

Republic of the Philippines
SUPREME COURT
Manila

En Banc

SUZETTE NICOLAS y SOMBILON,
Petitioner,

-versus-

G.R. No. 175888

ALBERTO ROMULO, ET AL.,
Respondents.

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JOVITO R. SALONGA, ET AL.,
Petitioners,

-versus-

G.R. No. 176051

DANIEL SMITH, ET AL.,
Respondents.

x-----x

**BAGONG ALYANSANG
MAKABAYAN, ET AL.,**
Petitioners,

-versus-

G.R. Nos. 176222

**PRESIDENT GLORIA
MACAPAGAL-ARROYO, ET AL.,**
Respondents.

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JOINT MOTION FOR RECONSIDERATION

PETITIONERS, by counsel, respectfully move for the reconsideration of the Decision of the Honorable Court promulgated on 11 February 2009, and in support thereof respectfully state:

We cannot keep the respect of the world or our own self-respect if we lack the moral fiber to resist the impositions of the powerful, much less at the cost of our own fundamental law... This Supreme Court has the power to stop the rampage of constitutional breaches in which other agencies of our government are indulging in a servile attitude of complaisance to former masters who are bent on keeping in their hands the strings, the chains, and the whip of unquestioned command. Our oath of office compels us to exercise that power... Let us make the present Republic of the Philippines as truly sovereign as is the will of our people, solemnly manifested in the Constitution.¹

1. In its Decision of 11 February 2009, the Honorable Court upheld the constitutional validity of the Visiting Forces Agreement but ruled that the agreements that were executed between Foreign Affairs Secretary Alberto Romulo and US Ambassador Kristie Kenney are invalid because they do not comply with the terms of the VFA.

2. Petitioners most respectfully submit that the Honorable Court overlooked or misappreciated circumstances, arguments, and legal principles which, if considered, would show that the VFA is unconstitutional. Moreover, developments that occurred after the Honorable Court promulgated its Decision, particularly the disclosure of the “secret agreement” popularly referred to as the “VFA II,” give additional basis for the VFA to be declared unconstitutional. Hence, petitioners pray that the Honorable Court reconsider its Decision based on the following grounds:

¹ Perfecto, J., dissenting in *Godofredo Dizon vs. The Commanding General of the Philippine Ryukus Command, United States Army*, G.R. No. L-2110, 22 July 1948.

- I. The Mutual Defense Treaty is completely inapplicable to and cannot be considered as the basis of the validity of the VFA.
- II. The presence of US troops in the Philippines must be governed by a treaty validly entered into in accordance with the 1987 Philippine Constitution. The VFA does not comply with those constitutional requirements.
- III. The Case-Zablocki Act cannot be considered as the implementing legislation of the VFA.
- IV. The letter that was relied upon by the Honorable Court in stating that the United States recognizes the VFA as a binding treaty is inconclusive because the US Ambassador does not have the authority to make such certification.
- V. The US case of *Weinberger vs. Rossi* is not controlling.
- VI. Based on *Medellin vs. Texas*, the Mutual Defense Treaty is neither self-executing nor enforceable under US law.
- VII. The VFA violates the equal protection clause of the Constitution and undermines the independence of the judiciary.
- VIII. The VFA is unconstitutional and void because an integral part of it, the so-called "VFA II," was not included in the Senate deliberations and resolution of concurrence.
- IX. The Decision contains errors of fact that must be corrected.

DISCUSSION

I. The Mutual Defense Treaty is completely inapplicable to and cannot be considered as the basis of the validity of the VFA.

1. Petitioners respectfully submit that the Honorable Court erred in holding that “the VFA, which is the instrument agreed upon to provide for the joint RP-US military exercises, is simply an implementing agreement to the main RP-US Military Defense Treaty.”

2. The RP-US Mutual Defense Treaty (“MDT”) was, indeed, ratified with the advice and consent of the U.S. Senate. However, it is totally irrelevant to the present controversy because the said treaty is only applicable in times of war. It is an agreement for resisting an armed attack on either of the parties and on defending against external aggression committed against any of them. As of this writing, the Philippines is not at war with any nation.

3. What is, instead, relevant to the instant controversy is the 1947 RP-US Military Bases Agreement, which provides the historical and legal background against which the VFA must be considered and measured.

4. The following provisions of the 1947 RP-US Military Bases Agreement are important to the present discussion:

TITLE I. PURPOSE AND DURATION

ARTICLE 1.- Subject to mutual agreements, the Government of the United States of America will furnish military assistance to the Government of the Republic of the Philippines in the training

and development of armed forces and in the performance of other services essential to the fulfillment of those obligations which may devolve upon the Republic of the Philippines under its international agreements including commitments assumed under the United Nations and to the maintenance of the peace and security of the Philippines, as provided in Title II, Article 6, hereof.

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TITLE II. GENERAL

ARTICLE 6.- For the purposes of this Agreement the **military assistance authorized in Article 1 hereof is defined as the furnishing of arms, ammunition, equipment and supplies; certain aircraft and naval vessels, and instructions and training assistance by the Army and Navy of the United States** and shall include the following:

(a) Establishing in the Philippines of a United States Military Advisory Group composed of an Army group, a Navy group and an Air group to assist and advise the Republic of the Philippines on military and naval matters;

(b) **Furnishing from the United States sources equipment and technical supplies for training, operations and certain maintenance of Philippines armed forces of such strength and composition as mutually agreed upon;**

(c) Facilitating the procurement by the Government of the Republic of the Philippines of a military reserve of United States equipment and supplies, in such amounts as may be subsequently agreed upon;

(d) **Making available selected facilities of United States Army and Navy training establishments to provide training for key personnel of the Philippine armed forces, under the conditions hereinafter described.²**

5. Unlike the MDT, which contains broad commitments of support and general undertakings to come to the aid of the other party in the event of an attack, the above provisions of the 1947 RP-US Military Bases Agreement specifically provide for the entry of American soldiers into the country, with a view to providing military assistance through the provision of equipment and training.

² Emphasis supplied.

6. The significance of the basing agreement to the current controversy comes to a sharper focus when the Honorable Court considers the fact that the 1947 RP-US Military Bases Agreement was never ratified because the U.S. Senate never gave its advice and consent. It was for this reason that when the 1987 Constitution was drafted, its framers included in its transitory provisions the following requirements found in Article XVIII, Section 25:³

Section 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning military bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, **and recognized as a treaty by the other contracting State.**"⁴

7. Moreover, while the RP-US Mutual Defense Treaty of 1951 is mentioned in one of the preambular paragraphs of the VFA,⁵ the VFA is an independent agreement, with its own requirements for its entry into force and provisions on duration and termination.⁶

³ For an account of the provenance of this provision, see JOAQUIN BERNAS, S.J. *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 1212-1216 (1996).

⁴ Emphasis supplied.

⁵ The Preamble of the VFA reads in part: "The Government of the Republic of the Philippines and the Government of the United States of America,...Reaffirming their obligations under the Mutual Defense Treaty of 1951."

⁶ Article IX of the VFA provides:

Duration and Termination

This agreement shall enter into force on the date on which the parties have notified each other in writing through the diplomatic channel that they have completed their constitutional requirements for entry into force. This agreement shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement.

II. The presence of US troops in the Philippines must be governed by a treaty validly entered into in accordance with the 1987 Philippine Constitution. The VFA does not comply with those constitutional requirements.

8. The Court explains in its Decision that:

Accordingly, as an implementing agreement of the RP-US Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but merely to the US Congress under the Case-Zablocki Act within 60 days of its ratification. It is for this reason that the US has certified that it recognizes the VFA as a binding international agreement, i.e., a treaty, and this substantially complies with the requirements of Art. XVIII, Sec. 25 of our Constitution.

The provision of Art. XVIII, Sec. 25 of the Constitution, is complied with by virtue of the fact that the presence of the US Armed Forces through the VFA is a presence “allowed under” the RP-US Mutual Defense Treaty. Since the RP-US Mutual Defense Treaty itself has been ratified and concurred in by both the Philippine Senate and the US Senate, there is no violation of the Constitutional provision resulting from such presence.

9. Petitioners respectfully submit that this is a serious error.

10. Our constitutional legal framework has radically changed since the MDT was signed in 1951 and ratified by the U.S. President in 1952, after the U.S. Senate gave its advice and consent. Under the 1987 Constitution, the general rule is prohibition of the presence of foreign military bases, troops, or facilities in the Philippines, and exceptions are allowed only upon compliance with certain requirements. This current constitutional framework does not permit the existence of the VFA as a component of the subsisting MDT without compliance with the specific

requirements under Section 25 of Article XVIII of the 1987 Constitution.⁷ In recognition of this, the Philippine Senate gave its concurrence in the ratification of the VFA.

11. The advice and consent of the U.S. Senate to the ratification of the RP-US Mutual Defense Treaty **in 1952** could not possibly be considered as compliance with the requirements set by the Philippine Constitution **35 years later**, in 1987, **or 46 years later**, in 1998, when the VFA was signed and ratified.

12. Indeed, the problem that *Bayan vs. Zamora* ostensibly settled actually remains: the United States does not recognize the VFA as a treaty, which requires the advice and consent of the U.S. Senate. This runs afoul of the aforesaid Section 25 of Article XVIII, which uses “treaty” in a specific sense, a meaning that must prevail, in accordance with Article 2⁸ of the Vienna Convention on the Law of Treaties, over the interpretation of a U.S. Ambassador.⁹

⁷ It provides: “After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State.”

⁸ Article 2 of the Vienna Convention on the Law of Treaties provides:

1. For the purposes of this present Convention:

(a) “**treaty**” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or into or more related instruments and whatever its particular designation.

x x x

2. **The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State. (Emphasis supplied).**

⁹ Thomas C. Hubbard.

III. The Case-Zablocki Act cannot be considered as the implementing legislation of the VFA.

13. In its Decision, the Court relies on the Case-Zablocki Act, treating that U.S. legislation as both a congressional affirmation equivalent to ratification¹⁰ and an implementing legislation¹¹ of the VFA.

14. Petitioners respectfully submit that such treatment is erroneous. The Case-Zablocki Act is **NOT** proof that the United States recognizes the VFA as a treaty; on the contrary, it is proof that the U.S. **DOES NOT** recognize the VFA as a treaty.

15. In the first place, the very text of the Case-Zablocki Act provides that it applies to any international agreement “**other than a treaty.**” **Thus, the Act does not apply to treaties.** The pertinent provision reads:

Section 112b. United States international agreements;
transmission to Congress.

(a) The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), **other than a treaty**, to which the United States is a party as soon as practicable....¹²

16. In other words, matters falling under the said Act are not treated as treaties.

¹⁰ Decision, pp. 9, 12.

¹¹ Decision, p. 16.

¹² Emphasis supplied.

17. Under Article II, Section 2 of the Constitution of the United States, the President “shall have Power, **by and with the Advice and Consent of the Senate**, to make Treaties, provided two thirds of the Senators present concur.” If the U.S. really recognizes the VFA as a treaty, then this provision of their Constitution should have been applied. The very fact that a different procedure was followed in relation to the VFA is undeniable proof that the United States treats the said agreement differently.

18. Moreover, the procedure under the Case-Zablocki Act is merely a process of **notification** by which the U.S. President, through the Secretary of State, informs the U.S. Congress of the agreements that the country has entered into. It does not constitute ratification of a treaty which requires the advice and consent of the U.S. Senate. It is merely a means for the legislative branch to monitor the agreements that have been concluded by the President and to consider those agreements in drafting laws.

19. The word “notification” is defined as “the act or an instance of notifying,” or “a written or printed matter that gives notice.”¹³ In contrast,

¹³ Merriam-Webster’s Online Dictionary at <http://merriam-webster.com/dictionary>. Black’s Law Dictionary (6th ed.) does not define “notification” itself but refers to the word “notice,” which it defines as:

Notice in its legal sense is information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source, and is regarded in law as “actual” when the

“ratification” is defined as “the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives.”¹⁴ The purpose of ratification is to enable the contracting states to examine the treaty more closely and to give them an opportunity to refuse to be bound by it should they find it inimical to their interests. While notification refers to a simple **ministerial** act of sharing or providing information through a notice, ratification refers to an optional **discretionary** act that involves making a decision as to whether to give full effect to an agreement or not. Under the U.S. Constitution, ratification of a treaty by the U.S. President requires the advice and consent of the U.S. Senate.

20. Nothing in the entire text of the Case-Zablocki Act provides that an agreement shall become valid and enforceable upon compliance with the procedure prescribed thereunder, or that an agreement that does not comply with the said procedure is not valid and enforceable. Unlike ratification or, as required in *Medellin vs. Texas*,¹⁵ an indication of legislative intent to enforce a treaty domestically, notification under the Act is not a requirement for the effectivity or enforceability of an agreement.

person sought to be affected by it knows thereby of the existence of the particular fact in question... In another sense, “notice” means information, an advice, or written warning, in more or less formal shape, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the notifying party to communicate (p. 1061).

¹⁴ Pimentel, et al. vs. Office of the Executive Secretary, et al., G.R. No. 158088, 6 July 2005.

¹⁵ 552 US __ No. 06-984 (March 25, 2008).

21. As clearly pointed out in the dissent of the Hon. Justice Carpio, notification is far less significant legally than ratification (or concurrence) by the Senate:

The fact that the U.S. State Department notified the VFA to the U.S. Congress under the Case-Zablocki Act, and the U.S. Congress has not objected to the characterization of the VFA as an executive agreement, is incontrovertible proof that the VFA is not a treaty but merely an executive agreement as far as the United States is concerned. **In short, the United States does not recognize the VFA as a treaty.** It is also an admission that the VFA does not have the status of domestic law in the United States. ... If a ratified treaty does not automatically become part of US domestic law under *Medellin*, with more reason a merely notified executive agreement does not form part of US domestic law.¹⁶

IV. The letter that was relied upon by the Honorable Court in stating that the United States recognizes the VFA as a binding treaty is inconclusive because the US Ambassador does not have authority to make such certification.

22. In finding that the United States recognizes the VFA as a treaty, the Supreme Court has twice relied on the letter addressed by then U.S. Ambassador Thomas C. Hubbard to the Philippine Senate.¹⁷ The Court found that the U.S. government “has fully committed to living up to

¹⁶ Carpio, J., dissenting, citing Dr. Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda of Progress*, Boston University International Law Journal, Spring 195.

¹⁷ Letter of Ambassador Hubbard to Senator Miriam Defensor-Santiago:

“As a matter of both US and international law, an international agreement like the Visiting Forces Agreement is legally binding on the US Government. In international legal terms, such an agreement is a ‘treaty.’ However, as a matter of US domestic law, an agreement like the VFA is an ‘executive agreement,’ because it does not require the advice and consent of the Senate under Article II, section 2 of our Constitution.”

the terms of the VFA. For as long as the United States of America accepts or acknowledges the VFA as a treaty, and binds itself further to comply with its obligations under the treaty, there is indeed marked compliance with the mandate of the Constitution.”¹⁸

23. However, in the very letter of Ambassador Hubbard, he admits that the VFA, as far as US domestic law is concerned, is merely an executive agreement.

24. Ambassador Hubbard then invokes international law in stating that despite the classification of the VFA as an agreement other than a treaty, the said agreement has the binding effect of a treaty.

25. Apparently, the Honorable Supreme Court fell for this explanation because it relied primarily on this rationalization in the case of *Bayan vs. Zamora*. In the assailed Decision, the Court again makes the same mistake.

26. Petitioners submit that the manner of treatment of the VFA by the U.S. can and should be deduced, inferred, and interpreted only through the actions and enactments of the pertinent U.S. government officials or agency, including the U.S. Senate.

¹⁸ *Bayan vs. Zamora*, 342 SCRA 449 (2002).

27. It is quite self-contradictory for the Honorable Court to declare that “this is a matter of internal United States law,”¹⁹ but in the same breath proceed to use the international effect of a treaty commitment by the U.S. as basis for finding that the VFA need not have the advice and consent of the US Senate.

28. Such approach refers not to the state party itself, which ought to do the recognizing, but to the expectations of the international community of states, including the other signatory to the treaty. This approach is erroneous because **recognition** is a positive action, which can be determined only from the perspective of the actor. There can be recognition only if there is an entity that does or makes the recognizing; absent such entity, then there is no such action. Hence, the only way through which “recognition” can be inferred, interpreted or deduced is by examining the acts, namely the laws and issuances of the state actor, and not by invoking the expectations of third party entities under international law.

29. In the first place, does an ambassador have the power to make such a declaration?

¹⁹ At page 8.

30. While it is true that the executive branch of government, to which the ambassador belongs, is the branch that is empowered to negotiate, enter into and execute treaties, the said branch does not have the power to create and enact laws. Such power belongs to the legislative branch of government.

31. As part of such law-making power, the legislative branch of government has the power and discretion to adopt a treaty as part of the law of the land, thereby giving it the status of a legislative enactment. The legislative branch of government is clothed with the sole authority of determining which mandates are to be considered as law or which agreements are to be enforced as official enactments of the state.

32. Petitioners submit that it is the U.S. Congress that has the power to make a declaration on the actual status of a treaty or agreement, as far as the U.S. is concerned. Therefore, the letter of former Ambassador Hubbard may not be given conclusive effect. There is no reason for the Honorable Court to consider the said letter as a “certification” that is conclusive as to the matters contained therein.

V. The US case of *Weinberger vs. Rossi* is not controlling.

33. In its Decision, the Honorable Court invokes the U.S. case of *Weinberger vs. Rossi*²⁰ in ruling that “an executive agreement is a treaty within the meaning of that word in international law and constitutes enforceable domestic law *vis-à-vis* the United States.”

34. Petitioners respectfully submit that such reliance on *Weinberger vs. Rossi* is misplaced.

35. Briefly, *Weinberger* involved an executive agreement entered into by the presidents of the Republic of the Philippines and the United States. The agreement provided for the preferential employment of Filipino citizens at United States military bases in the Philippines. Subsequently, the U.S. Congress enacted a statute that prohibits employment discrimination against United States citizens on military bases overseas **unless permitted by “treaty.”** Thereafter, respondent United States citizens residing in the Philippines were notified that their jobs at a naval base were being converted into local national positions in accordance with the 1968 agreement.

²⁰ 456 U.S. 25, 31 March 1982.

36. It is true that in the said case the U.S. Supreme Court held that the word “treaty” includes an executive agreement.

37. However, the court was very specific in limiting the application of its ruling to the factual circumstances under consideration. It made clear that its construction of the words “executive agreement” and “treaty” relates only to the 1968 executive agreement between the Philippines and the United States, in relation to the 1971 legislative enactment of the US Congress. This is very evident in the text of the decision itself, which reads:

Our task is to determine the meaning of the word “treaty” as Congress used it in this statute. Congress did not separately define the word, as it has done in other enactments. We must therefore ascertain as best we can whether Congress intended the word “treaty” to refer solely to Art. II, § 2, cl. 2, ‘Treaties’ -- those international agreements concluded by the President with the advice and consent of the Senate -- or whether Congress intended “treaty” to also include executive agreements such as the BLA.

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In the case of a statute such as § 106, that does touch upon the United States' foreign policy, there is even more reason to construe Congress' use of “treaty” to include international agreements as well as Art. II treaties. At the time § 106 was enacted, 13 executive agreements provided for preferential hiring of local nationals. Thus, if Congress intended to limit the “treaty exception” in § 106 to Art. II treaties, it must have intended to repudiate these executive agreements that affect the hiring practices of the United States only at its military bases overseas. One would expect that Congress would be aware [456 U.S. 32] that executive agreements may represent a quid pro quo: the host country grants the United States base rights in exchange, inter alia, for preferential hiring of local nationals.

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While the question is not free from doubt, we conclude that **the “treaty” exception contained in § 106** extends to executive agreements as well as to Art. II treaties.

38. In further support of this position, the U.S. Supreme Court recognized that the U.S. Congress has not really been consistent on what it meant when referring to a “treaty.” These pronouncements serve as clear guidelines that delimit the application of the case to other circumstances, i.e., the conclusion therein applies only to the enactments under consideration and is not to be conclusive as to other cases.

39. The U.S. Supreme Court even **explicitly** mentioned the Case Act (Case-Zablocki) in its decision, as applying to **agreements other than treaties**. Hence, if any weight is to be given to the *Weinberger* case, it should be considered as proof that the United States does not regard the VFA as a treaty.

40. The court said:

Under the United States Constitution, of course, the word ‘treaty’ has a far more restrictive meaning. Article II, § 2 [456 U.S. 30] cl. 2, of that instrument provides that the President ‘shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.’

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Congress has not been consistent in distinguishing between Art. II treaties and other forms of international agreements. For example, **in the Case Act**, 1 U.S.C. § 112b(a) (1976 ed., Supp. IV), Congress required the Secretary of State to ‘transmit to the Congress the text of any international agreement, . . . **other than a treaty**, to which the

United States is a party' no later than 60 days after 'such agreement has entered into force.' Similarly, Congress has explicitly referred to Art. II treaties in the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq. (1976 ed. and Supp. IV), and the Arms Control and Disarmament Act, 22 U.S.C. § 2551 et seq. (1976 ed. and Supp. IV). On the other hand, Congress has used 'treaty' to refer [456 U.S. 31] only to international agreements other than Art. II treaties. In 39 U.S.C. § 407(a), for example, Congress authorized the Postal Service, with the consent of the President, to 'negotiate and conclude postal treaties or conventions.' A 'treaty' which requires only the consent of the President is not an Art. II treaty.²¹

41. Based on the above, petitioners submit that the Honorable Court is mistaken in taking the *Weinberger* case as proof that under U.S. law, the term "treaty" includes all international agreements. On the contrary, the court made an explicit pronouncement in *Weinberger* that agreements covered by the Case-Zablocki Act are agreements "other than a treaty."

**VI. Based on *Medellin vs. Texas*,
the Mutual Defense Treaty is
neither self-executing nor
enforceable under US law.**

42. Moreover, even if we were to assume, for the sake of argument, that the RP-US Mutual Defense Treaty of 1951 is the applicable legal framework to the instant controversy, still it fails to pass muster in accordance with the requirements set in the US case of *Medellin vs. Texas*.²² The *Medellin* case created an implicit presumption of non-enforceability, and established a two-pronged test to determine whether a treaty is enforceable under U.S. domestic law: a treaty is self-executory if (1) textually, it is so worded to convey an intention to make it self-executory,²³

²¹ Emphasis supplied.

²² 552 US __ No. 06-984 (March 25, 2008).

²³ *Air France v. Saks*, 470 U.S. 392, 396-397 (1985). Because a treaty ratified by the United States is "an agreement among sovereign powers," the court has also considered as

and it has been ratified with such understanding, or (2) Congress has enacted enabling legislation that will make the same enforceable under U.S. law.²⁴ In accordance with the U.S. Supreme Court's definition of self-execution,²⁵ a treaty, by itself, would not serve to create a cause of action for a violation of any treaty rights, and would, in essence, be judicially unenforceable until Congress chose to make it enforceable.

43. The MDT fails on both tests. There is nothing in the language of the treaty that makes it self-executory. There is nothing on record that supports the idea that it was ratified with the intention to make it automatically enforceable. Moreover, it cannot be disputed that no enabling law was at all passed by the U.S. Congress making the treaty enforceable under U.S. law.

44. Similar to the Vienna Convention on Consular Relations, the MDT is not part of U.S. domestic law and it cannot be enforced by the U.S. President. For while both treaties were approved by the U.S. Senate and ratified accordingly, they do not possess the requirements of enforceability that are essential before any individual can invoke it before a court, agency or other body.

45. Based on all of the above, petitioners respectfully submit that the RP-US Visiting Forces Agreement is unconstitutional because it does

"aids to its interpretation" the negotiation and drafting history of the treaty as well as "the post-ratification understanding" of signatory nations. *Zicherman vs. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996); see also *United States vs. Stuart*, 489 U.S. 353, 365-366 (1989); *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943).

²⁴ Taryn Marks. *The Problems of Self-Execution: Medellín vs. Texas*. Duke Journal of Constitutional Law and Public Policy. Accessed through <http://www.law.duke.edu/journals/djclpp> on February 7, 2009.

²⁵ A treaty is self-executing if it "has automatic domestic effect as federal law upon ratification." citing the Transcript of Oral Argument, at 30-31 ("[S]elf-executing is one of those words that people use to cover a lot of different meanings [T]here's another meaning of 'self-executing,' or maybe it's a misuse of the term" (statement of Solicitor General Paul Clement)). Direct effect means that the treaty confers on an individual the right to enforce the treaty in domestic courts—i.e., that the treaty itself creates a cause of action in a court of law. *Medellín v. Texas*.

not comply with the requirements of the Philippine Constitution. The promulgation of the case of *Medellin vs. Texas* by the U.S. Supreme Court constitutes a fundamental change in the circumstances which makes it necessary to revisit the earlier case of *Bayan vs. Zamora*, in the fashion of *Bangko Sentral ng Pilipinas Employees Association, Inc. vs. Bangko Sentral ng Pilipinas*.²⁶ *Medellin* negates all of the assumptions and legal reasoning that were made by the Honorable Supreme Court in *Bayan*.

VII. The VFA violates the equal protection clause of the Constitution and undermines the independence of the judiciary.

46. The Honorable Court found that the VFA, particularly Article V thereof on “Criminal Jurisdiction,”²⁷ neither violates the equal protection clause of the Constitution nor undermines the independence of the judiciary.

47. The Court’s justification for this conclusion is that our exercise of jurisdiction over U.S. servicemen who are in the Philippines under the VFA is only “to the extent agreed upon” by the U.S. and Philippine Governments in the VFA. In other words, the Court upheld the primacy

²⁶ G.R. No. 148208, 15 Dec. 2004.

²⁷ Article V, Criminal Jurisdiction. x x x 6. The custody of any United States personnel over whom the Philippines is to exercise jurisdiction shall immediately reside with United States military authorities, if they so request, from the commission of the offense until completion of all judicial proceedings. United States military authorities shall, upon formal notification by the Philippine authorities and without delay, make such personnel available to those authorities in time for any investigative or judicial proceedings relating to the offense with which the person has been charged. In extraordinary cases, the Philippine Government shall present its position to the United States Government regarding custody, which the United States Government shall take into full account. In the event Philippine judicial proceedings are not completed within one year, the United States shall be relieved of any obligations under this paragraph. The one year period will not include the time necessary to appeal. Also, the one year period will not include any time during which scheduled trial procedures are delayed because United States authorities, after timely notification by Philippine authorities to arrange for the presence of the accused, fail to do so.

of the States' contract that is the VFA. The Court further reasons out that the Constitution does not prohibit agreements recognizing immunity from jurisdiction or aspects of jurisdiction (such as on custody), and invokes Article II, Section 2, that the Philippines "adopts the generally accepted principles of international law as part of the law of the land."

48. But the Decision forgets our constitutional provisions on national sovereignty,²⁸ national interest,²⁹ the bill of rights,³⁰ and the independence of the judiciary,³¹ including the powers and duties of the Supreme Court. Those provisions set the parameters for and serve as limitations on the exercise of governmental power.

49. The fundamental rule remains that a treaty is in parity with statutes, and both must conform to the Constitution.³² Indeed, while "generally accepted principles of international law" form part of the law of the land, a treaty or executive agreement such as the VFA is neither a "generally accepted principle of international law" nor the *fundamental* law of the land. There is no law more fundamental than our Constitution. In fact, a treaty forms part of the law of the land or domestic law only when it meets the requirements of the Constitution.³³

50. That the U.S. and Philippine governments "agreed" on the treatment of accused American servicemen in the Philippines under the VFA does not at all resolve the issue of violation of the equal protection clause. The Court's reasoning reduces violations of fundamental rights and constitutional mandates to a matter of "contractual relations" between States. This is not permissible or acceptable in our legal system. It is, in

²⁸ Art. II, sec. 7.

²⁹ *Id.*

³⁰ Art. III.

³¹ Art. VII,

³² See *Abbas vs. Commission on Elections*, 179 SCRA 287.

³³ M. MAGALLONA, *FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW* (2005) 543, citing *Guerrero's Transportation Services, Inc. vs. Blaylock Transportation Services Employees Association-Kilusan*, G.R. No. L-41518, 30 June 1976.

the words of *Central Bank Employees Association Inc. v. Banko Sentral ng Pilipinas et al*,³⁴ an “abdication of this Court’s solemn duty to strike down any law repugnant to the Constitution and the rights it enshrines.”

51. Petitioners respectfully ask the Court to reconsider this ruling that the VFA does not violate the equal protection of the laws, particularly in the light of its ruling in *Central Bank* which held:

Under most circumstances, the Court will exercise judicial restraint in deciding questions of constitutionality, recognizing the broad discretion given to Congress in exercising its legislative power. Judicial scrutiny would be based on the ‘rational basis’ test, and the legislative discretion would be given deferential treatment. But if the challenge to the statute is premised on the denial of a fundamental right, or the perpetuation of prejudice against persons favored by the Constitution with special protection, judicial scrutiny ought to be more strict. A weak and watered down view would call for the abdication of this Court’s solemn duty to strike down any law repugnant to the Constitution and the rights it enshrines. This is true whether the actor committing the unconstitutional act is a private person or the government itself or one of its instrumentalities. Oppressive acts will be struck down regardless of the character or nature of the actor.

52. *On its face*, the VFA discriminates against persons other than US servicemen found in the Philippines by virtue of the VFA. It expressly grants privileges to United States personnel that are not available to others who are situated in the Philippines. The Court justifies this distinction on the basis of a rule in international law that “foreign armed forces allowed to enter one’s territory [are] immune from local jurisdiction, except to the extent agreed upon.” This may be an accurate statement of the rule but still it does not mean that any agreement reached by the parties may run rough shod over constitutional rights and rules. Like any other agreement, the VFA must conform to the dictates of the Constitution. International

³⁴ G.R. No. 148208, 15 December 2004.

law cannot be used to justify distinctions that in the first place cannot exist under Philippine law.

53. The protection of constitutional rights, including the equal protection of the laws, must be related to the State policy of pursuing “an independent foreign policy,” and that “[i]n its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.”³⁵ These are not idle words because when it comes to foreign military presence in the country, the Constitution demands adherence to processes that are meant to ensure mutuality and reciprocity between the Philippines and its foreign partner. The obligation to ensure this adherence lies not only on the legislative and executive branches but also on the judiciary.

54. Given that the challenge to the VFA is premised on the denial of a fundamental right bearing on national sovereignty and national interest, judicial scrutiny ought to be “more strict,” as held in *Central Bank*.

55. Applying the strict scrutiny test to the VFA, the agreement violates the equal protection clause of the Constitution. *First*, there is no close fit, much less any relation, between the classification of accused American servicemen as a “special class” accorded different treatment and the expressed purposes of the VFA, which are to strengthen international and regional security in the Asia Pacific by fostering cooperation between the Philippine and U.S. Governments. *Second*, the means, that is, exempting American servicemen like Smith from the rules that apply to other criminals, was never shown to be “necessary” to achieve the ends of the VFA. *Third*, there is nothing to indicate what the statutory ends of the VFA are in exempting American servicemen from the application of our rules, much less that they are “compelling” state interests. Thus, the VFA fails the test of equal protection.

³⁵ Art. II, sec. 7.

56. A classification based on race is always suspect and has never been held to contain any significant distinctions to allow preferential treatment. Race as a differentiating factor may only be upheld where it is absolutely necessary to promote and attain a compelling governmental interest. Unfortunately in the instant case the Court failed even to identify the governmental interest that the VFA wanted to pursue on behalf of the Philippines or the necessity for race to be used as a basis for treating similarly situated persons differently.

57. The Honorable Court must consider how the glaring violation of the equal protection clause has played out in the case of Daniel Smith, from the time this case started until now, even after the Court promulgated its Decision of 11 February 2009:

(a) While Philippine courts continue to exercise jurisdiction over Filipino and foreign nationals convicted by our courts, L/CPL Daniel Smith, who has been convicted of rape punishable by *reclusion perpetua*, is outside our court's jurisdiction by virtue of the application of the VFA. Even the Honorable Supreme Court admitted this when it merely instructed the Philippine government to "negotiate" with the US government for the return of Smith to Philippine jurisdiction.

This makes a mockery of our judiciary and its supposed independence. Moreover, it deprives petitioner Nicolas of a remedy; indeed, she has no remedy under the Philippine legal system should the US continue to insist on having custody of Smith as it does now.

(b) While other persons convicted of a crime punishable by *reclusion perpetua* remain in prison because Article III, Section 13 of our Constitution allows bail or recognizance only "before conviction,"

L/CPL Smith, who is similarly situated, remains free (his alleged detention in the U.S. Embassy is not the detention contemplated in our criminal law).

(c) While Filipinos, and even foreign nationals, charged in court with a non-bailable offense languish in jail for years while undergoing trial, Smith, who was also charged with a non-bailable offense, was never detained.

(d) While Filipinos and other foreign nationals, accused or convicted of a crime cannot negotiate whether they will be detained in a Philippine or foreign detention facility or even choose their place of detention in any Philippine prison facility, Smith has the privilege to choose his “detention facility.” While many Filipinos are not allowed to temporarily leave prison for a medical check up without a court approval, Smith can have his choice of a place for confinement without court approval.

58. In *Central Bank*, this Court held:

The constitutionality of a statute cannot, in every instance, be determined by a mere comparison of its provisions with applicable provisions of the Constitution, since the statute may be constitutionally valid as applied to one set of facts and invalid in its application to another.

A statute valid at one time may become void at another time because of altered circumstances. Thus, if a statute in its practical operation becomes arbitrary or confiscatory, its validity, even though affirmed by a former adjudication, is open to inquiry and investigation in the light of changed conditions.

x x x

In the Philippine setting, this Court declared the continued enforcement of a valid law as unconstitutional as a consequence of significant changes in circumstances...

x x x

Echoes of these rulings resonate in our case law, viz:

[C]ourts are not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect. A statute nondiscriminatory on its face may be grossly discriminatory in its operation. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

[W]e see no difference between a law which denies equal protection and a law which permits of such denial. A law may appear to be fair on its face and impartial in appearance, yet, if it permits of unjust and illegal discrimination, it is within the constitutional prohibition..... In other words, statutes may be adjudged unconstitutional because of their effect in operation.... If a law has the effect of denying the equal protection of the law it is unconstitutional.
....

59. How vastly unfair the VFA is can be discerned from a comparison of its provisions with those in the **“Agreement Between the Government of the United States and the Government of the Republic of the Philippines Regarding the Treatment of Republic of the Philippines Personnel Visiting the United States of America”** or popularly known as **“VFA II.”** This Agreement became known to the Filipino public only recently, after an incumbent senator exposed this **“secret agreement”** which he called a **“well kept secret.”**³⁶

60. The Honorable Court’s claim that the favorable treatment of US troops under the VFA is justified because **“there is a substantial basis for a different treatment of a member of foreign military armed forces”** loses legal force in the light of the provisions of VFA II. After all, Filipino troops

³⁶ “Secret VFA paper bared,” Philippine Daily Inquirer, 20 February 2009.

in the US are also “foreign military armed forces” and it is incomprehensible why they are treated differently from the US troops in the Philippines.

61. Article VIII on “Criminal Jurisdiction” under VFA II gives the United States Government custody over accused Philippine military personnel visiting the United States. Consistently, Article IX thereof on “Confinement and Visitation” states:

Confinement imposed by a United States federal or state court upon Republic of the Philippines personnel shall be served **in penal institutions in the United States** suitable for the custody level of the prisoners chosen after consultation between the two governments.

62. Quite clearly international law cannot justify treating United States military personnel differently while they are in the Philippines. The United States Government is not required to give preferential treatment to Filipinos in the United States under international law.

63. When the Court said in its Decision that:

As a result, the situation involved is not one in which the power of the Court to adopt rules of procedure is curtailed or violated, but rather one which, as is normally encountered around the world, the laws (including rules of procedure) of one State do not extend or apply – except to the extent agreed upon – to subjects of another State due to the recognition of extraterritorial immunity given to such bodies as visiting foreign armed forces[.]

it failed to state that in no case has any other independent and sovereign country, in entering into similar agreements, surrendered to the U.S. the independence of its judiciary and its national sovereignty as the Philippine Government has done through the VFA. In fact, the Court cites none.

64. What good is a judiciary that cannot control its processes and writs? What purpose do courts attain if they cannot determine where and

when to detain convicts? What integrity do magistrates have if for one group of people they can command their detention and as regards another group they cannot?

VIII. The VFA is unconstitutional and void because an integral part of it, the so-called "VFA II," was not included in the Senate deliberations and resolution of concurrence.

65. The VFA has *not* been validly concurred in because vital information in the form of VFA II, which appears as an integral part of the VFA, was withheld from the Philippine Senate during its deliberations on and concurrence in the VFA. This fact came to light only recently. Petitioners respectfully submit that the Honorable Court must consider this newly-disclosed fact as constituting "altered circumstances" or "changed conditions" that further justify the declaration of the VFA as unconstitutional, following its ruling in *Central Bank*.

66. VFA II is not at all mentioned in the Senate Resolution No. 18 dated 27 May 1999, which is the Senate Resolution of concurrence in the ratification of the VFA. In fact, Resolution No. 18 is titled, "Resolution Concurring in the Ratification of the Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines." It exclusively concerns only the VFA as the agreement that is being concurred in by the Senate. Moreover, the Senate records only have the VFA as an attachment to the Resolution. The Resolution states in part:

WHEREAS, the Agreement Between the Government of the Republic of the Philippines and the Government of the United

States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines (**hereafter referred to as the "VFA"**) was signed by the Honorable Domingo L. Siazon, Jr., Secretary of the Department of Foreign Affairs and Ambassador Thomas C. Hubbard, United States Ambassador to the Philippines, in Manila on February 10, 1998;

x x x

WHEREAS, on October 6, 1998, President Joseph Ejercito Estrada submitted the VFA to the Senate for concurrence, in accordance with Article VII, Section 21 of the Constitution of the Philippines;

x x x

WHEREAS, nothing in this Resolution or in the VFA shall be construed as authorizing the President of the Philippines alone to bind the Philippines to any amendment of any provision of the VFA;

Resolved, That the Senate concur, as it hereby concurs, in the Ratification of the Agreement between the Government of the Republic of the Philippines and the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines.

67. VFA II is not mentioned either in the records of the deliberations of the Senate on the VFA, although VFA II was signed in Manila on 9 October 1998, three days *after* President Estrada submitted the VFA to the Senate for concurrence and almost eight months *before* the Senate concurred in the ratification of the VFA.

68. It should be noted that VFA II provides in its Article XX that:

This Agreement will enter into force simultaneously with the Visiting Forces Agreement and will continue in force as long as such agreement remains in force.

Its Preamble reads:

For the purpose of complementing the Agreement Between the Government of the Republic of the Philippines and the Government of the

United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines (hereinafter referred to as the "Visiting Forces Agreement") the two Governments have agreed as follows with respect to Republic of the Philippines personnel in the United States:

69. Although the Preamble states that it is for the purpose of "complementing" the VFA, VFA II entered into force simultaneously with the VFA and will continue in force as long as the VFA remains in force. It appears then that VFA II is an integral part of the VFA, given that it would not have become effective if the Philippine Senate did not concur in the VFA and the same would cease to be in force if and when the VFA is scrapped, abrogated or declared unconstitutional and void.

70. It does not appear however that VFA II was ever ratified by our President. Unlike the VFA, VFA II has no provisions referring to the completion of constitutional requirements for its entry into force. Its effectivity hinges on the effectivity of the VFA.

71. More significantly, if ever VFA II was ratified by our President, it was never concurred in by the Philippine Senate. There is absolutely no Senate Resolution of Concurrence that exists insofar as it is concerned. As stated, it was not included in the Senate Resolution No. 18 concurring in the VFA.

72. A treaty that has not been ratified by the President and concurred in by the Senate is not valid. As held by this Court in *Pimentel, et al. vs. Office of the Executive Secretary, et al.*:³⁷

Nonetheless, while the President has the sole authority to negotiate and enter into treaties, the Constitution provides a limitation to his power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him. Section 21, Article VII of the 1987 Constitution provides

³⁷ G.R. No. 158088, 6 July 2005.

that “no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.” The 1935 and the 1973 Constitution also required the concurrence by the legislature to the treaties entered into by the executive. Section 10 (7), Article VII of the 1935 Constitution provided:

Sec. 10. (7) The President shall have the power, with the concurrence of two-thirds of all the Members of the Senate, to make treaties xxx.

Section 14 (1) Article VIII of the 1973 Constitution stated:

Sec. 14. (1) Except as otherwise provided in this Constitution, no treaty shall be valid and effective unless concurred in by a majority of all the Members of the Batasang Pambansa.

The participation of the legislative branch in the treaty-making process was deemed essential to provide a check on the executive in the field of foreign relations. By requiring the concurrence of the legislature in the treaties entered into by the President, the Constitution ensures a healthy system of checks and balance necessary in the nation’s pursuit of political maturity and growth.

x x x

Justice Isagani Cruz, in his book on International Law, describes the treaty-making process in this wise:

The usual steps in the treaty-making process are: negotiation, signature, ratification, and exchange of the instruments of ratification. The treaty may then be submitted for registration and publication under the U.N. Charter, although this step is not essential to the validity of the agreement as between the parties.

Negotiation may be undertaken directly by the head of state but he now usually assigns this task to his authorized representatives. These representatives are provided with credentials known as full powers, which they exhibit to the other negotiators at the start of the formal discussions. It is standard practice for one of the parties to submit a draft of the proposed treaty which, together with the counter-proposals, becomes the basis of the subsequent negotiations. The negotiations may be brief or protracted, depending on the issues involved, and may even “collapse” in case the parties are unable to come to an agreement on the points under consideration.

If and when the negotiators finally decide on the terms of the treaty, the same is opened for *signature*. This step is primarily intended as a means of authenticating the instrument and for the purpose of symbolizing the good faith of the parties; but, significantly, **it does not indicate the final consent of the state in cases where ratification of the treaty is required.** The document is ordinarily signed in accordance with the *alternat*, that is, each of the several negotiators is allowed to sign first on the copy which he will bring home to his own state.

Ratification, which is the next step, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representatives. **The purpose of ratification is to enable the contracting states to examine the treaty more closely and to give them an opportunity to refuse to be bound by it should they find it inimical to their interests. It is for this reason that most treaties are made subject to the scrutiny and consent of a department of the government other than that which negotiated them.**

x x x

The last step in the treaty-making process is the *exchange of the instruments of ratification*, which usually also signifies the effectivity of the treaty unless a different date has been agreed upon by the parties. Where ratification is dispensed with and no effectivity clause is embodied in the treaty, the instrument is deemed effective upon its signature.

Petitioners' arguments equate the signing of the treaty by the Philippine representative with ratification. It should be underscored that the signing of the treaty and the ratification are two separate and distinct steps in the treaty-making process. As earlier discussed, the signature is primarily intended as a means of authenticating the instrument and as a symbol of the good faith of the parties. It is usually performed by the state's authorized representative in the diplomatic mission. Ratification, on the other hand, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative. It is generally held to be an executive act, undertaken by the head of the state or of the government. Thus, Executive Order No. 459 issued by President Fidel V. Ramos on November 25, 1997 provides the guidelines in the negotiation of international agreements and its ratification. It mandates that after the treaty has been signed by the Philippine representative, the same shall be transmitted to the Department of Foreign Affairs. The Department of Foreign Affairs shall then prepare the ratification papers and forward the signed copy of the treaty to the President for ratification. After the President has ratified the treaty, the Department of Foreign Affairs

shall submit the same to the Senate for concurrence. Upon receipt of the concurrence of the Senate, the Department of Foreign Affairs shall comply with the provisions of the treaty to render it effective.

73. Since VFA II is an integral part of the VFA, the Philippine Senate in effect ratified only a partial agreement, that is, the VFA, which was the only agreement submitted to it for concurrence. The ratification of an incomplete treaty by the President, and the concurrence by the Senate in the same incomplete treaty, cannot be considered valid.

74. For this reason, petitioners submit that the Honorable Court declare that the Visiting Forces Agreement was not validly concurred in by the Philippine Senate. It is thus unconstitutional and void because it failed to comply with the requirements of Section 25 of Article XVIII of the Philippine Constitution.

It is most likely that the Philippine Senate would not have concurred in the VFA had it known about VFA II.

75. The powers, rights and privileges given to the U.S. under the VFA and VFA II, in stark contrast to the lack thereof on the part of the Philippines under both agreements, would have stopped the Philippine Senate from concurring in the VFA had they been informed of VFA II. For VFA II aggravates the lack of reciprocity and mutuality in the VFA.

76. The following are some of the unequal impositions in both agreements:

(a) While the Philippines shall surrender custody of a US soldier upon request under the VFA, the US Government is not at all

obligated to transfer custody of an accused Filipino soldier in the US under VFA II. In fact, the US State department and the Department of Defense have the power to insist on US jurisdiction, a power not given to the Philippine government.³⁸

(b) While the detention of a US soldier may be in the US embassy under the VFA, according to the Kenney-Romulo Agreement, Sec. Eduardo Ermita and Sec. Raul Gonzalez, Article IX (1) of VFA II specifically provides that “penal institutions in the United States” shall be the place of detention for Filipino soldiers.

(c) U.S. military personnel are exempt from passport and visa requirements under the VFA,³⁹ while Philippine personnel are not given the same exemption under VFA II.⁴⁰

(d) While under the VFA, vehicles owned by the Government of the United States are exempt from registration,⁴¹ the same is not granted to the Philippines under VFA II.

(e) Under Article III (3) (c) of the VFA, the Philippines cannot inspect US vessels or planes entering Philippine territory because, under the VFA, it is bound by a “declaration” from a United States officer that the vessel does not pose a threat to the health of the Filipino people. On the other hand, Philippine vessels and aircrafts may be inspected

³⁸ Art. VIII, par. 2. “When so requested in a particular case by the Government of the Republic of the Philippines, the United States Department of State or Department of Defense **will ask** the appropriate authorities in the United States having jurisdiction over an offense committed by Republic of the Philippines personnel to waive in favor of the Republic of the Philippines their right to exercise jurisdiction, **except in cases where the Department of State and the Department of Defense, after special consideration, determine that United States interests require the exercise of United States federal or state jurisdiction.**”

³⁹ See Art. III (2).

⁴⁰ See Art. III.

⁴¹ See Art. IV, par. 2.

by US authorities for communicable or “quarantinable” diseases since VFA II does not grant the same exemption to the Philippines.

(f) US troops are absolutely exempt from Philippine taxes under the VFA,⁴² an exemption not approved by the Congress, but Philippine personnel are not granted the same privilege under VFA II.⁴³

(g) Under the VFA, the Philippine government has waived all claims, except contractual claims, for damage, loss or destruction to property to its armed forces or for death or injury to its military and civilian personnel arising from activities under the VFA in the Philippines.⁴⁴ No such waiver of claims can be found under VFA II.

IX. The Decision contains errors of fact that must be corrected.

77. The Decision of the Court contains errors of fact that petitioners respectfully submit must be corrected. Given that the Decision will be read, scrutinized and become a significant part of our legal and political history, it is our common obligation to our people to ensure that factual errors are not purveyed as historical facts.

78. The Decision states that “[t]he facts are not disputed.” But it proceeds to state a “fact” that is not at all in accordance with **official documents** that petitioners submitted and which were not controverted by respondents. This factual error is found in the following paragraph:

Pursuant to the Visiting Forces Agreement (VFA) between the Republic of the Philippines and the United States, entered into on February 10, 1998, **the United States, at its**

⁴² See Art. VII (2).

⁴³ See Art. X.

⁴⁴ See Art. VI.

request, was granted custody of defendant Smith pending proceedings.

79. Petitioners have pointed out in their Petitions that the United States never requested for custody of Smith nor was it granted custody pending proceedings. Instead, the United States unilaterally took custody of Daniel Smith and his co-accused immediately after the commission of the crime and throughout the conduct of judicial proceedings before the trial court. Official communications of our Department of Foreign Affairs (DFA) confirm this. Petitioner Nicolas annexed to her Petition the notes verbale that were exchanged between our Department of Foreign Affairs and the U.S. Embassy.⁴⁵ One, the Note Verbale No. 05-2662 of our Department of Foreign Affairs dated 16 November 2006, demanded the turnover of custody of the accused to Philippine authorities:

Pursuant to the exercise by the Philippines of its primary right of jurisdiction over the case as conveyed through the Department's Note Verbale No. 05-2579 **and in view of the non-receipt of a formal request for initial United States' custody over the United States military personnel involved in the alleged rape relative to Article V, Paragraph 6 of the Agreement** and the extraordinary nature of the case, being a heinous crime, the Department... **requests the Embassy of the United States to turn over custody of said U.S. military personnel to Philippine authorities as soon as practicable.**⁴⁶

80. The DFA reiterated this request for the turnover of Daniel Smith and his co-accused to Philippine authorities in its Note Verbale No. 06-0103 dated 17 January 2006,⁴⁷ where it also said that "the Philippine Government is seriously concerned over the patent disparity in the

⁴⁵ See Annex "E" of the Petition in G.R. No. 175888 and its annexes.

⁴⁶ Emphasis supplied.

⁴⁷ See Annex "B" of Annex "E" of the Petition in G.R. No. 175888. The criminal case against Daniel Smith and his co-accused was already filed in court when this note verbale was sent to the U.S. Embassy.

treatment of US personnel in other countries on the issue of custody in criminal cases.” The U.S. Embassy denied those requests and insisted on its custody of the accused.

81. Thus, the correct fact is that the U.S. Embassy took custody of Smith without any formal request to and consent of the Philippine authorities. It was only *after 4 December 2006*, when Smith was convicted by the trial court, that the executive branch entered into several agreements with the U.S. Embassy consenting to the custody of Smith by the U.S. authorities.

82. Petitioners also respectfully submit that the following paragraphs in the Decision are misleading:

On December 4, 2006, the RTC of Makati, following the end of the trial, rendered its Decision, finding defendant Smith guilty, thus:

x x x

As a result, the Makati court ordered Smith detained at the Makati jail until further orders.

On December 29, 2006, however, defendant Smith was taken out of the Makati jail by a contingent of Philippine law enforcement agents, purportedly acting under orders of the Department of the Interior and Local Government, and brought to a facility for detention under the control of the United States government, provided for under new agreements between the Philippines and the United States, referred to as the Romulo-Kenney Agreement of December 19, 2006 which states:

The Government of the Republic of the Philippines and the Government of the United States of America agree that, in accordance with the Visiting Forces Agreement signed between our two nations, Lance Corporal Daniel J. Smith, United States Marine Corps, be returned to U.S. military custody at the U.S. Embassy in Manila.

(Sgd.) KRISTIE A. KENNEY

(Sgd.) ALBERTO _____ G.

ROMULO

Representative of the United States
Republic
of America

Representative of the
of the Philippines

DATE: 12-19-06

DATE: December 19, 2006

and the Romulo-Kenney Agreement of December 22, 2006 which states:

The Department of Foreign Affairs of the Republic of the Philippines and the Embassy of the United States of America agree that, in accordance with the Visiting Forces Agreement signed between the two nations, upon transfer of Lance Corporal Daniel J. Smith, United States Marine Corps, from the Makati City Jail, he will be detained at the first floor, Rowe (JUSMAG) Building, U.S. Embassy Compound in a room of approximately 10 x 12 square feet. He will be guarded round the clock by U.S. military personnel. The Philippine police and jail authorities, under the direct supervision of the Philippine Department of Interior and Local Government (DILG) will have access to the place of detention to ensure the United States is in compliance with the terms of the VFA.

The matter was brought before the Court of Appeals which decided on January 2, 2007, as follows:

WHEREFORE, all the foregoing considered, we resolved to DISMISS the petition for having become moot.^{48[3]}

Hence, the present actions.

83. Under the foregoing narration of facts, it seems to appear that Daniel Smith was first transferred to the U.S. Embassy before the matter of his custody was brought to the Court of Appeals. This is incorrect. It is on record that that on 14 December 2006, Daniel Smith filed with the Court of Appeals a Petition for Certiorari with Prayer for the Issuance of a Temporary Restraining Order against Hon. Benjamin Pozon, the Jail Warden of the Makati City Jail and the People of the Philippines impugning the 12 December 2006 Order of the court *a quo* directing his detention in the Makati City Jail.⁴⁹ The Department of Foreign Affairs,

⁴⁸ *Rollo*, pp. 90-127.

⁴⁹ The Petition was docketed as CA-G.R. SP No. 97212.

through the Solicitor General, subsequently intervened in this suit. But after the Court of Appeals, through its Special Sixteenth Division, denied respondent Smith's prayer for the issuance of a temporary restraining order on 18 December 2006, the Philippine government submitted agreements entered into by U.S. Ambassador Kristie Kenney and respondent Secretary Romulo dated 19 December 2006 and 22 December 2006 on the transfer of Smith to the U.S. Embassy. The DFA then urgently prayed that respondent Smith be forthwith turned over to the United States Embassy in accordance with the aforesaid agreements.

84. When the Court of Appeals did not act on the DFA's motion and simply "noted" the agreements submitted, our executive officials and the U.S. Embassy proceeded to take matters into their hands. At about 11 o'clock in the evening of 29 December 2006, respondent Smith was released from the Makati City Jail by Philippine officials and turned over to U.S. authorities.

85. Thus, it is not correct to state that the transfer of Daniel Smith from the Makati City Jail to the U.S. Embassy came before the matter of his custody was brought to the Court of Appeals when the correct sequence is the reverse.

A Final Note

The lament of Justice Gregorio Perfecto, dissenting in the 1946 case of *Dizon vs. Commanding Officer*,⁵⁰ is relevant:

It appears paradoxical that in a constitutional democracy like ours, official pronouncements should be made recognizing immunities of foreign sovereigns and ministers in violation of the Constitution. The Filipino people have never given recognition to such immunities. On the contrary, they have embodied in the

⁵⁰ *Supra* at note 1.

Constitution the purpose to establish a government under a regime of justice, liberty and democracy, where any discrimination even in favor of the most powerful foreign power should not take place. In tyrannical dictatorships or under a god-emperor regime, even the most powerful chief of state is bound by laws or even traditions.

It appears that our officials have made it their cause to defend those immunities given to American soldiers in violation of our Constitution, even to the extent of defying the order of this Honorable Court. The pronouncements of our executive officials after the Court promulgated its Decision of 11 February 2009 show this.

The Secretary of Justice even suggested that the Supreme Court Decision could allow the detention of Smith in the Philippine Embassy in the U.S.,⁵¹ echoing the position of Smith's lawyers. Worse, Press Secretary Cerge Remonde repeatedly declared on print and broadcast media, in clear defiance of the Court's Decision, that the government "could not start negotiations on the transfer of Smith to a Philippine-run facility because the American's conviction for rape was not final yet."⁵² He asked, "What if the lower court's decision is reversed by the Court of Appeals? So Malacañang actually has its hands tied on the issue." He further said that:

So you can see that we are not in a hurry. We want to attend (to) things with great expedition, as far as practicable. Malacañang couldn't do anything but maintain the status quo because of the state of the case.

Mr. Remonde also said that once *the conviction becomes final and executory*, he would "exhaust all possible remedies to enforce the sovereignty of the Philippine government and the Filipino people."

⁵¹ "Smith may be detained in RP facility in the States," Philippine Daily Inquirer, 20 February 2009, p. 1.

⁵² See "Palace says its hands are 'tied' on Smith case," Philippine Daily Inquirer, 14 February 2009, p. A8.

These pronouncements should make every decent and self-respecting Filipino weep. Our executive branch has sold out our sovereignty; it is "in tatters," in the words of the Chief Justice.

Is it any surprise then that our own officials do not respect our Supreme Court?

It is in this light that the reconsideration of the Court's ruling is critical, for the independence of the judiciary is essential for the Court to command respect for and obedience to its orders.

PRAYER

WHEREFORE, petitioners respectfully pray that the Honorable Court RECONSIDER its Decision dated 11 February 2009 and MODIFY the same by DECLARING the Visiting Forces Agreement unconstitutional and void and DIRECTING the immediate transfer of Daniel Smith to the custody of Philippine authorities.

Petitioners also respectfully pray that the Honorable Court correct the errors of fact stated in the Decision.

Petitioners further pray for other forms of relief that are just and equitable under the circumstances.

Quezon City and Makati City for the City of Manila, 25 February
2009.

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EXPLANATION ON MODE OF SERVICE

(In compliance with Section 11, Rule 13, 1997 Rules of Civil Procedure)

Service of copies of this Joint Motion for Reconsideration on the parties was made by registered mail because of time and distance constraints and the lack of personnel to effect personal service.

EVALYN G. URSUA