in hot pursuit, the arresting officers themselves must have personal, first-hand knowledge — in other words, based on their own observation – that a crime was committed and the person to be arrested was the one who committed it. The element of the officers' own observation is crucial, as it ties in with the element of *immediacy*. The crime should have "just been" committed. The police officers' knowledge cannot be based on records, mere reports, hearsay — and not even on previous surveillance or investigation which they themselves conducted.

That Rule 9.2 of the IRR deviates from the language of Rule 113, Section 5(b) on a material point is a red flag that must not be taken lightly. It is yet another indication that the warrantless arrest and prolonged detention authorized under Section 29 of the ATA are not only unreasonably broad and without parameters, but also require a standard much lower than that of probable cause.

In conclusion, Section 29 of the ATA and Rule 9.2 of the IRR violate the fundamental right to liberty and the right of the people to be secure against unreasonable searches and seizures because, as plainly worded, Section 29 deviates from the rule on warrantless arrests in Rule 113 of the Rules of Court. The attempt in the IRR to paraphrase Rule 113 does not save Section 29 of the law from invalidity because the IRR cannot go beyond what the law provides. Even assuming that the IRR can modify the law, Section 29 would remain infirm because it contains no parameters and safeguards for the initial 14-day detention of a person arrested, and it allows both the arrest and extended detention to be done upon mere suspicion, not probable cause.

Having established that the situation on which Section 29 of the ATA seeks to operate is no different from instances of warrantless arrests, there is an argument to be made in favor of the proposition that Section 29 creates a group or classification of persons who may be arrested without warrant but are treated differently insofar as their period of detention prior to a judicial charge is concerned. Considering that the fundamental rights of equal protection and of liberty are at stake, the Court should weigh Section 29's provisions on detention under the strict scrutiny test.

To recall, any inquiry into a constitutional challenge based on the equal protection clause and fundamental freedoms necessarily begins with three components:

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[403] *Veridiano v. People*, supra note 399, at 402-405. Citations omitted.

The first inquiry is what governmental interests support a statute's constitutionality. Depending on the standard of review, the governmental interests must be legitimate or permissible, important, substantial, or significant; or compelling or overriding.[404] Of course, the governmental interest to support a statute may be impermissible or illegitimate, and thus not support the statute under any standard of review.[405]

The second inquiry concerns the relationship between the statute's means and how it advances those governmental ends. Depending on the standard of review, the statute must have a rational relationship, a substantial relationship, or a direct relationship to its ends.[406]

The third inquiry focuses on the burdens imposed by the statute's means. Depending on the standard of review, the statute's burden must not be irrational, substantially more burdensome than necessary, or it must be the least restrictive burden that would be effective in advancing the governmental interest.[407]

The three main standards of review track the responses to these three questions. Under strict scrutiny, the statute must directly advance compelling governmental interests and be the least restrictive effective means of doing so.[408] While the Court is ready to concede that an effective approach at addressing the ever-mutating nature of terrorism is a compelling government interest, the means adopted by Section 29 are from being the least restrictive and even borders on the absurd.

XIII.

The 14-day detention period in Section 29, which may be extended for another 10 days, is unconstitutional because it goes beyond the three-day period laid down in Section 18, Article VII of the 1987 Constitution.

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404 See R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. Rich, L. Rev. 1279 (1994) available at <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2109&context=lawreview>.

405 See, *e.g.*, Romer v. Evans, 517 U.S. 620, 634-35 (1996) (finding "animus" against a politically unpopular group, in this case animus based upon sexual orientation, an illegitimate governmental interest); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (holding prejudice against the mentally impaired is illegitimate); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (finding prejudice against interracial marriage illegitimate).

406 See generally R. Randall Kelso, supra note 392, at 1288-97.

407 Id. at 1298-1305.

408 Id. ("Under strict scrutiny a law is upheld if it is proven necessary to achieve a compelling government interest. The government... must show that it cannot achieve its objective through any less discriminatory alternative.").

The *ponencia* finds that Section 18, Article VII of the Constitution is irrelevant to terrorism because it applies only in cases of invasion or rebellion when the public safety requires it. Rebellion or invasion are scenarios of open war while terrorism is not, to wit:

> x x x [T]he Constitution is silent as to the exact maximum number of hours that an arresting officer can detain an individual before he is compelled by law to deliver him to the courts. The three-day period in the last paragraph of Section 18, Article VII of the Constitution is irrelevant to terrorism because it is applicable only in cases of invasion or rebellion when the public safety requires it. The fifth paragraph of Section 18 reiterates this by stating that the suspension of the privilege of the writ of habeas corpus shall apply only to persons judicially charged for rebellion or offenses inherent in, or directly connected with, invasion. To add terrorism is not permitted by the text of the Constitution and would indirectly extend the President's powers to call out the armed forces and suspend the privilege of the writ of *habeas corpus*.
>
> Petitioners have not made out a case that terrorism is conceptually in the same class as rebellion or invasion, which are scenarios of "open war". This is not unexpected, since terrorism – a relatively modern global phenomenon – then may not have been as prevalent and widespread at the time the 1987 Constitution was framed as compared to now. It must be remembered that "rebellion" has an exact definition under Article 134 of the RPC as the act of rising publicly and taking arms against the Government for the purpose of, among others, removing from the allegiance to said Government or its laws, the territory of the Philippine Islands or any part thereof. The intent of rebellion is categorically different from that provided for under Section 4 of the ATA. Thus, a person may be in rebellion while not committing terrorism and vice versa.[409] (Emphasis omitted)

I vehemently disagree. To say that Section 18, Article VII is not applicable to acts of terrorism would mean that, in the face of a terrorist attack, the President is rendered inutile because he cannot invoke any of his Commander-in-Chief powers. Surely, this piecemeal application and apparent compartmentalization of Section 18, Article VII of the 1987 Constitution, if only to lend legitimacy to an extended form of deprivation of liberty, should not, and cannot, withstand constitutional muster.

Section 18, Article VII of the 1987 Constitution refers to the graduated powers of the President as Commander-in-Chief. From the most to the least benign, these are: the calling out power, the power to suspend the privilege of the writ of *habeas corpus*, and the power to declare martial law.[410] The Commander-in-Chief provision reads:

> Section 18. The President shall be the 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 or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend

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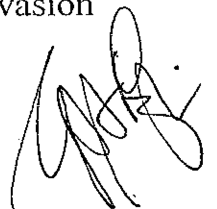
[409] *Ponencia*, pp. 213-214.

[410] *Lagman v. Medialdea*, G.R. Nos. 231658, 231771 & 231774, July 4, 2017, 829 SCRA 1, 162.

> the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.
>
> The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without any need of a call.
>
> The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof, and must promulgate its decision thereon within thirty days from its filing.
>
> A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assemblies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ.
>
> The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offenses inherent in or directly connected with the invasion.
>
> **During the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released.** (Emphasis and underscoring supplied)

Aside from granting the President Commander-in-Chief powers, Section 18, Article VII is, more significantly, a curtailment of said powers. It is a product of the country's experience during Martial Law under the dictator, Ferdinand E. Marcos. **The manipulations and abuses that the Filipino people went through during those dark years resulted in a Commander-in-Chief provision that essentially limited the exercise of powers that are generally accepted to be inherent powers of the President as head of the Executive Department.**

One of the restrictions put in place by Section 18, Article VII after a President suspends the privilege of the writ of *habeas corpus* is the three-day detention period within which persons arrested for rebellion or offenses inherent in or directly connected with the invasion must be judicially charged. Otherwise, said person should be released. It is the judicial charge for rebellion or offenses inherent in or directly connected with the invasion



which marks the onset of the suspension of the privilege of the writ of *habeas corpus*.[411]

The rationale behind the three-day maximum detention period can be gleaned from the deliberations of the 1986 Constitutional Commission, to wit:

> THE PRESIDENT: Commissioner Padilla is recognized.
>
> MR. PADILLA: Madam President, I propose to delete lines 21, 22, and 23 of Section 15 and in lieu thereof insert the following: DURING THE SUSPENSION OF THE PRIVILEGE OF THE WRIT OF *HABEAS CORPUS*, ANY PERSON WHO HAS BEEN ARRESTED OR DETAINED SHALL BE JUDICIOUSLY CHARGED WITHIN FIVE WORKING DAYS, OTHERWISE HE SHALL BE RELEASED. If I may explain a little, Madam President.
>
> THE PRESIDENT: Commissioner Padilla has five minutes to explain his amendment.
>
> MR. PADILLA: **The purpose of the amendment is to prevent a situation similar to the past regime when innocent persons were**

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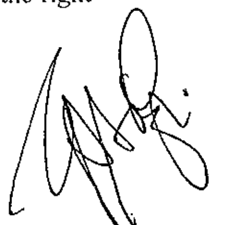
[411] Based on the Record of the Constitutional Commission, R.C.C. No. 44, July 31, 1986:

> **FR. BERNAS:** Madam President, after conferring with Commissioner Concepcion, we have no objection to the amendment if it is an amendment by addition but not by substitution, because if it is an amendment by substitution, it weakens the intent of the provision as it exists. The intention of the provision is precisely to apply the suspension of the privilege of the writ of *habeas corpus* only to those who have been judicially charged.
>
> So if the amendment is by addition, that is, we require that the accused be charged within a certain period or number of days, we will accept it provided that what stands here is not deleted. The suspension of the privilege of the writ will apply only to those who' have been judicially charged. Until they are charged, the suspension does not apply to them.
>
> x x x x
>
> **FR. BERNAS**: It is not a question of whether or not a warrant of arrest can be issued. The question is whether in spite of the warrant, they can still be released. What we are saying here is that to prevent release under a suspension of the privilege of the writ of *habeas corpus*, the person who is under detention must be judicially charged. Until he is judicially charged, he is not covered by any suspension.
>
> **MR. PADILLA**: If other persons are not covered by the suspension except those who are judicially charged, what would be the effect of that to others not subject to the suspension?
>
> **FR. BERNAS**: Precisely, the purpose of the suspension of the privilege of the writ of *habeas corpus* is to enable the government to deal with a situation of an invasion or a rebellion and the government must charge judicially those who are involved in invasion or rebellion. Those who are not charged are not involved nor considered to be involved in the rebellion or invasion and, therefore, there is no reason for extending the suspension of the privilege of the writ to them.
>
> x x x x
>
> Point of clarification only from the distinguished Vice-President. Is it my understanding that during the three-day period, and consistent with the firm stand and interpretation of the honorable Chief Justice Concepcion, that particular respondent would not be deprived of the right to sue for a writ of *habeas corpus*?
>
> **MR. PADILLA:** There is no waiver of any right of the person arrested.



arrested, detained and confined in prison sometimes for one month, one year, or even more, without any criminal charge filed against them who oftentimes did not even understand why they had been arrested or detained.

The last paragraph of Section 15 reads:

> The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or for offenses inherent in or directly connected with invasion.

If a person has been judicially charged, that means there has been a warrant of arrest issued by the courts. This paragraph will not protect innocent persons who have been arrested and detained by the military under orders of the past regime, such as the ASSO, PCO or PDA. What we are trying to protect is the right of the persons arrested and detained by requiring that at least within five working days a criminal charge be filed against them, otherwise, if there is no crime committed or no evidence in support of the culpability of such detained person, he should be immediately released after five working days.

x x x x

MR. DE CASTRO: Madam President, yesterday I informed the Floor Leader about my proposed amendment on the last paragraph of Section 15. My first impression was to delete the whole lines 21, 22 and 23, but after talking with the honorable Chief Justice, both of us expressed our concern on judicially charging those arrested under the writ. so I gave way to the amendment of Commissioner Padilla. My reason in doing so is that there are only two instances by which the writ may be issued, and that is during actual rebellion and actual invasion. **We shall not talk of actual invasion because I really doubt the practicality of issuing a writ when there is actual invasion of our country. Instead, we will talk of actual rebellion in a certain area where the writ will have to be issued. I even doubt whether the detainee could be released within five working days considering that there is a fighting going on in that area, or a theater of war, as described by the Honorable Bernas. In the actual theater of war, I really doubt whether the authorities will have sufficient time to get the necessary affidavits, prepare the necessary complaint and submit the necessary charge before the court. I even doubt whether there will be a court existing in the actual theater of war or in the place where there is actual rebellion. Nevertheless, let me say that I finally would like to agree or to convince myself to agree that the five-day period in the actual operation, actual shooting, actual theater of war, when the authorities may be able to prepare the necessary charge, the necessary affidavits, the necessary evidence so that the court may accept the complaint, will be sufficient.**

x x x x

MR. SARMIENTO: I wish to propose an amendment to the amendment of the honorable Vice-President. He is for the charging of the accused within five days. **My submission, Madam President, is that five days is too long. Our experience during martial law was that torture and other human rights violations happened immediately after the arrest, on the way to the safe houses or to Camp Aguinaldo, Fort**

> **Bonifacio or Camp Crame. I repeat, five days is too long, Madam President. As a matter of fact, under the Revised Penal Code, and, of course, the honorable Vice-President is an expert on criminal law, we have the 6-9-18 formula — 6 hours, 9 hours, 18 hours within which to charge and bring the accused to judicial authorities. Of course, during martial law, the 6-9-18 formula was increased under P.D. No. 1404. So I wish to suggest that we reduce the period of five days to THREE days as a compromise. That would be 72 hours, Madam President. Actually, it is still quite long.**
>
> Will the honorable Vice-President yield to my amendment?
>
> THE PRESIDENT: What does Commissioner Padilla say?
>
> MR. PADILLA: Madam President, I have no particular conviction on the number of days or number of hours. That was suggested by a few Commissioners in conference yesterday. **It is true that under Article 125 of the Revised Penal Code which penalizes the delaying of the transmittal or delivery of the person arrested to the judicial authorities, the period is based on the gravity of the offense and this is punishable by the same penalties as those for arbitrary detention in Article 124 of the Code and the delay in the release under Article 126. But this provision is made to apply when there is a suspension by the President of the privilege of the writ of *habeas corpus*. So it covers a different situation from that contemplated in the Revised Penal Code.** The Rules of Court, Rule 113, Section 6 thereof, also allows arrest without warrant under three situations. However, that is also subject to the period for delivery of the arrested person to the judicial authorities, which means to the courts through the fiscal.
>
> With regard to the proposed amendment to our amendment which is to reduce the period of five working days to "THREE" working days, I have no particular objection, Madam President.[412] (Emphasis and underscoring supplied)

Section 18, Article VII contemplates the exercise by the President of the powers to suspend the privilege of the writ of habeas corpus and to declare martial law in a "theater of war"[413] where all hell has broken loose.

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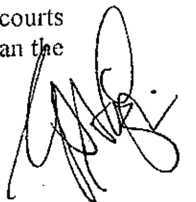
[412] Record of the Constitutional Commission, R.C.C. No. 44, July 31, 1986.

[413] **MR. FOZ:** Thank you, Madam President.

May I go to the next question? This is about the declaration of martial law or the suspension of the privilege of the writ of *habeas corpus* on page 7, on the second to the last paragraph of Section 15. Is it possible to delete the clause "where civil courts are able to function"? In the earlier portion of the same sentence, it says, "nor supplant the functioning of the civil courts . . ." I was just thinking that if this provision states the effects of the declaration of martial law — one of which is that it does not supplant the functioning of the civil courts — I cannot see how civil courts would be unable to function even in a state of martial law.

MR. SUMULONG: May we refer that interpellation to Commissioner Bernas?

FR. BERNAS: This phrase was precisely put here because we have clarified the meaning of martial law; meaning, limiting it to martial law as it has existed in the jurisprudence in international law, that it is a law for the theater of war. In a theater of war, civil courts are unable to function. If in the actual theater of war civil courts, in fact, are unable to function, then the military commander is authorized to give jurisdiction even over civilians to military courts precisely because the civil courts are closed in that area. But in the general area where the civil courts are opened then in no case can the



In such extraordinary times, a person arrested for rebellion or offenses inherent in or directly connected with the invasion can be detained without judicial charge for a maximum of three days only. The three-day maximum applies regardless and in spite of the probability that the government – crippled by an actual rebellion or invasion – could barely function and in all likelihood, does not have enough resources to gather evidence and charge the person arrested.

At this juncture, mindful of the historical context upon which the constitutional provision draws its origins and the foresight the framers had in ensuring that the words ratified by the people will provide protection from any and all attempts at replicating the atrocities of the past and its cognate evils, two key points warrant consideration:

First, it must be pointed out that the deliberations took place in 1986 when technology was more crude and investigative tools were more rudimentary. Even then and notwithstanding an actual rebellion or invasion, the framers of the Constitution set a limit of three days within which a person arrested for rebellion or offenses inherent in or directly connected with the invasion must be judicially charged. Given the advances in forensic science and in technology in the last three decades, the rationale behind the 14-day detention period, which is extendible for another ten (10) days, simply does not hold water.[414] It is incomprehensible why it would take

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military courts be given jurisdiction over civilians. This is in reference to a theater of war where the civil courts, in fact, are unable to function.

MR. FOZ: It is a state of things brought about by the realities of the situation in that specified critical area.

FR. BERNAS: That is correct. (Record of the Constitutional Commission, R.C.C. No. 42, July 29, 1986.)

[414] <u>**TSN, Senate Deliberations, January 22, 2020, pp. 28-36:**</u>

Senator Hontiveros. Thank you, Mr. President.

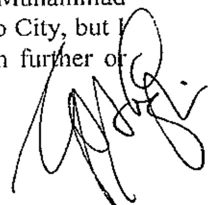
I would like to proceed now to Section 23 of the bill which amends Section 27 and increases the period of detention from three days to 14 days. What is the rationale, Mr. President, for increasing the period of detention from three days to 14 days? So, from half week to two weeks. In the worst scenarios, is it so that subjects might possibly be subjected to 14 days of enhanced investigation or interrogation until they crack?

Senator Lacson. Mr. President, in his co-sponsorship speech, Sen..Ronald dela Rosa shared with the members of this Body his first-hand experience in Davao City. The 36-hour reglementary period is not enough to build up a case against the suspected terrorist.

With the permission of the lady senator, let us hear directly from Senator Dela Rosa what he experienced; and it created more damage when he was not able to file or make the inquest proceedings on the arrested suspects.

Senator Dela Rosa. Thank you, and Mr. President.

Based on my personal experience, indeed, the spirit of this bill is to secure the state and protect our people from terrorism by giving more teeth to our law enforcement in its anti-terror campaign. Then, I think we should extend the reglementary period from the maximum period of 36 hours to what is being penned in this bill. Because as per my experience, ISIS terrorist Muhammad Reza, which I presented during my cosponsorship speech, I was able to arrest him in Davao City, but I had to release him before 36 hours because I do not have enough evidence to hold him further or



beyond 36 hours. But I was fully convinced and the intelligence community was fully convinced and they were forcing me, they were pleading before me not to release this guy because he was very dangerous. But I told them that I cannot do otherwise; I cannot break the law. So, I had to release him. But months later, Mr. President, the intelligence committee showed me the video from YouTube the three of them, including Mohammad Reza were holding the head of the European victim and slashing the throat of the victim. So, from being local black flag terrorist here in the Philippines, in Lanao del Sur, he travelled to Raqqa, Iraq and became an ISIS member. So, he was able to slash a lot more throats of ISIS victims in Iraq and Syria. If there was a law allowing me to hold him further beyond 36 hours, then many more lives could have been saved.

Senator Hontiveros. The current Human Security Act already provides not just 36 hours, but 72 hours--doble po—or three days. Ang tinatanong ko lamang ay hindi ba sapat na iyong tatlong araw, doble sa panahon na mayroon? Kailangan pa ba talagang dagdagan hanggang dalawang linggo? In fact, should not the case be built up before arrest? Noong naaresto sa wakas iyong Mohammad Reza and definitely, persons like him should be arrested and subjected to our laws, bago pa siya inaresto, hindi po ba nabigyan ng ebidensiya ang good gentleman from Davao ng intelligence community? Ano po iyong evidence na mayroon that prompted the good gentleman to make the arrest in the first place? It must have been substantive enough.

Senator Dela Rosa. For the information of the good lady from Panay, ibang-iba po iyong intelligence reports from investigative reports. Intelligence reports have no evidentiary value but they are classified as A1, meaning, coming from the direct source and from first-hand information. Iba po iyon. Alam natin na iyan na iyan talaga, but legally, it cannot stand in court. So, iyan po ang dilemma ngayon ng law enforcers.

Babalik lamang ako sa sinabi ng ating interpellator, the good senator from Panay, that instead of using the 72 hours as provided by the Human Security Act, the law enforcers are more inclined to use the 36 hours provided by ordinary laws other than the Human Security Act because we find more convenience in using the other laws and because we find the Human Security Act very anti-police. Instead of giving more teeth to the police, it is giving more fear to the police because of that provision.

Senator Lacson. Because of the P500,000 per day fine, Mr. President. So, instead of filing cases for violation of the Human Security Act, the police would instead file ordinary violations of the Revised Penal Code to avoid this, sasabihin natin, sword of Damocles.

Senator Hontiveros. I understand, Mr. President.

Senator Lacson. Pagbabayarin sila ng P500,000 per day once the suspected terrorist is acquitted.

On top of what Senator Dela Rosa has shared with us, during the committee hearings, the members of the law enforcement agencies shared with us their experience na kulang talaga iyong three days and they need, more or less, 14 days. That is the reason why we incorporated in this measure iyong reglementary period na 14 days.

We are just trying to be at par with other ASEAN neighbors or ASEAN countries--Sri Lanka, 14 days; Australia, 14 days; Bangladesh, 15 days; Indonesia, 21 days; Pakistan, 30 days; Malaysia, 59 days; and Singapore, 730 days. Ito iyong reglementary periods. Tapos tayo, non-extendible iyong 14 days.

In other countries or in other jurisdictions, like Thailand, puwede pa silang mag-extend ng another 30 days; Indonesia, extendable hanggang 120 days; Malaysia, extendible hanggang dalawang taon; Maldives, extendible to an indefinite period; and Singapore, indefinite period. Mabait po tayo kasi alam ko po nandiyan kayo kaya ang sabi ko 14 days, tama na.

Senator Hontiveros. Thank you, Mr. President.

Mr. President, I understand na ganito po ang trend sa iba at karamihan ng mga bansa sa region natin. Mas gusto ko pa nga na hindi tayo manatiling mabait pero...

Senator Lacson. So, we value human rights, Mr. President.

Senator Hontiveros. Exactly, Mr. President.

Senator Lacson. That is what I meant by saying na mabait tayo.

Senator Hontiveros. Yes, exactly, Mr. President.

Kahit na nagmumukha tayong odd man out, mas gusto ko po sanang manatili tayong nagtataguyod ng mahabang track record ng ating bansa struggling to uphold human rights and civil liberties even under very challenging circumstances tulad nitong global threat nga ng terrorism na humanap ng mga creative pero effective na paraan. I was even surprised doon sa sinabi ng good gentleman from Davao na walang evidentiary value bilang investigation report iyong intelligence report. Because I know even as a civilian at bilang mistah ng good gentleman from Davao, and the good sponsor knows this even more as a former chief-PNP, how hard our police and military intelligence units work to gather iyong sinabi nga ng good gentleman from Davao—A1 intelligence information which will enable our law enforcement officers to arrest these suspected terrorists or these terrorists. Kaya ko itinanong na hindi ba iyong pag-aresto roon kay Mohammad Reza was actually backed up by solid evidence that could stand in court in the prosecution of the case, Mr. President.

Senator Lacson. Well, the bottom line here is, Mr. President, had Senator Dela Rosa, or Colonel Dela Rosa at that time been, accorded this particular provision extending the reglementary period for terrorist, sana na-save natin iyong na-slash na leeg doon sa Iraq.

On top of that, Mr. President, let me just inform the gentlelady that there are safeguards that are put in place to prevent abuses under this particular provision. Number one, the law enforcer taking custody shall notify in writing the judge nearest the place of arrest of the following facts: time, date, manner of arrest, location or locations of the detained suspects, physical and mental condition of the detained suspects. These are the additional safeguards na naisip naming ilagay para mabawasan or mawala iyong possible abuses ng law enforcement agents.

So, hindi puwede iyong itago-tago because they will be answerable. They are also mandated to furnish with a written notice iyong anti-terrorism council, Mr. President. Ito iyong mga safeguards.

Senator Hontiveros. Thank you, Mr. President.

Of course, we also believe that we have to consider the rationale behind the original provision in the Human Security Act which is to prevent or frustrate an imminent attack. Because if an attack is already being carried out, then is it not correct to say that not only can our security forces arrest the perpetrators in flagrante delicto but they can also use deadly force to preserve public order or save lives?

Senator Lacson. Well, we should not wait for the destruction or the killing to happen before we conduct the arrest, Mr. President. We want to be proactive because malalakas na po iyong mga anti-terrorism laws in other jurisdictions. If we are left behind, we are opening up our country to be a safe haven for these terrorists. Ito pa po, Section 20, iyong penalty for failure to deliver suspect to the proper judicial authority, mayroon po tayong provision na puwede silang makulong. Of course, it is already provided for under existing laws, iyong tinatawag na "arbitrary detention" pero nai-emphasize pa rin po natin iyon.

Senator Hontiveros. Salamat po, Mr. President.

At sa totoo lamang po, itong pinag-uusapan nating longer period of detention na sinasabi na global trend at nakikita natin sa ating rehiyon ay ginagamit laban sa mga estudyante, mga pro-democracy activists, pati mga human rights lawyers na lahat po ay hindi mga terorista and there is no evidence that it contributes meaningfully against terrorism. Ito po ay mula sa Amnesty International.

Senator Lacson. On the other hand, let us look at it from another perspective, Mr. President. Itong mga countries na ito, they are adequately equipped. Tayo po ay hindi masyado. And iyong existence ng batas na umiiral sa kanila that provides for a longer reglementary period could be contributory kung bakit kakaunti marahil iyong nangyayaring mga terroristic activities in their areas. Sa atin, nagiging laboratory, nagiging training ground just like Marwan and the other terrorists sa Marawi. Kaya po nangyayari iyon kasi mas magaan sila sa Pilipinas because of our weak laws on terrorism.

Senator Hontiveros. Mr. President, I think it would be arguable na roon sa mga bansa na mas may mahahabang reglementary period, lalo na iyong mga maunlad na bansa sa kanila ay posibleng humuhupa ang terorismo because they are addressing the root causes of terrorism in a balanced way kasama ng effective law enforcement. So, hindi lamang heavily sa law enforcement, may kasama po.

Senator Lacson. And effective laws, Mr. President.

longer to gather evidence and build a case against a suspected terrorist in this day and age and under ordinary circumstances without any ongoing armed rebellion or invasion contemplating actual hostilities. On the one

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Senator Hontiveros. Which is the argument of the good sponsor that we do not have right now. And effective laws which, I know, is what we are all seeking to.

Senator Lacson. Which we do not have right now, Mr. President.

Senator Hontiveros. Which is the argument of the good sponsor that we do not have right now, Mr. President. At the proper time, I will propose some possible amendments to achieve that objective as part of the community of nations, to address the threat of terrorism while still unequivocally upholding our commitments to human rights and civil liberties.

Further, Mr. President, if our security forces are still in the process of investigating a terrorist conspiracy, can they not build their case using the mechanisms already provided, for example, in the Terrorism Financing Prevention and Suppression Act? Secondly, the surveillance order provision in the current HSA or applying for a good old-fashioned search warrant under the Rules of Court?

Senator Lacson. It is time to improve or enhance the Human Security Act by way of amending it, Mr. President, including all these provisions because right now, there is only one conviction. Imagine, when did we pass the Human Security Act? It is in 2007. We are now in 2020. So far, there is only one conviction and one difficulty which we suggested that we delete, iyong predicate crimes. Ito iyong one of the handicaps. We have to prove first the predicate crimes before we can even proceed to prosecute the terrorist for violating the Human Security Act. That is why, we deemed it necessary to just delete the predicate crimes.

Senator Hontiveros. I see, Mr. President. If the State needs 14 days with the suspect to get anything useful from him or her, hindi po ba fishing expedition na iyon?

Senator Lacson. Definitely no, Mr. President. Sa amin nga pong committee hearing, ito iyong common experience ng mga law enforcement agencies present, ang sabi nila ay kulang na kulang talaga iyong three days. Ang hinihingi pa po nila ay 90 days na hindi nga ako pumayag dahil naalala ko kayo. x x x

<u>TSN, Senate Deliberations, January 29, 2020, pp. 30-31:</u>

Senator Pangilinan. Yes, Mr. President. We thank the good senator for that clarification. My concern now is if we do approve the extension, will the proposed lengthening of the period to 14 days, maybe the two-week period, then merits a presentation before a judge?

This is just a manifestation, Mr. President. We will review the provision, and if we feel the need to put some amendments so that we can ensure that the 14-day period that a person is held in detention would not be an opportunity in violation of the accused's rights.

We have no problem if the person accused is in fact a known terrorist. But reality is more complex. We may find ourselves in a situation wherein we are accused of terrorism and, therefore, 14 days in detention, lengthening the period, may apply to us or may apply to working days.

That is our concern, Mr. President.

Senator Lacson. During the committee hearing, Mr. President, we asked the law enforcement agents and according to them, the three-day reglementary period is too short to gather enough evidence and to prevent the occurrence of another terrorist act. In fact, in his co-sponsorship speech, Senator Dela Rosa related his own firsthand personal experience wherein he arrested a terrorist suspect but he was forced to release him because he would exceed the three-day reglementary period. Then a few weeks after that, he recognized that same terrorist that he arrested beheading a person in Iraq. When we asked them, they told us that they need at least 14 days to develop a case and to file a strong case for violation of this proposed measure to strengthen the case. And we want to be at par with the other countries. For example, Singapore, two years pero renewable pa to an unlimited period; Sri Lanka, 14 days; Bangladesh, 15 days; Pakistan, 60 days; Australia, 14 days.

Ito po iyong mga na-consult natin during the deliberations that is why we just wanted to be at par with other countries because we want to prevent the Philippines to be a safe haven for terrorists, Mr. President.

hand, the three-day period is a fixed limit set by no less than the 1987 Constitution. On the other hand, the competency and expertise of law enforcement agencies are variables that can be honed and developed. **If law enforcement agencies bemoan that three days are not enough time to build a case against a suspected terrorist, then the solution is to strengthen the institutional capacities of these agencies in order to meet the three-day period — not to encroach on constitutionally-protected rights and freedoms of the citizenry. It does not bode well for a democracy to shift the burden of responsibility from the government to the people *at the expense of sacrificing civil liberties in order to make up for government inadequacies*.**

The threshold of three (3) days was put in place *to prevent a repeat of the atrocities that happened during Martial Law under Ferdinand E. Marcos*. This is in recognition of the fact that certain situations, such as custodial investigations or, as couched in the ATA, custodial detentions,[415] are the perfect set-up for abusive and cruel behavior. In their zeal to catch the culprit, law enforcement authorities often lose sight of what is lawful in pursuit of an apparently legitimate objective. Thus, aside from an equivocal prohibition on torture of a person under investigation for the commission of an offense,[416] including rebellion or offenses inherent in or directly connected with the invasion under the context of Section 18, Article VII, a maximum detention period of three days for such offenses was likewise put in place by the said provision.

Hence, *second*, it would appear that the lay of the land is for all measures of custodial investigation, for whatever purpose it may serve, to fall within the spectrum set by Section 18, Article VII of the 1987 Constitution. That is, any form of custodial investigation, to be constitutionally firm, may authorize a period no longer than three days before proper judicial intervention. This is evident in the periods set by Article 125 of the Revised Penal Code and the predecessor of the ATA, the Human Security Act. Indeed, even the most atrocious acts condemned by the international community, domestically penalized by R.A. No. 9851 or "*The Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity*", follow the regime circumscribed by Section 18, Article VII of the 1987 Constitution.

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[415] SEC. 30. *Rights of a Person under Custodial Detention.* — The moment a person charged with or suspected of committing any of the acts defined and penalized under Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12 of this Act is apprehended or arrested and detained, he/she shall forthwith be informed, by the arresting law enforcement agent or military personnel to whose custody the person concerned is brought, of his/her right: (a) to be informed of the nature and cause of his/her arrest, to remain silent and to have competent and independent counsel preferably of his/her choice. If the person cannot afford the services of counsel of his/her choice, the law enforcement agent or military personnel concerned shall immediately.

[416] Section 12 (2) of Article III of the 1987 Constitution reads:

Section 12.

x x x x

2. No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, *incommunicado*, or other similar forms of detention are prohibited.

While the ATA explicitly prohibits torture and other cruel, inhumane and degrading treatment during investigation or interrogation, this again would be merely paying lip service if the arresting officers are given the latitude to commit the said acts in the first place. A detention period of fourteen (14) days, extendible for another ten (10) days, is exactly that — an occasion for law enforcement agents or military personnel to lose their heads in the name of a warped concept of justice. That evidence obtained as a result of torture is inadmissible is practically meaningless in light of the longer detention period. As is the nature of torture, perpetrators commit such acts covertly. Victims of torture —if they are permitted to survive —would be hard-pressed to scrape together sufficient proof to prosecute their torturers, much less challenge the admissibility of evidence unlawfully obtained from them by their torturers.

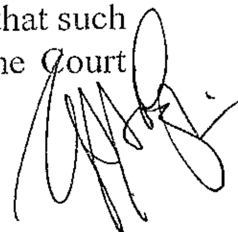
Finally, the fact that other countries have longer detention periods is irrelevant in this case — they are irrelevant because our Constitution makes them so. Our Constitution reflects our values and history as a people. **Because of the scar left by our dark years under the Martial Law of Ferdinand E. Marcos, the Constitution was crafted to allow only a maximum of three days of detention even under the most dire of circumstances, *i.e.*, "open war".** And it defies logic that such period of detention can become longer for a situation that is less than "open war".

A palpable temptation certainly exists to curtail, if not wholeheartedly abandon, historical roots and time-honored protections articulated in our laws in favor of measures that, at first blush, purport to offer a greater sense of security and prosecutorial power all in the name of preventing a great evil. **Lest we forget, these measures which promise to offer much but stand with one foot outside of constitutionally protected rights are no less malevolent than the evils which they seek to prevent.** ***In its insidious nature, such measures are the greater evil.***

XIV.

Regrettably, the Court did not take this opportune time to reconsider its judicial policy towards facial challenges. I remain steadfast, however, that statutes or regulations patently offensive to the constitution, or those that seriously intrude into protected civil liberties, are within the Court's expanded power of judicial review — even when the right implicated by such a measure does not concern speech. Having established that the Court's reluctance in taking on facial challenges outside free speech cases is premised on wrong reasons, the Court should discard its practice of framing facial challenges of this sort as automatically premature for adjudication.

Fully cognizant of a perceived effect that in allowing facial challenges the Court may be inviting a deluge of cases that could clog its docket and adversely affect the discharge of its functions, I respectfully submit that such apprehension is more imagined than real. Parties coming before the Court



remain bound by the requirements of justiciability. A carved out exception to this is not being suggested here. That the floodgates would open to constitutional challenges is not, to my mind, a reasonable justification to defer to the legislature and shirk from the Court's constitutional duty. The floodgates should rightly be open to cases of transcendental importance. **The Court was not vested with the power of judicial review so it could dedicate itself solely to the resolution of private obligations and property rights.** ***As the highest tribunal and final arbiter of the law, it is with more reason that the Court must, without hesitation, wield its authority when the fundamental rights of life and liberty are at stake.***

Professor Laurence Tribe and Joshua Matz, in their book Uncertain Justice: The Roberts Court and the Constitution,[417] significantly observed:

> The Court's slate of cases thus continues to fill up with the most pressing and conflicted issues of our time. Questions about how the Court will resolve the controversies that reach it, what considerations will influence its decisions, what effects it expects those decisions to have, and how well those expectations will match what actually ensues -- all of these uncertainties remain a constant in the unfolding story of the Court and the Constitution. It could hardly be otherwise. The decisions the Court will render, and the effects those decisions might have, are beyond precise calibration and exact prediction.

In all, the disfavor towards facial challenges should not become an unbending, rigid and inflexible rule that stymies the Court into inaction. As in *Joint Ship,* where the Court found that the petition presented a case of first impression and the issues involved public welfare and the advancement of public policy, or in *National Federation,* where it was emphasized that the Court should not mechanically apply the filtering mechanism, the Court has the prerogative and discretion to determine which cases should be given due course.

As a final word, the rhetoric that the law-abiding citizen has nothing to fear,[418] in my view, dismally misses the point that in the whole scheme of law enforcement, a lot of variables come into play. One such possible variable is a vague and overbroad law, which a scrupulous law enforcer and a conscientious court may otherwise end up enforcing and interpreting, to the detriment of an accused. The rhetoric does nothing but unduly place the burden on the individual to watch over and protect his or her civil liberties, which the State is duty-bound to observe in the first place. ***The Bill of Rights, it must be underscored, operates for the protection of the innocent and the guilty alike.*** The vast powers of the government are likewise circumscribed by the liberties guaranteed under the Bill of Rights. As such, the suppression of these rights is not warranted merely because a person is

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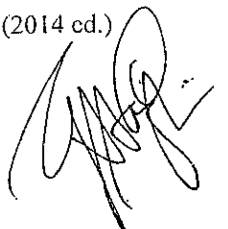
[417] Laurence Tribe and Joshua Matz, Uncertain Justice: The Roberts Court and the Constitution (2014 ed.) p. 317.

[418] Opening Statement of Solicitor General Calida, p. 17, par. 88.



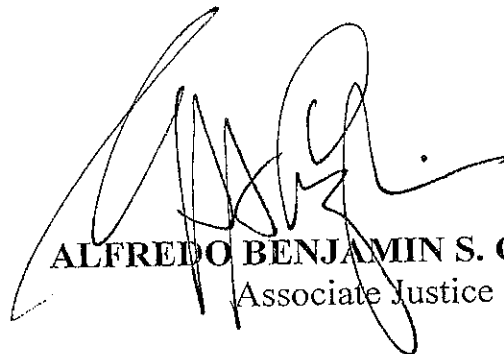
guilty. Neither is it warranted when the suppression is made for a laudable objective. The Bill of Rights is an enduring protection of the people against the State's unreasonable and unjustified intrusion into their guaranteed liberties. In no uncertain terms should this protection be turned on its head.

In these lights, in addition to my submission that the Court should abandon its rigid position on facial challenges to penal statutes, I vote to strike down the following provisions of the ATA for being unconstitutional:

(1) the "Not Intended Clause" in the *proviso* of Section 4 for vagueness, overbreadth, and for failing the strict scrutiny test;

(2) the second and third modes of designation under Section 25 for vagueness and overbreadth; and

(3) Section 29 for violating the principle of separation of powers, for infringing on the right to liberty and the right to be secure against unreasonable searches and seizures, and for failing the strict scrutiny test. As a necessary consequence of declaring Section 29 unconstitutional: (a) Rule 9.1 of the IRR should also be declared void for being *ultra vires*; and (b) Rule 9.2 of the IRR should be declared void for violating the right to liberty and the right to be secure against unreasonable searches and seizures.



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice