Republic of the Philippines
Supreme Court
Manila

EN BANC

NOTICE

Sirs/Mesdames:

Please take notice that the Court en banc issued a Resolution dated **JULY 19, 2022**, *which reads as follows:*

"**G.R. No. 251977 (*In the Matter of Interpretation of Section 21, Article VII, and Section 25, Article XVIII of the 1987 Constitution; Senate of the Philippines, represented by Hon. Vicente C. Sotto III, in his capacity as Senate President, Hon. Ralph G. Recto, in his capacity as Senate President Pro Tempore, Hon. Juan Miguel 'Migz' F. Zubiri, in his capacity as Majority Leader; Hon. Franklin M. Drilon, in his capacity as Minority Leader, and Hon. Richard J. Gordon and Hon. Panfilo 'Ping' M. Lacson, in their individual capacities as Members of the Senate of the Philippines v. Office of the Executive Secretary, represented by Hon. Salvador C. Medialdea, in his capacity as Executive Secretary; and Department of Foreign Affairs, represented by Hon. Teodoro L. Locsin, Jr., in his capacity as Secretary of Foreign Affairs*).** – Before this Court is a Petition for Declaratory Relief and Mandamus[1] dated March 9, 2020, questioning the validity of the president's withdrawal from the Visiting Forces Agreement (*VFA*) between the Republic of the Philippines and the United States of America (*U.S.*) without Senate concurrence.

Petitioners-Senators Vicente C. Sotto III, Ralph G. Recto, Juan Miguel 'Migz' F. Zubiri, Franklin M. Drilon, Richard J. Gordon, Panfilo 'Ping' M. Lacson (*petitioners*) alleged that the President cannot unilaterally withdraw from a treaty duly concurred in by the Senate, such as the VFA, without a concomitant concurrence from the Senate. They invoke Section 21, Article VII of the 1987 Constitution which reads:[2]

> 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 facts are not disputed.

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1 *Rollo*, pp. 3-57.
2 *Id.* at 4-5.

On January 22, 2020, Senator Ronald 'Bato' dela Rosa (*Senator Dela Rosa*), the Philippine National Police Chief appointed by President Rodrigo R. Duterte (*President Duterte*), announced that his U.S. visa had been cancelled.[3] The next day, on January 23, 2020, President Duterte issued a statement threatening the termination of the VFA if the U.S. does not rectify the cancellation of Senator Dela Rosa's visa.[4] On January 29, 2020, President Duterte prohibited the members of his cabinet from visiting the U.S. indefinitely, and insisted that he would limit the Philippines' interaction in whatever aspects of international relations.[5]

Following President Duterte's pronouncements were several Resolutions filed in the Senate of the Philippines (*Senate*), *viz.*:

> Senate Resolution No. 299 – Resolution Expressing the Sense of the Senate that the Validity and Implementation of the Enhanced Defense Cooperation Agreement (EDCA) between the Republic of the Philippines and the United States of America be Urgently Reviewed;
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> Senate Resolution No. 303 – Resolution Directing the Proper Senate Committee to Conduct an Inquiry in Aid of Legislation on the Implications of the Termination of RP-US Visiting Forces Agreement;
>
> Senate Resolution No. 305 – Resolution Expressing the Sense of the Senate, that the Termination of, or Withdrawal from Treaties and International Agreements concurred in by the Senate shall be Valid and Effective Only upon Concurrence by the Senate;
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> Senate Resolution No. 306 – Resolution Expressing the Sense of the Senate that the Validity and Implementation of the Visiting Forces Agreement between the Republic of the Philippines and the United States of America should be Urgently Reviewed; and
>
> Senate Resolution No. 312 – Resolution Expressing the Sense of the Senate for the President to Reconsider his Plan to Withdraw from the Visiting Forces Agreement with the United States of America.[6]

On February 6, 2020, the Senate's Committee on Foreign Relations conducted a public hearing to discuss the possible repercussions of the termination of the VFA. During the hearing, Department of Foreign Affairs (*DFA*) Secretary Teodoro L. Locsin, Jr. (*Secretary Locsin*) expressed his concerns over the negative impacts of the termination of the VFA on

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[3] *Id.* at 12. See also Dela Rosa confirms his US visa has been cancelled, available at <*https://cnnphilippines.com/news/2020/1/22/ronald-bato-dela-rosa-united-states-visa.html?fbclid=IwAR0IDW0kEf6YKN8ndKSVQmtkgS53li14rOE2MhLGw6XI0qXH4DHaJ7devYw*>(last accessed on January 18, 2022).

[4] *Id.* See also Duterte threatens to scrap VFA if US doesn't rectify Bato's visa cancellation, available at <https://newsinfo.inquirer.net/1218839/duterte-threatens-to-scrap-vfa-if-us-doesnt-rectify-batos-visa-cancellation> (last accessed on January 18, 2022).

[5] Duterte prohibits Cabinet members from traveling to U.S., available at https://www.rappler.com/nation/250526-duterte-prohibits-cabinet-members-traveling-to-us/ (last accessed on January 18, 2022).

[6] *Rollo*, pp. 12-13.

Philippine defense and security arrangements and the country's overall bilateral relations with the U.S.[7]

Nevertheless, on February 11, 2020, upon instructions of President Duterte, the DFA sent a Notice of Termination of the VFA to the U.S. Embassy, in accordance with Article IX[8] of the said agreement. The Notice was, however, made without the participation and concurrence of the Senate.[9]

Thus, on February 20, 2020, the Senate Committee on Foreign Relations conducted a hearing on Resolution No. 305, or Resolution Expressing the Sense of the Senate, that the Termination of, or Withdrawal from Treaties and International Agreements Concurred in by the Senate shall be Valid and Effective Only Upon Concurrence by the Senate.[10]

Subsequently, on March 2, 2020, the Senate, in plenary session, and by a vote of twelve in favor, zero against, and seven abstentions, approved Resolution No. 39 (previously Resolution No. 337), or Resolution Asking the Honorable Supreme Court of the Philippines to Rule on Whether or Not the Concurrence of the Senate is Necessary in the Abrogation of a Treaty Previously Concurred in by the Senate.[11]

Hence, the present petition.

Procedurally, petitioners argue that the resolution of the present case falls squarely within the jurisdiction of this Court under its expanded power of judicial review under the 1987 Constitution. They argue that all the elements for this Court's exercise of its power of judicial review are satisfied in the present case.[12] *First*, an actual case or controversy exists. There is a conflicting delineation and exercise of powers between the Executive Department and the Senate with respect to the withdrawal from a treaty. *Second*, the Senate has legal standing to raise the question of constitutionality, anchored on its substantial interest to fully exercise its constitutionally- mandated powers. *Third*, the constitutional question was raised at the earliest opportunity. The present petition was originally filed

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7 Locsin: Risky for PH to terminate visiting forces agreement with U.S., available at <https://www.rappler.com/nation/251149-locsin-risky-to-terminate-visiting-forces-agreement/> (last accessed on January 18, 2022); *id.*

8 Article IX
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.

9 *Rollo*, p. 13.

10 *Id.*

11 *Id.* at 13-14.

12 *Id.* at 15-16.

before this Court precisely to resolve the constitutionality of the Executive's supposed exercise of its powers. *Fourth*, the resolution on the constitutional issue raised in the present petition is the *lis mota* of the controversy. The issue of whether the Chief Executive can validly withdraw from a treaty without the concurrence of the Senate is a constitutional question in and of itself.[13]

Petitioners contend that the petition raises issues of paramount and transcendental importance that have significant and tremendous effect on the Filipino people in terms of foreign policy and national defense.[14] Particularly, they argue that the Senate, as the duly mandated constitutional body designed to concur in the ratification of treaties, is the sole organ that can question the constitutionality of the unilateral termination effected by the President on a duly concurred treaty. In this regard, the unilateral withdrawal of the VFA by President Duterte affected the core of the constitutional mechanism of checks and balances.[15]

According to petitioners, the question raised in the present petition is purely one of law. Thus, although a petition for declaratory relief under Rule 63 is required to be filed before the Regional Trial Court (*RTC*), a direct resort to this Court is necessary not only because of the transcendental importance of the issue presented, but because of extreme urgency. Petitioners note that the Notice of Withdrawal was sent to the U.S. Embassy on February 11, 2020. In accordance with the VFA's provisions, the termination shall be effective 180 days from receipt of notice, or on August 9, 2020. Thus, it is imperative for this Court to act and declare the Notice of Withdrawal as being of no force and effect for lack of concurrence from the Senate, lest it be to the detriment of the Filipino people.[16]

On substantive issues, petitioners dispute that the unilateral revocation by the President of any treaty or international agreement without the concurrence of the Senate violates the basic principle of checks and balances and doctrine of separation of powers under the 1987 Constitution.[17]

Petitioners add that, similar to a statute, the Rules of the Senate requires every treaty to undergo three readings in order to properly examine the nature, objective, benefits, and relative importance of the agreement to the country. The similarity of procedure between the concurrence in treaties and the passage of statutes is consistent with the doctrine of transformation under Section 21, Article VII of the 1987 Constitution which provides that treaties, once concurred in by Senate, are deemed to have the force and

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13 *Id.* at 17-19.
14 *Id.* at 21.
15 *Id.*
16 *Id.* at 21-22.
17 *Id.* at 34.

effect of domestic law.[18] Thus, according to petitioners, it would set a dangerous precedent if the President can unilaterally terminate a treaty, which has the force and effect of law, without the concurrence of the Senate.[19]

Petitioners urge this Court to apply the Mirror Doctrine which calls for a parity of authority for entry and exit from an international agreement. Under this principle, the same degree of legislative participation is legally required to exit from, as to enter an international commitment. According to petitioners, the Mirror Doctrine finds support in recent related foreign jurisprudence in South Africa and in the United Kingdom.[20]

Thus, petitioners pray for this Court to (1) render a decision declaring that the withdrawal from, or termination of a treaty or international agreement that had been previously concurred in by the Senate requires the concurrence of two-thirds (2/3) of all the members of the Senate to be valid and effective; and (2) issue an order directing the respondents to refer the Notice of Withdrawal to the Senate for its concurrence pursuant to Section 21, Article VII of the 1987 Constitution.[21]

On October 30, 2020, respondents, through the OSG, filed their Comment.[22]

At the onset, respondents argue that the present petition should be dismissed on procedural grounds. Respondents contend that a resort to judicial action *via* declaratory relief and mandamus before this Court is not proper. They aver that this Court does not have original jurisdiction over a petition for declaratory relief even if only questions of law are involved. The exclusive jurisdiction over special civil actions of declaratory relief lies with the RTC.[23]

Respondents further argue that in any case, the petition failed to satisfy the requisites[24] of an action for declaratory relief under Section 1,[25]

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18 *Id.* at 38-39, citing *Pharmaceutical and Health Care Association of the Philippines v. Sec. Duque III*, 561 Phil. 386, 398 (2007).

19 *Id.* at 39.

20 *Id.* at 46-48. (Citations omitted)

21 *Id.* at 54.

22 *Id.* at 109-158.

23 *Id.* at 120-121.

24 (a) the subject matter of the controversy must be a deed, will, contract or other written instrument, statute, executive order or regulation, or ordinance; (b) the terms of said documents and the validity thereof are doubtful and require judicial construction; (c) there must have been no breach of the documents in question; (d) there must be an actual controversy or the 'ripening seeds' of one between persons whose interests are adverse; (e) the issue must be ripe for judicial determination; and (f) adequate relief is not available through other means or other forms of action or proceeding; (*Id.* at 121-122, citing *Commissioner of Internal Revenue v. Standard Insurance Co., Inc.*, 842 Phil. 1087, 1095 [2018])

25 Section 1. *Who may file petition.* — Any person interested under a deed, will, contract or other written instrument, or whose rights are affected by a statute, executive order or regulation, ordinance, or

Rule 63 of the Rules of Court. Respondents contend that the subject matter of petitioners' claim is not a deed, will, contract (or other written instrument), statute, executive order, or regulation or ordinance that calls for judicial construction. The petition rather challenges the constitutionality of the actions and exercise of powers of the Executive.[26]

Respondents also aver that the extraordinary remedy of mandamus lies only to compel the performance of duties that are purely ministerial in nature and not those that are discretionary. In the present case, the withdrawal from the VFA was a positive, discretionary, and political act that is within the exclusive prerogative of the President.[27]

Respondents next posit that the requisites for the exercise of this Court's power of judicial review are not met in the present petition. They argue that the Senate does not have legal standing to file the petition because it does not have the constitutional prerogative to concur in the withdrawal of a treaty. Further and more importantly, the petition does not present an actual case or controversy. They point out that on June 1, 2020, upon the President's instructions, the DFA formally notified the U.S. Embassy of the government's decision to suspend the termination of the VFA for six months, which period is extendible by the Philippines for another six months, after which the tolling of the initial period from February 11, 2020 shall resume. This notice of suspension was accepted by the U.S. Embassy. Thus, there is now no dispute or controversy to be resolved by this Court.[28]

Respondents argue that ultimately, the President's decision to withdraw from the VFA without Senate concurrence is not a justiciable controversy. It is a political question outside the scope of this Court's power of judicial review.[29]

On substantive issues, respondents maintain that the President can unilaterally withdraw from the VFA even without the Senate concurrence. They insist that the power to withdraw from a treaty is constitutionally lodged exclusively with the President. Thus, while lawmaking is within the province of the legislature, the power to act as chief architect of foreign affairs lies with the President. The fact that treaties and international agreements form part of the law of the land does not equate the process of

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any other governmental regulation may, before breach or violation thereof bring an action in the appropriate Regional Trial Court to determine any question of construction or validity arising, and for a declaration of his rights or duties, thereunder. (Bar Matter No. 803, 17 February 1998)

An action for the reformation of an instrument, to quiet title to real property or remove clouds therefrom, or to consolidate ownership under Article 1607 of the Civil Code, may be brought under this Rule. (1a, R64)

26 *Rollo*, pp. 121-123.

27 *Id.* at 123-124.

28 *Id.* at 125-129.

29 *Id.* at 134-138.

entering into treaties to lawmaking or the process of withdrawing therefrom to repealing a law.[30]

With regard to petitioners' plea for this Court to adopt the Mirror Doctrine, respondents asseverate that Philippine courts do not take judicial recognition of foreign judgments and laws. Moreover, respondents aver that the structure and design of the Philippine Constitution is vastly different from that of the South African Constitution, under which the power to ratify treaties or international agreements is vested on the legislature, and the role of the executive is limited to negotiation and signing of international agreements. Similarly, petitioners' invocation of the decision of the United Kingdom Supreme Court is misplaced because the United Kingdom has a parliamentary system of government, while the Philippines has a presidential system.[31]

Respondents argue that the power to unilaterally withdraw from a treaty is an unstated residual power of the President. Since the President is the chief architect of foreign policy, all the powers and functions to effect that duty necessarily and exclusively belong to him, absent any express constitutional provision to the contrary.[32]

Then, in a Resolution[33] dated February 9, 2021, this Court noted the comment filed by respondents and required the parties to Move in the Premises within 10 days from notice.

On September 24, 2021, respondents, through the OSG, filed a Manifestation and Motion[34] dated September 22, 2021. They stated that on July 30, 2021, upon instructions of President Duterte, Secretary Locsin handed over to U.S. Secretary of Defense, Lloyd J. Austin III (*Secretary Austin*), a Diplomatic Note[35] recalling the abrogation of the VFA.[36] Considering that the VFA is in full force again, respondents pray that the present petition be dismissed for being moot and academic.[37]

Our Ruling

I.

The VFA was forged after the expiration of the 1947 Military Bases Agreement between the Philippines and the U.S. in 1991. It allowed the limited and temporary presence of U.S. military troops in the Philippines,

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30 *Id.* at 140-141.
31 *Id.* at 143-146.
32 *Id.* at 150.
33 *Id.* at 171.
34 *Id.* at 173-176.
35 *Id.* at 178.
36 *Id.* at 174.
37 *Id.*

with the goal of promoting cooperation between the U.S. and the Philippine military forces in the event of an attack.[38] In sum, the VFA is the regulatory mechanism by which U.S. military and civilian personnel may visit the Philippines in connection with activities approved by the Philippine government.[39] Thus, the VFA contains provisions on the entry and departure of U.S. personnel to the Philippines; criminal jurisdiction; claims between the Philippines and the U.S. government; importation and exportation of U.S. government-owned equipment, materials, and supplies; and movement of vessels and aircraft operated by or for the U.S. Armed Forces.

The VFA was signed by DFA Secretary Domingo L. Siazon, Jr. (*Secretary Siazon*) and U.S. Ambassador Thomas Hubbard on February 10, 1998,[40] and was ratified by then President Joseph E. Estrada (*President Estrada*), through then DFA Secretary Ronaldo B. Zamora, on October 5, 1998. On October 6, 1998, the text of the VFA, the Instrument of Ratification, and the letter of President Estrada were officially transmitted to the Senate for concurrence pursuant to Section 21, Article VII of the 1987 Constitution.[41]

On May 27, 1999, the Senate, by a two-thirds (2/3) vote[42] of its members, approved Senate Resolution No. 443 (later renumbered as Senate Resolution No. 18), giving its concurrence to the VFA. On June 1, 1999, after an Exchange of Notes between Secretary Siazon and U.S. Ambassador Thomas Hubbard, the VFA officially entered into force.[43]

The constitutionality of the VFA was challenged in *Bayan (Bagong Alyansang Makabayan) v. Executive Secretary Zamora*,[44] where this Court was confronted with the primary issue of what constitutional provision applies with respect to the Senate's exercise of its constitutional power to concur in the VFA. Petitioners therein argued that since the VFA involved the presence of military troops in the Philippines, the applicable provision is Section 25, Article XVIII of the 1987 Constitution, *viz.*:

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38 *Lim v. Hon. Exec. Sec.*, 430 Phil. 555, 572 (2002).

39 *Id.*

40 *Bayan (Bagong Alyansang Makabayan) v. Exec. Sec. Zamora*, 396 Phil. 623, 633 (2000).

41 *Id.* at 633-634.

42 The following voted for concurrence: (1) Senate President Marcelo Fernan, (2) Senate President *Pro Tempore* Blas Ople, (3) Senator Franklin Drilon, (4) Senator Rodolfo Biazon, (5) Senator Francisco Tatad, (6) Senator Renato Cayetano, (7) Senator Teresa Aquino-Oreta, (8) Senator Robert Barbers (9) Senator Robert Jaworski (10) Senator Ramon Magsaysay, Jr., (11) Senator John Osmeña, (12) Senator Juan Flavier, (13) Senator Miriam Defensor-Santiago, (14) Senator Juan Ponce Enrile, (15) Senator Vicente Sotto III, (16) Senator Ramon Revilla, (17) Senator Anna Dominique Coseteng, and (18) Senator Gregorio Honasan.

Meanwhile, the following voted to reject the ratification of the VFA: (1) Senator Teofisto Guingona, Jr., (2) Senator Raul Roco, (3) Senator Sergio Osmeña III, (4) Senator Aquilino Pimentel, Jr., and (5) Senator Loren Legarda-Leviste; *id.* at 636.

43 *Id.* at 637.

44 *Supra* note 40.

> 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.

Opining otherwise, respondents therein countered that Section 21, Article VII applies because the VFA does not involve the establishment of bases in the Philippines, but only regulates the temporary visits of U.S. personnel for joint military exercises.

This Court adopted the view of petitioners and ruled that Section 25, Article XVIII applies in determining the validity of the VFA, since the provision specifically deals with treaties involving the entry of foreign military bases, troops, or facilities into the Philippines. This Court emphasized that contrary to respondents' claim, the proscription against entry under the said provision is not limited to troops and facilities without foreign military bases being established in the country. Rather, the use of comma and the disjunctive word 'or' means that the provision contemplates military treaties the subject of which could be one of the three: (a) foreign military bases, (b) foreign troops, or (c) foreign facilities. Considering that the VFA provides for the guidelines to govern the visits of U.S. military personnel and defines the rights of the Philippines and the U.S. governments concerning criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies, Section 25, Article XVIII applies.[45]

Nonetheless, this Court ruled that Section 21, Article VII also finds application if only to the extent of determining the number of votes required to obtain the valid concurrence of Senate as required in Section 25, Article XVIII, thus:

> Section 21, Article VII deals with treaties or international agreements in general, in which case, the concurrence of at least two-thirds (2/3) of all the Members of the Senate is required to make the subject treaty, or international agreement, valid and binding on the part of the Philippines. This provision lays down the general rule on treaties or international agreements and applies to any form of treaty with a wide variety of subject matter, such as, but not limited to, extradition or tax treaties or those economic in nature. All treaties or international agreements entered into by the Philippines, regardless of subject matter, coverage, or particular designation or appellation, requires the concurrence of the Senate to be valid and effective.

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45 *Id.* at 653.

In contrast, Section 25, Article XVIII is a special provision that applies to treaties which involve the presence of foreign military bases, troops or facilities in the Philippines. Under this provision, the concurrence of the Senate is only one of the requisites to render compliance with the constitutional requirements and to consider the agreement binding on the Philippines. Section 25, Article XVIII further requires that 'foreign military bases, troops, or facilities' may be allowed in the Philippines only by virtue of a treaty duly concurred in by the Senate, ratified by a majority of the votes cast in a national referendum held for that purpose if so required by Congress, and recognized as such by the other contracting state.

It is our considered view that both constitutional provisions, far from contradicting each other, actually share some common ground. These constitutional provisions both embody phrases in the negative and thus, are deemed prohibitory in mandate and character. In particular, Section 21 opens with the clause 'No treaty x x x ,' and Section 25 contains the phrase 'shall not be allowed.' Additionally, in both instances, the concurrence of the Senate is indispensable to render the treaty or international agreement valid and effective.

To our mind, the fact that the President referred the VFA to the Senate under Section 21, Article VII, and that the Senate extended its concurrence under the same provision, is immaterial. For in either case, whether under Section 21, Article VII or Section 25, Article XVIII, the fundamental law is crystalline that the concurrence of the Senate is mandatory to comply with the strict constitutional requirements.

On the whole, the VFA is an agreement which defines the treatment of United States troops and personnel visiting the Philippines. It provides for the guidelines to govern such visits of military personnel, and further defines the rights of the United States and the Philippine government in the matter of criminal jurisdiction, movement of vessel and aircraft, importation and exportation of equipment, materials and supplies.

Undoubtedly, Section 25, Article XVIII, which specifically deals with treaties involving foreign military bases, troops, or facilities, should apply in the instant case. To a certain extent and in a limited sense, however, the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate, as will be further discussed hereunder.

It is a finely-imbedded principle in statutory construction that a special provision or law prevails over a general one. *Lex specialis derogat generali*. Thus, where there is in the same statute a particular enactment and also a general one which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language which are not within the provision of the particular enactment.'[46]

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46 *Id.* at 650-652.

This Court then declared that under Section 25, Article XVIII, entry of foreign military bases, troops, or facilities into the Philippines is not allowed, except only under three conditions: (1) the entry is permitted under a treaty; (2) the treaty must be duly concurred in by the Senate and, when so required by Congress, ratified by a majority of votes cast by the people in a national referendum; and (3) the 'treaty' is *recognized as a treaty* by the other contracting state. With respect to the second condition, the Court said that construing Section 25, Article XVIII with Section 21, Article VII, it is clear that two-thirds (2/3) vote of all the members of the Senate is required for its concurrence to be validly obtained.[47]

In the case of the VFA, this Court found that all of the conditions were present. The VFA was concurred in by the Senate through Senate Resolution No.18, which was approved by two-thirds of its members. Meanwhile, the ratification by a majority of the votes cast in the national referendum was not necessary because the Congress had not required it. Lastly, contrary to therein petitioners' position that the VFA should have the advice and consent of the U.S. Senate, it is inconsequential whether the U.S. treats the VFA as a treaty or an executive agreement. Under international law, there is no difference between treaties and executive agreements in their binding effect upon the contracting states. Considering that the U.S. government had fully committed to abiding by the terms of the VFA, there is sufficient compliance with the mandate of Section 25, Article XVIII of the Constitution.

II.

Petitioners assail the President's act of withdrawing from the VFA without Senate concurrence. They argue that since the VFA was duly concurred in by the Senate, the withdrawal from it, to be valid and effective, requires a concomitant concurrence from the Senate.

Certainly, the question of whether or not Senate concurrence is required for the President's withdrawal from treaties or international agreements to be valid, is no longer novel. In the recent case of *Pangilinan v. Cayetano (Pangilinan)*,[48] this Court was confronted with the same issue when it was tasked to determine the validity of President Duterte's unilateral withdrawal from the Rome Statute, a treaty which was also duly concurred in by the Senate.

This Court, through Senior Associate Justice Marvic M.V.F. Leonen, noted that while the Constitution is clear that Senate concurrence is necessary for treaties and international agreements to be valid, there is, however, no similar provision in the Constitution or any law which provides for the mechanism for an effective withdrawal from treaties or international

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47 *Id.* at 654-655.

48 G.R. No. 238875, March 16, 2021.

agreements.[49] We then discussed the concept of 'mirror principle' proposed by Yale Law School Professor Harold Hongju Koh, which essentially postulates that the same degree of legislative participation is required to withdraw from as to enter an international agreement. Following this principle, a treaty duly concurred in by the Senate cannot be unilaterally withdrawn by the president without a parallel approval from the Senate. The Court found that the mirror principle is consistent with the Youngstown framework formulated by Justice Robert H. Jackson in his concurring opinion in the case of *Youngstown Sheet & Tube Co. v. Sawyer*.[50] In essence, the Youngstown framework provides that the validity of an act of the president may be assessed in light of the power he possesses with respect to that act in the first place. It lays down categories[51] of executive actions in relation to the necessity of legislative participation.

Guided by the mirror principle and the Youngstown framework, but taking into primordial account the unique Philippine historical and legal context, this Court, in *Pangilinan*, then adopted guidelines for evaluating cases concerning the president's withdrawal from international agreements, thus:

'*First*, the president enjoys some leeway in withdrawing from agreements which he or she determines to be contrary to the Constitution or statutes.'[52] This prescinds from the constitutional mandate of the president to ensure that the laws are faithfully executed. Considering that under our legal system, a treaty is of similar nature as a law, it goes without saying that a treaty cannot contravene the Constitution. On the other hand, while a treaty has the same force and effect of a law, in the event of conflict between the two, the law shall prevail. As this Court explained:

> In enacting laws, both houses of Congress participate. A bill undergoes three readings in each chamber. A bill passed by either chamber is scrutinized by the other, and both chambers consolidate their respective versions through a bicameral conference. Only after extensive participation by the people's elected representatives — members of the Senate who are elected at large, and, those in the House of Representatives who represent districts or national, regional, or sectoral party-list organizations — is a bill presented to the president for signature.

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49 *Id.*

50 343 U.S. 579 (1952).

51 Category One: 'when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate';

Category Two: 'when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain'; and

Category Three: 'when the President takes measures incompatible with the expressed or implied will of Congress, his power is at his lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.' (*Id.*, citing Koh, Harold Hongju, *Presidential Power to Terminate International Agreements*, November 12, 2018, The Yale Law Journal Forum, p. 462.)

52 *Pangilinan v. Cayetano, supra* note 48.

> In contrast, in the case of a treaty or international agreement, the president, or those acting under their authority, negotiates its terms. It is merely the finalized instrument that is presented to the Senate alone, and only for its concurrence. Following the president's signature, the Senate may either agree or disagree to the entirety of the treaty or international agreement. It cannot refine or modify the terms. It cannot improve what it deems deficient, or tame apparently excessive stipulations.
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> The legislature's highly limited participation means that a treaty or international agreement did not weather the rigors that attend regular lawmaking. It is true that an effective treaty underwent a special process involving one of our two legislative chambers, but this also means that it bypassed the conventional republican mill.
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> Having passed scrutiny by hundreds of the people's elected representatives in two separate chambers which are committed — by constitutional dictum — to adopting legislation, statutes enacted by Congress necessarily carry greater democratic weight than an agreement negotiated by a single person. This is true, even if that person is the chief executive who acts with the aid of unelected subalterns. This nuancing between treaties and international agreements, on one hand, and statutes on the other, is an imperative borne by the Philippines' basic democratic and republican nature: that the sovereignty that resides in the people is exercised through elected representatives.[53]

Thus, for treaties declared by this Court as unconstitutional and those that are inconsistent with subsequently enacted laws, the president can unilaterally withdraw therefrom without the concurrence of the Senate. Before a judicial declaration that a treaty is unconstitutional, nevertheless, the president may also withdraw from a treaty which in his or her judgment is contrary to the Constitution or law, subject of course, to judicial review on whether grave abuse of discretion attended the determination of unconstitutionality or conflict of the treaty with existing law.[54]

'*Second*, the president cannot unilaterally withdraw from agreements which were entered into pursuant to congressional imprimatur.'[55] This is in conformity with the mirror principle, which requires the same degree of legislative participation to effectively withdraw from an international agreement as to enter it. Clearly, this also covers a situation where a law is subsequently passed to implement an existing treaty, which is essentially a legislative approval of the prior executive action.[56] In *Pangilinan*, this Court emphasized that:

> When a treaty was entered into upon Congress's express will, the president may not unilaterally abrogate that treaty. In such an instance, the president who signed the treaty simply implemented the law enacted by Congress. While the president performed his or her function as primary

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53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*

> architect of international policy, it was in keeping with a statute. The president had no sole authority, and the treaty negotiations were premised not only upon his or her own diplomatic powers, but on the specific investiture made by Congress. This means that the president negotiated not entirely out of his or her own volition, but with the express mandate of Congress, and more important, within the parameters that Congress has set.
>
> While this distinction is immaterial in international law, jurisprudence has treated this as a class of executive agreements. To recall, an executive agreement implements an existing policy, and is entered 'to adjust the details of a treaty . . . pursuant to or upon confirmation by an act of the Legislature; executive agreements [hinge] on prior constitutional or legislative authorizations.' Executive agreements 'inconsistent with either a law or a treaty are considered ineffective.'[57]

'*Third*, the President cannot unilaterally withdraw from international agreements where the Senate concurred and expressly declared that any withdrawal must also be made with its concurrence.'[58] The power of the Senate to concur with treaties under the Constitution necessarily includes the power to impose conditions in the exercise thereof, lest the grant of power be rendered illusory and nugatory. The condition of the Senate requiring that withdrawal from a treaty must be with its concurrence may be stated in the very same resolution where it gave its concurrence, a subsequent resolution eventually indicating such condition, or even in a law or joint resolution with the House of Representatives.[59] Notably, as petitioners raise, the Senate had passed several resolutions[60] expressing its concurrence to treaties, with an express provision that the president may withdraw from the relevant treaty or international agreement also with the concurrence from the Senate.

III.

Petitioners are before us through the modes of declaratory relief and mandamus, praying that this Court (1) render a decision declaring that the withdrawal from or termination of a treaty or international agreement that had been previously concurred in by the Senate require the concurrence of two-thirds (2/3) of all the members of the Senate; and (2) consequently issue an order directing the respondents to refer the Notice of Withdrawal to the Senate for its concurrence pursuant to Section 21, Article VII.

A petition for declaratory relief is an action instituted by a person interested in a deed, will, contract or other written instrument, executive order or resolution, to determine any question of construction or validity arising from the instrument, executive order or regulation, or statute and for

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57 *Id.* (Citations omitted)
58 *Id.*
59 *Id.*
60 17th Congress Senate Resolution Nos. 33, 42, 79, 80, 81, 86, 87, 88, 89, 90, 93, 94, 95, 96, 97, 98, 99, and 100.

a declaration of his rights and duties thereunder.[61] It has been held that its purpose is to:

> x x x secure an authoritative statement of the rights and obligations of the parties under a statute, deed, or contract for their guidance in the enforcement thereof, or compliance therewith, and not to settle issues arising from an alleged breach thereof, it may be entertained only before the breach or violation of the statute, deed or contract to which it refers. x x x[62]

The requisites of a petition for declaratory relief was enumerated in *Republic v. Roque*,[63] as follows:

> Case law states that the following are the requisites for an action for declaratory relief: ***first***, the subject matter of the controversy must be a deed, will, contract or other written instrument, statute, executive order or regulation, or ordinance; ***second***, the terms of said documents and the validity thereof are doubtful and require judicial construction; ***third***, there must have been no breach of the documents in question; ***fourth***, there must be an actual justiciable controversy or the 'ripening seeds' of one between persons whose interests are adverse; ***fifth***, the issue must be ripe for judicial determination; and ***sixth***, adequate relief is not available through other means or other forms of action or proceeding.[64]

Pertinently, the requisite of judicial controversy is no longer present in the instant case. As will be discussed hereunder, there is no more actual case or controversy for which this Court may exercise its power of judicial review on account of the subsequent act of President Duterte.

Even if this Court were to treat the present petition as one for *certiorari* and prohibition[65] assailing the act of the executive, the same would still fail.

Ultimately, petitioners are seeking this Court's exercise of judicial review under Section 1,[66] Article VIII of the 1987 Constitution. This

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61 *Commissioner of Internal Revenue v. Standard Insurance Co., Inc.*, G.R. No. 219340 (Resolution), April 28, 2021.

62 *Malana v. Tappa*, 616 Phil. 177, 188-189 (2009).

63 718 Phil. 294 (2013).

64 *Id.* at 304.

65 In *Tañada v. Angara* (338 Phil. 546, 575 [1997]), the Court recognized that *certiorari* and prohibition are 'appropriate remedies to raise constitutional issues and to review and/or prohibit/nullify when proper, acts of legislative and executive officials.' See also *Magallona v. Ermita*, 671 Phil. 243, 256-257 (2011); *Imbong v. Ochoa*, 732 Phil. 1, 121 (2014).

66 ARTICLE VIII
Judicial Department
SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a

necessitates the presence of the following requisites: (1) an actual case or controversy; (2) the person challenging the act must have legal standing; (3) the question of constitutionality must be raised at the earliest opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.[67] Of all these requisites, the most important is the existence of an actual case or controversy.[68]

An actual case or controversy exists when there is a conflict of legal rights or opposite legal claims capable of judicial resolution and a specific relief.[69] A case is justiciable if the issues presented are 'definite and concrete, touching on the legal relations of parties having adverse legal interests.'[70]

It has been held that 'the Court is not empowered to decide moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the result as to the thing in issue in the case before it. In other words, when a case is moot, it becomes non-justiciable.'[71] A case becomes moot when it ceases to present a justiciable controversy because of supervening events so that a declaration thereon would be of no practical use or value.[72]

As now presented by the OSG, the Notice of Termination of the VFA was already recalled by the DFA upon instructions of President Duterte on July 30, 2021. Secretary of the Department of National Defense Delfin Lorenzana (*Secretary Lorenzana*) explained that the decision came after President Duterte himself met with U.S. Defense Secretary Austin on July 29, 2021.[73] As mentioned by Secretary Lorenzana, the terms of the VFA will now continue to operate as originally agreed upon.[74] This was further confirmed by the OSG in its Manifestation and Motion stating that the VFA is in full force again and asseverating that the supervening recall of the abrogation of the VFA has already mooted the main issue in this case.[75]

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grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

67 *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 892 (2003).

68 *Kilusang Mayo Uno v. Aquino III*, G.R. No. 210500, April 2, 2019, 899 SCRA 492, 591.

69 *Express Telecommunications Co., Inc., (EXTELCOM) v. AZ Communications, Inc.*, G.R. No. 196902, July 13, 2020).

70 *The Provincial Bus Operators Association of the Philippines (PBOAP) v. Department of Labor and Employment (DOLE)*, G.R. No. 202275, July 17, 2018, 872 SCRA 50, 98, citing *Information Technology Foundation of the Philippines v. COMELEC*, 499 Phil. 281, 304 (2005).

71 *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines)*, 791 Phil. 243, 259 (2016).

72 *Alliance of Non-Life Insurance Workers of the Philippines v. Hon. Mendoza*, G.R. No. 206159, August 26, 2020.

73 Duterte Cancels Order to Terminate VFA with US, available at <*https://www.cnnphilippines.com/news/2021/7/30/Visiting-Forces-Agreement-Philippines-United-States-Duterte-Austin.html*>(last accessed on December 1, 2021).

74 *Id.*

75 *Rollo*, p. 174.

Indeed, recalling the Notice of Termination of the VFA is a supervening event that has rendered the present petition moot and academic. To emphasize, the petition was filed essentially to question the constitutionality of the President's act of withdrawing from the VFA without the concurrence of the Senate. In their arguments, petitioners stressed the importance of the VFA in the country's national defense and ultimately prayed for this Court to issue a writ of *mandamus* directing respondents to refer the Notice of Withdrawal of the VFA to the Senate for its concurrence. However, with the President's revocation of the VFA's termination, petitioners' prayer can no longer be granted. There is no more document that needs to be referred to the Senate. Simply told, there is no more unsettled issue or question necessitating this Court's exercise of judicial power. To decide on the matter of the President's unilateral withdrawal, when the same has already been rendered ineffective by his recall of the Notice of Termination, would be a meaningless exercise devoid of any practical value.

To emphasize, this Court may only act on actual cases or controversies. The controversy must be real and substantial, and must require a specific relief that courts can grant.[76] The requirement of a *bona fide* controversy precludes advisory opinions from this Court.[77]

It is doctrinal that the President is the chief architect of our foreign affairs. By constitutional fiat and the intrinsic nature of his office, the President, as head of state, is the sole organ and authority in the external affairs in the country.[78] In the realm of treaty-making, more particularly, the president has the sole power to negotiate with other states. This power of the president is limited only by the Constitution requiring the concurrence of the Senate, by a two-thirds (2/3) vote of its members to make any treaty or international agreement entered into by the president valid. [79] Corollary to this is the concomitant limitation on the power of the president to withdraw from treaties or international agreements validly concurred in by the Senate, which this Court already recognized in *Pangilinan*. Nevertheless, the validity of the president's withdrawal from the VFA will have to be resolved in an opportune time, when the case presents itself again, taking into account the factual backdrop of and the relevant circumstances surrounding such action. For now, this Court is prevented from rendering judgment, it appearing that the issue raised had already been resolved by external developments.

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76 *Calida v. Trillanes IV*, G.R. No. 240873, September 3, 2019, 917 SCRA 490, 500, citing *Land Bank of the Philippines v. Fastech Synergy Philippines, Inc.*, 816 Phil. 422, 445 (2017).

77 *Alliance of Non-Life Insurance Workers of the Philippines v. Hon. Mendoza*, *supra* note 72.

78 *Bayan (Bagong Alyansang Makabayan) v. Exec. Sec. Zamora*, *supra* note 40, at 663.

79 *Sen. Pimentel, Jr. v. Office of the Executive Secretary*, 501 Phil. 303, 313-314 (2005).

As a final point, the President is not only the Chief Executive but also the Commander-in-Chief of the Armed Forces of the Philippines (*AFP*).[80] As Commander-in-Chief, the President leads the AFP in protecting the people and the State, as well as in securing our sovereignty and the integrity of our national territory.[81] Having absolute authority over the persons and actions of the members of the armed forces,[82] the President 'has the power to direct military operations and to determine military strategy,'[83] including the authority to direct the movements of the naval and military forces, and 'to employ them in a manner [he or she] may deem most effectual.'[84] It has been recognized that the Commander-in-Chief, along with the other constitutionally-granted executive powers, allow the President to 'address exigencies or threats which undermine the very existence of the government or the integrity of the State.'[85] Nevertheless, the Commander-in-Chief powers may also be exercised in keeping with the President's duty to maintain peace and order and ensure domestic tranquility even when no foreign threat is apparent. Thus, even in times of peace, the powers of the President as the Commander-in-Chief subsist, and he or she is given wide discretion to fulfill this duty, subject only to the limitations provided by law.[86]

As further clarified by Senior Associate Justice Leonen:

> Relevant to the case before us, this Court stated in Pangilinan that the president does not have the power to unilaterally abrogate a treaty whose negotiations were premised on an express mandate of Congress, within parameters set by Congress, and which treaty was entered into upon Congress's express will.

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80 The 1987 Constitution, Art. VII, Sec. 18 states:

ARTICLE VII
Executive Department

SECTION 18. **The President shall be the Commander-in-Chief of all armed forces of the Philippines** and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it. x x x. (Emphasis supplied.)

81 See 1987 Constitution, Art. II, Sec. 3 which provides:

ARTICLE II
Declaration of State Principles and State Policies Principles

SECTION 3. Civilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory.

82 *Padilla v. Congress of the Philippines*, 814 Phil. 344, 381 (2017), citing *B/Gen. Gudani v. Lt./Gen. Senga*, 530 Phil. 398, 421-422 (2006).

83 *Kulayan v. Tan*, 690 Phil. 72, 90 (2012), citing Fr. Joaquin Bernas, S.J., The 1987 Philippine Constitution: A Comprehensive Reviewer, (2006), p. 314.

84 *Id.* citing *Flaming v. Page*, 9 How 603, 615 U.S. (1850).

85 *SANLAKAS v. Reyes*, 466 Phil. 482, 518 (2004).

86 See *Marcos v. Manglapus*, 258 Phil. 479, 503-504 (1989).

This rule seems squarely applicable to the circumstances surrounding the Visiting Forces Agreement. However, further qualification must be made given the powers exercised by the president in relation to a particular international agreement.

We must distinguish between withdrawal from agreements that involve the power of the president as the head of the state, such as the Rome Statute, and withdrawal from agreements that involve the president's power as the head of state and commander-in-chief, such as the Visiting Forces Agreement, which involve the president's power as the head of state and as the commander-in-chief of the Armed Forces.

The Rome Statute created the International Criminal Court and gave it jurisdiction to "'investigate, prosecute, and try' individuals accused of international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.' Signing the Rome Statute signified the Philippine commitment to the prosecution of individuals accused of the worst international crimes and recognition of the International Criminal Court's jurisdiction, complementary to national criminal jurisdiction, over such crimes.

On the other hand, the Visiting Forces Agreement lays down the policies to be followed in connection with the presence of United States Armed Forces in the Philippines. The presence of foreign armed forces in the Philippines affects national security in direct, tangible, and immediate ways. Withdrawing from an agreement allowing foreign armed forces on Philippine soil involves not only the president's power as a head of state, but also their power as commander-in-chief of the armed forces.

As the commander-in-chief, the president must have the power to respond quickly to urgent necessity. Thus, commander-in-chief powers are generally not subject to the same restrictions as other presidential powers. This is illustrated by the president's calling out power, extraordinary power to suspend the privilege of the writ of habeas corpus, or the power to place the Philippines under martial law, without first consulting Congress. While such actions may be subsequently revoked by Congress and reviewed by this Court, the discretion at the onset belongs entirely to the president in recognition of the urgent nature of the situations such powers are meant to address.

National security, in relation to the presence of foreign armed forces, may be a similarly urgent concern that would require quick response. Concurrence of two-thirds of all Senate members would be [an] unwieldy requirement to insist from the president before allowing a withdrawal. It may unduly delay time sensitive action with massive and irreversible consequence.

Withdrawing from an agreement concerning recognition of jurisdiction has different implications and consequences from a withdrawal from an agreement concerning armed forces. Delay in withdrawing from each may also have drastically different consequences. Thus, to my mind, the parameters for withdrawing from Visiting Forces Agreement necessarily differ from withdrawal from treaties, such as the Rome Statute.[87]

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87 See Separate Concurring Opinion of Senior Associate Justice Marvic M.V.F. Leonen.

Indeed, it is not amiss to say that it is pursuant to the President's duty as the Commander-in-Chief of the country's armed forces that the Philippines negotiated for and entered into the VFA. The VFA, to note, is a reaffirmation[88] of and implements[89] the U.S.' and the Philippines' Mutual Defense Treaty of 1951 (*MDT*), which requires the parties to (1) aid each other in maintaining and developing the countries' individual and collective capacity to resist an armed attack;[90] and (2) come to the mutual aid and defense of each other in the event of an armed attack against the territory of either party.[91] One of the core features of the VFA is the conduct of the *Balikatan* exercises, or joint military exercises between the U.S. military and their Filipino counterparts, that aim to simulate joint military maneuvers pursuant to the MDT.[92]

Unlike treaties that deal with commerce, trade, and other economic relations which, the Philippines, through the President, may from time to time enter into, the terms of the VFA, which deals with military relations, have so far remained more or less fixed. Its existence and continued implementation depend only on the parties' recognition of the protection it affords and their intention to be bound by the provisions thereof.[93] As further pronounced by this Court in *Bayan (Bagong Alyansang Makabayan) v. Exec. Sec. Zamora*,[94] Section 25, Article XVIII of the Constitution, which specifically deals with treaties involving foreign military bases, troops, or facilities, should apply to the VFA. It is only to a certain extent and in a limited sense that the provisions of Section 21, Article VII will find applicability with regard to the issue and for the sole purpose of determining the number of votes required to obtain the valid concurrence of the Senate.[95] Section 25, Article XVIII is explicit in stating the rule that foreign military bases, troops, or facilities shall not be allowed in the Philippines. The

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88 The Preamble of the VFA states:
The Government of the United States of America and the Government of the Republic of the Philippines,
Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to strengthen international and regional security in the Pacific area;
Reaffirming their obligations under the Mutual Defense Treaty of August 30, 1951;
Noting that from time to time elements of the United States armed forces may visit the Republic of the Philippines;
Considering that cooperation between the United States and the Republic of the Philippines promotes their common security interests;
Recognizing the desirability of defining the treatment of United States personnel visiting the Republic of the Philippines; x x x. (Emphasis supplied)

89 *Nicolas v. Romulo*, 598 Phil. 262, 284 (2009).

90 Mutual Defense Treaty of 1951, Art. II.

91 Mutual Defense Treaty of 1951, Arts. IV and V.

92 *Saguisag v. Ochoa*, 777 Phil. 280, 342 (2016), citing *Lim v. Executive Secretary*, *supra* note 38, at 562.

93 Under Section IX of the VFA, the agreement shall remain in force indefinitely until a party wishes to terminate the same by giving written notice to the other party, thus:

Article IX
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.

94 *Supra* note 40.

95 *Id.* at 652.

exception is when a treaty is entered into under the requirements set forth by the Constitution. The VFA is one such exception. Notably, as it appears, President Duterte's decision to recall the termination of the VFA 'is based on upholding the [Philippines'] strategic core interests, the clear definition of PH-US alliance as one between sovereign equals, and clarity of US position on its obligations and commitments under MDT.'[96] It is precisely in view of the exceptional status of the VFA as a military agreement crucial to the country's national defense that any misgivings about it being at risk of termination by the President anew and randomly, cannot be entertained. In other words, the resolution of the issue raised before this Court must be resolved at an opportune time when the actual controversy presents itself.

WHEREFORE, premises considered, the Motion of the Office of the Solicitor General is **GRANTED**. The instant petition is **DISMISSED** for being moot and academic." (21)

By authority of the Court:

MARIFE M. LOMIBAO-CUEVAS
Clerk of Court

(With Separate Concurring Opinion of Senior Associate Justice Marvic M.V.F. Leonen and Dissenting Opinion of Associate Justice Alfredo Benjamin S. Caguioa)

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[96] As stated in a statement released by Malacañang Palace Spokesperson, Harry Roque, Jr., on July 30, 2021. (Duterte recalls order to terminate VFA, available at https://www.manilatimes.net/2021/07/30/news/duterte-recalls-order-to-terminate-vfa/1809060 [last accessed on July 9, 2022]).

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EN BANC

G.R. No. 251977 – IN THE MATTER OF INTERPRETATION OF SECTION 21, ARTICLE VII, AND SECTION 25, ARTICLE XVIII, OF THE 1987 CONSTITUTION; SENATE OF THE PHILIPPINES, REPRESENTED BY HON. VICENTE C. SOTTO III, IN HIS CAPACITY AS SENATE PRESIDENT, HON. RALPH G. RECTO, IN HIS CAPACITY AS SENATE PRESIDENT PRO TEMPORE, HON. JUAN MIGUEL "MIGZ" ZUBIRI, IN HIS CAPACITY AS MAJORITY LEADER, HON. FRANKLIN M. DRILON, IN HIS CAPACITY AS MINORITY LEADER, AND HON. RICHARD J. GORDON AND HON. PANFILO "PING" M. LACSON, IN THEIR INVIDUAL CAPACITIES AS MEMBERS OF THE SENATE OF THE PHILIPPINES V. OFFICE OF THE EXECUTIVE SECRETARY, REPRESENTED BY HON. SALVADOR C. MEDIALDEA, IN HIS CAPACITY AS EXECUTIVE SECRETARY; AND DEPARTMENT OF FOREIGN AFFAIRS, REPRESENTED BY HON. TEODORO L. LOCSIN, JR., IN HIS CAPACITY AS SECRETARY OF FOREIGN AFFAIRS.

Promulgated:

July 19, 2022

x----------x

SEPARATE CONCURRING OPINION

LEONEN, *J.*:

We must qualify the statement in *Saguisag v. Ochoa, Jr.*,[1] where the Court said the president cannot unilaterally withdraw from treaties entered into upon Congress's express will. Where a withdrawal involves the president's power as commander-in-chief, affecting national security in direct, tangible, immediate ways, concurrence of two-thirds of the Senate should not be required as a prerequisite to such withdrawal.

In *Pangilinan v. Cayetano*,[2] this Court explained that the president's discretion in withdrawing from treaties is not absolute. It then delineated when the president may or may not unilaterally withdraw from treaties:

> As primary architect of foreign policy, the president enjoys a degree of leeway to withdraw from treaties. However, this leeway cannot

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1 777 Phil. 280 (2016) [Per C.J. Sereno, En Banc].

2 G.R. Nos. 238875, March 16, 2021, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67374> [Per J. Leonen, En Banc].

> go beyond the president's authority under the Constitution and the laws. In appropriate cases, legislative involvement is imperative. The president cannot unilaterally withdraw from a treaty if there is subsequent legislation which affirms and implements it.
>
> Conversely, a treaty cannot amend a statute. When the president enters into a treaty that is inconsistent with a prior statute, the president may unilaterally withdraw from it, unless the prior statute is amended to be consistent with the treaty. A statute enjoys primacy over a treaty. It is passed by both the House of Representatives and the Senate, and is ultimately signed into law by the president. In contrast, a treaty is negotiated by the president, and legislative participation is limited to Senate concurrence. Thus, there is greater participation by the sovereign's democratically elected representatives in the enactment of statutes.
>
> The extent of legislative involvement in withdrawing from treaties is further determined by circumstances attendant to how the treaty was entered into or came into effect. Where legislative imprimatur impelled the president's action to enter into a treaty, a withdrawal cannot be effected without concomitant legislative sanction. Similarly, where the Senate's concurrence imposes as a condition the same concurrence for withdrawal, the president enjoys no unilateral authority to withdraw, and must then secure Senate concurrence.
>
> Thus, the president can withdraw from a treaty as a matter of policy in keeping with our legal system, if a treaty is unconstitutional or contrary to provisions of an existing prior statute. However, the president may not unilaterally withdraw from a treaty: (a) when the Senate conditionally concurs, such that it requires concurrence also to withdraw; or (b) when the withdrawal itself will be contrary to a statute, or to a legislative authority to negotiate and enter into a treaty, or an existing law which implements a treaty.[3]

Relevant to the case before us, this Court stated in *Pangilinan* that the president does not have the power to unilaterally abrogate a treaty whose negotiations were premised on an express mandate of Congress, within parameters set by Congress, and which treaty was entered into upon Congress's express will.

This rule seems squarely applicable to the circumstances surrounding the Visiting Forces Agreement. However, further qualification must be made given the powers exercised by the president in relation to a particular international agreement.

We must distinguish between withdrawal from agreements that involve the power of the president as the head of state, such as the Rome Statute, and withdrawal from agreements that involve the president's power as the head of state and commander-in-chief, such as the Visiting Forces Agreement.

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[3] Id.

The Rome Statute created the International Criminal Court and gave it jurisdiction to "'investigate, prosecute, and try' individuals accused of international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression."[4] Signing the Rome Statute signified the Philippine commitment to the prosecution of individuals accused of the worst international crimes and recognition of the International Criminal Court's jurisdiction, complementary to national criminal jurisdiction, over such crimes.

On the other hand, the Visiting Forces Agreement lays down the policies to be followed in connection with the presence of United States Armed Forces in the Philippines. The presence of foreign armed forces in the Philippines affects national security in direct, tangible, and immediate ways. Withdrawing from an agreement allowing foreign armed forces on Philippine soil involves not only the president's power as a head of state, but also their power as commander-in-chief of the armed forces.

As the commander-in-chief, the president must have the power to respond quickly to urgent necessity. Thus, the commander-in-chief powers are generally not subject to the same restrictions as other presidential powers.[5] This is illustrated by the president's calling out power, extraordinary power to suspend the privilege of the writ of habeas corpus, or the power to place the Philippines under martial law without first consulting Congress.[6] While such actions may be subsequently revoked by Congress and reviewed by this Court, the discretion at the onset belongs entirely to the president in recognition of the urgent nature of the situations such powers are meant to address.

National security, in relation to the presence of foreign armed forces, may be a similarly urgent concern that would require quick response. Concurrence of two-thirds of all Senate members would be an unwieldy requirement to insist from the president before allowing a withdrawal. It may unduly delay time sensitive action with massive and irreversible consequence.

Withdrawing from an agreement concerning recognition of jurisdiction has different implications and consequences from a withdrawal from an agreement concerning armed forces. Delay in withdrawing from each may also have drastically different consequences. Thus, to my mind, the parameters for withdrawing from Visiting Forces Agreement necessarily differ from withdrawal from treaties, such as the Rome Statute.

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4 *Pangilinan v. Cayetano*, G.R. Nos. 238875, March 16, 2021, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67374> [Per J. Leonen, En Banc].

5 *Gudani v. Senga*, 530 Phil. 398 (2006) [Per J. Tinga, En Banc].

6 CONST., art. VII, sec. 18.

I also concur with the *ponencia* that the case is properly considered moot, removing it from the ambit of judicial review.

I agree with Associate Justice Alfredo Benjamin S. Caguioa that the president may again attempt to unilaterally withdraw from a treaty that Congress has ratified, and that such attempt may evade judicial review. Nevertheless, I maintain that this Court should refrain from ruling on whether President Rodrigo Duterte's actions were unconstitutional on the ground of the issue being moot.

This Court has the constitutional power to review actions of coequal branches of government.[7] However, this power is exercised only when absolutely necessary.[8]

In *Saguisag*,[9] this Court has explained the scope of judicial review at length, the guidelines carefully observed in wielding it, and the reasons dictating this Court's restraint:

> The power of judicial review has since been strengthened in the 1987 Constitution. The scope of that power has been extended to the determination of whether in matters traditionally considered to be within the sphere of appreciation of another branch of government, an exercise of discretion has been attended with grave abuse. The expansion of this power has made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review."
>
> This moderating power, however, must be exercised carefully and only if it cannot be completely avoided. We stress that our Constitution is so incisively designed that it identifies the spheres of expertise within which the different branches of government shall function and the questions of policy that they shall resolve. Since the power of judicial review involves the delicate exercise of examining the validity or constitutionality of an act of a coequal branch of government, this Court must continually exercise restraint to avoid the risk of supplanting the wisdom of the constitutionally appointed actor with that of its own.
>
> Even as we are left with no recourse but to bare our power to check an act of a coequal branch of government — in this case the executive — we must abide by the stringent requirements for the exercise of that power under the Constitution. *Demetria v. Alba* and *Francisco v. House of Representatives* cite the "pillars" of the limitations on the power of judicial review as enunciated in the concurring opinion of U.S. Supreme Court Justice Brandeis in *Ashwander v. Tennessee Valley Authority*. *Francisco* redressed these "pillars" under the following categories:
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> 1. That there be *absolute necessity of deciding a case*

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7 CONST., art. VIII, sec. 1.
8 *Saguisag v. Ochoa, Jr.*, 777 Phil. 280 (2016) [Per C.J. Sereno, En Banc].
9 Id.

> 2. That rules of constitutional law shall be *formulated only as required by the facts* of the case
> 3. That judgment *may not be sustained on some other ground*
> 4. That there be *actual injury sustained by the party* by reason of the operation of the statute
> 5. That the *parties are not in estoppel*
> 6. That the Court upholds the *presumption of constitutionality*[.]
>
> These are the specific safeguards laid down by the Court when it exercises its power of judicial review. Guided by these pillars, it may invoke the power only when the following four stringent requirements are satisfied: (a) there is an actual case or controversy; (b) petitioners possess *locus standi*;(c) the question of constitutionality is raised at the earliest opportunity; and (d) the issue of constitutionality is the *lis mota* of the case.[10] (Citations omitted)

When asked to declare executive or legislative acts unconstitutional, this Court has exercised deliberate caution.[11] It will not invalidate a political act unless it "can craft [a] doctrine narrowly tailored to the circumstances of the case"[12] in recognition of the complementary nature of the branches of government and to preserve the balance necessary to uphold the rights of the public.

The circumstances of this unilateral withdrawal are unique, beginning with Senator Ronald Dela Rosa's announcement that his United States visa had been cancelled and followed by the president's statement threatening to terminate the Visiting Forces Agreement. This ultimately concluded with the issuance of a diplomatic note recalling the withdrawal. A proper disposition of this case would demand a full consideration of these circumstances to craft the appropriate doctrine narrowly tailored to these circumstances.

Considering that President Duterte recalled the withdrawal and can no longer assert the right, this Court correctly declined delving into these circumstances and ruling on the same. Future withdrawals may be similar in a few respects but drastically different in other ways that we cannot foresee.

Indeed, while a unilateral withdrawal may again be attempted, there may be no reasonable expectation that similar circumstances would be repeated. This Court may create rules for hypothetical, future withdrawals,

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10 Id. at 347–349.

11 See *Gios-Samar, Inc. v. Department of Transportation and Communications*, G.R. No. 217158, March 12, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64970> [Per J. Jardeleza, En Banc]; *Falcis III v. Civil Registrar General*, G.R. No. 217910, September 3, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65744> [Per J. Leonen, En Banc].

12 *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 337 (2015) [Per J. Leonen, En Banc].

but this would be without an appreciation of how such withdrawals may actually transpire.

On this, I restate my separate opinion in *Gios-Samar v. Department of Transportation and Communications*:[13]

> This Court should refrain from speculating on the facts of a case and should allow parties to shape their case instead. Likewise, this Court should avoid projecting hypothetical situations where none of the parties can fully argue simply because they have not established the facts or are not interested in the issues raised by the hypothetical situations. In a way, courts are mandated to adopt an attitude of judicial skepticism. What we think may be happening may not at all be the case. Therefore, this Court should always await the proper case to be properly pleaded and proved.
>
> Plainly put, majority opinions that rule on constitutional issues as *obiter dictum* is dangerous not only because it is injudicious, but also because it undermines the constitutional framework of governance.[14] (Citation omitted)

Accordingly, I vote to **DISMISS** the petition for being **MOOT**.

MARVIC M.V.F. LEONEN
Senior Associate Justice

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[13] J. Leonen, Concurring Opinion in *Gios-Samar v. Department of Transportation and Communications* G.R. No. 217158, March 12, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64970> [Per J. Jardeleza, En Banc].

[14] Id.

EN BANC

G.R. No. 251977 (IN THE MATTER OF INTERPRETATION OF SECTION 21, ARTICLE VII, AND SECTION 25, ARTICLE XVIII, OF THE 1987 CONSTITUTION; SENATE OF THE PHILIPPINES, REPRESENTED BY HON. VICENTE C. SOTTO III, IN HIS CAPACITY AS SENATE PRESIDENT, HON. RALPH G. RECTO, IN HIS CAPACITY AS SENATE PRESIDENT PRO TEMPORE, HON. JUAN MIGUEL "MIGZ" F. ZUBIRI, IN HIS CAPACITY AS MAJORITY LEADER; HON. FRANKLIN M. DRILON, IN HIS CAPACITY AS MINORITY LEADER, AND HON. RICHARD J. GORDON AND HON. PANFILO "PING" M. LACSON, IN THEIR INDIVIDUAL CAPACITIES AS MEMBERS OF THE SENATE OF THE PHILIPPINES, *petitioners*, ***versus*** **OFFICE OF THE EXECUTIVE SECRETARY, REPRESENTED BY HON. SALVADOR C. MEDIALDEA, IN HIS CAPACITY AS EXECUTIVE SECRETARY; AND DEPARTMENT OF FOREIGN AFFAIRS, REPRESENTED BY HON. TEODORO L. LOCSIN, JR., IN HIS CAPACITY AS SECRETARY OF FOREIGN AFFAIRS,** *respondents*.)

Promulgated:

July 19, 2022

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DISSENTING OPINION

CAGUIOA, *J.*:

On February 11, 2020, upon the instructions of President Rodrigo R. Duterte, the Department of Foreign Affairs (DFA) sent a Notice of Termination of the Visiting Forces Agreement (VFA) to the Embassy of the United States of America (U.S.).[1] Pivotal to this decision to terminate the VFA was the cancellation of Senator Ronald "Bato" Dela Rosa's U.S. visa.[2]

Thereafter, petitioners herein filed the instant Petition for Declaratory Relief and Mandamus (Petition) primarily to question the validity of the President's unilateral withdrawal from the VFA without the participation and concurrence of the Senate.[3]

The *ponencia* dismisses the Petition based on a procedural ground. According to the *ponencia*, the case should be dismissed because the

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1 *Ponencia*, p. 3.
2 Id. at 1-2.
3 Id. at 1.

supervening recall of the Notice of Termination of the VFA on July 30, 2021 rendered the instant case moot and academic.[4]

I strongly dissent.

While the succeeding recall of the Notice of Termination of the VFA is not denied, the Court was called upon to still rule on the validity of the Executive's withdrawal therefrom without Senate participation and concurrence, because the question presents a ***grave constitutional violation*** and is ***capable of repetition yet evading review***.

Mootness, as a ground of dismissal, is a natural consequence of the rule that "the Court may only adjudicate actual, ongoing controversies"[5] because "[j]udicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable."[6]

Jurisprudence dictates, however, that "[c]ourts assume jurisdiction over cases otherwise rendered moot and academic when any of the following instances [is] present: (1) [g]rave constitutional violations; (2) [e]xceptional character of the case; (3) [p]aramount public interest; (4) [t]he case presents an opportunity to guide the bench, the bar, and the public; or (5) [t]he case is capable of repetition yet evading review."[7]

Without doubt, should the Court find that Senate concurrence is required in withdrawing from the VFA, after weighing in the guidelines set out in *Pangilinan v. Cayetano*[8] (*Pangilinan*), then the President's act of unilaterally withdrawing from the VFA constitutes a grave constitutional violation that justifies the assumption of jurisdiction despite the mootness of the Petition. As well, the exceptional character of the VFA and the paramount public interest involved in the defense of the nation constitute further basis for the Court to directly resolve the Petition. In addition, as already stated, the Petition herein poses a question that is "capable of repetition yet evading review."

In *Madrilejos v. Gatdula*[9] (*Madrilejos*), it was clarified that for the "capable of repetition yet evading review" exception to apply, two circumstances must concur, *i.e.*, "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration[;] and (2) there is a reasonable expectation that the same complaining party would be

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4 Id. at 16.
5 *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines)*, 791 Phil. 243, 258 (2016).
6 1987 CONSTITUTION, Art. VIII, Sec. 1.
7 *Republic v. Moldex Realty, Inc.*, 780 Phil. 553, 561 (2016). Citations omitted.
8 G.R. Nos. 238875, 239483, and 240954, March 16, 2021.
9 G.R. No. 184389, September 24, 2019.

subjected to the same action again."[10] Both circumstances concur in the present controversy.

The second circumstance undoubtedly exists. Although the unilateral withdrawal of the President from a treaty is not as "frequent" and "routinary" as legislation of annual national budget, conduct of national and local elections, application of rally permits, and appointment of department secretaries by the President, the same is nonetheless still undeniably susceptible to repetition. Therefore, it can be reasonably expected that the question as to the rights of the Senate *vis-a-vis* that of the President in a subsequent withdrawal from a treaty would again confront both branches of government.

To be sure, recent history has shown that the controversy is indeed capable of repetition. To date, the Executive has already unilaterally withdrawn from two treaties, *i.e.*, the Rome Statute[11] and the VFA. In both instances, some members of the Senate have complained of their lack of participation in the withdrawal. In the aforementioned *Pangilinan* case which dealt with the withdrawal from the Rome Statute, the Court likewise refused to rule on the merits of the case, also on the procedural ground of mootness. Unfortunately, with the majority again voting to dismiss the instant Petition which involves the same substantive issue as in *Pangilinan*, the Court is left without a binding ruling on the matter. Therefore, any sitting President can again withdraw from and terminate treaties without the participation and concurrence of the Senate. Unquestionably, the Senate will once again be forced to assert that it has a role not just in accessions to these treaties, but also in withdrawals therefrom.

The *ponencia* submits that the present controversy regarding the validity of a President's unilateral withdrawal from a treaty without Senate participation and concurrence is no longer novel.[12] Indeed, in *Pangilinan* the Court adopted a set of guidelines for evaluating the constitutionality of such withdrawal.[13] However, considering the ultimate dismissal of the *Pangilinan* case on the ground of mootness, I submit that these guidelines cannot be considered as a binding and definitive ruling of the Court which has the force of adjudication. In other words, they can easily be characterized as mere *obiter dicta*. Stated simply, these guidelines were not necessary in order for the Court to arrive at its decision to dismiss the petition in *Pangilinan*[14] on the ground of mootness.

With regard to the first element required for the "capable of repetition yet evading review" exception to apply, the same also clearly exists, especially with the Court's pronouncement in *Pangilinan*. This circumstance

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10 Id. at 11. Emphasis omitted; citation omitted.
11 *Pangilinan v. Cayetano*, supra note 8.
12 *Ponencia*, p. 11.
13 *Pangilinan v. Cayetano*, supra note 8.
14 See *People v. Macadaeg*, 91 Phil. 410 (1952).

refers to a time element — the challenged action being too short in its duration to be fully litigated prior to its cessation.

In *Pangilinan*, the Court stated as follows:

> Moreover, **while its text provides a mechanism on how to withdraw from it, the Rome Statute does not have any proviso on the reversal of a state party's withdrawal.** We fail to see how this Court can revoke—as what petitioners are in effect asking us to do—the country's withdrawal from the Rome Statute, without writing new terms into the Rome Statute.
>
> Petitioners harp on the withdrawal's effectivity, which was one year from the United Nations Secretary-General's receipt of the notification. However, this one-year period only pertains to the *effectivity*, or when exactly the legal consequences of the withdrawal takes effect. It neither concerns approval nor finality of the withdrawal. x x x
>
> **Here, the withdrawal has been communicated and accepted, and there are no means to retract it. This Court cannot extend the reliefs that petitioners seek.** x x x[15] (Emphasis supplied; italics in the original)

In other words, what is binding in *Pangilinan* is the fact that once an irrevocable withdrawal from a treaty has already been communicated and accepted by the other party to the agreement, any question with respect to the validity of said withdrawal, *i.e.*, the absence of concomitant concurrence from the Senate, becomes moot and academic, and therefore non-justiciable.[16]

Article IX of the VFA on "Duration and Termination" provides that "[the] 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." Following the Court's ruling in *Pangilinan,* this 180-day period neither concerns approval nor the finality of the withdrawal. It only pertains to the effectivity of the termination. Similar to the Rome Statute, the VFA does not also contain any *proviso* on the reversal of either party's notice of termination.

Thus, following *Pangilinan*, the Court will never have a window to review any future unilateral withdrawal of the VFA, **because the very act of issuing the notice of termination and communicating the same to the U.S. already consummates the act of withdrawal**. The Court, in *Pangilinan*, ruled that once the act of withdrawing from a treaty becomes *fait accompli*, the Court will necessarily dismiss the case for being moot and academic.[17] I have already mounted this looming problem before the esteemed magistrates, yet the *ponencia*, joined by the majority, still maintains that "the validity of

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15 *Pangilinan v. Cayetano*, supra note 8, at 64-65.
16 Id. at 63-65.
17 Id. at 62-64.

the [P]resident's [unilateral] withdrawal from the VFA will have to be resolved in an opportune time, when the case presents itself again."[18]

At the risk of being repetitive, I emphasize anew that the unilateral withdrawal of the President from the VFA, when repeated in the future, will again evade the review of the judiciary, in violation of the system of checks and balances enshrined in our Constitution.

Senior Associate Justice Marvic M.V.F. Leonen (SAJ Leonen), the *ponente* of *Pangilinan*, acknowledged in his Separate Concurring Opinion that indeed future unilateral withdrawal from a treaty may evade judicial review, to wit:

> I agree with Associate Justice Alfredo Benjamin S. Caguioa that the [P]resident may again attempt to unilaterally withdraw from a treaty that Congress has ratified, and that such attempt may evade judicial review. x x x[19]

Confoundingly, however, SAJ Leonen still maintained that "[the] Court should refrain from ruling on whether President Rodrigo Duterte's actions were unconstitutional on the ground of the issue being moot."[20] SAJ Leonen went on further and stated that the power of the Judiciary to review actions of co-equal branches of government should only be wielded when absolutely necessary.[21]

What is absolutely necessary, however, is not just measured in terms of urgency. To be sure, the fact that any future unilateral withdrawal from the VFA will again evade judicial review makes the resolution of this instant case on its merits all the more absolutely necessary.

The *ponencia* emphasizes the special nature of the VFA, not only because it is the only existing exception to Section 25,[22] Article XVIII of the Constitution, which prohibits foreign military bases, troops, or facilities in the Philippines, but because it primarily involves our national security.[23] SAJ Leonen also states that "[a]s the commander-in-chief, the [P]resident must have the power to respond quickly to urgent necessity."[24]

Indeed, the VFA involves issues of national security where timely response is required. Hence, I submit that the Court should give the Executive

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18 *Ponencia*, p. 17.
19 Separate Concurring Opinion of SAJ Leonen, p. 4.
20 Id.
21 Id.
22 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.
23 *Ponencia*, pp. 19-20.
24 Separate Concurring Opinion of SAJ Leonen, p. 3.

certainty by ruling on the merits of this case. The present case provides an opportunity to eliminate doubt on whether the Executive may unilaterally withdraw from the VFA. If this matter is resolved now in this case, and in as definitive a manner as possible, then any sitting President will be able to aptly prepare and think on his or her toes, without any hesitation, if later on confronted with the same issue.

Too, even assuming that the termination of the VFA is not completed until the expiration of 180 days, this period still constitutes a time constraint that will surely expire before cases of this nature are fully litigated and heard. Specifically, this period is much shorter than the constitutionally-allotted time for the Court to decide a case, *i.e.*, 24 months (or two years) from the date of submission.[25] This period of 24 months does not even begin immediately, as it starts only "upon the filing of the last pleading, brief, or memorandum required by the Rules of Court or by the court itself."[26]

Moreover, jurisprudence on the "capable of repetition yet evading review" exception supports the view that the 180-day period constitutes a time constraint. For instance, in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*,[27] the very first case before the U.S. Supreme Court where the exception appeared, the subject matter therein was a cease-and-desist order that was valid for **two years** but which had already expired by the time the U.S. Supreme Court became ready to issue its decision.

In our jurisdiction, the "capable of repetition yet evading review" exception is being applied in election cases, even though elections in the country are held every **three years**. In other words, even if the issue at hand has truly become moot and academic because a new election has already been conducted and a new person has been elected to the position in question, the Court nevertheless rules on the issue if it is found to be "capable of repetition yet evading review." In fact, the first Philippine case where the said exception was applied was an election case, *Alunan III v. Mirasol*[28] (*Alunan*). In *Marquez v. Commission on Elections*,[29] citing *Alunan*, it was held:

> x x x The Court was then confronted with the issue of whether the COMELEC can validly vest in the DILG control and supervision of the SK Elections. While the second elections were already held on May 13, 1996, during the pendency of the petition, the Court ruled that the controversy raised is capable of repetition yet evading review because the same issue is "**likely to arise in connection with every SK election and yet, the question may not be decided before the date of such elections.**"[30] (Emphasis in the original)

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25 1987 CONSTITUTION, Art. VIII, Sec. 15(1).
26 Id., Art. VIII, Sec. 15(2).
27 219 U.S. 498 (1911).
28 342 Phil. 467 (1997).
29 G.R. No. 244274, September 3, 2019, 917 SCRA 502.
30 Id. at 517-518, citing *Alunan III v. Mirasol*, supra note 28, at 476.

Similar to *Alunan,* the Court again applied the exception in another election case, *Cardino v. Commission on Elections*,[31] and accordingly ruled on the merits even if the term of the contested office had already expired.

If two-year and three-year periods have been considered sufficient time constraints to trigger the "capable of repetition yet evading review" exception, then all the more that the said exception should be applied in cases where the relevant periods are much shorter, as in this case.

Clear from the foregoing, therefore, is that both circumstances exist and concur, thereby making the "capable of repetition yet evading review" exception applicable in the present controversy. Thus, even assuming that the Petition in relation to the withdrawal from the VFA has already become moot and academic, the Court may, **and should**, still rule on the validity of the President's unilateral withdrawal following primarily our Constitution, and persuasively, the guidelines set out in *Pangilinan.*

It is important to emphasize that the constitutional provisions provide for the limitations of governmental power, particularly those of the three branches of government. To recall, "the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government."[32] The issue in this case is not the wisdom of the decision of the chief architect of foreign policy, but rather, whether the requirements of the Constitution were complied with when the decision was exercised.

In straightforward and simple terms: was the President's act of unilaterally submitting the Notice of Termination of the VFA valid from the perspective of the Constitution?

The Court should not hesitate to rule on the question simply because the President is the chief architect of foreign policy. Indeed, while the principle of separation of powers entails that each department of the government has exclusive cognizance of matters within its jurisdiction and is supreme within its own sphere, the same does not mean that the Constitution intended the co-equal branches of government to be absolutely unrestrained and independent of each other.[33] On the contrary, the Constitution has provided for an elaborate system of checks and balances among the separate but equal branches of government.

Thus, even while the Constitution recognizes the President as the chief architect of foreign policy, it still implements checks and balances on the said

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31 806 Phil. 1053 (2017).
32 *Angara v. Electoral Commission*, 63 Phil. 139, 157 (1936).
33 Id. at 156.

power of the President, *e.g.*, Sections 20[34] and 21,[35] Article VII and Section 25,[36] Article XVIII of the Constitution. **It is high time that the Court finally make a definitive and binding ruling on the proper interpretation of the Constitution in relation to withdrawals from treaties.**

For these reasons, I vigorously **DISSENT** to the decision of the majority to dismiss the instant case. It is evident that the issue of whether the President can unilaterally withdraw from a treaty without Senate concurrence is a recurring question that warrants the Court's attention and as such, should not again be dismissed on the ground of mootness, as was done in the case of the withdrawal from the Rome Statute. Certainly, the issue is capable of repetition, having presented itself twice before the Court. Unfortunately, what appears clear from this second dismissal is that it is actually the Court who is evading its obligation to be the final arbiter on questions involving the action of a co-equal branch.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

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34 SECTION 20. The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

35 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.

36 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.