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[G.R. No. 168338. February 15, 2008.]

FRANCISCO CHAVEZ, *petitioner*, ***vs.*** **RAUL M. GONZALES, in his capacity as the Secretary of the Department of Justice; and NATIONAL TELECOMMUNICATIONS COMMISSION (NTC)**, *respondents*.

D E C I S I O N

PUNO, *C.J* :

A. Precis

In this jurisdiction, it is established that freedom of the press is crucial and so inextricably woven into the right to free speech and free expression, that any attempt to restrict it must be met with an examination so critical that only a danger that is clear and present would be allowed to curtail it.

Indeed, we have not wavered in the duty to uphold this cherished freedom. We have struck down laws and issuances meant to curtail this right, as in *Adiong v. COMELEC,* [1] *Burgos v. Chief of Staff,* [2] *Social Weather Stations v. COMELEC,* [3] and *Bayan v. Executive Secretary Ermita*. [4] When on its face, it is clear that a governmental act is nothing more than a naked means to prevent the free exercise of speech, it must be nullified.

B. The Facts

1. The case originates from events that occurred a year after the 2004 national and local elections. On June 5, 2005, Press Secretary Ignacio Bunye told reporters that the opposition was planning to destabilize the administration by releasing an audiotape of a mobile phone conversation allegedly between the President of the Philippines, Gloria Macapagal Arroyo, and a high-ranking official of the Commission on Elections (COMELEC). The conversation was audiotaped allegedly through wire-tapping. [5] Later, in a *Malacañang* press briefing, Secretary Bunye produced two versions of the tape, one supposedly the complete version, and the other, a spliced, "doctored" or altered version, which would suggest that the President had instructed the COMELEC official to manipulate the election results in the President's favor. [6] It seems that Secretary Bunye admitted that the voice was that of President Arroyo, but subsequently made a retraction. [7]

2. On June 7, 2005, former counsel of deposed President Joseph Estrada, Atty. Alan Paguia, subsequently released an alleged authentic tape recording of the wiretap. Included in the tapes were purported conversations of the President, the First Gentleman Jose Miguel Arroyo, COMELEC Commissioner Garcillano, and the late Senator Barbers. [8]

3. On June 8, 2005, respondent Department of Justice (DOJ) Secretary Raul Gonzales warned reporters that those who had copies of the compact disc (CD) and those broadcasting or publishing its contents could be held liable under the Anti-Wiretapping Act. These persons included Secretary Bunye and Atty. Paguia. He also

stated that persons possessing or airing said tapes were committing a continuing offense, subject to arrest by anybody who had personal knowledge if the crime was committed or was being committed in their presence. [9]

4. On June 9, 2005, in another press briefing, Secretary Gonzales ordered the National Bureau of Investigation (NBI) to go after media organizations *"found to have caused the spread, the playing and the printing of the contents of a tape"* of an alleged wiretapped conversation involving the President about fixing votes in the 2004 national elections. Gonzales said that he was going to start with **Inq7.net**, a joint venture between the **Philippine Daily Inquirer and GMA7** television network, because by the very nature of the Internet medium, it was able to disseminate the contents of the tape more widely. He then expressed his intention of inviting the editors and managers of Inq7.net and GMA7 to a probe, and supposedly declared, "I [have] asked the NBI to conduct a tactical interrogation of all concerned." [10]

5. On June 11, 2005, the NTC issued this press release: [11]

NTC GIVES FAIR WARNING TO RADIO AND TELEVISION OWNERS/OPERATORS TO OBSERVE ANTI-WIRETAPPING LAW AND PERTINENT CIRCULARS ON PROGRAM STANDARDS

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Taking into consideration the country's unusual situation, and in order not to unnecessarily aggravate the same, the NTC **warns** all radio stations and television network owners/operators that the conditions of the authorization and permits issued to them by Government like the Provisional Authority and/or Certificate of Authority explicitly provides that said companies shall not use [their] stations for the broadcasting or telecasting of false information or willful misrepresentation. Relative thereto, it has come to the attention of the [NTC] that certain personalities are in possession of alleged taped conversations which they claim involve the President of the Philippines and a Commissioner of the COMELEC regarding supposed violation of election laws.

These personalities have admitted that the taped conversations are products of illegal wiretapping operations.

Considering that these taped conversations have not been duly authenticated nor could it be said at this time that the tapes contain an accurate or truthful representation of what was recorded therein, it is the position of the [NTC] that the continuous airing or broadcast of the said taped conversations by radio and television stations is a continuing violation of the Anti-Wiretapping Law and the conditions of the Provisional Authority and/or Certificate of Authority issued to these radio and television stations. It has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation, the concerned radio and television companies are hereby **warned that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies**.

In addition to the above, the [NTC] reiterates the pertinent NTC circulars on program standards to be observed by radio and television stations. NTC Memorandum Circular 111-12-85 explicitly states, among others, that "all radio broadcasting and television stations shall, during any broadcast or telecast, cut

off from the air the speech, play, act or scene or other matters being broadcast or telecast the tendency thereof is to disseminate false information or such other willful misrepresentation, or to propose and/or incite treason, rebellion or sedition." The foregoing directive had been reiterated by NTC Memorandum Circular No. 22-89, which, in addition thereto, prohibited radio, broadcasting and television stations from using their stations to broadcast or telecast any speech, language or scene disseminating false information or willful misrepresentation, or inciting, encouraging or assisting in subversive or treasonable acts.

The [NTC] will not hesitate, after observing the requirements of due process, to apply with full force the provisions of said Circulars and their accompanying sanctions on erring radio and television stations and their owners/operators.

6. On June 14, 2005, NTC held a **dialogue** with the Board of Directors of the *Kapisanan ng mga Brodkaster sa Pilipinas (KBP)*. NTC allegedly assured the KBP that the press release did not violate the constitutional freedom of speech, of expression, and of the press, and the right to information. Accordingly, NTC and KBP issued a **Joint Press Statement** which states, among others, that: [12]

- NTC respects and will not hinder freedom of the press and the right to information on matters of public concern. KBP & its members have always been committed to the exercise of press freedom with high sense of responsibility and discerning judgment of fairness and honesty.
- NTC did not issue any MC [Memorandum Circular] or Order constituting a restraint of press freedom or censorship. The NTC further denies and does not intend to limit or restrict the interview of members of the opposition or free expression of views.
- What is being asked by NTC is that the exercise of press freedom [be] done responsibly.
- KBP has program standards that KBP members will observe in the treatment of news and public affairs programs. These include verification of sources, non-airing of materials that would constitute inciting to sedition and/or rebellion.
- The KBP Codes also require that no false statement or willful misrepresentation is made in the treatment of news or commentaries.
- The supposed wiretapped tapes should be treated with sensitivity and handled responsibly giving due consideration to the process being undertaken to verify and validate the authenticity and actual content of the same."

C. The Petition

Petitioner Chavez filed a petition under Rule 65 of the Rules of Court against respondents Secretary Gonzales and the NTC, "praying for the issuance of the writs of *certiorari* and prohibition, as extraordinary legal remedies, to annul void proceedings, and to prevent the unlawful, unconstitutional and oppressive exercise of authority by the respondents." [13]

Alleging that the acts of respondents are violations of the freedom on expression and of the press, and the right of the people to information on matters of public concern, [14] petitioner specifically asked this Court:

> [F]or [the] nullification of acts, issuances, and orders of respondents committed or made since June 6, 2005 until the present that curtail the public's rights to freedom of expression and of the press, and to information on matters of public concern specifically in relation to information regarding the controversial taped conversion of President Arroyo and for prohibition of the further commission of such acts, and making of such issuances, and orders by respondents. [15]

Respondents [16] denied that the acts transgress the Constitution, and questioned petitioner's legal standing to file the petition. Among the arguments they raised as to the validity of the "fair warning" issued by respondent NTC, is that broadcast media enjoy lesser constitutional guarantees compared to print media, and the warning was issued pursuant to the NTC's mandate to regulate the telecommunications industry. [17] It was also stressed that "most of the [television] and radio stations continue, even to this date, to air the tapes, but of late within the parameters agreed upon between the NTC and KBP." [18]

D. THE PROCEDURAL THRESHOLD: LEGAL STANDING

To be sure, the circumstances of this case make the constitutional challenge peculiar. Petitioner, who is not a member of the broadcast media, prays that we strike down the acts and statements made by respondents as violations of the right to free speech, free expression and a free press. For another, the recipients of the press statements have not come forward — neither intervening nor joining petitioner in this action. Indeed, as a group, they issued a joint statement with respondent NTC that does not complain about restraints on freedom of the press.

It would seem, then, that petitioner has not met the requisite legal standing, having failed to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." [19]

But as early as half a century ago, we have already held that where serious constitutional questions are involved, "the transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside if we must, technicalities of procedure." [20] Subsequently, this Court has repeatedly and consistently refused to wield procedural barriers as impediments to its addressing and resolving serious legal questions that greatly impact on public interest, [21] in keeping with the Court's duty under the 1987 Constitution to determine whether or not other branches of government have kept themselves within the limits of the Constitution and the laws and that they have not abused the discretion given to them.

Thus, in line with the liberal policy of this Court on *locus standi* when a case involves an issue of overarching significance to our society, [22] we therefore brush aside technicalities of procedure and take cognizance of this petition, [23] seeing as it involves a challenge to the most exalted of all the civil rights, the freedom of expression. **The petition raises other issues like the extent of the right to information of the public. It is fundamental, however, that we need not address all issues but only the most decisive one which in the case at bar is whether the acts of the**

respondents abridge freedom of speech and of the press.

But aside from the primordial issue of determining whether free speech and freedom of the press have been infringed, the case at bar also gives this Court the opportunity: (1) to distill the essence of freedom of speech and of the press now beclouded by the vagaries of motherhood statements; (2) to clarify the types of speeches and their differing restraints allowed by law; (3) to discuss the core concepts of prior restraint, content-neutral and content-based regulations and their constitutional standard of review; (4) to examine the historical difference in the treatment of restraints between print and broadcast media and stress the standard of review governing both; and (5) to call attention to the ongoing blurring of the lines of distinction between print and broadcast media.

E. RE-EXAMINING THE LAW ON FREEDOM OF SPEECH, OF EXPRESSION AND OF THE PRESS

> *No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.* [24]

Freedom of expression has gained recognition as a fundamental principle of every democratic government, and given a preferred right that stands on a higher level than substantive economic freedom or other liberties. The cognate rights codified by Article III, Section 4 of the Constitution, copied almost verbatim from the First Amendment of the U.S. Bill of Rights, [25] were considered the necessary consequence of republican institutions and the complement of free speech. [26] This preferred status of free speech has also been codified at the international level, its recognition now enshrined in international law as a customary norm that binds all nations. [27]

In the Philippines, the primacy and high esteem accorded freedom of expression is a fundamental postulate of our constitutional system. [28] This right was elevated to constitutional status in the 1935, the 1973 and the 1987 Constitutions, reflecting our own lesson of history, both political and legal, that freedom of speech is an indispensable condition for nearly every other form of freedom. [29] Moreover, our history shows that the struggle to protect the freedom of speech, expression and the press was, at bottom, the struggle for the indispensable preconditions for the exercise of other freedoms. [30] For it is only when the people have unbridled access to information and the press that they will be capable of rendering enlightened judgments. In the oft-quoted words of Thomas Jefferson, we cannot both be free and ignorant.

E.1. ABSTRACTION OF FREE SPEECH

Surrounding the freedom of speech clause are various concepts that we have adopted as part and parcel of our own Bill of Rights provision on this basic freedom. [31] What is embraced under this provision was discussed exhaustively by the Court in *Gonzales v. Commission on Elections*, [32] in which it was held:

> . . . At the very least, free speech and free press may be identified with the liberty to discuss publicly and truthfully any matter of public interest without censorship and punishment. There is to be no previous restraint on the communication of views or subsequent liability whether in libel suits, prosecution for sedition, or action for damages, or contempt proceedings unless there be a clear and present danger of substantive evil that Congress has a right to prevent. [33]

Gonzales further explained that the vital need of a constitutional democracy for freedom of expression is undeniable, whether as a means of assuring individual self-fulfillment; of attaining the truth; of assuring participation by the people in social, including political, decision-making; and of maintaining the balance between stability and change. [34] As early as the 1920s, the trend as reflected in Philippine and American decisions was to recognize the broadest scope and assure the widest latitude for this constitutional guarantee. The trend represents a profound commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open. [35]

Freedom of speech and of the press means something more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, and to take refuge in the existing climate of opinion on any matter of public consequence. [36] When atrophied, the right becomes meaningless. [37] The right belongs as well — if not more — to those who question, who do not conform, who differ. [38] The ideas that may be expressed under this freedom are confined not only to those that are conventional or acceptable to the majority. To be truly meaningful, freedom of speech and of the press should allow and even encourage the articulation of the unorthodox view, though it be hostile to or derided by others; or though such view "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." [39] To paraphrase Justice Holmes, it is freedom for the thought that we hate, no less than for the thought that agrees with us. [40]

The scope of freedom of expression is so broad that it extends protection to nearly all forms of communication. It protects speech, print and assembly regarding secular as well as political causes, and is not confined to any particular field of human interest. The protection covers myriad matters of public interest or concern embracing all issues, about which information is needed or appropriate, so as to enable members of society to cope with the exigencies of their period. The constitutional protection assures the broadest possible exercise of free speech and free press for religious, political, economic, scientific, news, or informational ends, inasmuch as the Constitution's basic guarantee of freedom to advocate ideas is not confined to the expression of ideas that are conventional or shared by a majority.

The constitutional protection is not limited to the exposition of ideas. The protection afforded free speech extends to speech or publications that are entertaining as well as instructive or informative. Specifically, in *Eastern Broadcasting Corporation (DYRE) v. Dans*, [41] this Court stated that all forms of media, whether print or broadcast, are entitled to the broad protection of the clause on freedom of speech and of expression.

While all forms of communication are entitled to the broad protection of freedom of expression clause, **the freedom of film, television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspapers and other print media, as will be subsequently discussed**.

E.2. DIFFERENTIATION: THE LIMITS & RESTRAINTS OF FREE SPEECH

From the language of the specific constitutional provision, it would appear that the right to free speech and a free press is not susceptible of any limitation. But the realities of life in a complex society preclude a literal interpretation of the provision prohibiting the passage of a law that would abridge such freedom. For freedom of expression is not an absolute, [42] nor is it an "unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."

Thus, all speech are not treated the same. Some types of speech may be subjected to some regulation by the State under its pervasive police power, in order that it may not be injurious to the equal right of others or those of the community or society. [43] The difference in treatment is expected because the relevant interests of one type of speech, *e.g.*, political speech, may vary from those of another, e.g., obscene speech. Distinctions have therefore been made in the treatment, analysis, and evaluation of the permissible scope of restrictions on various categories of speech. [44] We have ruled, for example, that in our jurisdiction slander or libel, lewd and obscene speech, as well as "fighting words" are not entitled to constitutional protection and may be penalized. [45]

Moreover, the techniques of reviewing alleged restrictions on speech (overbreadth, vagueness, and so on) have been applied differently to each category, either consciously or unconsciously. [46] A study of free speech jurisprudence — whether here or abroad — will reveal that courts have developed different tests as to specific types or categories of speech in concrete situations; *i.e.*, subversive speech; obscene speech; the speech of the broadcast media and of the traditional print media; libelous speech; speech affecting associational rights; speech before hostile audiences; symbolic speech; speech that affects the right to a fair trial; and speech associated with rights of assembly and petition. [47]

Generally, restraints on freedom of speech and expression are evaluated by either or a combination of three tests, *i.e.*, (a) the **dangerous tendency doctrine** which permits limitations on speech once a rational connection has been established between the speech restrained and the danger contemplated; [48] (b) the **balancing of interests tests**, used as a standard when courts need to balance conflicting social values and individual interests, and requires a conscious and detailed consideration of the interplay of interests observable in a given situation of type of situation; [49] and (c) the **clear and present danger rule** which rests on the premise that speech may be restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent. This rule requires that the evil consequences sought to be prevented must be substantive, "extremely serious and the degree of imminence extremely high." [50]

As articulated in our jurisprudence, we have applied either the **dangerous tendency doctrine** or **clear and present danger test** to resolve free speech challenges. More recently, we have concluded that we have generally adhered to the **clear and present danger test**. [51]

E.3. IN FOCUS: FREEDOM OF THE PRESS

Much has been written on the philosophical basis of press freedom as part of the larger right of free discussion and expression. Its practical importance, though, is more easily grasped. It is the chief source of information on current affairs. It is the most pervasive and perhaps most powerful vehicle of opinion on public questions. It is the instrument by which citizens keep their government informed of their needs, their aspirations and their grievances. It is the sharpest weapon in the fight to keep government responsible and efficient. Without a vigilant press, the mistakes of every administration would go uncorrected and its abuses unexposed. As Justice Malcolm wrote in *United States v. Bustos*: [52]

> The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe

relieves the abscesses of officialdom. Men in public life may suffer under a hostile and unjust accusation; the wound can be assuaged with the balm of clear conscience.

Its contribution to the public weal makes freedom of the press deserving of extra protection. Indeed, the press benefits from certain ancillary rights. The productions of writers are classified as intellectual and proprietary. Persons who interfere or defeat the freedom to write for the press or to maintain a periodical publication are liable for damages, be they private individuals or public officials.

E.4. ANATOMY OF RESTRICTIONS: PRIOR RESTRAINT, CONTENT-NEUTRAL AND CONTENT-BASED REGULATIONS

Philippine jurisprudence, even as early as the period under the 1935 Constitution, has recognized four aspects of freedom of the press. These are (1) freedom from prior restraint; (2) freedom from punishment subsequent to publication; [53] (3) freedom of access to information; [54] and (4) freedom of circulation. [55]

Considering that petitioner has argued that respondents' press statement constitutes a form of impermissible prior restraint, a closer scrutiny of this principle is in order, as well as its sub-specie of content-based (as distinguished from content-neutral) regulations.

At this point, it should be noted that respondents in this case deny that their acts constitute prior restraints. This presents a unique tinge to the present challenge, considering that the cases in our jurisdiction involving prior restrictions on speech never had any issue of whether the governmental act or issuance ***actually*** constituted prior restraint. Rather, the determinations were always about whether the restraint was justified by the Constitution.

Be that as it may, the determination in every case of whether there is an impermissible restraint on the freedom of speech has always been based on the circumstances of each case, including the nature of the restraint. **And in its application in our jurisdiction, the parameters of this principle have been etched on a case-to-case basis, always tested by scrutinizing the governmental issuance or act against the circumstances in which they operate, and then determining the appropriate test with which to evaluate**.

Prior restraint refers to official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination. [56] Freedom from prior restraint is largely freedom from government censorship of publications, whatever the form of censorship, and regardless of whether it is wielded by the executive, legislative or judicial branch of the government. Thus, it precludes governmental acts that required approval of a proposal to publish; licensing or permits as prerequisites to publication including the payment of license taxes for the privilege to publish; and even injunctions against publication. Even the closure of the business and printing offices of certain newspapers, resulting in the discontinuation of their printing and publication, are deemed as previous restraint or censorship. [57] Any law or official that requires some form of permission to be had before publication can be made, commits an infringement of the constitutional right, and remedy can be had at the courts.

Given that deeply ensconced in our fundamental law is the hostility against all prior restraints on speech, and any act that restrains speech is presumed invalid, [58] and "any act that restrains speech is hobbled by the presumption of invalidity and should be

greeted with furrowed brows," [59] it is important to stress not all prior restraints on speech are invalid. **Certain previous restraints may be permitted by the Constitution**, but determined only upon a careful evaluation of the challenged act as against the appropriate test by which it should be measured against.

Hence, it is not enough to determine whether the challenged act constitutes some form of restraint on freedom of speech. A distinction has to be made whether the restraint is (1) a **content-neutral** regulation, *i.e.*, merely concerned with the incidents of the speech, or one that merely controls the time, place or manner, and under well defined standards; [60] or (2) a **content-based** restraint or censorship, *i.e.*, the restriction is based on the subject matter of the utterance or speech. [61] The cast of the restriction determines the test by which the challenged act is assayed with.

When the speech restraints take the form of a **content-neutral regulation**, only a substantial governmental interest is required for its validity. [62] Because regulations of this type are not designed to suppress any particular message, they are not subject to the strictest form of judicial scrutiny but an **intermediate approach** — somewhere between the mere rationality that is required of any other law and the compelling interest standard applied to content-based restrictions. [63] The **test** is called **intermediate** because the Court will not merely rubberstamp the validity of a law but also require that the restrictions be narrowly-tailored to promote an important or significant governmental interest that is unrelated to the suppression of expression. The intermediate approach has been formulated in this manner:

> A governmental regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incident restriction on alleged [freedom of speech & expression] is no greater than is essential to the furtherance of that interest. [64]

On the other hand, a governmental action that restricts freedom of speech or of the press **based on content** is given the **strictest scrutiny** in light of its inherent and invasive impact. Only when the challenged act has overcome the **clear and present danger rule** will it pass constitutional muster, [65] with the government having the burden of overcoming the presumed unconstitutionality.

Unless the government can overthrow this presumption, the **content-based** restraint will be struck down. [66]

With respect to **content-based** restrictions, the government must also show the type of harm the speech sought to be restrained would bring about — especially the gravity and the imminence of the threatened harm — otherwise the prior restraint will be invalid. Prior restraint on speech based on its content cannot be justified by hypothetical fears, "but only by showing a substantive and imminent evil that has taken the life of a reality already on ground." [67] As formulated, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." [68]

The regulation which restricts the speech content must also serve an important or substantial government interest, which is unrelated to the suppression of free expression. [69]

Also, the incidental restriction on speech must be no greater than what is essential to the furtherance of that interest. [70] A restriction that is so broad that it

encompasses more than what is required to satisfy the governmental interest will be invalidated. [71] The regulation, therefore, must be reasonable and narrowly drawn to fit the regulatory purpose, with the least restrictive means undertaken. [72]

Thus, when the prior restraint partakes of a **content-neutral regulation**, it is subjected to an intermediate review. A **content-based regulation**, [73] however, bears a heavy presumption of invalidity and is measured against the **clear and present danger rule**. The latter will pass constitutional muster only if justified by a compelling reason, and the restrictions imposed are neither overbroad nor vague. [74]

Applying the foregoing, it is clear that the challenged acts in the case at bar need to be subjected to the **clear and present danger rule**, as they are **content-based restrictions**. The acts of respondents focused solely on but one object — a specific content — fixed as these were on the alleged taped conversations between the President and a COMELEC official. Undoubtedly these did not merely provide regulations as to the time, place or manner of the dissemination of speech or expression.

E.5. Dichotomy of Free Press: Print v. Broadcast Media

Finally, comes respondents' argument that the challenged act is valid on the ground that broadcast media enjoys free speech rights that are lesser in scope to that of print media. We next explore and test the validity of this argument, insofar as it has been invoked to validate a content-based restriction on broadcast media.

The regimes presently in place for each type of media differ from one other. Contrasted with the regime in respect of books, newspapers, magazines and traditional printed matter, broadcasting, film and video have been subjected to regulatory schemes.

The dichotomy between print and broadcast media traces its origins in the United States. There, broadcast radio and television have been held to have **limited** First Amendment protection, [75] and U.S. Courts have **excluded** broadcast media from the application of the "strict scrutiny" standard that they would otherwise apply to content-based restrictions. [76] According to U.S. Courts, the **three major reasons** why broadcast media stands apart from print media are: (a) the scarcity of the frequencies by which the medium operates [*i.e.,* airwaves are physically limited while print medium may be limitless]; [77] (b) its "pervasiveness" as a medium; and (c) its unique accessibility to children. [78] Because cases involving broadcast media need not follow "precisely the same approach that [U.S. courts] have applied to other media," nor go "so far as to demand that such regulations serve 'compelling' government interests," [79] **they are decided on whether the "governmental restriction" is narrowly tailored to further a substantial governmental interest," [80] or the intermediate test**.

As pointed out by respondents, Philippine jurisprudence has also echoed a differentiation in treatment between broadcast and print media. **Nevertheless, a review of Philippine case law on broadcast media will show that — as we have deviated with the American conception of the Bill of Rights [81] — we likewise did not adopt *en masse* the U.S. conception of** free speech as it relates to broadcast media, **particularly as to which test would govern content-based prior restraints**.

Our cases show two distinct features of this dichotomy. *First,* the difference in treatment, in the main, is in the regulatory scheme applied to broadcast media that is not imposed on traditional print media, and narrowly confined to unprotected speech

(*e.g.,* obscenity, pornography, seditious and inciting speech), or is based on a compelling government interest that also has constitutional protection, such as national security or the electoral process.

Second, regardless of the regulatory schemes that broadcast media is subjected to, the Court has consistently held that the clear and present danger test applies to content-based restrictions on media, without making a distinction as to traditional print or broadcast media.

The distinction between broadcast and traditional print media was first enunciated in *Eastern Broadcasting Corporation (DYRE) v. Dans*, [82] wherein it was held that "*[a]ll forms of media, whether print or broadcast, are entitled to the broad protection of the freedom of speech and expression clause. The test for limitations on freedom of expression continues to be the clear and present danger rule . . .*" [83]

Dans was a case filed to compel the reopening of a radio station which had been summarily closed on grounds of national security. Although the issue had become moot and academic because the owners were no longer interested to reopen, the Court still proceeded to do an analysis of the case and made formulations to serve as guidelines for all inferior courts and bodies exercising quasi-judicial functions. Particularly, the Court made a detailed exposition as to what needs be considered in cases involving broadcast media. Thus: [84]

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> (3) All forms of media, whether print or broadcast, are entitled to the broad protection of the freedom of speech and expression clause. **The test for limitations on freedom of expression continues to be the clear and present danger rule**, that words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the lawmaker has a right to prevent, In his *Constitution of the Philippines* (2nd Edition, pp. 569-570) Chief Justice Enrique M. Fernando cites at least nine of our decisions which apply the test. More recently, the clear and present danger test was applied in J.B.L. Reyes in behalf of the *Anti-Bases Coalition v. Bagatsing*. (4) The clear and present danger test, however, does not lend itself to a simplistic and all embracing interpretation applicable to all utterances in all forums.
>
> Broadcasting has to be licensed. Airwave frequencies have to be allocated among qualified users. A broadcast corporation cannot simply appropriate a certain frequency without regard for government regulation or for the rights of others.
>
> All forms of communication are entitled to the broad protection of the freedom of expression clause. Necessarily, however, the freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper and print media.
>
> The *American Court in Federal Communications Commission v. Pacifica Foundation* (438 U.S. 726), confronted with a patently offensive and indecent regular radio program, explained why radio broadcasting, more than other forms of communications, receives the most limited protection from the free expression clause. First, broadcast media have established a uniquely pervasive presence in the lives of all citizens, Material presented over the airwaves confronts the citizen, not only in public, but in the privacy of his home. Second, broadcasting is uniquely accessible to children. Bookstores and motion picture theaters may be

prohibited from making certain material available to children, but the same selectivity cannot be done in radio or television, where the listener or viewer is constantly tuning in and out.

Similar considerations apply in the area of national security.

The broadcast media have also established a uniquely pervasive presence in the lives of all Filipinos. Newspapers and current books are found only in metropolitan areas and in the poblaciones of municipalities accessible to fast and regular transportation. Even here, there are low income masses who find the cost of books, newspapers, and magazines beyond their humble means. Basic needs like food and shelter perforce enjoy high priorities.

On the other hand, the transistor radio is found everywhere. The television set is also becoming universal. Their message may be simultaneously received by a national or regional audience of listeners including the indifferent or unwilling who happen to be within reach of a blaring radio or television set. The materials broadcast over the airwaves reach every person of every age, persons of varying susceptibilities to persuasion, persons of different I.Q.s and mental capabilities, persons whose reactions to inflammatory or offensive speech would be difficult to monitor or predict. The impact of the vibrant speech is forceful and immediate. Unlike readers of the printed work, the radio audience has lesser opportunity to cogitate analyze, and reject the utterance.

(5) The clear and present danger test, therefore, must take the particular circumstances of broadcast media into account. The supervision of radio stations-whether by government or through self-regulation by the industry itself calls for thoughtful, intelligent and sophisticated handling.

The government has a right to be protected against broadcasts which incite the listeners to violently overthrow it. Radio and television may not be used to organize a rebellion or to signal the start of widespread uprising. At the same time, the people have a right to be informed. Radio and television would have little reason for existence if broadcasts are limited to bland, obsequious, or pleasantly entertaining utterances. Since they are the most convenient and popular means of disseminating varying views on public issues, they also deserve special protection.

(6) The freedom to comment on public affairs is essential to the vitality of a representative democracy. In the 1918 case of *United States v. Bustos* (37 Phil. 731) this Court was already stressing that.

The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts. Only thus can the intelligence and dignity of the individual be exalted.

(7) Broadcast stations deserve the special protection given to all forms of media by the due process and freedom of expression clauses of the Constitution. [Citations omitted]

It is interesting to note that the Court in *Dans* adopted the arguments found in

U.S. jurisprudence to justify differentiation of treatment (*i.e.*, the scarcity, pervasiveness and accessibility to children), **but only after categorically declaring that "the test for limitations on freedom of expression continues to be the clear and present danger rule," for all forms of media, whether print or broadcast.** Indeed, a close reading of the above-quoted provisions would show that the differentiation that the Court in *Dans* referred to was narrowly restricted to what is otherwise deemed as "unprotected speech" (*e.g.*, obscenity, national security, seditious and inciting speech), or to validate a licensing or regulatory scheme necessary to allocate the limited broadcast frequencies, which is absent in print media. Thus, when this Court declared in *Dans* that the freedom given to broadcast media was "somewhat lesser in scope than the freedom accorded to newspaper and print media," it was not as to what test should be applied, but the context by which requirements of licensing, allocation of airwaves, and application of norms to unprotected speech. [85]

In the same year that the *Dans* case was decided, it was reiterated in *Gonzales v. Katigbak*, [86] that the test to determine free expression challenges was the clear and present danger, again without distinguishing the media. [87] *Katigbak*, strictly speaking, does not treat of broadcast media but motion pictures. Although the issue involved obscenity standards as applied to movies, [88] the Court concluded its decision with the following *obiter dictum* that a less liberal approach would be used to resolve obscenity issues in television as opposed to motion pictures:

> All that remains to be said is that the ruling is to be limited to the concept of obscenity applicable to motion pictures. It is the consensus of this Court that where television is concerned, a less liberal approach calls for observance. This is so because unlike motion pictures where the patrons have to pay their way, television reaches every home where there is a set. Children then will likely be among the avid viewers of the programs therein shown. . . . . It cannot be denied though that the State as *parens patriae* is called upon to manifest an attitude of caring for the welfare of the young.

More recently, in resolving a case involving the conduct of exit polls and dissemination of the results by a broadcast company, we reiterated that the clear and present danger rule is the test we unquestionably adhere to issues that involve freedoms of speech and of the press. [89]

This is not to suggest, however, that the clear and present danger rule has been applied to all cases that involve the broadcast media. The rule applies to all media, including broadcast, but only when the challenged act is a content-based regulation that infringes on free speech, expression and the press. Indeed, in *Osmena v. COMELEC,* [90] which also involved broadcast media, the Court refused to apply the clear and present danger rule to a COMELEC regulation of time and manner of advertising of political advertisements because the challenged restriction was content-neutral. [91] And in a case involving due process and equal protection issues, the Court in *Telecommunications and Broadcast Attorneys of the Philippines v. COMELEC* [92] treated a restriction imposed on a broadcast media as a reasonable condition for the grant of the media's franchise, without going into which test would apply.

That broadcast media is subject to a regulatory regime absent in print media is observed also in other jurisdictions, where the statutory regimes in place over broadcast media include elements of licensing, regulation by administrative bodies, and censorship. As explained by a British author:

> The **reasons** behind treating broadcast and films differently from the print

> media differ in a number of respects, but have a common historical basis. The stricter system of controls seems to have been adopted in answer to the view that owing to their **particular impact on audiences,** films, videos and broadcasting require a system of prior restraints, whereas it is now accepted that books and other printed media do not. These media are viewed as beneficial to the public in a number of respects, but are also seen as possible sources of harm. [93]

Parenthetically, these justifications are now the subject of debate. **Historically**, the scarcity of frequencies was thought to provide a rationale. However, **cable and satellite television** have enormously increased the number of actual and potential channels. **Digital technology** will further increase the number of channels available. But still, the argument persists that broadcasting is the most influential means of communication, since it comes into the home, and so much time is spent watching television. Since it has a unique impact on people and affects children in a way that the print media normally does not, that regulation is said to be necessary in order to preserve pluralism. It has been argued further that a significant main threat to free expression — in terms of diversity — comes not from government, but from private corporate bodies. These developments show a need for a reexamination of the traditional notions of the scope and extent of broadcast media regulation. [94]

The emergence of digital technology — which has led to the convergence of broadcasting, telecommunications and the computer industry — has likewise led to the question of whether the regulatory model for broadcasting will continue to be appropriate in the converged environment. [95] Internet, for example, remains largely unregulated, yet the Internet and the broadcast media share similarities, [96] and the rationales used to support broadcast regulation apply equally to the Internet. [97] Thus, it has been argued that courts, legislative bodies and the government agencies regulating media must agree to regulate both, regulate neither or develop a new regulatory framework and rationale to justify the differential treatment. [98]

F. The Case At Bar

Having settled the applicable standard to content-based restrictions on broadcast media, let us go to its application to the case at bar. To recapitulate, a governmental action that restricts freedom of speech or of the press **based on content** is given the **strictest scrutiny,** with the **government having the burden** of overcoming the presumed unconstitutionality by the **clear and present danger rule.** This rule applies equally to **all** kinds of media, **including broadcast media.**

This outlines the **procedural map** to follow in cases like the one at bar as it spells out the following: (a) the test; (b) the presumption; (c) the burden of proof; (d) the party to discharge the burden; and (e) the quantum of evidence necessary. On the basis of the records of the case at bar, respondents who have the burden to show that these acts do not abridge freedom of speech and of the press failed to hurdle the clear and present danger test. It appears that the **great evil** which government wants to prevent is the airing of a tape recording in alleged violation of the anti-wiretapping law. The records of the case at bar, however, are confused and confusing, and respondents' evidence falls short of satisfying the clear and present danger test. **Firstly**, the various statements of the Press Secretary obfuscate the identity of the voices in the tape recording. **Secondly**, the integrity of the taped conversation is also suspect. The Press Secretary showed to the public two versions, one supposed to be a "complete" version and the other, an "altered" version. **Thirdly**, the evidence of the respondents on the who's and the how's of the wiretapping act is ambivalent, especially considering the tape's different versions. The identity of the wire-tappers, the manner of its commission

and other related and relevant proofs are some of the invisibles of this case. **Fourthly**, given all these unsettled facets of the tape, it is even arguable whether its airing would violate the anti-wiretapping law.

We rule that **not every violation of a law will justify straitjacketing the exercise of freedom of speech and of the press**. Our **laws are of different kinds** and doubtless, some of them provide norms of conduct which even if violated have only an adverse effect on a person's private comfort but does not endanger national security. There are laws of great significance but their violation, **by itself and without more**, cannot support suppression of free speech and free press. In fine, **violation of law is just a factor**, a vital one to be sure, which should be weighed in adjudging whether to restrain freedom of speech and of the press. The **totality of the injurious effects** of the violation to private and public interest must be calibrated in light of the preferred status accorded by the Constitution and by related international covenants protecting freedom of speech and of the press. In calling for a careful and calibrated measurement of the circumference of all these factors to determine compliance with the clear and present danger test, **the Court should not be misinterpreted as devaluing violations of law**. By all means, violations of law should be vigorously prosecuted by the State for they breed their own evil consequence. But to repeat, **the need to prevent their violation cannot per se trump the exercise of free speech and free press, a preferred right whose breach can lead to greater evils**. For this failure of the respondents alone to offer proof to satisfy the clear and present danger test, the Court has no option but to uphold the exercise of free speech and free press. There is no showing that the feared violation of the anti-wiretapping law clearly endangers the **national security of the State**.

This is not all the faultline in the stance of the respondents. We slide to the issue of whether the **mere press statements** of the Secretary of Justice and of the NTC in question constitute a form of content-based prior restraint that has transgressed the Constitution. In resolving this issue, we hold that **it is not decisive that the press statements made by respondents were not reduced in or followed up with formal orders or circulars. It is sufficient that the press statements were made by respondents while in the exercise of their official functions**. Undoubtedly, respondent Gonzales made his statements as Secretary of Justice, while the NTC issued its statement as the regulatory body of media. **Any act done, such as a speech uttered, for and on behalf of the government in an official capacity is covered by the rule on prior restraint. The concept of an "act" does not limit itself to acts already converted to a formal order or official circular. Otherwise, the non formalization of an act into an official order or circular will result in the easy circumvention of the prohibition on prior restraint**. The press statements at bar are acts that should be struck down as they constitute impermissible forms of prior restraints on the right to free speech and press.

There is enough evidence of **chilling effect** of the complained acts on record. The **warnings** given to media **came from no less** the NTC, a regulatory agency that can cancel the Certificate of Authority of the radio and broadcast media. They also came from the Secretary of Justice, the alter ego of the Executive, who wields the awesome power to prosecute those perceived to be violating the laws of the land. **After the warnings**, the KBP inexplicably joined the NTC in issuing an ambivalent Joint Press Statement. After the warnings, petitioner Chavez was left alone to fight this battle for freedom of speech and of the press. This silence on the sidelines on the part of some media practitioners is too deafening to be the subject of misinterpretation.

The constitutional imperative for us to strike down unconstitutional acts should always be exercised with care and in light of the distinct facts of each case. For there are no hard and fast rules when it comes to slippery constitutional questions, and the limits and construct of relative freedoms are never set in stone. Issues revolving on their construct must be decided on a case to case basis, always based on the peculiar shapes and shadows of each case. But in cases where the challenged acts are patent invasions of a constitutionally protected right, **we should be swift** in striking them down as nullities per se. **A blow too soon struck for freedom is preferred than a blow too late**.

In VIEW WHEREOF, the petition is GRANTED. The writs of *certiorari* and prohibition are hereby issued, nullifying the official statements made by respondents on June 8, and 11, 2005 warning the media on airing the alleged wiretapped conversation between the President and other personalities, for constituting unconstitutional prior restraint on the exercise of freedom of speech and of the press

SO ORDERED.

Ynares-Santiago and *Reyes, JJ.,* concur.

Quisumbing, J., concurs in the result and joins in the separate concurring opinion of J. Carpio.

Sandoval-Gutierrez, J., please see my separate concurring opinion.

Carpio, J., see separate concurring opinion.

Austria-Martinez, J., also joins in the separate opinion of J. Carpio.

Corona, J., joins the dissent of Mr. Justice Nachura.

Carpio-Morales, J., joins in the separate concurring opinion of J. Carpio.

Azcuna, J., concurs in a separate opinion.

Tinga, J., please see separate opinion (dissenting and concurring).

Chico-Nazario, J., please see my separate dissenting opinion.

Velasco, Jr., J., please see separate concurring and dissenting opinion.

Nachura, J., please see my dissent.

Leonardo-de Castro, J., joins the dissent of Justice Nazario and Justice Nachura.

Separate Opinions

SANDOVAL-GUTIERREZ, *J., concurring*:

"Where they have burned books, they will end in burning human beings."

These are the prophetic words of the German Author Heinrich Heine when the Nazis fed to the flames the books written by Jewish authors. True enough, the mass extermination of Jews followed a few years later. **What was first a severe form of book censorship ended up as genocide**.

Today, I vote to grant the writs of *certiorari* and prohibition mindful of Heine's prophecy. The issuance of the Press Release by the National Telecommunications Commission (NTC) is a form of censorship. To allow the broadcast media to be burdened by it is the first misstep leading to the strangling of our citizens. We must

strike this possibility while we still have a voice.

I fully concur with the well-written *ponencia* of Mr. Chief Justice Reynato S. Puno and that of Mr. Justice Antonio T. Carpio.

The *Universal Declaration of Human Rights* guarantees that **"everyone has the right to freedom of opinion and expression."** Accordingly, this right **"includes the freedom to hold opinions without interference and impart information and ideas through any media regardless of frontiers."** [1] At the same time, our Constitution mandates that **"no law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people to peaceably assemble and petition the government for redress of grievances."**

These guarantees are testaments to the value that humanity accords to the above-mentioned freedoms — commonly summed up as **freedom of expression**. The justifications for this high regard are specifically identified by Justice Mclachlin of the Canadian Supreme Court in *Her Majesty The Queen v. Keegstra*, [2] to wit: **(1)** Freedom of expression promotes the free flow of ideas essential to political democracy and democratic institutions, and limits the ability of the State to subvert other rights and freedoms; **(2)** it promotes a marketplace of ideas, which includes, but is not limited to, the search for truth; **(3)** it is intrinsically valuable as part of the self-actualization of speakers and listeners; and **(4)** it is justified by the dangers for good government of allowing its suppression.

These are the same justifications why censorship is anathema to freedom of expression. Censorship is that officious functionary of the repressive government who tells the citizen that he may speak only if allowed to do so, and no more and no less than what he is permitted to say on pain of punishment should he be so rash as to disobey. [3] Censorship may come in the form of **prior restraint** or **subsequent punishment**. **Prior restraint** means official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination. [4] Its most blatant form is a system of licensing administered by an executive officer. [5] Similar to this is judicial prior restraint which takes the form of an injunction against publication. [6] And equally objectionable as prior restraint is the imposition of license taxes that renders publication or advertising more burdensome. [7] On the other hand, **subsequent punishment** is the imposition of liability to the individual exercising his freedom. It may be in any form, such as penal, civil or administrative penalty.

I

The Issuance of the Press Release Constitutes Censorship

In the case at bar, the first issue is whether the Press Release of the NTC constitutes censorship. Reference to its pertinent portions is therefore imperative. Thus:

> Considering that these taped conversations have not been duly authenticated nor could it be said at this time that the tapes contain an accurate or truthful representation of what was recorded therein, it is the position of the [NTC] that the continuous airing or broadcast of the said taped conversations by radio and television stations is a continuing violation of the Anti-Wiretapping Law and the conditions of the Provisional Authority and/or Certificate of Authority issued to these radio and television stations. It has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or

appropriate investigation, the concerned radio and television companies are hereby **warned that their broadcast/airing of such false information and/or willful misrepresentation shall be a just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to said companies**.

xxx xxx xxx

The [NTC] will not hesitate, after observing the requirements of due process, to apply with full force the provisions of said Circulars and their accompanying sanctions on erring radio and television stations and their owners/operators.

The **threat of suspension, revocation** and/or **cancellation** of the **licenses** or **authorization** hurled against radio and television stations should they air the *Garci Tape* is definitely a form of prior restraint. The license or authorization is the life of every media station. If withheld from them, their very existence is lost. Surely, no threat could be more discouraging to them than the suspension or revocation of their licenses. In *Far Eastern Broadcasting v. Dans*, [8] while the need for licensing was rightly defended, the defense was for the purpose, **not of regulation of broadcast content**, but for the proper allocation of airwaves. In the present case, what the NTC intends to regulate are the contents of the *Garci Tapes* — the alleged taped conversation involving the President of the Philippines and a Commissioner of the Commission on Election. The reason given is that it is a "false information or willful misrepresentation." As aptly stated by Mr. Justice Antonio T. Carpio that "the NTC action in restraining the airing of the *Garci Tapes* is a content-based prior restraint because it is directed at the message of the *Garci Tapes*."

History teaches us that licensing has been one of the most potent tools of censorship. This powerful bureaucratic system of censorship in Medieval Europe was the target of John Milton's speech *Areopagita* to the Parliament of England in 1644. [9] Under the Licensing Act of 1643, all printing presses and printers were licensed and nothing could be published without the prior approval of the State or the Church Authorities. Milton vigorously opposed it on the ground of freedom of the press. His strong advocacy led to its collapse in 1695. In the U.S., the first encounter with a law imposing a prior restraint is in *Near v. Minnesota*. [10] Here, the majority voided the law authorizing the permanent enjoining of future violations by any newspaper or periodical if found to have published or circulated an "obscene, lewd and lascivious" or "malicious, scandalous and defamatory" issue. While the dissenters maintained that the injunction constituted no prior restraint, inasmuch as that doctrine applied to prohibitions of publication without advance approval of an executive official, the majority deemed the difference of no consequence, since in order to avoid a contempt citation, the newspaper would have to clear future publications in advance with the judge. In other similar cases, the doctrine of prior restraint was frowned upon by the U.S. Court as it struck down loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them, and as it voided other restrictions on First Amendment rights. [11] Then there came the doctrine that prior licensing or permit systems were held to be constitutionally valid so long as the discretion of the issuing official is limited to questions of times, places and manners. [12] And in *New York Times Company v. United States*, [13] the same Court, applying the doctrine of prior restraint from *Near*, considered the claims that the publication of the Pentagon Papers concerning the Vietnam War would interfere with foreign policy and prolong the war too speculative. It held that

such claim could not overcome the strong presumption against prior restraints. **Clearly, content-based prior restraint is highly abhorred in every jurisdiction**.

Another objectionable portion of the NTC's Press Release is the warning that it will not hesitate "**to apply with full force the provisions of the Circulars and their accompanying sanctions on erring radio and television stations and their owners/operators.** This is a threat of a subsequent punishment, an equally abhorred form of censorship. This should not also be countenanced. It must be stressed that the evils to be prevented are not the censorship of the press merely, but **any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens**. [14] There is logic in the proposition that the liberty of the press will be rendered a **"mockery and a delusion"** if, while every man is at liberty to publish what he pleases, the public authorities might nevertheless punish him for harmless publications. In this regard, the fear of subsequent punishment has the same effect as that of prior restraint.

It being settled that the NTC's Press Release constitutes censorship of broadcast media, the next issue is whether such censorship is justified.

II

The Issuance of the Press Release Constitutes an Unjustified Form of Censorship

Settled is the doctrine that any system of prior restraint of expression comes to this Court bearing a presumption against its constitutional validity. [15] The Government thus carries a heavy burden of showing justification for the enforcement of such a restraint. [16]

Various tests have been made to fix a standard by which to determine what degree of evil is sufficiently substantial to justify a resort to abridgment of the freedom of expression as a means of protection and how clear and imminent and likely the danger is. Among these tests are the *Clear and Present Danger, Balancing, Dangerous Tendency, Vagueness, Overbreadth, and Least Restrictive Means*.

Philippine jurisprudence shows that we have generally adhered to the *clear and present danger test*. Chief Justice Puno, in his *ponencia*, has concluded that the Government has not hurdled this test. He cited four (4) reasons to which I fully concur.

The justification advanced by the NTC in issuing the Press Release is that **"the taped Conversations have not been duly authenticated nor could it be said at this time that the tape contains an accurate and truthful representation of what was recorded therein"** and that **"its continuous airing or broadcast is a continuing violation of the Anti-Wiretapping Law."**

To prevent the airing of the *Garci Tapes* on the premise that their contents may or may not be true is not a valid reason for its suppression. In *New York Times v. Sullivan*, [17] Justice William Brennan, Jr. states that the authoritative interpretation of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, jurists, or administrative officials — and especially not one that puts the burden of proving truth on the speaker. He stressed that **"the constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and belief which are offered."** Moreover, the fact that the tapes were obtained through violation of the *Anti-*

Wiretapping Law does not make the broadcast media privy to the crime. **It must be stressed that it was a government official who initially released the *Garci Tapes*, not the media.**

In view of the presence of various competing interests, I believe the present case must also be calibrated using the **balancing test**. In *American Communication Association v. Douds*, [18] it is held that **"when a particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demand the greater protection under the circumstances presented**. In the present case, perched at the one hand of the scale is the government's interest to maintain public order, while on the other hand is the interest of the public to know the truth about the last national election and to be fully informed. Which of these interests should be advanced? I believe it should be that of the people.

The right of the people to know matters pertaining to the integrity of the election process is of paramount importance. It cannot be sideswiped by the mere speculation that a public disturbance will ensue. **Election is a sacred instrument of democracy. Through it, we choose the people who will govern us. We entrust to them our businesses, our welfare, our children, our lives**. Certainly, each one of us is entitled to know how it was conducted. What could be more disheartening than to learn that there exists a tape containing conversations that compromised the integrity of the election process. The doubt will forever hang over our heads, doubting whether those who sit in government are legitimate officials. In matters such as these, leaving the people in darkness is not an alternative course. People ought to know the truth. Yes, the airing of the *Garci Tapes* may have serious impact, but this is not a valid basis for suppressing it. As Justice Douglas explained in his concurring opinion in the *New York Times*, **"the dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. A debate of large proportions goes in the nation over our posture in Vietnam. Open debate and discussion of public issues are vital to our national health."**

More than ever, now is the time to uphold the right of the Filipinos to information on matters of public concern. As Chief Justice Hughes observed: "The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and liberty by criminal alliances and official neglect, emphasize the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any less necessary the immunity of the press from previous restraint in dealing with official misconduct." [19] Open discussions of our political leaders, as well as their actions, are essential for us to make informed judgments. Through these, we can influence our government's actions and policies. **Indeed, no government can be responsive to its citizens who have refrained from voicing their discontent because of fear of retribution**.

III

A free press is an indispensable component of a democratic and free society.

Burke once called the Press the *Fourth Estate* in the Parliament. This is because its ability to influence public opinion made it an important source in the governance of a nation. It is considered one of the foundations of a democratic society. One sign of its importance is that when a tyrant takes over a country, his first act is to muzzle the press. **Courts should therefore be wary in resolving cases that has implication on the freedom of the press** — to the end that the freedom will never be curtailed absent a recognized and valid justification.

In fine let it be said that the struggle for freedom of expression is as ancient as the history of censorship. From the ancient time when Socrates was poisoned for his unorthodox views to the more recent Martial Law Regime in our country, the lesson learned is that censorship is the biggest obstacle to human progress. Let us not repeat our sad history. Let us not be victims again now and in the future.

WHEREFORE, I vote to CONCUR with the majority opinion.

CARPIO, *J., concurring*:

The Case

This is a petition for the writs of *certiorari* and prohibition to set aside "acts, issuances, and orders" of respondents Secretary of Justice Raul M. Gonzalez (respondent Gonzales) and the National Telecommunications Commission (NTC), particularly an NTC "press release" dated 11 June 2005, warning radio and television stations against airing taped conversations allegedly between President Gloria Macapagal-Arroyo and Commission on Elections (COMELEC) Commissioner Virgilio Garcillano (Garcillano) [1] under pain of suspension or revocation of their airwave licenses.

The Facts

On 24 June 2004, Congress, acting as national board of canvassers, proclaimed President Arroyo winner in the 2004 presidential elections. [2] President Arroyo received a total of 12,905,808 votes, 1,123,576 more than the votes of her nearest rival, Fernando Poe, Jr. Sometime before 6 June 2005, the radio station dzMM aired the Garci Tapes where the parties to the conversation discussed "rigging" the results of the 2004 elections to favor President Arroyo. On 6 June 2005, Presidential spokesperson Ignacio Bunye (Bunye) held a press conference in Malacañang Palace, where he played before the presidential press corps two compact disc recordings of conversations between a woman and a man. Bunye identified the woman in both recordings as President Arroyo but claimed that the contents of the second compact disc had been "spliced" to make it appear that President Arroyo was talking to Garcillano.

However, on 9 June 2005, Bunye backtracked and stated that the woman's voice in the compact discs was not President Arroyo's after all. [3] Meanwhile, other individuals went public, claiming possession of the genuine copy of the Garci Tapes. [4] Respondent Gonzalez ordered the National Bureau of Investigation to investigate media organizations which aired the Garci Tapes for possible violation of Republic Act No. 4200 or the Anti-Wiretapping Law.

On 11 June 2005, the NTC issued a press release warning radio and television stations that airing the Garci Tapes is a "cause for the suspension, revocation and/or cancellation of the licenses or authorizations" issued to them. [5] On 14 June 2005, NTC officers met with officers of the broadcasters group, *Kapisanan ng mga Broadcasters sa Pilipinas* (KBP), to dispel fears of censorship. The NTC and KBP issued a joint press

statement expressing commitment to press freedom. [6]

On 21 June 2005, petitioner Francisco I. Chavez (petitioner), as citizen, filed this petition to nullify the "acts, issuances, and orders" of the NTC and respondent Gonzalez (respondents) on the following grounds: (1) respondents' conduct violated freedom of expression and the right of the people to information on matters of public concern under Section 7, Article III of the Constitution, and (2) the NTC acted *ultra vires* when it warned radio and television stations against airing the Garci Tapes.

In their Comment to the petition, respondents raised threshold objections that (1) petitioner has no standing to litigate and (2) the petition fails to meet the case or controversy requirement in constitutional adjudication. On the merits, respondents claim that (1) the NTC's press release of 11 June 2005 is a mere "fair warning," not censorship, cautioning radio and television networks on the lack of authentication of the Garci Tapes and of the consequences of airing false or fraudulent material, and (2) the NTC did not act *ultra vires* in issuing the warning to radio and television stations.

In his Reply, petitioner belied respondents' claim on his lack of standing to litigate, contending that his status as a citizen asserting the enforcement of a public right vested him with sufficient interest to maintain this suit. Petitioner also contests respondents' claim that the NTC press release of 11 June 2005 is a mere warning as it already prejudged the Garci Tapes as inauthentic and violative of the Anti-Wiretapping Law, making it a "cleverly disguised . . . gag order."

ISSUE

The principal issue for resolution is whether the NTC warning embodied in the press release of 11 June 2005 constitutes an impermissible prior restraint on freedom of expression.

I vote to (1) grant the petition, (2) declare the NTC warning, embodied in its press release dated 11 June 2005, an unconstitutional prior restraint on protected expression, and (3) enjoin the NTC from enforcing the same.

1. Standing to File Petition

Petitioner has standing to file this petition. When the issue involves freedom of expression, as in the present case, any citizen has the right to bring suit to question the constitutionality of a government action in violation of freedom of expression, whether or not the government action is directed at such citizen. The government action may chill into silence those to whom the action is directed. Any citizen must be allowed to take up the cudgels for those who have been cowed into inaction because freedom of expression is a vital public right that must be defended by everyone and anyone.

Freedom of expression, being fundamental to the preservation of a free, open and democratic society, is of *transcendental importance* that must be defended by every patriotic citizen at the earliest opportunity. We have held that any concerned citizen has standing to raise an issue of *transcendental importance to the nation*, [7] and petitioner in this present petition raises such issue.

2. Overview of Freedom of Expression, Prior Restraint and Subsequent Punishment

Freedom of expression is the foundation of a free, open and democratic society. Freedom of expression is an indispensable condition [8] to the exercise of almost all other civil and political rights. No society can remain free, open and democratic without freedom of expression. Freedom of expression guarantees full, spirited, and even contentious discussion of all social, economic and political issues. To survive, a free

and democratic society must zealously safeguard freedom of expression.

Freedom of expression allows citizens to expose and check abuses of public officials. Freedom of expression allows citizens to make informed choices of candidates for public office. Freedom of expression crystallizes important public policy issues, and allows citizens to participate in the discussion and resolution of such issues. Freedom of expression allows the competition of ideas, the clash of claims and counterclaims, from which the truth will likely emerge. Freedom of expression allows the airing of social grievances, mitigating sudden eruptions of violence from marginalized groups who otherwise would not be heard by government. Freedom of expression provides a civilized way of engagement among political, ideological, religious or ethnic opponents for if one cannot use his tongue to argue, he might use his fist instead.

Freedom of expression is the freedom to disseminate ideas and beliefs, whether competing, conforming or otherwise. It is the freedom to express to others what one likes or dislikes, as it is the freedom of others to express to one and all what they favor or disfavor. It is the free expression for the ideas we love, as well as the free expression for the ideas we hate.[9] Indeed, the function of freedom of expression is to stir disputes:

> [I]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[10]

Section 4, Article III of the Constitution prohibits the enactment of any law curtailing freedom of expression:

> No law shall be passed abridging the freedom of speech, of expression, or the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

Thus, the rule is that expression is not subject to any *prior restraint or censorship* because the Constitution commands that freedom of expression shall not be abridged. Over time, however, courts have carved out narrow and well defined exceptions to this rule out of necessity.

The exceptions, ***when expression may be subject to prior restraint,*** apply in this jurisdiction to ***only*** four categories of expression, namely: pornography,[11] false or misleading advertisement,[12] advocacy of imminent lawless action,[13] and danger to national security.[14] **All other expression is not subject to prior restraint**. As stated in *Turner Broadcasting System v. Federal Communication Commission*, "[T]he First Amendment (Free Speech Clause), subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."[15]

Expression not subject to prior restraint is ***protected expression*** or high-value expression. ***Any content-based prior restraint on protected expression is unconstitutional without exception***. A protected expression means what it says — it is absolutely protected from censorship. Thus, there can be no prior restraint on public debates on the amendment or repeal of existing laws, on the ratification of treaties, on the imposition of new tax measures, or on proposed amendments to the Constitution.

Prior restraint on expression is content-based if the restraint is aimed at the message or idea of the expression. Courts will subject to strict scrutiny content-based restraint. If the content-based prior restraint is directed at protected expression, courts will strike down the restraint as unconstitutional because there can be no content-based prior restraint on protected expression. The analysis thus turns on whether the prior restraint is content-based, and if so, whether such restraint is directed at protected expression, that is, those not falling under any of the recognized categories of unprotected expression.

If the prior restraint is not aimed at the message or idea of the expression, it is content-neutral even if it burdens expression. A content-neutral restraint is a restraint which regulates the time, place or manner of the expression in public places [16] without any restraint on the content of the expression. Courts will subject content-neutral restraints to intermediate scrutiny. [17]

An example of a content-neutral restraint is a permit specifying the date, time and route of a rally passing through busy public streets. A content-neutral prior restraint on protected expression which does not touch on the content of the expression enjoys the presumption of validity and is thus enforceable subject to appeal to the courts. [18] Courts will uphold time, place or manner restraints if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of expression. [19]

In content-neutral prior restraint on protected speech, there should be no prior restraint on the content of the expression itself. Thus, submission of movies or pre-taped television programs to a government review board is constitutional only if the review is for classification and not for censoring any part of the content of the submitted materials. [20] However, failure to submit such materials to the review board may be penalized without regard to the content of the materials. [21] The review board has no power to reject the airing of the submitted materials. The review board's power is only to classify the materials, whether for general patronage, for adults only, or for some other classification. The power to classify expressions applies only to movies and pre-taped television programs [22] but not to live television programs. Any classification of live television programs necessarily entails prior restraint on expression.

Expression that may be subject to prior restraint is ***unprotected expression*** or low-value expression. By definition, prior restraint on unprotected expression is content-based [23] since the restraint is imposed because of the content itself. In this jurisdiction, there are currently only four categories of unprotected expression that may be subject to prior restraint. This Court recognized false or misleading advertisement as unprotected expression only in October 2007. [24]

Only unprotected expression may be subject to prior restraint. However, any such prior restraint on unprotected expression must hurdle a high barrier. ***First,*** such prior restraint is presumed unconstitutional. ***Second,*** the government bears a heavy burden of proving the constitutionality of the prior restraint. [25]

Courts will subject to strict scrutiny any government action imposing prior restraint on unprotected expression. [26] The government action will be sustained if there is a compelling State interest, and prior restraint is necessary to protect such State interest. In such a case, the prior restraint shall be ***narrowly drawn*** — only to the extent necessary to protect or attain the compelling State interest.

Prior restraint is a ***more severe*** restriction on freedom of expression than

subsequent punishment. Although subsequent punishment also deters expression, still the ideas are disseminated to the public. Prior restraint prevents even the dissemination of ideas to the public.

While there can be no prior restraint on protected expression, such expression may be subject to subsequent punishment,[27] either civilly or criminally. Thus, the publication of election surveys cannot be subject to prior restraint,[28] but an aggrieved person can sue for redress of injury if the survey turns out to be fabricated. Also, while Article 201 (2) (b) (3) of the Revised Penal Code punishing "shows which offend any race or religion" cannot be used to justify prior restraint on religious expression, this provision can be invoked to justify subsequent punishment of the perpetrator of such offensive shows.[29]

Similarly, if the unprotected expression does not warrant prior restraint, the same expression may still be subject to subsequent punishment, civilly or criminally. Libel falls under this class of unprotected expression. However, if the expression cannot be subject to the lesser restriction of subsequent punishment, logically it cannot also be subject to the more severe restriction of prior restraint. Thus, since profane language or "hate speech" against a religious minority is not subject to subsequent punishment in this jurisdiction,[30] such expression cannot be subject to prior restraint.

If the unprotected expression warrants prior restraint, necessarily the same expression is subject to subsequent punishment. There must be a law punishing criminally the unprotected expression before prior restraint on such expression can be justified. The legislature must punish the unprotected expression because it creates a substantive evil that the State must prevent. Otherwise, there will be no legal basis for imposing a prior restraint on such expression.

The prevailing test in this jurisdiction to determine the constitutionality of government action imposing prior restraint on three categories of unprotected expression — pornography,[31] advocacy of imminent lawless action, and danger to national security — is the clear and present danger test.[32] The expression restrained must present a clear and present danger of bringing about a substantive evil that the State has a right and duty to prevent, and such danger must be grave and imminent.[33]

Prior restraint on unprotected expression takes many forms — it may be a law, administrative regulation, or impermissible pressures like threats of revoking licenses or withholding of benefits.[34] The impermissible pressures need not be embodied in a government agency regulation, but may emanate from policies, advisories or conduct of officials of government agencies.

3. Government Action in the Present Case

The government action in the present case is a *warning by the NTC that the airing or broadcasting of the Garci Tapes by radio and television stations is a "cause for the suspension, revocation and/or cancellation of the licenses or authorizations*" issued to radio and television stations. The NTC warning, embodied in a press release, relies on two grounds. First, the airing of the Garci Tapes "is a continuing violation of the Anti-Wiretapping Law and the conditions of the Provisional Authority and/or Certificate of Authority issued to radio and TV stations." Second, the Garci Tapes have not been authenticated, and subsequent investigation may establish that the tapes contain false information or willful misrepresentation.

Specifically, the NTC press release contains the following categorical warning:

> Taking into consideration the country's unusual situation, and in order not

to unnecessarily aggravate the same, the NTC warns all radio stations and television networks owners/operators that the conditions of the authorizations and permits issued to them by Government like the Provisional Authority and/or Certificate of Authority explicitly provides that said companies shall not use its stations for the broadcasting or telecasting of false information or willful misrepresentation. Relative thereto, it has come to the attention of the Commission that certain personalities are in possession of alleged taped conversation which they claim, (*sic*) involve the President of the Philippines and a Commissioner of the COMELEC regarding their supposed violation of election laws. These personalities have admitted that the taped conversations are product of illegal wiretapping operations.

Considering that these taped conversations have not been duly authenticated nor could it be said at this time that the tapes contain an accurate or truthful representation of what was recorded therein, (*sic*) **it is the position of the Commission that the continuous airing or broadcast of the said taped conversations by radio and television stations is a continuing violation of the Anti-Wiretapping Law and the conditions of the Provisional Authority and/or Certificate of Authority issued to these radio and television stations. If it has been (*sic*) subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation, the concerned radio and television companies are hereby warned that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies**. (Boldfacing and underscoring supplied)

The NTC does not claim that the public airing of the Garci Tapes constitutes unprotected expression that may be subject to prior restraint. The NTC does not specify what substantive evil the State seeks to prevent in imposing prior restraint on the airing of the Garci Tapes. The NTC does not claim that the public airing of the Garci Tapes constitutes a clear and present danger of a substantive evil, of grave and imminent character, that the State has a right and duty to prevent.

The NTC did not conduct any hearing in reaching its conclusion that the airing of the Garci Tapes constitutes a continuing violation of the Anti-Wiretapping Law. At the time of issuance of the NTC press release, and even up to now, the parties to the conversations in the Garci Tapes have not complained that the wire-tapping was without their consent, an essential element for violation of the Anti-Wiretapping Law. [35] It was even the Office of the President, through the Press Secretary, that played and released to media the Garci Tapes containing the alleged "spliced" conversation between President Arroyo and Commissioner Garcillano. There is also the issue of whether a *wireless* cellular phone conversation is covered by the Anti-*Wiretapping* Law.

Clearly, the NTC has no factual or legal basis in claiming that the airing of the Garci Tapes constitutes a violation of the Anti-Wiretapping Law. The radio and television stations were not even given an opportunity to be heard by the NTC. The NTC did not observe basic due process as mandated in *Ang Tibay v. Court of Industrial Relations*. [36]

The NTC claims that the Garci Tapes, "after a prosecution or the appropriate investigation," may constitute "false information and/or willful misrepresentation." However, the NTC does not claim that such possible false information or willful

misrepresentation constitutes misleading commercial advertisement. In the United States, false or deceptive commercial speech is categorized as unprotected expression that may be subject to prior restraint. Recently, this Court upheld the constitutionality of Section 6 of the Milk Code requiring the submission to a government screening committee of advertising materials for infant formula milk to prevent false or deceptive claims to the public.[37] There is, however, no claim here by respondents that the Garci Tapes constitute false or misleading commercial advertisement.

The NTC concedes that the Garci Tapes have not been authenticated as accurate or truthful. The NTC also concedes that only "after a prosecution or appropriate investigation" can it be established that the Garci Tapes constitute "false information and/or willful misrepresentation." ***Clearly, the NTC admits that it does not even know if the Garci Tapes contain false information or willful misrepresentation***.

4. Nature of Prior Restraint in the Present Case

The NTC action restraining the airing of the Garci Tapes is a content-based prior restraint because it is directed at the message of the Garci Tapes. The NTC's claim that the Garci Tapes might contain "false information and/or willful misrepresentation," and thus should not be publicly aired, is an *admission* that the restraint is content-based.

5. Nature of Expression in the Present Case

The public airing of the Garci Tapes is a **protected expression** because it does not fall under any of the four existing categories of unprotected expression recognized in this jurisdiction. The airing of the Garci Tapes is essentially a political expression because it exposes that a presidential candidate had allegedly improper conversations with a COMELEC Commissioner right after the close of voting in the last presidential elections.

Obviously, the content of the Garci Tapes **affects gravely the sanctity of the ballot**. Public discussion on the sanctity of the ballot is indisputably a protected expression that cannot be subject to prior restraint. Public discussion on the credibility of the electoral process is one of the highest political expressions of any electorate, and thus deserves the utmost protection. If ever there is a hierarchy of protected expressions, political expression would occupy the highest rank,[38] and among different kinds of political expression, the subject of fair and honest elections would be at the top. In any event, public discussion on all political issues should always remain uninhibited, robust and wide open.

The rule, which recognizes no exception, is that there can be no content-based prior restraint on protected expression. On this ground alone, the NTC press release is unconstitutional. Of course, if the courts determine that the subject matter of a wiretapping, illegal or not, endangers the security of the State, the public airing of the tape becomes unprotected expression that may be subject to prior restraint. However, there is no claim here by respondents that the subject matter of the Garci Tapes involves national security and publicly airing the tapes would endanger the security of the State.[39]

The alleged violation of the Anti-Wiretapping Law is not in itself a ground to impose a prior restraint on the airing of the Garci Tapes because the Constitution expressly prohibits the enactment of any law, and that includes anti-wiretapping laws, curtailing freedom of expression.[40] The only exceptions to this rule are the four

recognized categories of unprotected expression. However, the content of the Garci Tapes does not fall under any of these categories of unprotected expression.

The airing of the Garci Tapes does not violate the right to privacy because the content of the Garci Tapes is a matter of important public concern. The Constitution guarantees the people's right to information on matters of public concern. [41] The remedy of any person aggrieved by the public airing of the Garci Tapes is to file a complaint for violation of the Anti-Wiretapping Law *after* the commission of the crime. Subsequent punishment, *absent a lawful defense*, is the remedy available in case of violation of the Anti-Wiretapping Law.

The present case involves a prior restraint on protected expression. Prior restraint on protected expression differs significantly from subsequent punishment of protected expression. While there can be no prior restraint on protected expression, there can be subsequent punishment for protected expression under libel, tort or other laws. In the present case, the NTC action seeks prior restraint on the airing of the Garci Tapes, not punishment of personnel of radio and television stations for actual violation of the Anti-Wiretapping Law.

6. Only the Courts May Impose Content-Based Prior Restraint

The NTC has no power to impose content-based prior restraint on expression. The charter of the NTC does not vest NTC with any content-based censorship power over radio and television stations.

In the present case, the airing of the Garci Tapes is a protected expression that can never be subject to prior restraint. However, even assuming for the sake of argument that the airing of the Garci Tapes constitutes unprotected expression, only the courts have the power to adjudicate on the factual and legal issue of whether the airing of the Garci Tapes presents a clear and present danger of bringing about a substantive evil that the State has a right and duty to prevent, so as to justify the prior restraint.

Any order imposing prior restraint on ***unprotected expression*** requires prior adjudication by the courts on whether the prior restraint is constitutional. This is a necessary consequence from the presumption of invalidity of any prior restraint on unprotected expression. Unless ruled by the courts as a valid prior restraint, government agencies cannot implement outright such prior restraint because such restraint is presumed unconstitutional at inception.

As an agency that allocates frequencies or airwaves, the NTC may regulate the bandwidth position, transmitter wattage, and location of radio and television stations, but not the content of the broadcasts. Such content-neutral prior restraint may make operating radio and television stations more costly. However, such content-neutral restraint does not restrict the content of the broadcast.

7. Government Failed to Overcome Presumption of Invalidity

Assuming that the airing of the Garci Tapes constitutes unprotected expression, the NTC action imposing prior restraint on the airing is presumed unconstitutional. The Government bears a heavy burden to prove that the NTC action is constitutional. The Government has failed to meet this burden.

In their Comment, respondents did not invoke any compelling State interest to impose prior restraint on the public airing of the Garci Tapes. The respondents claim that they merely "fairly warned" radio and television stations to observe the Anti-Wiretapping Law and pertinent NTC circulars on program standards. Respondents have

not explained how and why the observance by radio and television stations of the Anti-Wiretapping Law and pertinent NTC circulars constitutes a compelling State interest justifying prior restraint on the public airing of the Garci Tapes.

Violation of the Anti-Wiretapping Law, like the violation of any criminal statute, can always be subject to criminal prosecution *after* the violation is committed. Respondents have not explained why there is a need in the present case to impose prior restraint just to prevent a possible future violation of the Anti-Wiretapping Law. Respondents have not explained how the violation of the Anti-Wiretapping Law, or of the pertinent NTC circulars, can incite imminent lawless behavior or endanger the security of the State. To allow such restraint is to allow prior restraint on all future broadcasts that may possibly violate any of the existing criminal statutes. That would be the dawn of sweeping and endless censorship on broadcast media.

8. The NTC Warning is a Classic Form of Prior Restraint

The NTC press release threatening to suspend or cancel the airwave permits of radio and television stations constitutes impermissible pressure amounting to prior restraint on protected expression. Whether the threat is made in an order, regulation, advisory or press release, the chilling effect is the same: the threat freezes radio and television stations into deafening silence. Radio and television stations that have invested substantial sums in capital equipment and market development suddenly face suspension or cancellation of their permits. The NTC threat is thus real and potent.

In *Burgos v. Chief of Staff,* [42] this Court ruled that the closure of the *We Forum* newspapers under a general warrant "is in the nature of a previous restraint or censorship abhorrent to the freedom of the press guaranteed under the fundamental law." The NTC warning to radio and television stations not to air the Garci Tapes or else their permits will be suspended or cancelled has the same effect — a prior restraint on constitutionally protected expression.

In the recent case of *David v. Macapagal-Arroyo*, [43] this Court declared unconstitutional government threats to close down mass media establishments that refused to comply with government prescribed "standards" on news reporting following the declaration of a State of National Emergency by President Arroyo on 24 February 2006. The Court described these threats in this manner:

> Thereafter, **a wave of warning[s] came from government officials** . Presidential Chief of Staff Michael Defensor was quoted as saying that such raid was "meant to show a 'strong presence,' to tell media outlets not to connive or do anything that would help the rebels in bringing down this government." Director General Lomibao further stated that "if they do not follow the standards — and the standards are if they would contribute to instability in the government, or if they do not subscribe to what is in General Order No. 5 and Proc. No. 1017 — we will recommend a 'takeover.'" **National Telecommunications Commissioner Ronald Solis urged television and radio networks to "cooperate" with the government for the duration of the state of national emergency. He warned that his agency will not hesitate to recommend the closure of any broadcast outfit that violates rules set out for media coverage during times when the national security is threatened**. [44] (Emphasis supplied)

The Court struck down this "**wave of warning[s]**" as impermissible restraint on freedom of expression. The Court ruled that "the imposition of standards on media or any form of prior restraint on the press, as well as the warrantless search of the Tribune

offices and whimsical seizure of its articles for publication and other materials, are declared UNCONSTITUTIONAL." [45]

The history of press freedom has been a constant struggle against the censor whose weapon is the suspension or cancellation of licenses to publish or broadcast. The NTC warning resurrects the weapon of the censor. The NTC warning is a ***classic form of prior restraint*** on protected expression, which in the words of *Near v. Minnesota* is "the essence of censorship." [46] Long before the American Declaration of Independence in 1776, William Blackstone had already written in his *Commentaries on the Law of England,* "The liberty of the press . . . consists in laying no previous restraints upon publication . . .." [47]

Although couched in a press release and not in an administrative regulation, the NTC threat to suspend or cancel permits remains real and effective, for without airwaves or frequencies, radio and television stations will fall silent and die. The NTC press release does not seek to advance a legitimate regulatory objective, but to suppress through coercion information on a matter of vital public concern.

9. Conclusion

In sum, the NTC press release constitutes an unconstitutional prior restraint on protected expression. There can be no content-based prior restraint on protected expression. This rule has no exception.

I therefore vote to (1) grant the petition, (2) declare the NTC warning, embodied in its press release dated 11 June 2005, an unconstitutional prior restraint on protected expression, and (3) enjoin the NTC from enforcing the same.

AZCUNA, *J., concurring*:

I vote to GRANT the petition on the ground that the challenged NTC and DOJ warnings violate Sec. 10, Art XVI of the Constitution which states:

> Sec. 10. The State shall be provide the policy environment for the full development of Filipino capability and the emergency of communication structures suitable to the needs and aspirations of the nations and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press.

This provision was precisely crafted to meet the needs and opportunities of the emerging new pathways of communications, from radio and tv broadcast to the flow of digital informations via cables, satellites and the internet.

The purpose of this new statement of directed State policy is to hold the State responsible for a policy environment that provides for (1) the full development of Filipino capability, (2) the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information, and (3) respect for the freedom of speech and of the press.

The regulatory warnings involved in this case work against a balanced flow of information in our communication structures and do so without respecting freedom of speech by casting a chilling effect on the media. This is definitely not the policy environment contemplated by the Constitution.

CHICO-NAZARIO, *J., dissenting*:

With all due respect, I vote to dismiss the present Petition for the simple reason

that the assailed press statements made by the National Telecommunications Commission (NTC) and the Secretary of Justice Raul Gonzales (Gonzales) do not constitute prior restraint that impair freedom of speech. There being no restraint on free speech, then there is even no need to apply any of the tests, *i.e.*, the dangerous tendency doctrine, the balancing of interests test, and the clear and present danger rule, to determine whether such restraint is valid.

The assailed press statements must be understood and interpreted in the proper perspective. The statements must be read in their entirety, and interpreted in the context in which they were made.

A scrutiny of the "fair warning" issued by the NTC on 11 June 2005 reveals that it is nothing more than that, a fair warning, calling for sobriety, care, and circumspection in the news reporting and current affairs coverage by radio and television stations. It reminded the owners and operators of the radio stations and television networks of the provisions in NTC Memorandum Circulars No. 11-12-85 and 22-89, which are also stated in the authorizations and permits granted to them by the government, that they shall not use their stations for the broadcasting or telecasting of false information or willful misrepresentation. It must be emphasized that the NTC is merely reiterating the very same prohibition **already contained** in its previous circulars, and even in the authorizations and permits of radio and television stations. The reason thus escapes me as to why said prohibition, when it was stated in the NTC Memorandum Circulars and in the authorizations and permits, was valid and acceptable, but when it was **reiterated** in a mere **press statement** released by the NTC, had become a violation of the Constitution as a prior restraint on free speech.

In the midst of the media frenzy that surrounded the Garci tapes, the NTC, as the administrative body tasked with the regulation of radio and television broadcasting companies, cautioned against the airing of the **unauthenticated** tapes. The warning of the NTC was expressed in the following manner, "[i]f it has been (*sic*) subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation, the concerned radio and television companies are hereby warned that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies." According to the foregoing sentence, **before any penalty could be imposed on a radio or television company for airing the Garci tapes, the tapes must have been established to be false and fraudulent after prosecution and investigation**. The warning is nothing new for it only verbalizes and applies to the particular situation at hand an existing prohibition against spreading false information or willful misrepresentation by broadcast companies. In fact, even without the contested "fair warning" issued by the NTC, broadcast companies could still face penalties if, after investigation and prosecution, the Garci tapes are established to be false and fraudulent, and the airing thereof was done to purposely spread false information or misrepresentation, in violation of the prohibition stated in the companies' authorizations and permits, as well as the pertinent NTC Memorandum Circulars.

Moreover, we should not lose sight of the fact that just three days after its issuance of its "fair warning," or on 14 June 2005, the NTC again released another press statement, this time, jointly made with the *Kapisanan ng Broadcasters sa Pilipinas* (KBP), to the effect that:

JOINT PRESS STATEMENT: NTC AND KBP

- CALL FOR SOBRIETY, RESPONSIBLE JOURNALISM, AND OBSERVANCE OF LAW, AND THE RADIO AND TELEVISION CODES.

- NTC RESPECTS AND WILL NOT HINDER FREEDOM OF THE PRESS AND THE RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN. KBP & ITS MEMBERS HAVE ALWAYS BEEN COMMITTED TO THE EXERCISE (*sic*) PRESS FREEDOM WITH HIGH SENSE OF RESPONSIBILITY AND DISCERNING JUDGMENT OF FAIRNESS AND HONESTY.

- NTC DID NOT ISSUE ANY MC OR ORDER CONSTITUTING A RESTRAINT OF PRESS FREEDOM OR CENSORSHIP. NTC FURTHER DENIES AND DOES NOT INTEND TO LIMIT OR RESTRICT THE INTERVIEW OF MEMBERS OF THE OPPOSITION OR FREE EXPRESSION OF VIEWS.

- WHAT IS BEING ASKED BY NTC IS THAT THE EXERCISE OF PRESS FREEDOM IS DONE RESPONSIBLY.

- KBP HAS PROGRAM STANDARDS THAT KBP MEMBERS WILL OBSERVE IN THE TREATMENT OF NEWS AND PUBLIC AFFAIRS PROGRAMS. THESE INCLUDE VERIFICATION OF SOURCES, NON-AIRING OF MATERIALS THAT WOULD CONSTITUTE INCITING TO SEDITION AND/OR REBELLION.

- THE KBP CODES ALSO REQUIRE THAT NO FALSE STATEMENT OR WILLFUL MISREPRESENTATION IS MADE IN THE TREATMENT OF NEWS OR COMMENTARIES.

- THE SUPPOSED WIRETAPPED (*sic*) TAPES SHOULD BE TREATED WITH SENSITIVITY AND HANDLED RESPONSIBLY GIVING DUE CONSIDERATION TO THE PROCESSES BEING UNDERTAKEN TO VERIFY AND VALIDATE THE AUTHENTICITY AND ACTUAL CONTENT OF THE SAME.

The relevance of the afore-quoted press statement cannot be downplayed. It already categorically settles what NTC meant and how the KBP understood the 11 June 2005 NTC press statement. We cannot insist to give a different and more sinister interpretation to the first press statement, when the second press statement had already particularly defined the context by which it should be read.

Neither should we give much merit to the statements made by Secretary Gonzales to the media that he had already instructed the National Bureau of Investigation (NBI) to monitor all radio stations and television networks for possible violations of the Anti-Wiretapping Law. Secretary Gonzales is one of media's favorite political personalities, hounded by reporters, and featured almost daily in newspapers, radios, and televisions, for his "quotable quotes," some of which appeared to have been uttered spontaneously and flippantly. There was no showing that Secretary Gonzales had actually and officially ordered the NBI to conduct said monitoring of radio and television broadcasts, and that the NBI acted in accordance with said order. Which leads me to my next point.

We should be judicious in giving too much weight and credence to press statements. I believe that it would be a dangerous precedent to rule that press statements should be deemed an official act of the administrative agency or public official concerned. Press statements, in general, can be easily manufactured, prone to alteration or misinterpretation as they are being reported by the media, and may, during some instances, have to be made on the spot without giving the source much time to discern the ramifications of his statements. Hence, they cannot be given the same

weight and binding effect of official acts in the form of, say, memorandum orders or circulars.

Even if we assume *arguendo* that the press statements are official issuances of the NTC and Secretary Gonzales, then the petitioner alleging their unconstitutionality must bear the burden of proving first that the challenged press statements did indeed constitute prior restraint, before the presumption of invalidity of any system of prior restraint on free speech could arise. Until and unless the petitioner satisfactorily discharges the said burden of proof, then the press statements must similarly enjoy the presumption of validity and constitutionality accorded to statutes, having been issued by officials of the executive branch, a co-equal. The NTC and Secretary Gonzales must likewise be accorded the presumption that they issued the questioned press statements in the regular performance of their duties as the regulatory body for the broadcasting industry and the head of the principal law agency of the government, respectively.

Significantly also, please allow me to observe that the purported chilling effect of the assailed press statements was belied by the fact that the owners and operators of radio stations and television networks, who were supposed to feel most threatened by the same, did not find it necessary to go to court. They should have been the ones to have felt and attested to the purported chilling effect of said press statements. Their silence in all this speaks for itself.

In view of the foregoing, I vote for the denial of the present petition.

NACHURA, *J., dissenting*:

I respectfully register my dissent to the majority opinion penned by the esteemed Chief Justice. The assailed press releases and statements do not constitute a prior restraint on free speech. It was not improper for the NTC to warn the broadcast media that the airing of taped materials, if subsequently shown to be false, would be a violation of law and of the terms of their certificate of authority, and could lead, after appropriate investigation, to the cancellation or revocation of their license.

The Facts

This case arose from events that transpired a year after the 2004 national and local elections, a period marked by disquiet and unrest; events that rocked the very foundations of the present administration.

To recall, on June 5, 2005, Press Secretary Ignacio Bunye conveyed to reporters that the opposition was planning to destabilize the administration by releasing an audiotape of a bugged mobile phone conversation allegedly between the President of the Republic of the Philippines and a high-ranking official of the Commission on Elections (COMELEC). [1]

The following day, June 6, 2005, Secretary Bunye presented and played two compact discs (CD's) to the Malacañan Press Corps, and explained that the first contained the wiretap, while the second, the spliced, doctored, and altered version which would suggest that during the 2004 National and Local Elections the President instructed the COMELEC official to manipulate in her favor the election results. [2]

Atty. Alan Paguia, former counsel of then President Joseph E. Estrada, subsequently released, on June 7, 2005, the alleged authentic tape recordings of the wiretap. Included, among others, in the tapes were purported conversations of the President, First Gentleman Jose Miguel Arroyo, COMELEC Commissioner Virgilio

Garcillano, and the late Senator Robert Barbers. [3]

On June 8, 2005, respondent Secretary of the Department of Justice (DOJ), Raul Gonzalez, informed news reporters that persons in possession of copies of the wiretap and media outlets broadcasting, or publishing the contents thereof, could be held liable under the Anti-Wiretapping Act [Republic Act No. 4200]. [4] He further told newsmen, on the following day, that he had already instructed the National Bureau of Investigation (NBI) to monitor all radio stations and television networks for possible violations of the said law. [5]

Then, on June 10, 2005, former NBI Deputy Director Samuel Ong presented to the media the alleged master tape recordings of the wiretap or the so-called "mother of all tapes," and disclosed that their contents were wiretapped by T/Sgt. Vidal Doble of the Intelligence Service of the Armed Forces of the Philippines (ISAFP). Ong then called for the resignation of the President. [6]

On June 11, 2005, after several news reports, respondent National Telecommunications Commission (NTC) issued the following press release:

> Contact:
> Office of the Commissioner
> National Telecommunications Commission
> BIR Road, East Triangle, Diliman, Quezon City
> Tel. 924-4048/924-4037
> E-mail: commissioner@ntc.gov.ph
>
> **NTC GIVES FAIR WARNING TO RADIO AND TELEVISION OWNERS/OPERATORS TO OBSERVE ANTI-WIRETAPPING LAW AND PERTINENT NTC CIRCULARS ON PROGRAM STANDARDS**
>
> In view of the unusual situation the country is in today, The (*sic*) National Telecommunications Commission (NTC) calls for sobriety among the operators and management of all radio and television stations in the country and reminds them, especially all broadcasters, to be careful and circumspect in the handling of news reportage, coverages of current affairs and discussion of public issues, by strictly adhering to the pertinent laws of the country, the current program standards embodied in radio and television codes and the existing circulars of the NTC.
>
> The NTC said that now, more than ever, the profession of broadcasting demands a high sense of responsibility and discerning judgment of fairness and honesty at all times among broadcasters amidst all these rumors of unrest, destabilization attempts and controversies surrounding the alleged wiretapping of President GMA (*sic*) telephone conversations.
>
> Taking into consideration the country's unusual situation, and in order not to unnecessarily aggravate the same, the NTC warns all radio stations and television networks owners/operators that the conditions of the authorizations and permits issued to them by Government like the Provisional Authority and/or Certificate of Authority explicitly provides that said companies shall not use its stations for the broadcasting or telecasting of false information or willful misrepresentation. Relative thereto, it has come to the attention of the Commission that certain personalities are in possession of alleged taped conversation which they claim, (*sic*) involve the President of the Philippines and a Commissioner of the COMELEC regarding their supposed violation of election

laws. These personalities have admitted that the taped conversations are product of illegal wiretapping operations.

Considering that these taped conversations have not been duly authenticated nor could it be said at this time that the tapes contain an accurate or truthful representation of what was recorded therein, (*sic*) it is the position of the Commission that the continuous airing or broadcast of the said taped conversations by radio and television stations is a continuing violation of the Anti-Wiretapping Law and the conditions of the Provisional Authority and/or Certificate of Authority issued to these radio and television stations. If it has been (*sic*) subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation, the concerned radio and television companies are hereby warned that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies.

In addition to the above, the Commission reiterates the pertinent NTC circulars on program standards to be observed by radio and television stations. NTC Memorandum Circular No. 111-12-85 explicitly states, among others, that "all radio broadcasting and television stations shall, during any broadcast or telecast, cut off from the air the speech, play, act or scene or other matters being broadcast and/or telecast if the tendency thereof" is to disseminate false information or such other willful misrepresentation, or to propose and/or incite treason, rebellion or sedition. The foregoing directive had been reiterated in NTC Memorandum Circular No. 22-89 which, in addition thereto, prohibited radio, broadcasting and television stations from using their stations to broadcast or telecast any speech, language or scene disseminating false information or willful misrepresentation, or inciting, encouraging or assisting in subversive or treasonable acts.

The Commission will not hesitate, after observing the requirements of due process, to apply with full force the provisions of the said Circulars and their accompanying sanctions on erring radio and television stations and their owners/operators. [7]

On June 14, 2005, respondent NTC held a dialogue with the Officers and Board of Directors of the *Kapisanan ng mga Broadcasters sa Pilipinas* (KBP) to clarify the said press release. As a result, the NTC and the KBP issued a joint press release which reads: [8]

JOINT PRESS STATEMENT: NTC AND KBP

- CALL FOR SOBRIETY, RESPONSIBLE JOURNALISM, AND OBSERVANCE OF LAW, AND THE RADIO AND TELEVISION CODES.

- NTC RESPECTS AND WILL NOT HINDER FREEDOM OF THE PRESS AND THE RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN. KBP & ITS MEMBERS HAVE ALWAYS BEEN COMMITTED TO THE EXERCISE (SIC) PRESS FREEDOM WITH HIGH SENSE OF RESPONSIBILITY AND DISCERNING JUDGMENT OF FAIRNESS AND HONESTY.

- NTC DID NOT ISSUE ANY MC OR ORDER CONSTITUTING A RESTRAINT OF PRESS FREEDOM OR CENSORSHIP. NTC FURTHER DENIES AND DOES NOT INTEND TO LIMIT OR RESTRICT THE INTERVIEW OF MEMBERS OF THE OPPOSITION OR FREE EXPRESSION OF VIEWS.

- WHAT IS BEING ASKED BY NTC IS THAT THE EXERCISE OF PRESS FREEDOM IS DONE RESPONSIBLY.
- KBP HAS PROGRAM STANDARDS THAT KBP MEMBERS WILL OBSERVE IN THE TREATMENT OF NEWS AND PUBLIC AFFAIRS PROGRAMS. THESE INCLUDE VERIFICATION OF SOURCES, NON-AIRING OF MATERIALS THAT WOULD CONSTITUTE INCITING TO SEDITION AND/OR REBELLION.
- THE KBP CODES ALSO REQUIRE THAT NO FALSE STATEMENT OR WILLFUL MISREPRESENTATION IS MADE IN THE TREATMENT OF NEWS OR COMMENTARIES.
- THE SUPPOSED WIRETAPPED (SIC) TAPES SHOULD BE TREATED WITH SENSITIVITY AND HANDLED RESPONSIBLY GIVING DUE CONSIDERATION TO THE PROCESSES BEING UNDERTAKEN TO VERIFY AND VALIDATE THE AUTHENTICITY AND ACTUAL CONTENT OF THE SAME. [9]

On June 21, 2005, petitioner Francisco Chavez, a Filipino citizen, taxpayer and law practitioner, instituted the instant Rule 65 Petition [10] for *certiorari* and prohibition with a prayer for the issuance of a temporary restraining order on the following grounds:

> RESPONDENTS COMMITTED BLATANT VIOLATIONS OF THE FREEDOM OF EXPRESSION AND OF THE PRESS AND THE RIGHT OF THE PEOPLE TO INFORMATION ON MATTERS OF PUBLIC CONCERN ENSHRINED IN ARTICLE III, SECTIONS 4 AND 7 OF THE 1987 CONSTITUTION.
>
> RESPONDENT NTC ACTED BEYOND ITS POWERS AS A REGULATORY BODY UNDER EXECUTIVE ORDER 546 AND REPUBLIC ACT NO. 7925 WHEN IT WARNED RADIO BROADCAST AND TELEVISION STATIONS WITH DIRE CONSEQUENCES IF THEY CONTINUED TO AIR CONTENTS OF THE CONTROVERSIAL TAPES OF THE PRESIDENT'S CONVERSATION. [11]

In their Comment [12] to the petition, the respondents, through the Office of the Solicitor General (OSG), countered that: (1) the petitioner had no legal standing to file, and had no clear case or cause of action to support, the instant petition as to warrant judicial review; [13] (2) the respondents did not violate petitioner's and/or the public's fundamental liberties of speech, of expression and of the press, and their right to information on matters of public concern; [14] and (3) the respondent NTC did not commit any grave abuse of discretion amounting to lack or excess of jurisdiction when it "fairly warned" radio and television owners/operators to observe the Anti-Wiretapping Law and pertinent NTC circulars on program standards. [15]

The Issues

For the resolution, therefore, of the Court are the following issues: (1) whether or not petitioner has *locus standi*; (2) whether or not there exists an actual case or controversy ripe for judicial review; and (3) whether or not the respondents gravely abused their discretion to warrant remedial action from the Court.

On the Procedural Issues

Petitioner has locus standi

Petitioner has standing to file the instant petition. The test is whether the party has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. [16] When suing

as a citizen, the person complaining must allege that he has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of. [17] When the issue concerns a public right, it is sufficient that the petitioner is a citizen and has an interest in the execution of the laws. [18]

In the case at bench, petitioner Chavez justifies his standing by alleging that the petition involves the enforcement of the constitutional rights of freedom of expression and of the press, and to information on matters of public concern. [19] As a citizen of the Republic and as a taxpayer, petitioner has already satisfied the requisite personal stake in the outcome of the controversy. In any case, the Court has discretion to relax the procedural technicality on *locus standi*, given the liberal attitude it has shown in a number of prior cases, climaxing in *David v. Macapagal-Arroyo*. [20]

The main issues have been mooted, but the case should nonetheless be resolved by the Court

The exercise by this Court of the power of judicial inquiry is limited to the determination of actual cases and controversies. [21] An actual case or controversy means an existing conflict that is appropriate or ripe for judicial determination, one that is not conjectural or anticipatory, otherwise the decision of the court will amount to an advisory opinion. The power does not extend to hypothetical questions since any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities. [22] Neither will the Court determine a moot question in a case in which no practical relief can be granted. Indeed, it is unnecessary to indulge in academic discussion of a case presenting a moot question as a judgment thereon cannot have any practical legal effect or, in the nature of things, cannot be enforced. [23]

In the instant case, it is readily observable that the subsequent joint statement of the respondent NTC and the Officers and Board of Directors of the KBP after their June 14, 2005 dialogue not only substantially diminished [24] but, in fact, obliterated the effects of the earlier press warnings, thus rendering the case moot and academic. Notably, the joint press statement acknowledged that *"NTC did not issue any memorandum circular or order constituting a restraint of press freedom or censorship."*

A case becomes moot when its purpose has become stale. [25]

Be that as it may, the Court should discuss and resolve the fundamental issues raised herein, in observance of the rule that courts shall decide a question otherwise moot and academic if it is capable of repetition yet evasive of review. [26]

The Dissent

The assailed press statement does not infringe on the constitutional right to free expression

Petitioner assails the constitutionality of respondents' press release and statements warning radio stations and television networks of the possible cancellation of their licenses and of potential criminal prosecution that they may face should they broadcast or publish the contents of the tapes. Petitioner contends that the assailed press release and statements infringe on the freedom of expression and of the press.

I do not agree, for the following reasons:

1. *The issuance of the press release was a valid exercise*

of the NTC's regulatory authority over broadcast media.

Admittedly, freedom of expression enjoys an exalted place in the hierarchy of constitutional rights. But it is also a settled principle, growing out of the nature of well-ordered civil societies that the exercise of the right is not absolute for it may be so regulated that it shall not be injurious to the equal enjoyment of others having equal rights, not injurious to the rights of the community or society. [27] Consistent with this principle, the exercise of the freedom may be the subject of reasonable government regulation.

The broadcast media are no exception. In fact, in *Federal Communications Commission (FCC) v. League of Women Voters in America*, [28] it was held that —

> (W)e have long recognized that Congress, acting pursuant to the Commerce Clause, has power to regulate the use of this scarce and valuable national resource. The distinctive feature of Congress' efforts in this area has been to ensure through the regulatory oversight of the FCC that only those who satisfy the "public interest, convenience and necessity" are granted a license to use radio and television broadcast frequencies.

In the Philippines, it is the respondent NTC that has regulatory powers over telecommunications networks. In Republic Act No. 7925, [29] the NTC is denominated as its principal administrator, and as such shall take the necessary measures to implement the policies and objectives set forth in the Act. Under Executive Order 546, [30] the NTC is mandated, among others, to establish and prescribe rules, regulations, standards and specifications in all cases related to the issued Certificate of Public Convenience, promulgate rules and regulations as public safety and interest may require, and supervise and inspect the operation of radio stations and telecommunications facilities. [31] The NTC exercises quasi-judicial powers. [32]

The issuance of the press release by NTC was well within the scope of its regulatory and supervision functions, part of which is to ensure that the radio and television stations comply with the law and the terms of their respective authority. Thus, it was not improper for the NTC to warn the broadcast media that the airing of taped materials, if subsequently shown to be false, would be a violation of law and of the terms of their certificate of authority, and could lead, after appropriate investigation, to the cancellation or revocation of their license.

2. The press release was not in the nature of "prior restraint" on freedom of expression

Courts have traditionally recognized two cognate and complementary facets of freedom of expression, namely: freedom from censorship or prior restraint and freedom from subsequent punishment. The first guarantees untrammeled right to expression, free from legislative, administrative or judicial orders which would effectively bar speech or publication even before it is made. The second prohibits the imposition of any sanction or penalty for the speech or publication after its occurrence. Freedom from prior restraint has enjoyed the widest spectrum of protection, but no real constitutional challenge has been raised against the validity of laws that punish abuse of the freedom, such as the laws on libel, sedition or obscenity.

"Prior restraint" is generally understood as an imposition in advance of a limit upon speech or other forms of expression. [33] In determining whether a restriction is a prior restraint, one of the key factors considered is whether the restraint prevents the expression of a message. [34] In *Nebraska Press Association v. Stuart,* [35] the U.S.

Supreme Court declared:

> A prior restraint . . . by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

As an aspect of freedom of expression, prior restraint should not be confused with subsequent punishment. In *Alexander v. U.S.*,[36] petitioner's complaint was that the RICO forfeiture provisions on businesses dealing in expressive materials constituted "prior restraint" because they may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech. In rejecting the petitioner's contention and ruling that the forfeiture is a permissible criminal punishment and not a prior restraint on speech, the U.S. Supreme Court said:

> The term prior restraint is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Temporary restraining orders and permanent injunctions — *i.e.,* court orders that actually forbid speech activities — are classic examples of prior restraints.
>
> xxx xxx xxx
>
> Finally, petitioner's proposed definition of the term "prior restraint" would undermine the time-honored distinction between barring speech in the future and penalizing past speech. The doctrine of prior restraint originated in the common law of England where prior restraints of the press were not permitted, but punishment after publication was. This very limited application of the principle of freedom of speech was held inconsistent with our First Amendment as long ago as *Grosjean v. American Press Co*. While we may have given a broader definition to the term "prior restraint" than was given to it in English common law, our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments. Though petitioner tries to dismiss this distinction as "neither meaningful nor useful," we think it is critical to our First Amendment jurisprudence. Because we have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments, it is important for us to delineate with some precision the defining characteristics of a prior restraint. To hold that the forfeiture order in this case constituted a prior restraint would have the exact opposite effect. It would blur the line separating prior restraints from subsequent punishments to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not.

A survey of free speech cases in our jurisdiction reveals the same disposition: there is prior restraint when the government act forbids speech, prohibits the expression of a message, or imposes onerous requirements or restrictions for the publication or dissemination of ideas. In theses cases, we did not hesitate to strike down the administrative or judicial order for violating the free expression clause in the Constitution.

Thus, in *Primicias v. Fugoso*[37] and in *Reyes v. Bagatsing*,[38] the refusal, without valid cause, of the City Mayor of Manila to issue a permit for a public assembly was held to have infringed freedom of expression. In *Burgos v. Chief of Staff*[39] and in *Eastern Broadcasting v. Dans*,[40] the closure of the printing office of the newspapers, *We Forum* and *Metropolitan Mail,* and of radio station DYRE in Cebu, respectively, was ruled as violation of freedom of the press.

On election-related restrictions, *Mutuc v. COMELEC* [41] invalidated the respondent's prohibition against the use of taped jingles in mobile units of candidates; *Adiong v. COMELEC* [42] struck down the COMELEC's resolution limiting the posting of candidates' decals and stickers only in designated areas and not allowing them in private or public vehicles; *Sanidad v. COMELEC* [43] declared as unconstitutional the COMELEC prohibition on newspaper columnists and radio commentators to use their columns or programs to campaign for or against the ratification of the organic act establishing the Cordillera Autonomous Region; *ABS-CBN Broadcasting Corporation v. COMELEC* [44] annulled the COMELEC resolution prohibiting the conduct of exit polls; and *Social Weather Stations v. COMELEC* [45] nullified Section 5.4 of Republic Act No. 9006 and Section 24 (h) of COMELEC Resolution 3636 which prohibited the publication of pre-election survey results within specified periods.

On movies and television, the injunctive writs issued by lower courts against the movie producers in *Ayer Productions Pty. Ltd. v. Capulong* [46] and in *Viva Productions v. Court of Appeals* [47] were invalidated, while in *Iglesia ni Cristo v. Court of Appeals*, [48] the X-rating given by MTRCB to the television show was ruled as grave abuse of discretion.

But there is no parity between these cases and the case at bench. Unlike the government acts in the above-cited cases, what we have before us now is merely a press release — not an order or a circular — warning broadcast media on the airing of an alleged taped conversation, with the caveat that should its falsity be subsequently established, the act could lead to the revocation or cancellation of their licenses, after appropriate investigation. The warnings on possible license revocation and criminal prosecution are simply what they are, mere warnings. They have no compulsive effect, as they do not impose a limit on speech or other forms of expression nor do they prevent the expression of a message.

The judicial angle of vision in testing the validity of the assailed press release against the prior restraint standard is its operation and substance. The phrase "prior restraint" is not a self-wielding sword, nor should it serve as a talismanic test. What is needed is a practical assessment of its operation in specific or particular circumstances. [49]

Significant are our own decisions in a number of cases where we rejected the contention that there was infringement of freedom of expression. In *Lagunzad v. Vda. de Gonzales*, [50] after balancing the right to privacy of Padilla's family with the right to free expression of the movie producer, we did not deem the Licensing Agreement for the movie depiction of the life of Moises Padilla as imposition of an impermissible limit on free speech. In *Presidential Commission on Good Government (PCGG) v. Nepomuceno*, [51] we refused to consider the PCGG takeover of radio station DWRN as an infringement on freedom of the press. In *Tolentino v. Secretary of Finance*, [52] we did not yield to the proposition of the press that the imposition of value added tax (VAT) on the gross receipts of newspapers from advertisements and on their acquisition of paper, ink and services for publication was an abridgment of press freedom. In *Lagunzad,* we said that while the License Agreement allowed the producer to portray in a movie the life of Moises Padilla, it did not confer poetic license to incorporate fictional embellishments. The takeover in *PCGG* was merely intended to preserve the assets, funds and properties of the station while it maintained its broadcasting operations. The VAT in *Tolentino* did not inhibit or impede the circulation of the newspapers concerned.

Similarly, in the instant case, the issuance of the press release was simply part of the duties of the NTC in the enforcement and administration of the laws which it is

tasked to implement. The press release did not actually or directly prevent the expression of a message. The respondents never issued instructions prohibiting or stopping the publication of the alleged wiretapped conversation. The warning or advisory in question did not constitute suppression, and the possible *in terrorem* effect, if any, is not prior restraint. It is not prior restraint because, if at all, the feared license revocation and criminal prosecution come after the publication, not before it, and only after a determination by the proper authorities that there was, indeed, a violation of law.

The press release does not have a "chilling effect" because even without the press release, existing laws — and rules and regulations — authorize the revocation of licenses of broadcast stations if they are found to have violated penal laws or the terms of their authority. [53] The majority opinion emphasizes the chilling effect of the challenged press releases — the fear of prosecution, cancellation or revocation of license by virtue of the said press statements. [54] With all due respect, the majority loses sight of the fact that the press statements are not a prerequisite to prosecution, neither does the petition demonstrate that prosecution is any more likely because of them. If the prosecutorial arm of the Government and the NTC deem a media entity's act to be violative of our penal laws or the rules and regulations governing broadcaster's licenses, they are free to prosecute or to revoke the licenses of the erring entities **with or without the challenged press releases.** [55]

The petitioner likewise makes capital of the alleged prior determination and conclusion made by the respondents that the continuous airing of the tapes is a violation of the Anti-Wiretapping Law and of the conditions of the authority granted to the broadcast stations. The assailed portion of the press release reads:

> Considering that these taped conversations have not been duly authenticated nor could it be said at this time that the tapes contain an accurate or truthful representation of what was recorded therein, it is the position of the commission that the continuous airing or broadcast of the said taped conversations by radio and television stations is a continuing violation of the anti-wiretapping law and the conditions of the provisional authority and/or certificate of authority issued to these radio and television stations.

However, that part of the press statement should not be read in isolation, but in the context of the entire paragraph, the rest of which reads:

> **If it has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation,** the concerned radio and television companies are hereby warned that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies.

Obviously, this latter portion qualifies the earlier part of the paragraph. Only when it has been sufficiently established, after a prosecution or appropriate investigation, that the tapes are false or fraudulent may there be a cancellation or revocation of the station's license. There is no gainsaying that the airing of false information or willful misrepresentation constitutes a valid ground for revocation of the license, and so is violation of the Anti-Wiretapping Law which is a criminal offense. But that such revocation of license can only be effected after an appropriate investigation clearly shows that there are adequate safeguards available to the radio and television stations, and that there will be compliance with the due process clause.

It is noteworthy that in the joint press statement issued on June 14, 2005 by the NTC and the *Kapisanan ng mga Broadcasters sa Pilipinas*, there is an acknowledgement by the parties that NTC "did not issue any MC (Memorandum Circular) or order constituting a restraint of press freedom or censorship." If the broadcasters who should be the most affected by the assailed NTC press release, by this acknowledgement, do not feel aggrieved at all, we should be guided accordingly. We cannot be more popish than the pope.

Finally, we believe that the "clear and present danger rule" — the universally-accepted norm for testing the validity of governmental intervention in free speech — finds no application in this case precisely because there is no prior restraint.

3. The penal sanction in R.A. 4200 or the revocation of the license for violation of the terms and conditions of the provisional authority or certificate of authority is permissible punishment and does not infringe on freedom of expression.

The Anti-Wiretapping Law (Republic Act 4200) is a penal statute. Over the years, no successful challenge to its validity has been sustained. Conviction under the law should fittingly be a just cause for the revocation of the license of the erring radio or television station.

Pursuant to its regulatory authority, the NTC has issued memorandum circulars covering Program Standards to be followed by radio stations and television networks, a common provision of which reads:

> All radio broadcasting and television stations shall provide adequate public service time, shall conform to the ethics of honest enterprise; and shall not use its stations for the broadcasting or telecasting of obscene or indecent language, speech and/or scene, **or for the dissemination of false information or willful misrepresentation**, or to the detriment of the public health or to incite, encourage or assist in subversive or treasonable acts. [56]

Accordingly, in the Provisional Authority or the Certificate of Authority issued to all radio, television and cable TV stations, which all licensees must faithfully abide with, there is incorporated, among its terms and conditions, the following clause:

> Applicant-Grantee shall provide free of charge, a minimum of thirty (30) hours/month time or access channel thru its radio/television station facilities to the National Government to enable it to reach the population on important public issues; assist public information and education; **conform with the ethics of honest enterprise; and shall not use its stations for the telecasting of obscene or for dissemination of false information or willful misrepresentation, or do any such act to the detriment of public welfare, health, morals or to incite, encourage, or assist in any treasonous, rebellious, or subversive acts/omissions.**

Undoubtedly, this is a reasonable standard of conduct demanded of the media outlets. The sanction that may be imposed for breach thereof — suspension, cancellation or revocation of the station's license after an appropriate investigation has sufficiently established that there was a breach — is also reasonable. It cannot be characterized as impermissible punishment which violates freedom of expression.

There is no transgression of the people's right

to information on matters of public concern.

With the foregoing disquisition that there was no infringement on freedom of expression, there is no case for violation of the right to information on matters of public concern. Indeed, in the context of the prevailing factual milieu of the case at bench, the petitioner's contention can thrive only if there is a showing that the act of the respondents constituted prior restraint.

There is, therefore, no further need to belabor the point.

NTC did not commit grave abuse of discretion when it issued the press release

Grave abuse of discretion is defined as such capricious or whimsical exercise of judgment equivalent to lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility. [57] For grave abuse of discretion to be present, petitioner must show that the respondents violated or ignored the Constitution, the laws or existing jurisprudence. [58]

As discussed earlier, respondents, in making the questioned press releases, did not violate or threaten to violate the constitutional rights to free expression and to information on matters of public concern. No grave abuse of discretion can be imputed to them.

One final word. With the benefit of hindsight, it is noted that from the time the assailed press releases were issued and up to the present, the feared criminal prosecution and license revocation never materialized. They remain imagined concerns, even after the contents of the tapes had been much talked about and publicized.

I therefore vote to dismiss the petition for *certiorari* and prohibition.

TINGA, *J., dissenting and concurring*:

This case, involving as it does the perennial clash between fundamental individual freedoms and state power, confronts the Court with a delicate and difficult balancing task.

With all due respect with a little more forbearance, the petition could have been conduced to a denouement of congruity but without diminishing the level of scrutiny that the crucial stakes demand. I trust though that future iterations of this Court, more divorced from some irrational aspects of the passions of these times, will further refine the important doctrines laid down today.

Several considerations guide my vote to grant the petition — to issue the quested writ against the respondent Department of Justice Secretary Raul M. Gonzalez (DOJ Secretary), but not as to respondent National Telecommunications Commission (NTC).

I.

I begin with some observations on the petition itself filed by former Solicitor General Francisco Chavez, brought forth in his capacity "as a citizen, taxpayer and a law practitioner" against the DOJ Secretary and the NTC. At a crucial point during the deliberations on this case, much of the focus within the Court was on the aspect of the case concerning the NTC, to the exclusion of the aspect concerning the DOJ Secretary. However, the petition itself only minimally dwells on the powers of the National

Telecommunications Commission (NTC).

The petition was filed on 21 June 2005, less than a month after the so-called *Hello Garci* tapes (*Garci* tapes) hit the newstands. The petition narrates that a few days after reports on the *Garci* tapes became public, respondent DOJ Secretary "threatened that everyone found to be in possession of the controversial audio tape, as well as those broadcasting it or printing its contents, were liable for violation of the Anti-Wiretapping Law," [1] and subsequently he ordered the National Bureau of Investigation (NBI) "to go after media organizations found to have caused the spread, the playing and the printing of the contents" of the said tape.

Then, a Press Release was issued by respondent NTC, essentially warning broadcast stations, "[i]f it has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation. . .[,] that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies." [2] These essentially are the antecedent facts raised in the petition.

Petitioner presents two general arguments for our determination: that respondents violated the constitutional provisions on the freedom of expression and of the press, [3] and of the right of the people to information on matters of public concern; [4] and that the NTC acted beyond its powers as a regulatory body when it warned broadcast stations of consequences if they continued to air the contents of the disputed tapes. [5]

Fifteen (15) pages are assigned to the first issue, while four (4) pages are allotted to the second issue concerning the NTC. In the context of arguing that there had been prior restraint, petitioner manifests that "the threat of crackdown on media and the public were calculated to sow fear and terror in advance of actual publication and dissemination of the contents of the controversial tapes." [6] Because of such "fear and terror," the public was denied free access to information as guaranteed by the Constitution. [7]

Only four (4) pages are devoted to whether the NTC exceeded its discretion when it issued the Press Release. About two (2) of the four (4) pages are utilized to cite the statutory provisions delineating the powers and functions of the NTC. The citations are geared toward the claim that "NTC is independent in so far as its regulatory and quasi-judicial functions are concerned." [8] Then the petition argues that nothing in the functions of the NTC "warrants the pre-emptive action it took on June 11, 2005 of declaring in a Press Release that airing of the contents of the controversial tape already constituted a violation of the Anti-Wire Tapping Law." [9] The petition also states that " [w]orse, the judgment of NTC was outright, without a hearing to determine the alleged commission of a crime and violation of the certificate of authority issued to radio and television stations," [10] though this point is neither followed up nor bolstered by appropriate citations which should be plenty.

One relevant point of fact is raised in the Comment filed by the Office of the Solicitor General (OSG) in behalf of respondents. Three (3) days after the issuance of the Press Release, the NTC and the *Kapisanan ng mga Brodkaster sa Pilipinas* (KBP) issued a Joint Statement crafted after a dialogue between them. The Joint Statement declares:

> 2. NTC respects and will not hinder freedom of the press and the right to information on matters of public concern. KBP & its members have always

been committed to the exercise of press freedom with high sense of responsibility and discerning judgment of fairness and honesty.

3. NTC did not issue any Memorandum Circular or Order constituting a restraint of press freedom or censorship. The NTC further denies and does not intend to limit or restrict the interview of members of the opposition or free expression of views.

4. What is being asked by NTC is that the exercise of press freedom be done responsibly. [11]

II.

Based on the petition, the determinative questions appear to be: (1) whether the DOJ Secretary may be enjoined from prosecuting or threatening to prosecute any person for possessing or broadcasting the contents of the *Garci* tapes, an act which allegedly violates the free expression clause if not also the right to information clause; and (2) whether the NTC may be enjoined from sanctioning or threatening to sanction any broadcast media outlet for broadcasting the *Garci* tapes, an action also alleged to infringe the aforementioned constitutional rights.

It should be stressed that there are critical differences between the factual and legal milieu of the assailed act of the DOJ Secretary, on one hand, and that of the questioned conduct of the NTC, on the other. The act complained of the NTC consists in the issuance of a Press Release, while that of the DOJ Secretary is not encapsulated in a piece of paper but comprised in utterances which nonetheless were well documented by the news reports at that time. There is an element of caution raised in the Press Release in that it does not precisely sanction or threaten to immediately sanction the broadcast media for airing the *Garci* tapes, but it raises that possibility on the condition that "it has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation." No such suspensive condition is embodied in the assailed acts of the DOJ Secretary.

And most critical in my view is the distinction between the NTC and the DOJ Secretary with respect to the breadth and reach of their ability to infringe upon the right to free expression. The NTC is a quasi-judicial regulatory body attached to the Department of Transportation and Communications exercising regulatory jurisdiction over a limited set of subjects: the broadcast media, telecommunications companies, etc. In the scope of its regulatory jurisdiction, it concededly has some capacity to impose sanctions or otherwise perform acts that could impinge on the right of its subjects of regulation to free expression, although the precise parameters of its legal authority to exercise such actions have not yet been fully defined by this Court.

In contrast, the ability of the DOJ Secretary and the office that he heads to infringe on the right to free expression is quite capacious. Unlike the NTC whose power of injunction and sanction is limited to its subjects of regulation, the DOJ Secretary heads the department of government which has the premier faculty to initiate and litigate the prosecution of just about anybody.

III.

It should be assumed without controversy that the *Garci* tapes fall within the protection of the free expression clause.

Much has been said in homage to the right to free expression. It is precisely the underlying reason I can write this submission, and the reader can read this opinion or

any news account concerning the decision and its various separate opinions. The revolutions we celebrate in our history books were animated in part by an insistence that this right should be recognized as integral. [12] The right inheres in the first yawl of the newborn infant, and allows a person to speak honestly in the throes of death.

In 20th century American jurisprudence, the right to free speech and expression has been rightly linked to the inalienable right to liberty under the due process clause. [13] Indeed, liberty cannot be actualized unless it encompasses liberty of speech and expression. As a consequence, the same methodology as applied to due process and equal protection cases may hold as well to free expression cases.

In my view, the operative principles that should govern the adjudication of free expression cases are uncomplicated. The infringement on the right by the State can take the mode of a content-based regulation or a content-neutral regulation. With respect to content-based regulations, the only expressions that may be proscribed or punished are the traditionally recognized unprotected expressions — those that are obscene, pose danger to national security or incite imminent lawless action, or are defamatory. [14] In order that such unprotected expressions may be restrained, it must be demonstrated that they pose a clear and present danger of bringing about a substantive evil that the State has a right and duty to prevent, such danger being grave and imminent as well. But as to all other protected expressions, there can be no content-based regulation at all. No prior restraint, no subsequent punishment.

For as long as the expression is not libelous or slanderous, not obscene, or otherwise not dangerous to the immediate well-being of the State and of any other's, it is guaranteed protection by the Constitution. I do not find it material whether the protected expression is of a political, religious, personal, humorous or trivial nature — they all find equal comfort in the Constitution. Neither should it matter through what medium the expression is conveyed, whether through the print or broadcast media, through the Internet or through interpretative dance. For as long as it does not fall under the above-mentioned exceptions, it is accorded the same degree of protection by the Constitution.

Still concerning the protection afforded to the tapes, I do take issue with Justice Carpio's view that "[t]he airing of the Garci tapes is essentially a political expression because it exposes that a presidential candidate had allegedly improper conversations with a COMELEC Commissioner. . ." and that the contents of the tapes "affect gravely the sanctity of the ballot." [15] These statements are oriented towards the conclusion that "[i]f ever there is a hierarchy of protected expressions, political expression would occupy the highest rank, and among different kinds of political expression, the subject of fair and honest elections would be at the top." [16] Yet even the majority opinion acknowledges that "the integrity of the taped conversation is also suspect. . ." and "[t]he identity of the wire-tappers, the manner of its commission, and other related and relevant proofs are some of the invisibles of this case. . . given all these unsettled facets of the tape, it is even arguable whether its airing would violate the anti-wiretapping law." [17]

To be blunt, it would be downright pretentious for the Court to attribute to the tapes any definitive character, political or otherwise, because there is simply no basis for us to make such conclusion at this point. But even if they are not of a political character, they nonetheless find protection under the free expression clause.

IV.

Given the constitutionally protected character of the tapes, it still falls upon the

petition to establish that there was an actual infringement of the right to expression by the two denominated respondents — the DOJ Secretary and the NTC — in order that the reliefs sought may avail. There are two distinct (though not necessarily exclusive) means by which the infringement can be committed by either or both of the respondents — through prior restraint or through an act that creates a chilling effect on the exercise of such right.

I turn first to the assailed acts of the NTC.

It is evident from the Decision and the concurring opinion of Justice Carpio that they give primary consideration to the aspect relating to the NTC, notwithstanding the relative lack of attention devoted by the petition to that issue. The impression they leave thus is that the assailed acts of the NTC were somehow more egregious than those of the DOJ Secretary. Worse, both the Decision and the concurring opinion reach certain conclusions on the nature of the Press Release which are, with due respect, untenable.

IV-A.

As a means of nullifying the Press Release, the document has been characterized as a form of prior restraint which is generally impermissible under the free expression clause. The concept of prior restraint is traceable to as far back as Blackstone's Commentaries from the 18th century. Its application is integral to the development of the modern democracy. "In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." [18] In *Nebraska Press Association v. Stuart,* [19] the United States Supreme Court noted that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." [20]

Yet prior restraint "by contrast and by definition, has an immediate and irreversible sanction." [21] The assailed act of the NTC, contained in what is after all an unenforceable Press Release, hardly constitutes "an immediate and irreversible sanction." In fact, as earlier noted, the Press Release does not say that it would immediately sanction a broadcast station which airs the *Garci* tapes. What it does say is that only "if it has been subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation" that the stations could be subjected to possible suspension. It is evident that the issuance does not prohibit the airing of the *Garci* tapes or require that the broadcast stations obtain permission from the government or the NTC to air such tapes.

How then have my esteemed colleagues, the Chief Justice and Justice Carpio, arrived at their conclusion that the Press Release operated as a prior restraint? Justice Carpio characterizes the Press Release as a "warning," and the document does use the word "warned," yet a warning is not "an immediate and irreversible sanction." The warning embodied in the Press Release is neither a legally enforceable vehicle to impose sanction nor a legally binding condition precedent that presages the actual sanction. However one may react to the Press Release or the perceived intent behind it, the issuance still does not constitute "an immediate and irreversible sanction".

On the other hand, the Decision discusses extensively what prior restraint is, characterizing it, among others things, as "official government restrictions on the press or other forms of expression in advance of actual publication or dissemination." [22] The majority enumerates certain governmental acts which constitute prior restraint, such as

the approval of a proposal to publish; licensing or permits as prerequisites to publication including the payment of license taxes for the privilege to publish; injunctions against publication; the closure of the business or printing offices of certain newspapers; or more generally, "[a]ny law or official [act] that requires some form of permission to be had before publication can be made." [23]

The Press Release does not fit into any of the acts described above in the majority opinion. Neither can it be identified as an "official government restriction" as it simply does not levy any actual restriction on the subjects of NTC regulation. Still, without undertaking a demonstration how the Press Release actually restrained free expression, the majority surprisingly makes a leap of logic, concluding as it does that such an informal act as a press statement is covered by the prior restraint concept. [24] As with Justice Carpio, the majority does not precisely explain how the Press Release could constitute an actual restraint, worded as it was with nary a notion of restriction and given its lack "of an immediate and irreversible sanction."

Absent prior restraint, no presumption of invalidity can arise.

IV-B.

I fear that the majority especially has unduly fused the concepts of "prior restraint" and "chilling effect." There are a few similarities between the two concepts especially that both come into operation before the actual speech or expression finds light. At the same time, there are significant differences.

A government act that has a chilling effect on the exercise of free expression is an infringement within the constitutional purview. As the liberal lion Justice William Brennan announced, in *NAACP v. Button*, [25] **"the threat of restraint, as opposed to actual restraint itself, may deter the exercise of the right to free expression almost as potently as the actual application of sanctions."** [26] Such threat of restraint is perhaps a more insidious, if not sophisticated, means for the State to trample on free speech. Protected expression is chilled simply by speaking softly while carrying a big stick.

In distinguishing chilling effect from prior restraint, *Nebraska Press Association*, citing Bickel, observed, "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint "freezes" it at least for the time." [27] An act of government that chills expression is subject to nullification or injunction from the courts, as it violates Section 3, Article III of the Constitution. "Because government retaliation tends to chill an individual's exercise of his right to free expression, public officials may not, as a general rule, respond to an individual's protected activity with conduct or speech even though that conduct or speech would otherwise be a lawful exercise of public authority. [28]

On the one hand, Justice Carpio does not bother to engage in any "chilling effect" analysis. On the other hand, the majority does conclude that the acts of the NTC had a chilling effect. Was there truly a chilling effect resulting from the Press Release of the NTC?

While the act or issuance itself may evince the impression of a chilling effect, there still must be factual evidence to support the conclusion that a particular act of government actually engendered a chilling effect. **There appears to be no case in American jurisprudence where a First Amendment claim went forward in the absence of evidence that speech was actually chilled**. [29]

In a case decided just last year by a U.S. District Court in Georgia, [30] the following

summary was provided on the evidentiary requirement in claims of a chilling effect in the exercise of First Amendment rights such as free speech and association:

> 4. *Proof of Chilling Effect*
>
> Defendants' argue that Plaintiffs have failed to introduce evidence of a chilling effect, which is required to maintain a First Amendment claim. There is some uncertainty regarding the extent of evidence required to sustain a First Amendment challenge based on the chilling effect of compelled disclosure of protected political activity. *See In re Grand Jury Proceeding,* 842 F.2d 1229, 1235-36 (11th Cir.1988). The Supreme Court has indicated on several occasions that some evidence of a chilling effect is required.
>
> In *NAACP*, for example, the Supreme Court accepted that a chilling effect would result from the compelled disclosure of the NAACP's membership lists because of "uncontroverted evidence" in the record that members of the NAACP had suffered past adversity as a result of their known membership in the group. 357 U.S. at 464-65, 78 S.Ct. 1163. The Court in *Buckley v. Valeo*, however, emphasized, in rejecting a challenge to campaign finance disclosure laws based on its alleged chilling effect on political association, that there was no record evidence of a chilling effect proving a violation of the right to association. *Buckley*, 424 U.S. at 71-72, 96 S.Ct. 612 (noting that failure to tender evidence of chilling effect lessened scrutiny applied to First Amendment challenge to campaign donation disclosure laws).
>
> Seizing on this apparent evidentiary requirement, several lower courts have rejected right of association challenges for lack of evidence of a chilling effect. *See, e.g., Richey v. Tyson*, 120 F.Supp.2d 1298, 1324 (S.D.Ala.2000) (requiring, in challenge of campaign finance law, evidence of a "reasonable probability" of threats, harassment, or reprisals "from sources such as specific evidence of past or present harassment of members or of the organization, a pattern of threats, specific manifestations of public hostility, or conduct visited on organizations holding similar views"); *Alabama State Federation of Teachers, AFL-CIO v. James*, 656 F.2d 193, 197 (5th Cir. Unit B Sept.17, 1981) (rejecting right of association challenge for lack of evidence of chilling effect); *Int'l Organization of Masters, Mates, and Pilots*, 575 F.2d 896, 905 (D.C.Cir.1978) (same).
>
> But the Eleventh Circuit has drawn a distinction between challenges to political campaign donation disclosure rules of the sort at issue in *Buckley* and *Richey* and challenges to government investigations into "particular political group or groups" of the sort in *NAACP* and at issue in this case. *See In re Grand Jury Proceeding*, 842 F.2d at 1236. In doing so, the Eleventh Circuit suggested that a "more lenient" showing applies to targeted investigations because "the government investigation itself may indicate the possibility of harassment." *Id.; see also Pollard v. Roberts*, 283 F.Supp. 248, 258 (D.C.Ark.1968), aff'd per curiam 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (finding prosecutor's attempt to subpoena the names of contributors to a political campaign unconstitutional, despite "no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question," because "it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity"); *cf. also Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir.1999) (concluding, without discussing record evidence of chilling effect, that statute which required disclosure of names of principal stockholders of adult

entertainment establishments was abridgement of First Amendment).

> In addition, concerns about the economic vulnerabilities of public employees have led courts to more easily find the presence of a chilling effect on disclosure rules imposed on public employees. *See, e.g., Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission of New York Harbor*, 667 F.2d 267, 271-72 (2d Cir.1981). Where the government has "pervasive control over the economic livelihood" or "professional destiny" of its employees, it may be obvious that compelling disclosure of organizational affiliations under threat of discipline could create a "substantial danger" of an "inevitable" chilling effect. *Id.* Thus, when examining freedom of association challenges in the public employment context, courts have applied a "common sense approach." *Id.* at 272; *see also Shelton*, 364 U.S. at 486, 81 S.Ct. 247 (noting, in finding questionnaire distributed to public teachers inquiring into their organizational memberships unconstitutional, that burden on teacher's freedom to associate was "conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made," and not discussing evidence of chilling effect); *Fraternal Order of Police*, 812 F.2d at 119-20 ("We recognize that the record contains no evidence that would support a finding that a required response to this question would chill the applicant's or family member's associational activities. However, in light of the absence of any legitimate interest asserted by the City to justify the inquiry, we conclude that the question would not even withstand a more relaxed scrutiny than that usually applied to questions which seek disclosure of associational ties."). [31]

It makes utter sense to impose even a minimal evidentiary requirement before the Court can conclude that a particular government action has had a chilling effect on free speech. Without an evidentiary standard, judges will be forced to rely on intuition and even personal or political sentiments as the basis for determining whether or not a chilling effect is present. That is a highly dangerous precedent, and one that clearly has not been accepted in the United States. In fact, in *Zieper v. Metzinger*, [32] the U.S. District Court of New York found it relevant, in ruling against the petitioner, that Zieper "has stated affirmatively that his speech was not chilled in any way." [33] "Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech." [34]

In view of its regulatory jurisdiction over broadcast media, the ability of the NTC to infringe the right to free expression extends only to its subjects of regulation, not to private persons such as petitioner. Thus, to consider at bar whether or not the NTC Press Release had a chilling effect, one must look into the evidence on record establishing the broadcast media's reaction to the Press Release.

The majority states that "[t]here is enough evidence of chilling effect of the complained acts of record," alluding to "the warnings given to media [which] came from no less the NTC, a regulatory agency that can cancel the Certificate of Authority of the radio and broadcast media." [35] With due respect, I submit that what the record establishes is merely the presence of the cause for chilling (the Press Release), but not the actual chilling effect itself on the broadcast media. In that respect, the Joint Statement of the NTC and the KBP executed just three (3) days after the issuance of the Press Release, becomes material.

In the employment of the "chilling effect mode of analysis," disregarding the actual effects would mean dispensing with any evidentiary requirement for the constitutional claim. That is a doctrine which does not bode well for the Court's future

in constitutional adjudication, and one I expect that will be significantly modified in due time.

In the Joint Statement, the KBP assented to the manifestation that "NTC did not issue any [Memorandum Circular] or Order constituting a restraint of press freedom or censorship, as well as disavowed having acted or intending "to limit or restrict the interview of members of the opposition or free expression of views." [36] The Joint Statement can certainly be taken in favor of the NTC as proof that its Press Release did not actually create a chilling effect on the broadcast media. On its face, it evinces the KBP's contentment with the Press Release and all other steps taken by the NTC with respect to the *Garci* tapes, coupled with the acknowledgment that the NTC had not infringed the right to free expression of its subjects of regulation.

The majority casts aspersions on the KBP for "inexplicably joining the NTC in issuing an ambivalent Joint Press Statement" and on the perceived "silence on the sidelines on the part of some media practitioners." [37] Yet these are derogatory conjectures that are not supported by the record. It is quite easy to draw such negative inference, but there is another inference that can be elicited from the evidence on record — that the KBP was so satisfied with the NTC's actions it consented to the averments in the Joint Statement. Since Independence, and outside of the Marcos years, there is no tradition of cowardice on the part of the Philippine media, even in the face of government retribution. Indeed, it is false and incongruous to dilute with aspersions of docility and inertness the true image of the most robust, vigilant and strident media in Asia.

The best indication that the Philippine broadcast media was cowered or chilled by the NTC Press Release, if ever, would have been its initiation of a suit similar to that at bar, or its participation herein. The fact that it did not can lead to the reasonable assumption that the Press Release did not instill fear in the members of the broadcast media, for they have since then, commendably and in true-to-form fashion challenged before the courts other NTC issuances which they perceived as actual threats to their right to free expression. [38]

It bears adding that I had proposed during the deliberations of this case that the KBP or other large media organizations be allowed to intervene should they be so minded, if only to elicit their views for the record whether the NTC by issuing the Press Release truly chilled the exercise of their rights to expression, notwithstanding the Joint Statement. After all, **it would be paternalistic at best, presumptuous at worst, for the Court to assume that conclusion without affording the broadcast media the opportunity to present its views on the question. Yet a majority of the members of the Court declined to take that step, thereby disallowing the introduction of more sufficient evidence to warrant a ruling against the NTC.**

Thus, we are left with utter paucity of evidence that the NTC had infringed the press freedom of its subjects of regulation mainly because of the broadcast media's non-participation in the petition at bar. If only on that account, I have to vote against the writ sought against the NTC. To decide otherwise would simply set an injudicious precedent that permits the affirmative relief to constitutional claims without having to bother with the need for evidence.

There is another point raised with respect to the NTC aspect of this case, and that is the question of whether the NTC actually has the statutory authority to enjoin or sanction the broadcast of the tapes. The majority opinion does not conclusively settle that question, and that is for the best, given the absence of comprehensive arguments

offered by the petitioner on that issue. I reserve my right to offer an opinion on that question in the appropriate case. Suffice it to say, there are at least two other cases now pending with this Court which raise precisely that question as the central issue and not merely as an afterthought. Those cases, which do offer more copious arguments on that issue than those presented before us, would provide a more fortuitous venue for the settlement of those questions.

IV-C.

The majority and concurring opinions hardly offer any rebuke to the DOJ Secretary even as they vote to grant affirmative relief against his actions. This ensued, I suspect, due to the undue focus placed on the arguments concerning the NTC, even though the petition itself was not so oriented. But for my part, it is the unequivocal threats to prosecute would-be-offenders, made no less by the head of the principal law agency of the government charged with the administration of the criminal justice system,[39] that constitute the violation of a fundamental freedom that in turn warrants this Court's intervention.

The particular acts complained of the DOJ Secretary are explained in detail in the petition,[40] narrated in the decision,[41] and corroborated by contemporary news accounts published at that time.[42] The threats are directed at anybody in possession of, or intending to broadcast or disseminate, the tapes. Unlike the NTC, the DOJ Secretary has the actual capability to infringe the right to free expression of even the petitioner, or of anybody for that matter, since his office is empowered to initiate criminal prosecutions. Thus, petitioner's averments in his petition and other submissions comprise the evidence of the DOJ Secretary's infringement of the freedom of speech and expression.

Was there an actual infringement of the right to free expression committed by the DOJ Secretary? If so, how was such accomplished? Quite clearly, the DOJ Secretary did infringe on the right to free expression by employing "the threat of restraint,"[43] thus embodying "government retaliation [that] tends to chill an individual's exercise of his right to free expression."[44] The DOJ Secretary plainly and directly threatened anyone in possession of the *Garci* tapes, or anyone who aired or disseminated the same, with the extreme sanction of criminal prosecution and possible imprisonment. He reiterated the threats as he directed the NBI to investigate the airing of the tapes. He even extended the warning of sanction to the Executive Press Secretary. These threats were evidently designed to stop the airing or dissemination of the *Garci* tapes a protected expression which cannot be enjoined by executive fiat.

Tasked with undertaking the defense of the DOJ Secretary, the OSG offered not even a ghost of a contest as soon as the bell for the first round rang. In abject surrender, it squeezed in just one paragraph[45] in its 27-page Comment for that purpose.

The arguments offered in that solitary paragraph are meager. It avers that the media reports are without probative value or, at best, inconclusive as the declarations therein may have been quoted inaccurately or out of context.[46] Yet the OSG does not deny that the statements were made,[47] failing even to offer what may have been the "accurate context." The OSG also points out that the DOJ Secretary has not actually "made any issuance, order or instruction to the NBI to go after such media organizations." Yet the fact that the DOJ Secretary has yet to make operational his threats does not dissuade from the conclusion that the threats alone already chilled the atmosphere of free speech or expression.

V.

By way of epilogue, I note that the *Garci* tapes have found shelter in the Internet [48] after the broadcast media lost interest in airing those tapes, after the newsprint that contained the transcript had dissembled. The tapes are widely available on the Internet and not only in websites maintained by traditional media outfits, but also in such media-sharing sites as Google-owned *YouTube*, which has at least 20 different files of the tapes. [49] Internationally popular websites such as the online encyclopedia *Wikipedia* have linked to the tapes as well. [50] Then there is the fact that excerpts of the tapes were remixed and widely distributed as a popular ringtone for cellular phones.

Indeed, the dimensions of the issue have long extended beyond the Philippine mass media companies and the NTC. This issue was hardly limited to the right of Philippine broadcast media to air the tapes without sanction from the NTC. It involved the right of any person wherever in the world situated to possess and disseminate copies of the tape without fear of reprisal from the Philippine government.

Still, the vitality of the right to free expression remains the highlight of this case. Care and consideration should be employed in presenting such claims before the courts, and the hope is for a growing sophistication and specialization in the litigation of free speech cases.

For all the above, I vote to GRANT the petition against respondent DOJ Secretary and DISMISS the same insofar as the NTC is concerned.

VELASCO, JR., *J., concurring and dissenting*:

I concur in the results of the majority opinion penned by Chief Justice Puno, but only insofar as the NTC aspect of the case is concerned.

The opinion of the Chief Justice — upon which this concurrence hinges — is to the effect that the warning issued by the NTC, by way of a press release, that the continuous airing or broadcast of the "Garci Tapes" is a violation of the Anti-Wiretapping Law, restricts the freedom of speech and of the press and constitutes a content-based prior restraint impermissible under the Constitution. The quality of impermissibility comes in owing to the convergence and combined effects of the following postulates, to wit: the warning was issued at the time when the "Garci Tapes" was newspaper headline and radio/TV primetime material; it was given by the agency empowered to issue, suspend, or altogether cancel the certificate of authority of owners or operators of radio or broadcast media; the chilling effect the warning has on media owners, operators, or practitioners; and facts are obtaining casting doubt on the proposition that airing the controversial tape would violate the anti-wiretapping law.

I also agree with the Chief Justice's observation that the prior restraining warning need not be embodied in a formal order or circular, it being sufficient that such warning was made by a government agency, NTC in this case, in the performance of its official duties. Press releases on a certain subject can rightfully be treated as statements of official position or policy, as the case may be, on such subject.

To me, the facts on record are sufficient to support a conclusion that the press release issued by NTC — with all the unmistakable threat embodied in it of a possible cancellation of licenses and/or the filing of criminal cases against erring media owners and practitioners — constitutes a clear instance of prior restraint. Not lost on this writer is the fact that five (5) days after it made the press release in question, NTC proceeded to issue jointly with the Kapisanan ng mga Broadcasters sa Pilipinas (KBP) another

press release to clarify that the earlier one issued was not intended to limit or restrain press freedom. With the view I take of the situation, the very fact that the KBP agreed to come up with the joint press statement that "NTC did not issue any [Memorandum Circular] or order constituting a restraint of press freedom or censorship" tends to prove, rather than disprove, the threatening and chilling tone of its June 11, 2005 press release. If there was no prior restraint from the point of view of media, why was there a need to hold a dialogue with KBP and then issue a clarifying joint statement?

Moreover, the fact that media owners, operators, and practitioners appeared to have been frozen into inaction, not making any visible effort to challenge the validity of the NTC press statement, or at least join the petitioner in his battle for press freedom, can only lead to the conclusion that the chilling effect of the statement left them threatened.

The full ventilation of the issues in an oral argument would have been ideal, particularly so since TV and radio operators and owners opted not to intervene nor were asked to give their comment on the chilling effect of the NTC press statement. Nonetheless, I find the admissions in the pleadings and the attachments thereto to be more than sufficient to judiciously resolve this particular issue. The contents of the June 11, 2005 press release eloquently spoke for themselves. The NTC "warning" is in reality a threat to TV and radio station owners and operators not to air or broadcast the "Garci Tapes" in any of their programs. The four corners of the NTC's press statement unequivocally reveal that the "Garci Tapes" may not be authentic as they have yet to be duly authenticated. It is a statement of fact upon which the regulatory body predicated its warning that its airing or broadcast will constitute false or misleading dissemination of information that could result in the suspension or cancellation of their respective licenses or franchises. The press statement was more than a mere notice of a possible suspension. Its crafting and thrust made it more of a threat — a declaration by the regulatory body that the operators or owners should not air or broadcast the tapes. Otherwise, the menacing portion on suspension or cancellation of their franchises to operate TV/radio station will be implemented. Indeed, the very press statement speaks eloquently on the chilling effect on media. One has to consider likewise the fact that the warning was not made in an official NTC circular but in a press statement. The press statement was calculated to immediately inform the affected sectors, unlike the warning done in a circular which may not reach the intended recipients as fast.

In all, the NTC statement coupled with other circumstances convince this writer that there was indeed a chilling effect on the TV/radio owners, in particular, and media, in general.

While the Court has several pieces of evidence to fall back on and judiciously resolve the NTC press release issue, the situation is different with respect to the Department of Justice (DOJ) warning issue. What is at hand are mere allegations in the petition that, on June 8, 2005, respondent DOJ Secretary Raul Gonzales warned reporters in possession of copies of the compact disc containing the alleged "Garci" wiretapped conversation and those broadcasting or publishing its contents that they could be held liable under the Anti-Wiretapping Act, adding that persons possessing or airing said tapes were committing a continuing offense, subject to arrest by anybody who had personal knowledge of the crime committed or in whose presence the crime was being committed. [1]

There was no proof at all of the possible chilling effect that the alleged statements of DOJ Secretary Gonzales had on the reporters and media practitioners. The DOJ Secretary, as head of the prosecution arm of the government and lead

administrator of the criminal justice system under the Administrative Code [2] is, to be sure, impliedly empowered to issue reminders and warnings against violations of penal statutes. And it is a known fact that Secretary Gonzales had issued, and still issues, such kind of warnings. Whether or not he exceeded his mandate under premises is unclear. It is for this main reason that I found the prior-restraint issue in the DOJ aspect of the case not yet ripe for adjudication.

I, therefore, register my concurrence with the *ponencia* of Chief Justice Reynato S. Puno insofar as it nullifies the official statement made by respondent NTC on June 11, 2005, but dissent, with regrets, with respect to the nullification of the June 8, 2005 official statement of respondent Secretary of Justice.

Footnotes

1. G.R. No. 103956, March 31, 1992, 207 SCRA 712.
2. 218 Phil. 754 (1984).
3. G.R. No. 147571, May 5, 2001, 357 SCRA 496.
4. G.R. No. 169838, April 25, 2006, 488 SCRA 226.
5. *Rollo*, pp. 6-7 (citing the Philippine Daily Inquirer (PDI), June 7, 2005, pp. A1, A18; PDI, June 14, 2005, p. A1); and p. 58.
6. *Id.* at 7-8 (citing the Manila Standard, June 10, 2005, p. A2); and 58.
7. *Id.* at 7-8 and 59.
8. *Id.*
9. *Id.* at 8-9 and 59.
10. *Id.* at 9.
11. *Id.* at 10-12, 43-44, 60-62.
12. *Id.* at 62-63, 86-87.
13. *Id.* at 6.
14. Respondents have "committed blatant violations of the freedom of expression and of the press and the right of the people to information on matters of public concern enshrined in Article III, Sections 4 and 7 of the 1987 Constitution. *Id.* at 18. Petitioner also argued that respondent NTC acted beyond its powers when it issued the press release of June 11, 2005. *Id.*
15. *Id.* at 6.
16. Through the Comment filed by the Solicitor-General. *Id.* at 56-83.
17. *Id.* at 71-73.
18. *Id.* at 74-75.
19. The Court will exercise its power of judicial review only if the case is brought before it by a party who has the legal standing to raise the constitutional or legal question. "Legal standing" means a personal and substantial interest in the case such that the party has sustained or will sustain direct injury as a result of the government act that is being

challenged. The term "interest" is material interest, an interest in issue and to be affected by the decree, as distinguished from mere interest in the question involved, or a mere incidental interest. *Pimentel v. Executive Secretary*, G.R. No. 158088, July 6, 2005, 462 SCRA 622, citing *Joya vs. Presidential Commission on Good Government,* G.R. No. 96541, August 24, 1993, 225 SCRA 568. See *Kilosbayan, Inc. v. Morato*, G.R. No. 118910, July 17, 1995, 246 SCRA 540, 562-563; and *Agan v. PIATCO* (Decision), 450 Phil. 744 (2003).

20. *Araneta v. Dinglasan*, 84 Phil. 368, 373 (1949), cited in *Osmeña v. COMELEC,* G.R. No. 100318, July 30, 1991, 199 SCRA 750.

21. See *Agan v. PIATCO* (Decision), 450 Phil. 744 (2003).

22. *Philconsa v. Jimenez*, 122 Phil. 894 (1965); *Civil Liberties Union v. Executive Secretary*, G.R. No. 83896, February 22, 1991, 194 SCRA 317; *Guingona v. Carague*, G.R. No. 94571, April 22, 1991, 196 SCRA 221; *Osmeña v. COMELEC,* G.R. No. 100318, July 30, 1991, 199 SCRA 750; *Basco v. PAGCOR*, 274 Phil. 323 (1991); *Carpio v. Executive Secretary*, G.R. No. 96409, February 14, 1992, 206 SCRA 290; *Del Mar v. PAGCOR*, 400 Phil. 307 (2000).

23. *Basco v. PAGCOR*, 274 Phil. 323 (1991), citing *Kapatiran ng mga Naglilingkod sa Pamahalaan ng Pilipinas Inc. v. Tan*, G.R. No. L-81311, June 30, 1988, 163 SCRA 371.

24. 1987 PHIL. CONST. Art. III, Subsection 4.

25. U.S. Bill of Rights, First Amendment. ("Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

26. The First Amendment was so crafted because the founders of the American government believed — as a matter of history and experience — that the freedom to express personal opinions was essential to a free government. *See* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTION AND JUDICIAL REVIEW (2004).

27. Article 19 of the 1948 Universal Declaration on Human Rights (UDHR) states: "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Although the UDHR is not binding as a treaty, many of its provisions have acquired binding status on States and are now part of customary international law. Article 19 forms part of the UDHR principles that have been transformed into binding norms. Moreover, many of the rights in the UDHR were included in and elaborated on in the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by over 150 States, including the Philippines. The recognition of freedom of expression is also found in regional human rights instruments, namely, the European Convention on Human Rights (Article 10), the American Convention on Human Rights (Article 10), and the African Charter on Human and Peoples' Rights (Article 9).

28. *Gonzales v. COMELEC,* 137 Phil. 471, 492 (1969).

29. *Salonga v. Cruz-Pano*, G.R. 59524, February 18, 1985, 134 SCRA 458-459; *Gonzales v. COMELEC,* 137 Phil. 489, 492-3 (1969); *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co.*, 151-A Phil. 676-677 (1973); *National Press Club v. COMELEC,* G.R. No. 102653, March 5, 1992, 207 SCRA 1, 9; *Adiong v. COMELEC,* G.R. No. 103956, March 31, 1992, 207 SCRA 712, 715.

30. Indeed, the struggle that attended the recognition of the value of free expression was discussed by Justice Malcolm in the early case *United States v. Bustos,* 37 Phil. 731, 739 (1918). Justice Malcolm generalized that the freedom of speech as cherished in

democratic countries was unknown in the Philippine Islands before 1900. Despite the presence of pamphlets and books early in the history of the Philippine Islands, the freedom of speech was alien to those who were used to obeying the words of *barangay* lords and, ultimately, the colonial monarchy. But ours was a history of struggle for that specific right: to be able to express ourselves especially in the governance of this country. *Id.*

31. *Id.*

32. 137 Phil. 471, 492 (1969).

33. *Id.*

34. *Id.* at 493, citing Thomas I. Emerson, *Toward a General Theory of the First Amendment,* 72 Yale Law Journal 877 (1963).

35. *Id.* citing *New York Times Co. v. Sullivan*, 376 US 254, 270 (1964).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* citing *Terminiello v. City of Chicago*, 337 US 1, 4 (1949).

40. *Id.* citing *U.S. v. Schwimmer*, 279 US 644, 655 (1929).

41. G.R. No. L-59329, July 19, 1985, 137 SCRA 628.

42. *Gonzales v. COMELEC,* 137 Phil. 471, 494(1969).

43. HECTOR S. DE LEON, I PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES 485 (2003) [Hereinafter DE LEON, CONSTITUTIONAL LAW].

44. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW Subsection 16.1, 1131 (7th ed.2000 [Hereinafter NOWAK & ROTUNDA, CONSTITUTIONAL LAW].

45. DE LEON, CONSTITUTIONAL LAW at 485. Laws have also limited the freedom of speech and of the press, or otherwise affected the media and freedom of expression. The Constitution itself imposes certain limits (such as Article IX on the Commission on Elections, and Article XVI prohibiting foreign media ownership); as do the Revised Penal Code (with provisions on national security, libel and obscenity), the Civil Code (which contains two articles on privacy), the Rules of Court (on the fair administration of justice and contempt) and certain presidential decrees. There is also a "shield law," or Republic Act No. 53, as amended by Republic Act No. 1477. Section 1 of this law provides protection for non-disclosure of sources of information, without prejudice to one's liability under civil and criminal laws. The publisher, editor, columnist or duly accredited reporter of a newspaper, magazine or periodical of general circulation cannot be compelled to reveal the source of any information or news report appearing in said publication, if the information was released in confidence to such publisher, editor or reporter unless the court or a Committee of Congress finds that such revelation is demanded by the security of the state.

46. See NOWAK & ROTUNDA, CONSTITUTIONAL LAW Subsection 16.1, 1131 (7th ed.2000).

47. *Id.*

48. *Cabansag v. Fernandez*, 102 Phil. 151 (1957); *Gonzales v. COMELEC,* 137 Phil. 471

(1969). See *People v. Perez*, 4 Phil. 599 (1905); *People v. Nabong,* 57 Phil. 455 (1933); *People v. Feleo*, 57 Phil. 451 (1933).

49. This test was used by J. Ruiz-Castro in his Separate Opinion in *Gonzales v. COMELEC,* 137 Phil. 471, 532-537 (1969).

50. *Cabansag v. Fernandez*, 102 Phil. 151 (1957).

51. *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780, 794 (2000).

52. See *U.S. v. Bustos*, 37 Phil. 731 (1918).

53. The aspect of *freedom from liability subsequent to publication* precludes liability for completed publications of views traditionally held innocent. Otherwise, the prohibition on prior restraint would be meaningless, as the unrestrained threat of subsequent punishment, by itself, would be an effective prior restraint. Thus, opinions on public issues cannot be punished when published, merely because the opinions are novel or controversial, or because they clash with current doctrines. This fact does not imply that publishers and editors are never liable for what they print. Such freedom gives no immunity from laws punishing scandalous or obscene matter, seditious or disloyal writings, and libelous or insulting words. As classically expressed, the freedom of the press embraces at the very least the freedom to discuss truthfully and publicly matters of public concern, without previous restraint or fear of subsequent punishment. For discussion to be innocent, it must be truthful, must concern something in which people in general take a healthy interest, and must not endanger some important social end that the government by law protects. See JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY, 225 (2003 ed.).

54. *Freedom of access to information* regarding matters of public interest is kept real in several ways. Official papers, reports and documents, unless held confidential and secret by competent authority in the public interest, are public records. As such, they are open and subject to reasonable regulation, to the scrutiny of the inquiring reporter or editor. Information obtained confidentially may be printed without specification of the source; and that source is closed to official inquiry, unless the revelation is deemed by the courts, or by a House or committee of Congress, to be vital to the security of the State. *Id.*

55. *Freedom of circulation* refers to the unhampered distribution of newspapers and other media among customers and among the general public. It may be interfered with in several ways. The most important of these is *censorship*. Other ways include requiring a permit or license for the distribution of media and penalizing dissemination of copies made without it; [55] and requiring the payment of a fee or tax, imposed either on the publisher or on the distributor, with the intent to limit or restrict circulation. These modes of interfering with the freedom to circulate have been constantly stricken down as unreasonable limitations on press freedom. Thus, imposing a license tax measured by gross receipts for the privilege of engaging in the business of advertising in any newspaper, or charging license fees for the privilege of selling religious books are impermissible restraints on the freedom of expression. *Id.* citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *American Bible Society v. City of Manila*, 101 Phil. 386 (1957). It has been held, however, even in the Philippines, that publishers and distributors of newspapers and allied media cannot complain when required to pay ordinary taxes such as the sales tax. The exaction is valid only when the obvious and immediate effect is to restrict oppressively the distribution of printed matter.

56. *Id.* at 225.

57. *Burgos v. Chief of Staff,* 218 Phil. 754 (1984).

58. *Gonzales v. COMELEC,* 137 Phil. 471 (1969); *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780, 795 (2000) ("Doctrinally, the Court has always ruled in favor of the freedom of expression, and any restriction is treated an exemption."); *Social Weather Stations v. COMELEC,* G.R. No. 147571, May 5, 2001, 357 SCRA 496 ("[A]ny system of prior restraint comes to court bearing a heavy burden against its constitutionality. It is the government which must show justification for enforcement of the restraint."). See also *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893 (1996) (religious speech falls within the protection of free speech).

59. *Iglesia ni Cristo v. CA*, 328 Phil. 893, 928 (1996), citing *Near v. Minnesota*, 283 US 697 (1931); *Bantam Books Inc. v. Sullivan*, 372 US 58 (1963); *New York Times v. United States*, 403 US 713 (1971).

60. See *J.B.L. Reyes v. Bagatsing,* 210 Phil. 457 (1983), *Navarro v. Villegas,* G.R. No. L-31687, February 18, 1970, 31 SCRA 730; *Ignacio v. Ela*, 99 Phil. 346 (1956); *Primicias v. Fugosa*, 80 Phil. 71 (1948).

61. Determining if a restriction is content-based is not always obvious. A regulation may be content-neutral on its face but partakes of a content-based restriction in its application, as when it can be shown that the government only enforces the restraint as to prohibit one type of content or viewpoint. In this case, the restriction will be treated as a content-based regulation. The most important part of the time, place, or manner standard is the requirement that the regulation be content-neutral both as written and applied. See NOWAK & ROTUNDA, CONSTITUTIONAL LAW Subsection 16.1, 1133 (7th ed.2000).

62. See *Osmeña v. COMELEC,* 351 Phil. 692, 718 (1998). The Court looked to *Adiong v. COMELEC,* G.R. No. 103456, March 31, 1992, 207 SCRA 712, which had cited a U.S. doctrine, *viz*. "A governmental regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incident restriction on alleged [freedom of speech & expression] is no greater than is essential to the furtherance of that interest."

63. NOWAK & ROTUNDA, CONSTITUTIONAL LAW Subsection 16.1, 1133 (7th ed.2000). This was also called a "deferential standard of review" in *Osmeña v. COMELEC,* 351 Phil. 692, 718 (1998). It was explained that the **clear and present danger rule** is not a sovereign remedy for all free speech problems, and its application to content-neutral regulations would be tantamount to "using a sledgehammer to drive a nail when a regular hammer is all that is needed." *Id.* at 478.

64. *Osmeña v. COMELEC,* 351 Phil. 692, 717, citing *Adiong v. COMELEC,* G.R. No. 103956, March 31, 1992, 207 SCRA 712. It was noted that the test was actually formulated in *United States v. O'Brien*, 391 U.S. 367 (1968), which was deemed appropriate for restrictions on speech which are content-neutral.

65. *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893 (1996). In this case, it was found that the act of respondent Board of Review for Motion Pictures and Television of rating a TV program with "X" — on the ground that it "offend[s] and constitute[s] an attack against other religions which is expressly prohibited by law" — was a form of prior restraint and required the application of the clear and present danger rule.

66. *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893 (1996); *Gonzales v. COMELEC,* 137

Phil. 471 (1969); *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780 (2000); *Social Weather Stations v. COMELEC,* G.R. No. 147571, May 5, 2001, 357 SCRA 496.

67. *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893 (1996).

68. *Schenke v. United States*, 249 U.S. 47, 52 (19191), cited in *Cabansag v. Fernandez*, 102 Phil. 151 (1957); and *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780, 794 (2000).

69. *Adiong v. COMELEC,* G.R. No. 103956, March 31, 1992, 207 SCRA 712, cited in *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780, 795 (2000).

70. See *Adiong v. COMELEC,* G.R. No. 103956, March 31, 1992, 207 SCRA 712, and *Gonzales v. COMELEC,* 137 Phil. 471 (1969), cited in *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780, 795 (2000).

71. See *Adiong v. COMELEC,* G.R. No. 103956, March 31, 1992, 207 SCRA 712.

72. See *Osmeña v. COMELEC,* 351 Phil. 692 (1998).

73. Parenthetically, there are two types of content-based restrictions. First, the government may be totally banning some type of speech for content (total ban). Second, the government may be requiring individuals who wish to put forth certain types of speech to certain times or places so that the type of speech does not adversely affect its environment. See NOWAK & ROTUNDA, CONSTITUTIONAL LAW Subsection 16.1, 1131 (7th ed. 2000). Both types of conten-based regulations are subject to strict scrutiny and the clear and present danger rule.

74. *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893 (1996); *Gonzales v. COMELEC,* 137 Phil. 471 (1969); *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780 (2000); *Social Weather Stations v. COMELEC,* G.R. No. 147571, May 5, 2001, 357 SCRA 496.

75. This is based on a finding that "broadcast regulation involves unique considerations," and that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broad. Co. v. Federal Communications Commission [FCC]*, 395 U.S. 367, 386 (1969). See generally *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (noting that the public interest standard denoted to the FCC is an expansive power).

76. See *Federal Communications Commission [FCC] v. Pacifica Foundation*, 438 U.S. 726 (1978); *Sable Communications v. FCC,* 492 U.S. 115 (1989); and *Reno v. American Civil Liberties Union [ACLU]*, 521 U.S. 844, 874 (1997). In these cases, U.S. courts disregarded the argument that the offended listener or viewer could simply turn the dial and avoid the unwanted broadcast [thereby putting print and broadcast media in the same footing], reasoning that because the broadcast audience is constantly tuning in and out, prior warnings cannot protect the listener from unexpected program content.

77. *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 386 (1969). Red Lion involved the application of the fairness doctrine and whether someone personally attacked had the right to respond on the broadcast medium within the purview of FCC regulation. The court sustained the regulation. The Court in Red Lion reasoned that because there are substantially more individuals who want to broadcast than there are frequencies available, this "scarcity of the spectrum" necessitates a stricter standard for broadcast media, as opposed to newspapers and magazines. See generally *National Broadcasting v. United States*, 319 U.S. 190, 219 (1943) (noting that the public interest standard denoted to the FCC is an expansive power).

78. See *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978); *Sable Communications v. FCC,* 492 U.S. 115 (1989); and *Reno v. American Civil Liberties Union [ACLU]*, 521 U.S. 844, 874 (1997). In *FCC v. Pacifica Foundation*, involving an FCC decision to require broadcasters to channel indecent programming away from times of the day when there is a reasonable risk that children may be in the audience, the U.S. Court found that the broadcast medium was an intrusive and pervasive one. In reaffirming that this medium should receive the most limited of First Amendment protections, the U.S. Court held that the rights of the public to avoid indecent speech trump those of the broadcaster to disseminate such speech. The justifications for this ruling were two-fold. First, the regulations were necessary because of the pervasive presence of broadcast media in American life, capable of injecting offensive material into the privacy of the home, where the right "to be left alone plainly outweighs the First Amendment rights of an intruder." Second, the U.S. Court found that broadcasting "is uniquely accessible to children, even those too young to read." The Court dismissed the argument that the offended listener or viewer could simply turn the dial and avoid the unwanted broadcast, reasoning that because the broadcast audience is constantly tuning in and out, prior warnings cannot protect the listener from unexpected program content.

79. *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984).

80. *Id.* at 380.

81. See *Estrada v. Escritor* (Resolution), A.M. No. P-02-1651, June 22, 2006 (free exercise of religion); and *Osmeña v. COMELEC,* 351 Phil. 692, 718 (1998) (speech restrictions to promote voting rights). The Court in *Osmeña v. COMELEC,* for example, noted that it is a foreign notion to the American Constitution that the government may restrict the speech of some in order to enhance the relative voice of others [the idea being that voting is a form of speech]. But this Court then declared that the same does not hold true of the Philippine Constitution, the notion "being in fact an animating principle of that document." 351 Phil. 692, 718 (1998).

82. G.R. No. L-59329, July 19, 1985, 137 SCRA 628.

83. *Id.*

84. *Id.* at 634-637.

85. There is another case wherein the Court had occasion to refer to the differentiation between traditional print media and broadcast media, but of limited application to the case at bar inasmuch as the issues did not invoke a free-speech challenge, but due process and equal protection. See *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. COMELEC,* 352 Phil. 153 (1998) (challenge to legislation requiring broadcast stations to provide COMELEC Time free of charge).

86. G.R. No. L-69500, July 22, 1985, 137 SCRA 717. In this case, the classification of a movie as "For Adults Only" was challenged, with the issue focused on obscenity as basis for the alleged invasion of the right to freedom on artistic and literary expression embraced in the free speech guarantees of the Constitution. The Court held that the test to determine free expression was the clear and present danger rule. The Court found there was an abuse of discretion, but did not get enough votes to rule it was grave. The decision specifically stated that the ruling in the case was limited to concept of obscenity applicable to motion pictures. *Id.* at 723-729.

87. *Id.* at 725.

88. *Id.*

89. *ABS-CBN Broadcasting Corp. v. COMELEC,* 380 Phil. 780, 794 (COMELEC Resolution restraining ABS-CBN, a corporation engaged in broadcast media of television and radio, from conducting exit surveys after the 1998 elections). Although the decision was rendered after the 1998 elections, the Court proceeded to rule on the case to rule on the issue of the constitutionality of holding exit polls and the dissemination of data derived therefrom. The Court ruled that restriction on exit polls must be tested against the clear and present danger rule, the rule we "unquestionably" adhere to. The framing of the guidelines issued by the Court clearly showed that the issue involved not only the conduct of the exit polls but also its dissemination by broadcast media. And yet, the Court did not distinguish, and still applied the clear and present danger rule.

90. 351 Phil. 692 (1998) (challenge to legislation which sought to equalize media access through regulation).

91. *Id.* at 718.

92. *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. COMELEC,* 352 Phil. 153 (1998) (challenge to legislation requiring broadcast stations to provide COMELEC Time free of charge).

93. HELEN FENWICK, CIVIL LIBERTIES AND HUMAN RIGHTS 296 (3rd ed. 2002).

94. *Id.*

95. Stephen J. Shapiro, *How Internet Non-Regulation Undermines The Rationales Used To Support Broadcast Regulation*, 8-FALL MEDIA L. & POL'Y 1, 2 (1999).

96. Technological advances, such as software that facilitates the delivery of live, or real-time, audio and video over the Internet, have enabled Internet content providers to offer the same services as broadcasters. Indeed, these advancements blur the distinction between a computer and a television. *Id.* at 13.

97. *Id.*

98. The current rationales used to support regulation of the broadcast media become unpersuasive in light of the fact that the unregulated Internet and the regulated broadcast media share many of the same features. *Id.* In other words, as the Internet and broadcast media become identical, for all intents and purposes, it makes little sense to regulate one but not the other in an effort to further First Amendment principles. Indeed, as Internet technologies advance, broadcasters will have little incentive to continue developing broadcast programming under the threat of regulation when they can disseminate the same content in the same format through the unregulated Internet. In conclusion, "the theory of partial regulation, whatever its merits for the circumstances of the last fifty years, will be unworkable in the media landscape of the future." *Id.* at 23.

SANDOVAL-GUTIERREZ, J., concurring:

1. Article 19, Adopted on December 10, 1948.

2. 3 S.C.R. 697 (1990).

3. Separate Opinion of Chief Justice Hilario G. Davide Jr. (ret.), in *Kapisanan ng mga Brodkasters sa Pilipinas*, G.R. No. 102983. March 5, 1992.

4. Bernas, *The 1987 Constitution of the Republic of the Philippines, A Commentary*, 2003 ed., p. 225.

5. *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Freedman v. Maryland*,380 U.S. 51 (1965).

6. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

7. *Supra*, footnote 4, citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *American Bible Society v. City of Manila*, 101 Phil. 386 (1957).

8. 137 SCRA 628 (1985).

9. http://www.beacon for freedom.org/about_project/history.html, *The Long History of Censorship*, p. 3.

10. 283 U.S. 697 (1931).

11. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Kunz v. New York*, 340 U.S. 290 (1951); *Nietmotko v. Maryland,* 340 U.S. 268 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958).

12. *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Paulos v. New Hampshire*, 345 U.S. 395 (1953).

13. 403 U.S. 713. 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).

14. T. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative powers of the States of the American Union* 885-86 (8th ed. 1927).

15. *Bantam Books, Inc. vs. Sullivan*, 372 U.S. 58 (1963).

16. *Supra*, p. 228, footnote 4, p. 228.

17. 376 U.S. 254 (1964).

18. 339 U.S. 382 (1950).

19. *Near v. Minnesota*, 179 Minn. 40; 228 N.W. 326.

CARPIO, J., concurring:

1. The taped conversations are referred to here as the "Garci Tapes."

2. Report of the Joint Committee on the Canvass of Votes for the Presidential and Vice-Presidential Candidates in the May 10, 2004 Elections, dated 23 June 2004.

3. In their Comment to the petition, the NTC and respondent Gonzalez only mentioned Bunye's press conference of 6 June 2005. However, respondents do not deny petitioner's assertion that the 9 June 2005 press conference also took place.

4. On 7 June 2005, Atty. Alan Paguia, counsel of former President Joseph Ejercito Estrada, gave to a radio station two tapes, including the Garci Tapes, which he claimed to be authentic. On 10 June 2005, Samuel Ong, a high ranking official of the National Bureau of Investigation, presented to the media the alleged "master tape" of the Garci Tapes.

5. The press release reads in its entirety:

   NTC GIVES FAIR WARNING TO RADIO AND TELEVISION OWNERS/OPERATORS TO OBSERVE ANTI-WIRE TAPPING LAW AND PERTINENT NTC CIRCULARS ON PROGRAM STANDARDS

In view of the unusual situation the country is in today, The (*sic*) National Telecommunications Commission (NTC) calls for sobriety among the operators and management of all radio and television stations in the country and reminds them, especially all broadcasters, to be careful and circumspect in the handling of news reportage, coverages [*sic*] of current affairs and discussion of public issues, by strictly adhering to the pertinent laws of the country, the current program standards embodied in radio and television codes and the existing circulars of the NTC.

The NTC said that now, more than ever, the profession of broadcasting demands a high sense of responsibility and discerning judgment of fairness and honesty at all times among broadcasters amidst all these rumors of unrest, destabilization attempts and controversies surrounding the alleged wiretapping of President GMA (*sic*) telephone conversations.

Taking into consideration the country's unusual situation, and in order not to unnecessarily aggravate the same, the NTC warns all radio stations and television networks owners/operators that the conditions of the authorizations and permits issued to them by Government like the Provisional Authority and/or Certificate of Authority explicitly provides that said companies shall not use its stations for the broadcasting or telecasting of false information or willful misrepresentation. Relative thereto, it has come to the attention of the Commission that certain personalities are in possession of alleged taped conversation which they claim, (*sic*) involve the President of the Philippines and a Commissioner of the COMELEC regarding their supposed violation of election laws. These personalities have admitted that the taped conversations are product of illegal wiretapping operations.

Considering that these taped conversations have not been duly authenticated nor could it be said at this time that the tapes contain an accurate or truthful representation of what was recorded therein, (*sic*) it is the position of the Commission that the continuous airing or broadcast of the said taped conversations by radio and television stations is a continuing violation of the Anti-Wiretapping Law and the conditions of the Provisional Authority and/or Certificate of Authority issued to these radio and television stations. If it has been (*sic*) subsequently established that the said tapes are false and/or fraudulent after a prosecution or appropriate investigation, the concerned radio and television companies are hereby warned that their broadcast/airing of such false information and/or willful misrepresentation shall be just cause for the suspension, revocation and/or cancellation of the licenses or authorizations issued to the said companies.

In addition to the above, the Commission reiterates the pertinent NTC circulars on program standards to be observed by radio and television stations. NTC Memorandum Circular No. 111-12-85 explicitly states, among others, that "all radio broadcasting and television stations shall, during any broadcast or telecast, cut off from the air the speech play, act or scene or other matters being broadcast and/or telecast if the tendency thereof" is to disseminate false information or such other willful misrepresentation, or to propose and/or incite treason, rebellion or sedition. The foregoing directive had been reiterated in NTC Memorandum Circular No. 22-89 which, in addition thereto, prohibited radio, broadcasting and television stations from using their stations to broadcast or telecast any speech, language or scene disseminating false information or willful misrepresentation, or inciting, encouraging or assisting in subversive or treasonable acts.

The Commission will not hesitate, after observing the requirements of due process, to apply with full force the provisions of the said Circulars and their accompanying sanctions or erring radio and television stations and their owners/operators.

6. The joint press statement reads (*Rollo*, pp. 62-63):

JOINT PRESS STATEMENT: THE NTC AND KBP

1. Call for sobriety, responsible journalism, and of law, and the radio and television Codes.

2. NTC respects and will not hinder freedom of the press and the right to information on matters of public concern. KBP & its members have always been committed to the exercise of press freedom with high sense of responsibility and discerning judgment of fairness and honesty.

3. NTC did not issue any MC [Memorandum Circular] or Order constituting a restraint of press freedom or censorship. The NTC further denies and does not intend to limit or restrict the interview of members of the opposition or free expression of views.

4. What is being asked by NTC is that the exercise of press freedom is done responsibly.

5. KBP has program standards that KBP members will observe in the treatment of news and public affairs programs. These include verification of sources, non-airing of materials that would constitute inciting to sedition and/or rebellion.

6. The KBP Codes also require that no false statement or willful misrepresentation is made in the treatment of news or commentaries.

7. The supposed wiretapped tapes should be treated with sensitivity and handled responsibly giving due consideration to the process being undertaken to verify and validate the authenticity and actual content of the same.

7. *David v. Macapagal-Arroyo*, G.R. No. 171396, 3 May 2006, 489 SCRA 160.

8. In *Palko v. Connecticut,* 302 U.S. 319 (1937), Justice Benjamin Cardozo wrote that freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom."

9. *See* dissenting opinion of Justice Oliver Wendell Holmes in *United States v. Schwimmer*, 279 U.S. 644 (1929).

10. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

11. *Gonzales v. Kalaw-Katigbak*, No. L-69500, 22 July 1985, 137 SCRA 717.

12. *Pharmaceutical and Health Care Association of the Philippines v. Health Secretary Francisco T. Duque III,* G.R. No. 173034, 9 October 2007. Another fundamental ground for regulating false or misleading advertisement is Section 11 (2), Article XVI of the Constitution which states: "The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare."

13. *Eastern Broadcasting Corporation v. Dans*, No. L-59329, 19 July 1985, 137 SCRA 628.

14. *Id.*

15. 512 U.S. 622, 640 (1994).

16. *Bayan, Karapatan, Kilusang Magbubukid ng Pilipinas (KMP) v. Ermita*, G.R. Nos. 169838, 169848 and 156881, 25 April 2006, 488 SCRA 2260.

17. *Constitutional Law*, Erwin Chemerinsky, pp. 902, 936 (2nd Edition).

18. *Ruiz v. Gordon*, 211 Phil. 411 (1983).

19. *United States v. Grace*, 461 U.S. 171 (1983).

20. *Gonzalez v. Kalaw-Katigbak, see* Note 11. The Court declared, "It is the opinion of this Court, therefore, that to avoid an unconstitutional taint on its creation, ***the power of respondent Board is limited to the classification of films***."

21. *Movie and Television Review and Classification Board v. ABS-CBN Broadcasting Corporation*, G.R. No. 155282, 17 January 2005, 448 SCRA 5750.

22. A case may be made that only television programs *akin* to motion pictures, like *tele-novelas*, are subject to the power of review and classification by a government review board, and such power cannot extend to other pre-taped programs like political shows.

23. *Constitutional Law*, Chemerinsky, see Note 17, p. 903.

24. *See* Note 12.

25. *Iglesia ni Cristo (INC) v. Court of Appeals, Board of Review for Motion Pictures and Television*, G.R. No. 119673, 26 July 1996, 259 SCRA 529; *New York Times v. United States*, 403 U.S. 713 (1971).

26. *Id.*

27. *Ayer Productions Pty. Ltd. v. Capulong,* G.R. No. L-82380, 29 April 1988, 160 SCRA 861.

28. *Social Weather Station, et al. v. COMELEC,* 409 Phil. 571 (2001).

29. *See* Note 25.

30. *VRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc.*, 444 Phil. 230 (2003). In effect, this makes "hate speech" against a religious or ethnic minority a protected expression.

31. In pornography or obscenity cases, the ancillary test is the contemporary community standards test enunciated in *Roth v. United States* (354 U.S. 476 [1957]), which asks: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *See Gonzalez v. Kalaw-Katigbak*, Note 11.

32. *See* notes 12 and 13. In false or misleading advertisement cases, no test was enunciated in *Pharmaceutical and Health Care Association of the Philippines v. Health Secretary* (*see* Note 12) although the Concurring and Separate Opinion of Chief Justice Reynato S. Puno advocated the four-part analysis in *Central Hudson Gas & Electric v. Public Service Commission* (447 U.S. 557 [1980]), to wit: (1) the advertisement must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the state regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than is necessary to serve that interest.

33. *Bayan v. Ermita, see* Note 16. In the United States, the prevailing test is the Brandenburg standard (*Brandenburg v. Ohio*, [395 U.S. 444 1969]) which refined the clear and present danger rule articulated by Justice Oliver Wendell Holmes in *Schenck v. United States* (249 U.S. 47 [1919]) by limiting its application to expressions where there is "imminent lawless action." See *American Constitutional Law*, Otis H. Stephen, Jr. and John M. Scheb II, Vol. II, p. 133 (4th Edition).

34. *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984).

35. Section 1, Republic Act No. 4200.

36. 69 Phil. 635 (1940).

37. *See* Note 12.

38. Some commentators, including Prof. Robert Bork, argue that political expression is the only expression protected by the Free Speech Clause. The U.S. Supreme Court has rejected this view. *Constitutional Law*, Chemerinsky, *see* Note 17, p. 897.

39. *See* Commonwealth Act No. 616 and Article 117 of the Revised Penal Code.

40. See *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In this case, the U.S. Supreme Court held that an anti-wiretapping law violates the First Amendment if it prohibits disclosure of intercepted information that is of significant public concern.

41. Section 7, Article III, Constitution.

42. 218 Phil. 754 (1984).

43. *See* Note 7.

44. *Id.* at 268.

45. *Id.* at 275.

46. 283 U.S. 697 (1931).

47. American Constitutional Law, Ralph A. Rossum and G. Alan Tass, vol. II, p. 183 (7th Edition).

NACHURA, J., dissenting:

1. *Rollo*, pp. 6-7.

2. *Id.* at 7 and 58.

3. *Id.* at 8 and 59.

4. Entitled "An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, and for Other Purposes."

5. *Rollo*, pp. 8-9 and 59.

6. *Id.* at 10 and 59.

7. *Id.* at 109-110.

8. *Id.* at 116.

9. *Id.* at 111-112.

10. *Id.* at 3-42.

11. *Id.* at 18.

12. *Id.* at 56-83.

13. *Id.* at 64-67.

14. *Id.* at 68-75.

15. *Id.* at 75-82.

16. *Province of Batangas v. Romulo*, G.R. No. 152774, May 27, 2004, 429 SCRA 736, 755.

17. *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 896 (2003).

18. *David v. Macapagal-Arroyo*, G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 and 171424, May 3, 2006, 489 SCRA 160, 223.

19. *Rollo*, p. 15.

20. *Supra* note 18.

21. *Dumlao v. COMELEC,* G.R. No. L-52245, January 22, 1980, 95 SCRA 392, 401. This case explains the standards that have to be followed in the exercise of the power of judicial review, namely: (1) the existence of an appropriate case; (2) an interest personal and substantial by the party raising the constitutional question; (3) the plea that the function be exercised at the earliest opportunity; and (4) the necessity that the constitutional question be passed upon in order to decide the case.

22. *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, 465 Phil. 860, 889-890 (2004).

23. *Lanuza, Jr. v. Yuchengco*, G.R. No. 157033, March 28, 2005, 454 SCRA 130, 138.

24. *See Multimedia Holdings Corporation v. Circuit Court of Florida, St. John's County*, 544 U.S. 1301, 125 S.Ct. 1624, 1626 (2005).

25. *Rufino v. Endriga*, G.R. Nos. 139554 and 139565, July 21, 2006, 496 SCRA 13, 46.

26. *Roble Arrastre, Inc. v. Villaflor*, G.R. No. 128509, August 22, 2006, 499 SCRA 434, 447.

27. *Primicias v. Fugoso*, 80 Phil. 71 (1980), quoted in Justice Azcuna's ponencia in *Bayan v. Ermita*, G.R. No. 169838, April 25, 2006.

28. 468 U.S. 364 (1984).

29. An Act to Promote and Govern the Development of Philippine Telecommunications and the Delivery of Public Telecommunications.

30. Dated July 23, 1979.

31. Section 15 (e), (g), (h), Executive Order No. 546.

32. Section 16, Executive Order No. 546.

33. *State v. Haley*, 687 P.2d 305, 315 (1984).

34. *Murray v. Lawson*, 138 N.J. 206, 222; 649 A.2d 1253, 1261 (1994).

35. 427 U.S. 539, 559 (1976).

36. 510 U.S. 909, 114 S.Ct. 295, June 28, 1993.

37. 80 Phil. 71 (1948).

38. No. L-65366, November 9, 1983, 125 SCRA 553, 564.

39. No. L-64261, December 26, 1984, 133 SCRA 800, 816.

40. 137 SCRA 647.

41. 36 SCRA 228.

42. G.R. No. 103956, March 31, 1992, 207 SCRA 712, 715.

43. G.R. No. 90878, January 29, 1990, 181 SCRA 529, 534-535.

44. G.R. No. 133486, January 28, 2000.

45. G.R. No. 147571, May 5, 2001, 357 SCRA 496, 506-507.

46. Nos. L-82380 and L-82398, April 29, 1988, 160 SCRA 861.

47. G.R. No. 123881, March 13, 1997.

48. G.R. No. 119673, July 26, 1996, 259 SCRA 529.

49. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-442; 77 S.Ct. 1325, 1328 (1957).

50. 181 Phil. 45.

51. G.R. No. 78750, April 20, 1990, 184 SCRA 449, 462-463.

52. G.R. Nos. 115455, 115525, 115543, 115544, 115754, 115781, 115852, 115873 and 115931, August 25, 1994, 235 SCRA 630, 675-682; see also Court's Resolution on the motions for reconsideration, October 30, 1995, 249 SCRA 628, 652-656.

53. Republic Act No. 3846; Executive Order No. 546; see pertinent memorandum circulars at <http://portal.ntc.gov.ph/wps/portal/!ut/p/.cmd/cs/.ce/7_0_A/.s/7_0_MA/_s.7_0_A/7_0_MA> (visited: January 3, 2008); see also terms and conditions of provisional authority and/or certificate of authority granted to radio and television stations, *rollo*, pp. 119-128.

54. *See Multimedia Holdings Corporation v. Circuit Court of Florida, St. John's County, supra* note 24, at 1626-1627.

55. *Id.*

56. NTC Memorandum Circular No. 22-89.

57. *Defensor-Santiago v. Guingona*, 359 Phil. 276, 304 (1998).

58. *Republic of the Philippines v. COCOFED*, 423 Phil. 735, 774 (2001); *Ang Bagong Bayani-OFW Labor Party v. COMELEC,* 412 Phil. 308, 340 (2001).

TINGA, J., dissenting and concurring:

1. *Rollo*, p. 8.

2. *Id.* at 10-11.

3. CONST., Art. III, Sec. 4.

4. CONST., Art. III, Sec. 7. The Decision however has properly refused to dwell on the right to information as central to the case at bar. See Decision, p. 9.

5. *Rollo*, p. 18.

6. *Id.* at 23.

7. *Id.* at 24.

8. *Rollo*, p. 34.

9. *Id.* at 34.

10. *Id.* at 37.

11. *Id.* at 111.

12. "Freedom of expression was a concept unknown to Philippine jurisprudence prior to 1900. It was one of the burning issues during the Filipino campaign against Spain, first, in the writings of the Filipino propagandists, and, finally, in the armed revolt against the mother country. Spain's refusal to recognize the right was, in fact, a prime cause of the revolution." J. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (1996 ed.), at 203-204.

13. Beginning with *Gitlow v. New York*, 268 U.S. 652 (1925). "For present purposes we may and do assume that freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666. "The incorporation of the other First Amendment rights followed. In 1931, the Supreme Court held squarely that the freedom of the press is within the protection of the 'liberty' guaranteed in the Fourteenth Amendment (*Near v. Minnesota*, [283 U.S. 697 (1931)]; in 1937 the right of peaceable assembly was included (*de Jonge v. Oregon*, 299 U.S. 353); and in 1940 the freedom-of-religion provision was used to invalidate a Connecticut statute requiring a permit for all solicitors for religious and charitable causes (*Cantwell v. Connecticut,* [310 U.S. 296 (1940)]" A.T Mason & W. Beaney, American Constitutional Law (4th ed.), at 496-497.

14. The views of this writer on the proper interpretation of our libel laws in light of Section 4, Article III of the Constitution were expressed in *Guingging v. Court of Appeals*, G.R. No. 128959, 30 September 2005, 471 SCRA 516.

15. Separate Concurring Opinion of Justice Carpio, p. 16.

16. *Id.*

17. Decision, p. 34.

18. *See e.g., Patterson v. Colorado*, 205 U.S. 454 (1907); *Near v. Minnesota*, 283 U.S. 697 (1931).

19. 427 U.S. 539 (1976).

20. *Id.* at 559.

21. *Id.*

22. Decision, p. 19; citing J. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY, 225 (2003 ed.).

23. *Id.*

24. *Id.* at 35.

25. 371 U.S. 415 (1963).

26. See *NAACP v. Button*, 371 U.S. 415, 433 (1963). Emphasis supplied.

27. *Supra* note 19 at 559; citing A. BICKEL, THE MORALITY OF CONSENT (1975).

28. *The Baltimore Sun Company v. Ehrlich*, No. 05-1297 (U.S. 4th Circuit), 15 February 2006; citing *Board of Country Commissioners v. Umbehr*, 518 U.S. 668. 674 (1996).

29. The Court notes, however, that it has found no case in which a First Amendment claim went forward in the absence of allegations or evidence that speech was actually chilled." *Zieper v. Metzinger*, No. 00 Civ. 5595 (PKC), U.S. District Court, S.D. New York, 22 August 2005; citing *Davis v. Village Park II Realty Co.*, 578 F.2d at 464.

30. *Local 491, International Brotherhood of Police Officers v. Gwinnet County*, 510 F.Supp. 2d1271.

31. *Id.* at 1294-1296.

32. *Supra* note 18.

33. *Id.* at 526.

34. *Id.*, citing *Curly v. Village of Suffern*, 268 F.3d 65 (2d Cir. 2001), at 73.

35. Decision, p. 35.

36. *Rollo*, p. 86.

37. Decision, pp. 35-36.

38. At least one case which has reached this Court challenges the validity of certain issuances of the NTC which were promulgated or reiterated shortly after the February 2006 declaration of a "state of emergency."

39. See Sec. 1, Chapter 1, Title III, Book IV, Administrative Code of 1987, which contains the "Declaration of Policy" of the Department of Justice. "It is the declared policy of the State to provide the government with a principal law agency which shall be both its legal counsel and prosecution arm; administer the criminal justice system in accordance with the accepted processes thereof consisting in the investigation of the crimes, prosecution of offenders and administration of the correctional system; . . ."

40. *Rollo*, pp. 8-10.

41. Decision, pp. 3-4.

42. See *e.g.*, "DOJ warns media vs. playing tapes" (first published by ABS-CBN News on 10 June 2005), at http://www.abs-cbnnews.com/topofthehour.aspx?StoryId=7564 (last visited, 13 February 2008).

43. See note 26.

44. See note 28.

45. *Rollo*, p. 75.

46. *Id.*

47. See also note 42.

48. Already, the U.S. Supreme Court in *Reno v. ACLU,* 521 U.S. 844 had pronounced that the factors that justify the government regulation of the broadcast medium are not present in cyberspace. It will be inevitable that this Court will soon have to adjudicate a similar issue.

49. See http://www.youtube.com/results?search_query=Hello+Garci. ("Search Results for "Hello Garci").

50. See "Hello Garci scandal" (http://en.wikipedia.org/wiki/Hello_Garci).

VELASCO, JR., J., concurring and dissenting:

1. *Rollo*, pp. 8-9 & 59.
2. Sec. 1, Chapter I, Title III of Book IV.