G.R. No. 212426 – RENE A.V. SAGUISAG, WIGBERTO E. TAÑADA, FRANCISCO "DODONG" NEMENZO, JR., SR. MARY JOHN MANANZAN, PACIFICO A. AGABIN, ESTEBAN "STEVE" SALONGA, H. HARRY L. ROQUE, JR., EVALYN G. URSUA, EDRE U. OLALIA, DR. CAROL PAGADUAN-ARAULLO, DR. ROLAND SIMBULAN, and TEDDY CASIÑO, *petitioners v.* EXECUTIVE SECRETARY PAQUITO OCHOA, JR., DEPARTMENT OF DEFENSE SECRETARY VOLTAIRE GAZMIN, DEPARTMENT OF FOREIGN AFFAIRS SECRETARY ALBERT DEL ROSARIO, JR., DEPARTMENT OF BUDGET AND MANAGEMENT SECRETARY FLORENCIO ABAD, and ARMED FORCES OF THE PHILIPPINES CHIEF OF STAFF GENERAL EMMANUEL T. BAUTISTA, *respondents.*

G.R. No. 212444 – BAGONG ALYANSANG MAKABAYAN (BAYAN), represented by its SECRETARY GENERAL RENATO M. REYES, JR., BAYAN MUNA PARTY-LIST REPRESENTATIVES NERI J. COLMENARES and CARLOS ZARATE, ET AL., *petitioners v.* DEPARTMENT OF NATIONAL DEFENSE (DND) SECRETARY VOLTAIRE GAZMIN, ET AL., *respondents.*

KILUSANG MAYO UNO, represented by its CHAIRPERSON ELMER LABOG, ET AL., *petitioners-in-intervention.*

RENE A.Q. SAGUISAG, JR., *petitioner-in-intervention.*

Promulgated:

July 26, 2016

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DISSENTING OPINION

BRION, *J.*:

I.

Prefatory Statement & Position

I write this Dissenting Opinion to reiterate my position that the Executive Department under President Benigno Aquino III disregarded the clear commands of the Constitution and the required constitutional process when it implemented the Enhanced Defense Cooperation Agreement (*EDCA*) as an Executive Agreement. **I thus vote for the grant of the motions for reconsideration.**

The EDCA, an international agreement between the Philippines and the United States, should be covered by a treaty that, under the Constitution,

requires concurrence by the Senate. The agreement should be made through a treaty rather than an executive agreement because it ***embodies new arrangements and new resulting obligations that are not present in the existing treaties.*** In its present form, the agreement is invalid and cannot thus be effective.

I arrived at this conclusion after considering Article VII, Section 21 and Article XVIII, Section 25 of the 1987 Constitution.

Article VII, Section 21 renders any international agreement invalid and ineffective in the Philippines unless it has been concurred in by the Senate. **Article XVII, Section 25**, on the other hand, specifies that agreements allowing the entry of foreign military bases, troops, or facilities into the Philippines shall be in the form of a treaty and, thus, obligatorily be submitted to the Senate for concurrence.

I submit these considerations and conclusions to the Court with no intent to object to the entry of foreign military bases, troops, or facilities in the Philippines if such entry would truly reflect the will of the Filipino people expressed through the Senate of the Philippines.

At this point in time when Philippine territorial sovereignty is being violated, we cannot simply turn our backs on foreign assistance, such as that of the EDCA, that is made available to the country. But because of the implications of the EDCA for the Filipino people (***as it may unnecessarily expose them to the dangers inherent in living in a country that serves as an implementing location of the U.S. Pivot to Asia strategy, as discussed below***), the people – even if only through the Senate – should properly be informed and should give their consent. This is what our Constitution provides in allowing foreign bases or their equivalent into the country, and this Court – with its sworn duty as guardian of the Constitution – should protect both the Constitution and its safeguards, as well as the people in their right to be informed and to be consulted.

To be very clear, this Dissent relates solely to the Executive and this Court's acts of disregarding the clear terms prescribed and the process required by the Constitution. Why the Court so acted despite the clear terms of the cited constitutional provisions, only the majority of this Court can fully explain. The undeniable reality,.though, is that the *ponencia* justified its conclusions by inordinately widening the scope of the presidential foreign affairs powers and misapplying the constitutional provisions mentioned above. Whichever way the matter is viewed, the result is the same – a clear violation of the 1987 Constitution.

I find it particularly timely to stress the constitutional violations at this point when talks of constitutional amendments again resound in the air; it would be useless to go through an amendatory exercise if we do not accord full respect to the Constitution anyway, or if our obedience to the

Constitution depends on political considerations and reasons extraneous to the Constitution.

I stress, too, that as Members of the Highest Court of the land, we owe utmost fidelity to our country's fundamental law, and have the duty to ensure its proper enforcement. The President, similarly burdened with the same duty, must owe the Constitution the same fidelity. The oaths we respectively took impose this obligation upon all of us. We must thus act on the present motions for reconsideration by re-examining the challenged ruling and by giving a more focused analysis on the issues based on what the Constitution truly requires.

It is well to recognize that part of the Court's compliance with its constitutional duty is to accord due deference to the President's authority and prerogatives in foreign affairs; that we should do so, fully aware that the President's discretion (or for that matter, the discretion exercised by all officials) in a constitutional and republican government is – by constitutional design – purposely limited. This case, in particular, presents a situation where foreign affairs powers that essentially belong to the President are shared with the Senate of the Philippines.[1]

All these form part of my original position that the President's use of an Executive Agreement as the medium to implement the EDCA does not comply with Article XVII, Section 21 and Article XVIII, Section 25, of the 1987 Constitution. As a consequence, the Executive Agreement that was signed cannot be "valid and effective" for being contrary to the Constitution; it continues to be so unless the EDCA is submitted to and concurred in by the Senate.

This position, in my view, will not pose any danger at all to the country under the present circumstances of international tension and on-going diplomatic interactions as ***my objection solely relates to the process***. It is within the power of this Court to suspend the effectiveness of the ruling recommended by this Dissent, to allow the Executive and the Senate time to

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[1] Treaty making has historically been a shared function between the President and the legislature.

Under the 1935 Constitution, ***the President has the "power, with the concurrence of a majority of all the members of the National Assembly, to make treaties..."*** The provision, Article VII, Section 11 paragraph 7, is part of the enumeration of the President's powers under Section 11, Article VII of the 1935 Constitution. This recognizes that treaty making is an executive function, but its exercise should be subject to the concurrence of the National Assembly. A subsequent amendment to the 1935 Constitution, which divided the country's legislative branch to two houses, transferred the function of treaty concurrence to the Senate, and required that two-thirds of its members assent to the treaty.

By 1973, the Philippines adopted a presidential parliamentary system of government, which merged some of the functions of the Executive and Legislative branches of government in one branch. Despite this change, concurrence was still seen as necessary in the treaty making process, as Article VIII, Section 14 required that a treaty should be first concurred in by a majority of all Members of the Batasang Pambansa before they may be considered valid and effective in the Philippines, thus:

> 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.

comply with the required constitutional process. After the EDCA's submission to the Senate within the time frame recommended by this Dissent and thereafter the Senate's concurrence, the EDCA can then be fully implemented as a treaty.

A. The Present Motions for Reconsideration

The present Motions for Reconsideration ask the Court to reconsider its previous ruling in *Saguisag v. Executive Secretary* (dated January 12, 2016) that recognized the EDCA, as written and signed, to be a validly entered Executive Agreement, thereby bypassing the need for the Senate concurrence that the Constitution requires.

The *ponencia* dismisses these motions, noting that they failed to present arguments sufficient to justify the reversal of the Court's previous Decision. In so ruling, the *ponencia* relies on the premise that the President may enter into an executive agreement allowing the entry of foreign military bases, troops, or facilities if:

(1) it is not the instrument that allows the *initial* presence of foreign military bases, troops, or facilities;[2] *or*

(2) it merely *implements* existing laws or treaties.[3]

The EDCA, according to the *ponencia*, merely implements the country's existing treaties with the U.S., specifically the 1998 Visiting Forces Agreement (*VFA*) and the 1951 Mutual Defense Treaty *(MDT)*.[4]

With due respect, these positions present an overly simplistic interpretation of Article XVIII, Section 25 of the Constitution. A deeper consideration of this provision demonstrates the need for approaches more nuanced than those that the *ponencia* now takes.

For one, the *ponencia* should have appreciated that ***Article XVIII, Section 25 does not exist in a vacuum.*** As with any constitutional provision, it must be read, interpreted, and applied in harmony with the rest of the Constitution[5] in order not to negate the effectiveness of other

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2 Page 5 of the *ponencia*'s Draft Resolution dated April 11, 2016 .

3 Pages 8 to 10 of the *ponencia*'s Draft Resolution dated April 11, 2016.

4 Page 6 of the *ponencia*'s Draft Resolution dated April 11, 2016; the *ponencia* also argues in pp. 10-11 that the EDCA is not a basing agreement.

5 It is a well-established rule in constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. Sections bearing on a particular subject should be considered and interpreted together as to effectuate the whole purpose of the Constitution and one section is not to be allowed to defeat another, if by any reasonable construction, the two can be made to stand together.

In other words, the court must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make the words idle and nugatory. *Francisco v House of Representatives*, G.R. No. 160261, November 10, 2003, 415 SCRA 44, citing *Civil Liberties Union v. Executive Secretary*, 194 SCRA 317, 330-331 (1991).

provisions and of the key constitutional principles that underlie the Constitution. The affected underlying principles are the separation of powers and the check and balance principles.

These nuances, when applied to the present case, lead me to conclude that the EDCA should have been entered into as a treaty that requires Senate concurrence. This deficiency, as I will discuss further, is not irremediable under the terms of this Dissent.

II.

Article VII, Section 21 of the Constitution requires that agreements containing new obligations be in the form of a treaty concurred in by the Senate; this rule should apply to new obligations under Article XVIII, Section 25 on the entry of foreign military bases, troops or facilities.

A. (a) The *Ponencia* and *Verba Legis*

The *ponencia*, in dismissing the petitioners' motions for reconsideration, refuses to accord merit to the petitioners' position that a *verba legis* approach to Article XVIII, Section 25 requires that ***every entry*** of foreign military troops, bases, or facilities should be covered by a treaty.

To the *ponencia*, the *verba legis* principle only requires that an international agreement be in the form of a treaty only for the ***initial entry*** of foreign military bases, troops and facilities. This, to the *ponencia*, is the appropriate application of *verba legis*, as the petitioners' application of the *verba legis* principle would lead to absurdity.

The *ponencia* further posits that requiring a treaty for every entry of foreign military troops could lead to the bureaucratic impossibility of negotiating a treaty for every entry of a Head of State's security detail of military officers, for meeting with foreign military officials in the country, and indeed for military exercises such as the *Balikatan*; all these would occupy much of the official working time of various government agencies.[6]

To support this interpretation, the *ponencia* also notes that Article XVIII, Section 25 of the 1987 Constitution does not prohibit foreign military bases, troops, or facilities, but merely restricts their entry to the country.[7]

(b) My View of *Verba Legis*

In contrast with these expressed positions, I hold the view that under the principles of constitutional construction, *verba legis* (*i.e.,* the use of

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6 Page 5 of the *ponencia*'s Draft Resolution dated April 11, 2016.

7 Id.

ordinary meaning or literal interpretation of the language of a provision)[8] is only proper and called for when the statute is clear and unequivocal,[9] not when there are latent ambiguities or obscurity in the provision to be applied.

The Court (through former Chief Justice Enrique Fernando) demonstrated the application of this rule in *J.M. Tuason & Co., Inc. v. Land Tenure Administration* when it said: "We look to the language of the document itself in our search for its meaning. *We do not of course stop there, but that is where we begin.*"[10] Justice Fernando then pointed out that constitutional construction may be reduced to a minimum and the provision should be given its ordinary meaning *when the "language employed is not swathed in obscurity."*[11]

A plain reading of Section 25, Article XVIII reveals that, on its face, it is far from complete, thus giving rise to the present "coverage" and other directly related issues. In the context of the case before us, it does not expressly state that it should only be at the initial entry (as the *ponencia* posits) or upon every entry (as the petitioners claim). Section 25 provides:

> 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.

Note that under these wordings a latent ambiguity exists on what the word *"allow"* in the phrase "*shall not be allowed,"* covers: does it refer only to the first entry thus permitting all subsequent entries, or is a treaty required for every entry. Also, is the "purpose" of allowing entry relevant in determining the scope of the entries allowed under a treaty? In the context of the present case, the unavoidable question is – is a treaty called for in order to allow entry?

The provision, to be sure, contains no express and specific statement or standard about these details and leaves the fleshing out to interpretation and construction. The *ponencia*, with its *verba legis* approach, of course, simply states that treaties – *i.e.,* the 1951 Mutual Defense and the 1998 Visiting Forces Agreement – are in place and, from there, proceeds to conclude that all entries shall be allowed after the first entry under these treaties. In this way, the *ponencia* gave Article XVIII, Section 25 a simplistic application that misses the provision's wordings and intent.

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[8] The first principle of constitutional construction is *verba legis*, that is, wherever possible, the words used in the Constitution must be given their ordinary meaning except where technical terms are employed; *Francisco v House of Representatives*, *supra* note 5.

[9] It is well-settled that where the language of the law is clear and unequivocal, it must be given its literal application and applied without interpretation; *Commissioner of Internal Revenue v. Central Luzon Drug Corporation*, G.R. No. 159610, 12 June 2008, 554 SCRA 398, 409.

[10] G.R. No. L-21064, February 18, 1970, 31 SCRA 413, 422.

[11] Id.

What the *ponencia* has not taken into account at all, is the deeper consideration that ***Section 25 was enacted to strike a balance between preserving the country's territorial sovereignty and recognizing the need for foreign military cooperation***. This balance was crafted in response to the country's history and experience with foreign military bases, and its perceived threat to full independence.[12] Indeed, the country's past experiences with foreign military presence had not been free from pain, but our constitutional framers recognized that there could be instances when foreign military presence would be necessary and thus gave the Constitution a measure of flexibility through Section 25.

To be sure, the requirement that *every entry* of foreign military bases, troops, or facilities in the Philippines be covered by a treaty does not and cannot achieve this balance. This requirement would unduly clog up government in its foreign and military affairs, and impede (or even block the possibility of) foreign military alliances, perhaps to the point of extreme difficulty in maintaining these ties if they materialize at all. In sum, the process would simply be too paralyzing for the government, and could not

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12 During the constitutional deliberation on Article XVIII, Section 25, two views were espoused on the presence of military bases in the Philippines. One view was that espoused by the anti-bases group; the other group supported the view that this should be left to the policy makers.[12]

Commissioner Adolfo Azcuna expressed the sentiment of the first group when he stated in his privilege speech on 16 September 1986 that:

> After the agreement expires in 1991, the question therefore, is: Should we extend a new treaty for these bases to stay put in 1991 in our territory? The position of the committee is that it should not, because *the presence of such bases is a derogation of Philippine sovereignty*.
>
> It is said that we should leave these matters to be decided by the executive, since the President conducts foreign relations and this is a question of foreign policy. I disagree, Madam President. *This is not simple a question of foreign policy; this is a question of national sovereignty*. And the Constitution is anything at all, it is a definition of the parameters of the sovereignty of the people.[12]

On the other hand, the second group posited that the decision to allow foreign bases into the country should be left to the policy makers. Commissioner Bengzon expressed the position of the group that:

> x x x this is neither the time nor the forum to insist on our views for we know not what lies in the future. It would be foolhardy to second-guess the events that will shape the world, our region, and our country by 1991. It would be sheer irresponsibility and a disservice of the highest calibre to our own country if we were to tie down the hands of our future governments and future generations.[12]

Despite his view that the presence of foreign military bases in the Philippines would lead to a derogation of national security, Commissioner Azcuna conceded that this would not be the case if the agreement to allow the foreign military bases would be embodied in a treaty.[12]

After a series of debates, Commissioner Romulo proposed an alternative formulation that is now the current Article XVIII, Section 25.[12] He explained that this is an explicit ban on all foreign military bases other than those of the U.S.[12] Based on the discussions, the spirit of the basing provisions of the Constitution is primarily a *balance of the preservation of the national sovereignty* and *openness to the establishment of foreign bases, troops, or facilities in the country*.[12]

Article XVIII, Section 25 imposed three requirements that must be complied with for an agreement to be considered valid insofar as the Philippines is concerned. These three requirements are: (1) the agreement must be embodied in a treaty; (2) the treaty must be duly concurred in by 2/3 votes of all the members of the Senate;[12] and (3) the agreement must be recognized as a treaty by the other State.

have been the interpretation intended by the framers of the Constitution when they drafted Section 25.

At the same time, Article XVIII Section 25 cannot be construed as a blanket authority to allow foreign military presence in the Philippines after the government agrees to its initial entry. Interpreting Article XVIII, Section 25 in this manner would ***expand Section 25 to areas beyond its intended borders*** and thereby unduly restrict the constitutionally mandated participation of the Senate in deciding the terms and degree of foreign military presence in the country. This blanket authority would lay open the country and its sovereignty to excessive foreign intrusion without the active consent of the people.

To fully capture and apply the balance envisioned when Article XVIII, Section 25 was drafted, we must look at its interaction with key provisions of the Constitution involving the conduct of international agreements, as well as with the principles of separation of powers and check and balance that underlie our Constitution. These principles are the measures that the Constitution institutionalizes in order to ensure that a balanced and very deliberate governmental approach is taken in protecting the country's sovereignty from foreign intrusion.

I submit, based on these premises, that the *ponencia*'s conclusions disregard at least three vital and important concepts in the country's tripartite system of government under the Constitution:

> *first,* that the President's foremost duty is to preserve and defend the Constitution;
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> *second*, that the President in the exercise of his powers cannot disregard the separation of powers and check and balance principles that underlie our system of government under the Constitution; and
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> *third*, that the totality of governmental powers involved in entering international agreements, although predominantly executive in character because the President leads the process, still involves shared functions among the three branches of government.

B. The President's role in defending and preserving the Constitution

The supremacy of the Constitution means that in the performance of his duties, the President should always be guided and kept in check by the safeguards crafted by the framers of the Constitution and ratified by the people.

Thus, while due deference and leeway should be given when the President exercises his powers as the commander in chief of the country's

armed forces[13] and as the chief architect of its international affairs,[14] this deference should never be used to allow him to countermand what the Constitution provides, as the President is himself a creature of the Constitution and his first and foremost task is to preserve and defend it.

No less than the oath of office required of the President before he assumes office (under Article VII, Section 5 of the Constitution) requires him to *"faithfully and conscientiously fulfill my duties as President (or Vice-President or Acting President) of the Philippines, preserve and defend its Constitution, execute its laws x x x."*

Notably, the President shares this duty with all government employees and officials, including members of the judiciary. Article IX-B, Section 4 requires all public officers and employees to "*take an oath or affirmation to uphold and defend this Constitution.*"

Taken together, these oath requirements are reminders of the duty of all persons working for the government – regardless of the branch to which they belong – to actively maintain their fealty to the present Constitution. ***For members of the judiciary, this duty requires that they faithfully apply what the Constitution provides, even if they do not fully agree with these terms, with their established interpretation, and with their application to actual situations.***

C. The President's foreign affairs power in the wider operational context of our government's tripartite system

a. The foreign affairs power in its wider context

While the President is undeniably the chief architect of foreign policy and is the country's chief representative in international affairs,[15] this wide grant of power ***operates under the wider context*** of the shared functions of the three branches of government in the conduct of international relations.

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[13] Article VII, Section 18 of the 1987 Constitution provides:

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 x x x.

[14] In our system of government, the President, being the head of state, is regarded as the sole organ and authority in external relations and is the country's sole representative with foreign nations. As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, the President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty making, the President has the sole authority to negotiate with other states; *Pimentel v. Executive Secretary*, 501 Phil. 304, 313 (2005).

[15] Id. See also *Bayan v. Executive Secretary,* 396 Phil 623, 663 (2000), where we held:

By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is (then) conceded." Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is "executive altogether."

I discern this legal reality in the phrasing and placement of Section 21, Article VII of the Constitution, which is the general provision governing the entry into a treaty:

> SECTION 21. 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 inclusion of Section 21 under the Article on the Executive Department is significant as this Article defines the powers of the President. Section 21 signifies the ***recognition*** of the President's foreign affairs power (among them, the negotiation and ratification of international agreements) as well as the limitation of this power.

The limitation can be found in the check-and-balance measure from the Senate that Section 21 provides, which requires ***prior*** Senate concurrence in the treaties and international agreements that the President enters into, before they become valid and effective. The required Senate concurrence is a check on the Executive's treaty-making prerogative, in the same manner that the Executive's veto on laws passed by Congress is a check on the latter's legislative powers.

To be sure, not every step by the Executive in the international sphere requires prior Senate concurrence under our Constitution which itself expressly recognizes that the President, in the conduct of international affairs, may enter into executive agreements that are not subject to Senate concurrence.

Article VIII, Section 4(2) of the Constitution separately refers to *treaties* **and** to *international or executive agreements,* thus expressly recognizing these two mediums of international relations. The constitutional recognition of these mediums and their distinctions are likewise expressed in jurisprudence, history, and the underlying structure of our government as discussed below. These are not idle distinctions because of their potentially deep impact on the operation of our government, in relation particularly to its three great branches that, although separate and distinct from one another, also interact in constitutionally defined areas.

In considering the two mediums that the Constitution recognizes in relation to the President's foreign affairs powers, the deeper question to contend with centers on the interface among the three great branches of government when they act and interact with one another: **who decides when to treat an international agreement as a treaty or as an executive agreement; and what are the parameters for arriving at this decision.**

The President's power over foreign relations under the Constitution generally gives him the prerogative to decide whether an international agreement should be considered a treaty or an executive agreement. He is also the chief architect of foreign policy and is the country's representative

with respect to international affairs.[16] He is vested with the authority to preside over the nation's foreign relations, particularly in dealing with foreign states and governments, extending or withholding recognition, maintaining diplomatic relations, and entering into treaties.[17] In the realm of treaty making, the President has the sole authority to negotiate with other States.[18]

His authority over foreign relations, however, is not unlimited. For one, in deciding whether an international agreement shall be in the form of a treaty or an executive agreement, placing the entire discretion in the President potentially renders Section 21 a nullity or, at the very least, waters down the Constitution's concurrence requirement.

Of course, in a situation where there are *no discoverable standards* that definitively guide the President's determination, the demand for prompt action on foreign affairs matters could arguably and incontestably lead to the treatment of international agreements as executive agreements. This result is not remote given that the alternative is the sharing of power with a 24-member Senate and with the uncertainty and intractability that this sharing entails. The situation, however, would be otherwise if applicable standards are *in place* or *can be discerned.*

In the Philippines' constitutional situation, while the Constitution does not specifically direct when an international agreement should be in the form of a treaty or an executive agreement, ***standards can be discerned*** by tracing the ***authority*** through which these agreements were arrived at and made effective, and by considering the ***impact*** of these agreements on the Philippine legal system.

As I have earlier explained, Section 21, Article VII of the 1987 Constitution governs the process by which a treaty is ratified and made valid and effective in the Philippines. The treaty-making process involves a shared function between the Executive and the Senate: the President negotiates and ratifies, but the Senate must concur for the treaty to be valid and effective.

From this general perspective and the general terms of Section 21, the President's act of entering into ***executive agreements*** may be considered an ***exception to the treaty-making process***: the President may enter into executive agreements which are international agreements that, until now, have been defined as international agreements "similar to treaties except they do not require legislative concurrence."[19] They have also been described to have "abundant precedent in history" and may either be ***concluded based on a "specific congressional authorization" or "in***

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16 *Pimentel v. Executive Secretary*, *supra* note 14, at 317-318.
17 Id.
18 Id.
19 Section 2(c) of Executive Order No. 459, Series of 1997.

conformity with policies declared in acts of Congress with respect to the general subject matter."[20]

Closely examined, the exceptional character of an executive agreement in relation to a treaty, its definition, and the general description shown above, cannot but lead to the conclusion that entry into an executive agreement does not purely involve the exercise of foreign affairs powers although the entry occurs in a foreign relations environment. While the President also deals with another State in a foreign affairs setting when negotiating and entering into an executive agreement, invalidity does not result even if no Senate intervention takes place, apparently because the *President exercises a power that is solely and constitutionally his*. This presidential power, based on the listing of powers under the Constitution, can only be the authority and duty to execute the laws and ensure their implementation.[21]

Under this close inspection and consideration of the sharing of power under Section 21, what stands out clearly is that the President can negotiate and ratify **as executive agreements** only those that he can competently execute and implement on his own, *i.e.*, ***those that have prior legislative authorization, or those that have already undergone the treaty-making process under Article VII, Section 21 of the 1987 Constitution.*** From the perspective of Section 21, treaty making is different and cannot be solely the President's as this power, by constitutional mandate, is one that he must share with the Senate.

Viewed and explained in this manner, executive agreements are clearly part of the President's duty to execute the laws faithfully. These agreements trace their validity from existing laws or treaties duly authorized by the legislative branch of government; they implement laws and treaties.

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[20] See *Commissioner of Customs v. Eastern Trading*, G.R. No. L-14279, October 31, 1961, citing Francis B. Sayre, former U.S. High Commissioner to the Philippines, said in his work on "The Constitutionality of Trade Agreement Acts":
Agreements concluded by the President which fall short of treaties are commonly referred to as executive agreements and are no less common in our scheme of government than are the more formal instruments – treaties and conventions. They sometimes take the form of exchanges of notes and at other times that of more formal documents denominated "agreements" time or "protocols." The point where ordinary correspondence between this and other governments ends and agreements – whether denominated executive agreements or exchanges of notes or otherwise – begin, may sometimes be difficult of ready ascertainment. It would be useless to undertake to discuss here the large variety of executive agreements as such, concluded from time to time. Hundreds of executive agreements, other than those entered into under the trade agreements act, have been negotiated with foreign governments x x x. It would seem to be sufficient, in order to show that the trade agreements under the act of 1934 are ***not anomalous in character, that they are not treaties, and that they have abundant precedent in our history, to refer to certain classes of agreements heretofore entered into by the Executive without the approval of the Senate***. They cover such subjects as the inspection of vessels, navigation dues, income tax on shipping profits, the admission of civil aircraft, customs matters, and commercial relations generally, international claims, postal matters, the registration of trademarks and copyrights, etcetera. ***Some of them were concluded not by specific congressional authorization but in conformity with policies declared in acts of Congress with respect to the general subject matter***, such as tariff acts; while still others, particularly those with respect of the settlement of claims against foreign governments, were concluded independently of any legislation." (39 Columbia Law Review, pp. 651, 755.)

[21] Constitution, Article VII, Sections 5 and 17.

In contrast, treaties – as international agreements that need concurrence from the Senate[22] – *do not originate solely from the President's duty as the executor of the country's laws, but from the shared function between the President and the Senate that the Constitution mandated under Article VII, Section 21 of the 1987 Constitution.*

Between the two, a treaty exists on a higher plane as it carries the authority of the President and the Senate.[23] Treaties, which have the impact of statutory law in the Philippines, can amend or prevail over prior statutory enactments. Executive agreements – which exist at the level of implementing rules and regulations or administrative orders in the domestic sphere – have no such effect.[24] They cannot contravene or amend statutory enactments and treaties.[25]

This difference in impact is based on their origins: since a treaty has the approval of both the President and the Senate, it has the same impact as a statute. In contrast, since an executive agreement springs from the President's power to execute laws, it cannot amend or violate existing treaties, and must be in accord with and made pursuant to laws and treaties.[26]

Accordingly, the intended effect of an international agreement determines its form.

When an international agreement merely implements an existing agreement or law, it is properly in the form of an executive agreement. In contrast, when an international agreement involves the introduction of a new subject matter or the amendment of existing treaties or laws, then it should properly be in the form of a treaty.[27]

Still another way of looking at the matter is ***from the prism of the shared function*** that Section 21 directly implies. In other words, based on the constitutional design reflected in Section 21, action on international agreements is always a *shared function* among the three branches of government.

Treaties that the President enters into should have the required Senate concurrence for its validity and effectivity. Even the President's ***executive agreements*** that are within the President's authority to enter into without Senate concurrence, effectively reflect a shared function as they implement laws passed by Congress or treaties that the Senate has previously concurred in. The ***judicial branch*** of government, on the other hand, passively participates in international agreements through the exercise of judicial

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22 Section 2 (b) of Executive Order No. 459, Series of 1997.

23 CONSTITUTION, Article VII, Section 21. See also *Bayan Muna v. Romulo,* 656 Phil. 246, 269-274 (2011), citing Henkin, *Foreign Affairs and the United States Constitution* 224 (2nd ed., 1996); and Borchard, Edwin, *Treaties and Executive Agreements-Reply*, Yale Law Journal, June 1945.

24 *Gonzales v. Hechanova*, 118 Phil. 1065, 1079 (1963).

25 *Adolfo v. CFI of Zambales*, 145 Phil. 264, 266-268 (1970).

26 *Bayan Muna v. Romulo*, *supra* note 23.

27 Id.

power; courts have the duty to ensure that the Executive and the Legislature stay within their spheres of competence, and that the constitutional standards and limitations set by the Constitution are not violated.

Under these norms, an executive agreement that creates new obligations or amends existing ones should properly be classified and entered into as a treaty. When implemented as an executive agreement that does not have the benefit of the treaty-making process and its Senate concurrence, such executive agreement is invalid and ineffective, and can judicially be so declared through judicial review.

D. Article XVIII, Section 25 reinforces Article VII, Section 21.

That the entry of foreign military bases, troops, or facilities into the country is specifically covered by its own provision (*i.e.,* Section 25, Article XVIII of the Constitution) does not change the dynamics that come into play in reading, interpreting, and implementing Section 25 and Section 21. In fact, these constitutional provisions actually reinforce one another.

Article XVIII, Section 25 of the 1987 Constitution does not specifically contradict the President's authority to conduct foreign affairs; neither does it limit the Senate's check-and-balance prerogative to concur in treaties under Section 21. ***Article XVIII, Section 25, too, is not an exception to Article VII, Section 21, but must be read under the terms of this latter provision.***

Viewed in this manner, the standard for determining the form of an international agreement for the entry of foreign military bases, troops, or facilities in the Philippines should be the same standard used to determine whether ***any*** international agreement should be in the form of an executive agreement or a treaty.

To reiterate this standard in the context of Article XVIII, Section 25: when an international agreement involves new obligations or amendments to existing obligations on foreign military bases, troops or facilities in the Philippine territory, the agreement should be in the form of a treaty that requires Senate concurrence; if, on the other hand, the agreement merely implements an existing treaty or law, then the subsequent entry of foreign military troops, bases, or facilities may be in the form of an executive agreement.

Note, at this point, that ***Congress cannot legislate the entry of foreign military troops, bases, or facilities into the country as Section 25, Article XVIII of the Constitution specifically requires that this action be made through the shared action of the President and the Senate***. Consistent with the delineation of authority on the entry of military bases, troops or facilities, the President can only enter into an executive agreement allowing such entry to implement treaties on foreign military presence that are already in place.

The *ponencia*'s insistence on confining Section 25 to the initial entry of foreign military bases, troops, or facilities contradicts and disrupts the check-and-balance harmony that Section 21 fosters. If we were to follow its argument that Section 25 is confined only to the initial entry, then subsequent ***changes or amendments*** to these agreements would no longer require a treaty, and would tilt the balance in favor of the President, contrary to the dictates of Section 21, Article VII of the 1987 Constitution.

Under the present circumstances, the affirmation of the ponencia's ruling effectively means that the President alone – by executive agreement – can determine the entry of foreign military presence, checked only by a Court already bound to the ponencia, as initial entry has been made under the general terms of the Mutual Defense Treaty and the Visiting Forces Agreements.

To carry the resulting consequence further, troops and facilities allowed via the EDCA through an Executive Agreement, would now be allowed simply because there had been earlier entries although their entries had effectively made the Philippines a forward base for American military operations. All these would be established at the sole will of one person, the President of the Philippines, abetted by this Court, and without the benefit of the collective wisdom of the Filipino people expressed through the Senate.

It is not for me, nor for this Court, to argue about the ***wisdom of this resulting arrangement***, but this Court must stand up and assert its duties and prerogatives when the arrangements violate the ***terms of the Constitution.***

Based on the relationship between Article VII, Section 21 and Article XVIII, Section 25 discussed in this dissenting opinion; on the principles of separation of powers and check and balance that underlie the Constitution; and on the duty of all officials to uphold and defend the Constitution, I submit that the *ponencia* and its "initial entry approach" incorrectly answers the following material issues:

(1) Does the EDCA introduce foreign military bases, troops, or facilities into the Philippines that call for the application of Article XVIII, Section 25?

(2) Do the obligations found in the EDCA impose new obligations or amend existing ones regarding the presence of military bases, troops, or facilities in the Philippines?

(3) On the basis of the responses to (1) and (2), can the EDCA be recognized as valid and effective without need for Senate concurrence?

To restate my position: since the EDCA introduces foreign military bases, troops, or facilities in the Philippines within the contemplation of Article XVIII, Section 25 of the 1987 Constitution, and since these are undertaken as obligations different from those found under currently existing treaties with the U.S., then the EDCA, as an executive agreement, is invalid and ineffective. Its terms cannot be enforced in the Philippines unless it is entered into as a treaty concurred in by the Senate.

III.

EDCA imposes new obligations that are different from those found in the MDT and the VFA.

The *ponencia*, in arguing that the EDCA has been properly entered into through an executive agreement, reiterates that it merely implements existing treaties between the Philippines and the U.S., specifically, the 1998 Visiting Forces Agreement (*VFA*) and the 1951 Mutual Defense Treaty (*MDT*).

The *ponencia* stresses that the VFA allows the entry of U.S. military troops and the conduct of related activities, which includes the activities agreed upon under the EDCA.

A. Purpose and contents of the EDCA

The EDCA was signed on April 28, 2014, in Manila, by Philippines Defense Secretary Voltaire Gazmin and U.S. Ambassador to the Philippines Philip Goldberg, in time for the official State Visit of U.S. President Barack Obama.

The ten-year accord is the *second military agreement between the U.S. and the Philippines* (the first being the 1998 VFA) since American troops withdrew from its Philippines naval base in 1992. The U.S. withdrew because the covering Military Bases Agreement (*MBA*) had expired.

The MDT, on the other hand, is merely a mutual defense alliance and cooperation agreement that does not contain authorizing provisions for the entry of military bases, troops, or facilities into the Philippines. *There was thus no existing military bases agreement in 1992 that would have supported the continued maintenance of U.S. military bases, troops, or facilities in the Philippines*; hence, the U.S. withdrawal.

The EDCA allows the U.S. to station military troops and to undertake military operations in Philippine territory without establishing a *permanent*

military base[28] and with the stipulation that the U.S. is not allowed to store or position any nuclear weapon in Philippine territory.[29]

The EDCA has two main **purposes**.

First, it is intended to provide a framework for activities for defense cooperation in accordance with the MDT and the VFA.

Second, it is an agreement for the grant to the U.S. military of the right to use identified portions of the Philippine territory referred to in the EDCA as "Agreed Locations." This right is fleshed out in the EDCA through terms that identify the privileges granted to the U.S. in bringing in troops and facilities, in constructing structures, and in conducting activities within Philippine territory.[30]

The EDCA has a term of ten years, unless both the U.S. and the Philippines formally agree to alter it.[31] The U.S. is bound to hand over any and all facilities in the "Agreed Locations" to the Philippine government upon the EDCA's termination.

In terms of **contents**, EDCA may be divided into two:

First, it reiterates the purposes of the MDT and the VFA by affirming that the U.S. and the Philippines shall continue to conduct joint activities in pursuit of defense cooperation.

Second, it contains an ***entirely new agreement*** pertaining to the Agreed Locations, the right of the U.S. military to stay in these areas, and to conduct activities that are not imbued with mutuality of interests and cannot, by any means, be reconciled with the idea of defense cooperation.

B. The EDCA as a continuation of the VFA and MDT under new and expanded dimensions

Under the **1998 VFA**, the Philippines' primary obligation is to facilitate the entry and departure of U.S. personnel in relation to "covered activities." *It merely defines* ***the status and treatment of U.S. personnel visiting the Philippines*** *"from time to time" in pursuit of cooperation to promote "common security interests."* Essentially, the 1998 VFA is a treaty governing the sojourn of U.S. forces in this country for joint exercises.[32]

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28 EDCA, Preamble, par. 5.

29 Id., Article IV, par. 6.

30 Id., Article III.

31 Id., Article XII(4).

32 *Lim v. Executive Secretary*, G.R. No. 151445. April 11, 2002. In this manner, visiting U.S. forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nations marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.

Interestingly, the 1998 VFA does not itself *expressly* specify what activities would allow the entry of U.S. troops. The parties left this aspect open, and recognized that the activities that shall require the entry of U.S. troops are subject to future agreements and approval by the Philippine Government.

Note, however, that *the* **VFA does not authorize U.S. personnel to permanently stay in the Philippines, nor does it allow any activity related to the establishment and operation of bases**.

Interestingly, **these very same activities that the VFA did not allow, became the centerpiece of the EDCA** which facilitates a more permanent presence of U.S. military troops and facilities in "Agreed Locations" in the Philippines, to the extent that ***these "Agreed Locations"*** *(as discussed below)* ***fit the description of modern military bases***.

Agreed Locations are portions of the Philippine territory whose use is granted to the U.S.[33] Under the EDCA, U.S. personnel can:

(i) ***preposition and store*** defense equipment, supplies, and materiel in Agreed Locations;

(ii) have ***unimpeded access to*** Agreed Locations on all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel; and

(iii) exercise all ***rights and authorities*** within the Agreed Locations that are ***necessary for their operational control or defense***.

In the same manner, ***U.S. contractors*** (entities not within the coverage of either the 1951 MDT or the 1998 VFA) are also allowed unimpeded access to the Agreed Locations in matters relating to the preposition and storage of defense equipment, supplies, and materiel.

Within the Agreed Locations, the U.S. may additionally ***conduct trainings*** for its troops, transit, support, and related activities.[34] The EDCA also allows the U.S. to use the Agreed Locations to ***refuel aircraft, bunker vessels***, and temporarily ***maintain vehicles, vessels, and aircraft***.[35]

The EDCA so provides with ***no qualification as to the purpose*** these vessels, vehicles, and aircraft may have when entering Philippine jurisdiction. It also permits the ***temporary accommodation of personnel***,[36] again without any qualification as to the purpose of their visit.

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33 EDCA, Article II(4).
34 EDCA, Art III, Sec. 1.
35 Id.
36 Id.

The U.S. forces may also engage in ***communications activities*** that include the use of ***its own radio spectrum***,[37] similarly without any limitation as to the purpose by which such communications shall be carried out.

Further, within the Agreed Locations, the U.S. can also ***preposition defense equipment, supplies, and materiel*** under the ***exclusive use and control of U.S. forces***.[38] Thus, the ***right to deploy weapons*** can be undertaken even if it is ***not in the pursuit of joint activities for common security interests***.

Note, at this point, that the Senators, during the ratification of the 1998 VFA, observed that it ***only covers temporary visits of U.S. troops and personnel in the country***. These Senators gave their consent to the 1998 VFA based on the knowledge that U.S. Forces' ***stay in the country may last only up to three weeks to six months***[39] ***per batch***.

This temporary stay of U.S. Forces in the Philippines under the VFA means that this agreement does not cover, nor does it give its approval to, a more permanent stay of U.S. Forces and their equipment in the Philippines; this coverage and approval came only under the EDCA and the Agreed Locations it provides. Note in this regard that *if the EDCA had not envisioned the stay of U.S. Forces and equipment in the Agreed Locations for a period longer than that envisioned in the VFA,* it would not have added obligations regarding the ***storage*** of their equipment and materiel.

All these show that the EDCA embodies ***arrangements of a more permanent nature*** than the arrangements under the VFA; there was ***a marked qualitative and quantitative change in the Philippines–U.S. military arrangements from the VFA to the EDCA***. The EDCA therefore cannot merely be an agreement implementing the 1998 VFA.

More aptly described, the EDCA may be a continuation of the 1998 VFA, but the ***continuity is under new and expanded dimensions***. These added dimensions reinforce the view that the EDCA effectively allows the establishment of a military base, albeit in a modern form, together with all the rights and activities that the use and operation of a military base requires.

Notably, the 1998 VFA had also been recognized as an implementation of the 1951 MDT, yet the Government deemed it necessary to have it embodied in a treaty concurred in by the Senate.

Early in the deliberations of the Senate's concurrence to the 1998 VFA, the senator-sponsors characterized it merely as a subsidiary or

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37 EDCA, Art. VII, Sec. 2.

38 EDCA, Art. IV, Secs. 1 & 3.

39 The senators argued the precise length of time but agreed that it would not exceed six months. (See Senate of the Philippines, Resolution on Second Reading, P.S. Res. No. 443 - Visiting Forces Agreement, May 17, 1999, Records and Archives Service Vol. 133, pp. 23-25.)

implementing agreement to the 1951 MDT.[40] Nevertheless, Senator Tatad, one of the VFA's co-sponsors, ***recognized that Article XVIII, Section 25 of the Constitution prohibits the 1998 VFA from being executed as a mere executive agreement.***[41]

The senators therefore agreed during their deliberations that an agreement implementing the 1951 MDT requires a treaty and Senate concurrence.[42] This was because the agreement, ***despite its affirmation of and consistency with the 1951 MDT, allowed the entry of U.S. troops in the Philippines***, the situation covered by Article XVIII, Section 25.

This same reasoning should also apply when the U.S. transitioned from the VFA to the EDCA. In fact, ***there is greater reason now*** to require a treaty since the EDCA allows a ***more permanent presence*** of U.S. troops and military equipment in the Philippines, equivalent in fact to the ***establishment of modern military bases*** that had not been contemplated at all under the earlier treaties. This enhancement, while *generally consistent* with the intents of the 1951 MDT and the 1998 VFA, creates ***new arrangements and new obligations*** that bring EDCA fully within the coverage of Article XVIII, Section 25 of the Constitution.

Note that the 1951 MDT merely embodied a ***defense agreement***, focused as it is on defenses against armed external attacks.[43] ***It made no provision for bases, troops, or facilities***. The entry of U.S. military bases and troops had been embodied in different, separate agreements, specifically, through the Military Bases Agreement (*MBA*) which expired in 1992, and through the current 1998 VFA.

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[40] Sponsorship speeches of Senator Tatad and Senator Biazon, Senate deliberations on P.S. Res. No. 443 – Visiting Forces Agreement *(Senate deliberations)*, May 3, 1999, pp. 8 and 44: The VFA gives "substance [to the MDT] by providing the *mechanism to regulate* the circumstances and conditions under which the U.S. forces may enter" the country.

[41] Senator Tatad. x x x Mr. President, distinguished colleagues, the Visiting Forces Agreement does not create a new policy or a new relationship. It simply seeks to implement and reinforce what already exists.

For that purpose, **an executive agreement might have sufficed, were there no constitutional constraints. But the Constitution requires the Senate to concur in all international agreements.** So the Senate must concur in the Visiting Forces Agreement, even if the U.S. Constitution does not require the U.S. Senate to give its advice and consent. (*Senate deliberations*, May 25, 1999, A.M., p. 17.)

[42] Senate Resolution No. 1414.

[43] The 1951 MDT provides that both nations would support one another if either the Philippines or the U.S. would be attacked by an external party. It states that each party shall either, separately or jointly, through mutual aid, acquire, develop and maintain their capacity to resist armed attack. It provides for a mode of consultations to determine the 1951 MDT s appropriate implementation measures and when either of the parties determines that their territorial integrity, political independence or national security is threatened by armed attack in the Pacific. An attack on either party will be acted upon in accordance with their constitutional processes and any armed attack on either party will be brought to the attention of the United Nations for immediate action.

The accord defines the meaning of an armed attack as including armed attacks by a hostile power on a metropolitan area of either party, on the island territories under their jurisdiction in the Pacific, or on their armed forces, public vessels or aircrafts in the Pacific. The U.S. government guaranteed to defend the security of the Philippines against external aggression but not necessarily against internal subversion. The treaty expressly stipulates that the treaty terms are indefinite and would last until one or both parties terminate the agreement by a one year advance notice.

With the lapse of the 1947 MBA, the MDT, on its own, does not have any provision allowing the entry of US military bases or facilities in the Philippines. The 1987 Constitution precisely foresaw the expiration of the 1947 MBA, and required that any subsequent extension of the presence of U.S. military bases, troops or facilities in the Philippines should be the subject of another treaty that would require Senate concurrence.[44]

Given the EDCA's introduction of U.S. military facilities that fall within the definition of "bases" (as discussed below) and the lack of any existing treaty allowing the entry of facilities of this type, the EDCA arguably now stands as an agreement taking the place of the 1947 MBA and should thus undergo the treaty-concurrence process that the 1987 Constitution requires. It cannot merely derive its validity and effectiveness from the 1951 MDT and 1998 VFA as an implementing instrument of these earlier agreements.

IV.

EDCA allows the entry of U.S. bases and facilities in the Philippines.

Neither can I agree with the *ponencia*'s continued denial of the EDCA's character as a basing agreement. A reading of the EDCA will reveal that it provides for arrangements equivalent to the establishment in this country of a foreign military base, based on the concept of a base under the 1947 Military Bases Agreement (*MBA*), under Philippine laws, or in the modern equivalent of a base under current U.S. military strategies and practices.

On this point and with due respect, the *ponencia* is plainly in error.

A. Obligations under the EDCA are similar to the obligations under the 1947 MBA.

The obligations under the EDCA are notably ***similar and even equivalent to the obligations under the 1947 R.P.-U.S. Military Bases Agreement (MBA)*** which expired in 1992.

They pursue the ***same purpose*** of identifying portions of the Philippine territory over which the U.S. is granted specific rights for its military activities, undertaken within the "bases" under the MBA and within the "Agreed Locations" in the case of the EDCA. Thus, only the name of the situs of operations varies.

These rights may be categorized into four:

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[44] See Article XVIII, Section 25 of the 1987 Constitution.

(i) the right to construct structures and other facilities for the proper functioning of the bases or the Agreed Locations;

(ii) the right to perform activities for the defense or security of the bases or Agreed Locations;

(iii) the right to the prepositioning of defense equipment, supplies, and materiel; and

(iv) other related rights such as the use of public utilities and public services.

For clarity, I present below a side by side comparison of the relevant provisions of the EDCA and the 1947 MBA.

EDCA	1947 MBA
Article III, Section 1 With the consideration of the views of the Parties, the Philippines hereby authorizes and agrees that United States forces, United States contractors, and vehicles, vessels, and aircraft operated by or for United States forces may conduct the following activities with respect to Agreed Locations: training, transit, support and related activities, refueling of aircraft; bunkering of vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel, and such other activities as the Parties may agree. **Article VI, Section 3** United States forces are authorized to exercise all rights and authorities within the Agreed Locations that are necessary for their operational control or defense, including undertaking appropriate measures to protect United States forces and United States contractors. The United States should coordinate such measures with appropriate authorities of the Philippines	**Article III, par. 1** It is mutually agreed that the United States shall have the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.

Article III, Section 4 The Philippines hereby grants to the United States, through bilateral security mechanisms, such as the MDB and SEB, operational control of Agreed Locations for construction activities and authority to undertake activities on, and make alterations and improvements to, Agreed Locations. x x x	**Article III, par. 2 (a) and (b)** x x x x 2. Such rights, power and authority shall include, inter alia, the right, power and authority : (a) to construct (including dredging and filling), operate, maintain, utilize, occupy, garrison, and control the bases; (b) to improve and deepen the harbors, channels, entrances and anchorages, and to construct or maintain necessary roads and bridges affording access to the bases; x x x x
Article VII, Section 1. The Philippines hereby grants to United States forces and United States contractors the use of water, electricity, and other public utilities on terms and conditions, including rates of charges, no less favorable than those available to the AFP or the Government of the Philippines. x x x **Article VII, Section 2** The Parties recognize that it may be necessary for United States forces to use the radio spectrum. The Philippines authorizes the United States to operate its own telecommunications systems [as telecommunication is defined in the 1992 Constitution and Convention of the International Telecommunication Union ("ITU")]. This shall include the right to utilize such means and services required to ensure the full ability to operate telecommunications systems and the right to use all necessary radio spectrum allocated for this purpose. xxx	**Article III, par 2 (d)** x x x x the right to acquire, as may be agreed between the two Governments, such rights of way, and to construct thereon, as may be required for military purposes, wire and radio communications facilities, including submarine and subterranean cables, pipe lines and spur tracks from railroads to bases, and the right, as may be agreed upon between the two Governments, to construct the necessary facilities; x x x x

Article IV, Section 1 The Philippines hereby authorizes United States forces, through bilateral mechanisms, such as the MDB and SEB, to preposition and store defense equipment, supplies and materiel ("prepositioned materiel"), including, but not limited to, humanitarian assistance and disaster relief equipment, supplies, and materiel, at Agreed Locations. x x x **Article IV, Section 3** The prepositioned materiel of the United States shall be for the exclusive use of United States forces, and full title to all such equipment, supplies, and materiel remains with the United States. United States forces shall have control over the access and disposition of such prepositioned materiel and shall have the unencumbered right to remove such prepositioned materiel at any time from the territory of the Philippines. **Article IV, Section 4** United States forces and United States contractors shall have unimpeded access to Agreed Locations for all matters relating to the prepositioning and storage of defense equipment, supplies, and materiel including delivery, management, inspection, use, maintenance, and removal of such equipment, supplies, and materiel.	**Article III, par (2) (e)** x x x x to construct, install, maintain, and employ on any base any type of facilities, weapons, substance, device, vessel or vehicle on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices, of any desired power, type of emission and frequency.
Article III, Section 2 When requested, the Designated Authority of the Philippines shall assist in facilitating transit or temporary access by United States forces to public land and facilities (including roads, ports, an airfield) including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields).	**Article VII** It is mutually agreed that the United States may employ and use for United States military forces any and all public utilities, other services and facilities, airfields, ports, harbors, roads, highways, railroads, bridges, viaducts, canals, lakes, rivers, and streams in the Philippines under conditions no less favorable than those that may be

	applicable from time to time to the military forces of the Philippines.

Presented in this manner, only those who *refuse to see* cannot discern the undeniable similarities and parallelisms between the expired 1947 MBA and the EDCA in terms of the rights conferred on the U.S. and its military forces.

Since the EDCA effectively allows the U.S. to "re-introduce" and "re-establish" military bases in the Philippines, albeit in a ***modernized form*** and ***on a piece-meal basis***, its implementation should comply with the requirements of Article XVIII, Section 25 of the Constitution. It can only be recognized as valid and effective if the Senate concurs.

B. The EDCA allows the entry of military bases in the Philippines, whether in the traditional or in the modernized concepts of a military base.

Independently of the concept of military bases under the 1947 MBA, the provisions of the EDCA more than sufficiently show that it seeks to allow in this country the military elements that Article XVIII, Section 25 intends to regulate.

There exists no rigid definition of a military base. However, it is a term used in the field of military operations and thus has a generally accepted connotation.

The ***U.S. Department of Defense Dictionary of Military and Associated Terms*** defines a base as "an area or locality containing installations which provides logistics or other support;" home airfield; or home carrier.[45]

We formulated our own definition of a base under ***Presidential Decree No. 1227*** which states that a military base is "any military, air, naval, coast guard reservation, base, fort, camp, arsenal, yard, station, or installation in the Philippines."[46] A military base connotes the presence, in a relatively permanent degree, of troops and facilities in a particular area.[47]

Both definitions are consistent with the use that EDCA allows for the U.S. and its forces.[48] For greater emphasis, *the EDCA allows U.S. military*

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[45] U.S. Department of Defense, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, p. 21 (2015) at <http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf>.

[46] Section 2, Presidential Decree No. 1227.

[47] IV RECORDS, CONSTITUTIONAL COMMISSION 86 (September 18, 1986):

> Fr. Bernas: By the term 'bases,' were we thinking of permanent bases?
>
> Mr. Maambong: Yes.

[48] Enhanced Defense Cooperation Agreement (hereinafter referred to as EDCA), Art. III Sec. 1. These activities are: *"training, transit, support and related activities, refueling of aircraft; bunkering of*

personnel ***to enter and remain in Philippine territory***. It grants the U.S. the ***right to construct structures and assemblies***.[49] It also allows the U.S. to ***preposition defense equipment, supplies and materiel***.[50] The U.S. personnel may also use the Agreed Locations ***to refuel aircraft and bunker vessels***.[51]

Thus, the EDCA's Agreed Locations are areas where the U.S. can perform ***military activities in structures built by U.S. personnel***. The extent of the U.S.' right to use the Agreed Locations is broad enough to include even the ***stockpiling of weapons*** and *the* ***sheltering and repair of vessels under the exclusive control of U.S. personnel***.

Under these terms, what the EDCA clearly allows are military activities undertaken in fixed or pre-determined locations or military bases as this term is defined above. If the Agreed Locations do not at all exactly fit the description of the base established under the terms of the 1947 MBA, they are nevertheless ***forward military bases of the U.S***. – *the equivalent of a military base in the immediate post-World War II world, re-created in, and answering to the military demands of, the 21st century.* That the EDCA allows these arrangements for an initial period of ten (10) years, *to continue automatically unless terminated*, is a concrete indicator that it pertains to the presence on Philippine soil of foreign military bases, troops, and facilities on a more or less permanent basis.

Our understanding of the provision's coverage should also be adjusted to take into account contemporary developments such as the **U.S.'s Pivot to Asia** strategy[52] which calls for U.S. presence in Asia in terms of the forward deployment of U.S. military forces. The EDCA fulfills this U.S. strategy as its Agreed Locations are the forward deployment sites where U.S. military forces are to be deployed, ready with manpower, arms, and resources for

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vessels; temporary maintenance of vehicles, vessels, and aircraft; temporary accommodation of personnel; communications; prepositioning of equipment, supplies, and materiel; deploying forces and materiel and such other activities as the Parties may agree."

49 EDCA, Article V, Sec. 2.

50 EDCA, Art IV, Sec. 1.

51 Id.

52 During the latter part of the first term of the Obama Administration, the U.S. announced a shift in its global strategy in favor of a military and diplomatic "pivot," or "rebalance" toward Asia. The strategy involved a shift of the U.S.'s diplomatic, economic, and defense resources to Asia, made urgent by "the rise of Chinese regional power and influence, and China's apparent inclination to exercise its burgeoning military power in territorial disputes with its neighbors." These disputes affected sea lanes that are vital to the U.S. and its allies; hence, the U.S. was particularly concerned with their peaceful resolution. John Hemmings., Understanding the U.S. Pivot: Past, Present, and Future. 34(6) *Royal United Services Institute Newsbrief* (November 2014), accessible from John Hemmings' webpage at (November 26, 2014), [https://hemmingsjohn.wordpress.com/2014/11/27/understanding-the-us-pivot-past-present-and-future/ (last accessed on December 8, 2015)].

The key to the new strategy in the military-political area is "presence: forward deployment of U.S. military forces; a significant tempo of regional diplomatic activity (including helping Asian countries resolve disputes that they can't resolve themselves); and promoting an agenda of political reform where it is appropriate." This meant, among others, the strengthening of U.S.' military alliance with Asian countries, including the Philippines. Richard C. Bush III. "No rebalance necessary: The essential continuity of U.S. policy in the Asia-Pacific" *Brookings Institution* (March 18, 2015) available at http://www.brookings.edu/blogs/order-from-chaos/posts/2015/03/18-value-of-continuity-us-policy-in-asia-pacific (last accessed on December 8, 1015).

battle. In this sense, the EDCA does not merely involve training or temporary sojourns, but more or less permanent sites that the U.S. can use as needed ***for its own military purposes***.

Even under the U.S. redefinitions of a military base, the EDCA would still involve the entry of military bases in the Philippines. It should be noted that the obligations under the EDCA correspond to the contemporary reclassification of a military base, *i.e.*, the Main Operating Base (*MOB*),[53] Forward Operating Site (*FOS*),[54] and Cooperative Security Location (*CSL*),[55] all footnoted below.

Essentially, the reconfiguration of what constitutes a U.S. base corresponds to the U.S.'s strategic objective of providing multiple avenues of access for contingency operations. Through access agreements (such as the EDCA), the U.S. maintains overseas military presence without the added costs and complications of establishing permanent bases. This is the U.S. "presence" that the *Pivot to Asia* speaks of. **With the Philippines as an implementing location of this "pivot" strategy, the country and its people would necessarily be exposed to all the dangers to which the U.S. would be exposed, even to the threats and dangers extraneous to Philippine interests. All these should be made known and clarified with the Filipino people in the manner the Constitution commands.**

V.

Effectivity of the EDCA in the Philippines

Based on all the above considerations, this Dissent concludes that the EDCA, instead of simply implementing the terms of the 1951 MDT and the 1998 VFA, carries terms ***significantly broader in scope*** than the terms of these two earlier treaties. A more correct description of EDCA is that it goes ***beyond the scope of an implementing agreement***; it is a substantively independent agreement that adds to what the 1951 MDT and the 1998 VFA provide.

The EDCA ultimately embodies a new agreement that touches on military bases, troops, or facilities beyond the scope of the 1951 MDT and the 1998 VFA, and should be covered by a treaty pursuant to

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[53] Main operating bases, with permanently stationed combat forces and robust infrastructure, will be characterized by command and control structures, family support facilities, and strengthened force protection measures. Examples include Ramstein Air Base (Germany), Kadena Air Base (Okinawa, Japan), and Camp Humphreys (Korea).

[54] Forward operating site will be an expandable "warm facilities" maintained with a limited U.S. military support presence and possibly prepositioned equipment. FOSs will support rotational rather than permanently stationed forces and be a focus for bilateral and regional training. Examples include the Sembawang port facility in Singapore and Soto Cano Air Base in Honduras.

[55] Cooperative security locations will be facilities with little or no permanent U.S. presence. Instead they will be maintained with periodic service, contractor, or host-nation support. CSLs will provide contingency access and be a focal point for security cooperation activities. A current example of a CSL is in Dakar, Senegal, where the U.S. Air Force has negotiated contingency landing, logistics, and fuel contracting arrangements, and which served as a staging area for the 2003 peace support operation in Liberia.

Article XVIII, Section 25 and Article VII, Section 21, both of the 1987 Constitution.

Without the referral to and concurrence by the Senate as a treaty, the EDCA is a *constitutionally deficient* international agreement; hence, it cannot be valid and effective in our country.

To remedy the **constitutional deficiency**, the best recourse available to the Court under the present circumstances of territorial conflict, regional tension, and actual intrusion into Philippine territory, is to reconsider its Decision of January 12, 2016:

- by declaring that the EDCA is constitutionally deficient as an Executive Agreement; it cannot be valid and effective in its present form;

- by suspending *pro hac vice* the operations of its rules on the finality of its rulings;

- by giving the President the opportunity to refer the EDCA as a treaty to the Senate for its consideration and concurrence, within ninety (90) days from the service of the Court's ruling on reconsideration; and

- by recognizing that the EDCA, once referred to and concurred in by the Senate, complies with the requirements of Article VII, Section 21 and Article XVIII, Section 25 of the Constitution.

If no referral is made to the Senate within 90 days from receipt, the conclusion that the President committed grave abuse of discretion by entering into an executive agreement instead of a treaty, and by certifying to the completeness of the Philippine internal process, shall be final and effective.

ARTURO D. BRION
Associate Justice