G.R. No. 205357 – GMA Network Inc., *petitioner versus* Commission on Elections, *respondent.*

G.R. No. 205374 – ABC Development Corporation, *petitioner versus* Commission on Elections, *respondent.*

G.R. No. 205592 – Manila Broadcasting Company, Inc. and Newsounds Broadcasting Network, Inc., *petitioners versus* Commission on Elections, *respondent.*

G.R. No. 205852 – Kapisanan ng mga Brodkaster ng Pilipinas (KBP) and ABS-CBN Corporation, *petitioners versus* Commission on Elections, *respondent.*

G.R. No. 206360 – Radio Mindanao Network, Inc., *petitioner versus* Commission on Elections, *respondent.*

Promulgated:

SEPTEMBER 02, 2014

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SEPARATE CONCURRING OPINION

BRION, *J.*:

I concur in the result. My reasons for this position are fully explained below.

The Case

The *ponencia* struck down **Commission on Elections (*Comelec*) Resolution No. 9615**, as amended by Comelec Resolution No. 9631. These resolutions changed the basis of the computation of the allowable airtime limits within which candidates or registered political parties may place their campaign advertisements on radio or television, as provided under **Republic Act (*RA*) No. 9006** or the **Fair Elections Act of 2001**. The pertinent portion of this law, Section 6.2, provides:

> 6.2. (a) Each bona fide candidate or registered political party for a nationally elective office shall be entitled to not more than one hundred twenty (120) minutes of television advertisement and one hundred eighty (180) minutes of radio advertisement whether by purchase or donation.
>
> (b) Each bona fide candidate or registered political party for a locally elective office shall be entitled to not more than sixty (60) minutes of television advertisement and ninety (90) minutes of radio advertisement whether by purchase or donation.

In the 2004,[1] 2007 and 2010 elections, the Comelec interpreted these provisions to mean that the specified airtime limits apply on a ***"per (radio/tv) station"*** basis. For a national candidate, entitlement to airtime translated to television campaign time of **120 minutes for *every* available television station** and **120 minutes for *every* available radio station**.

For the 2013 elections, the Comelec changed its interpretation, this time interpreting the law in the manner it did in 2001.[2] Instead of computing the airtime limits on a per station basis, the Comelec under the challenged resolutions, would now compute the airtime limits on an ***"aggregate total basis."*** This translated to **very much lesser airtime for campaign advertisements** that candidates and registered political parties could place.

According to the *ponencia*, the Comelec's new interpretation is legally flawed for the following reasons:

First, the Comelec failed to come up with a reasonable basis and explanation for the interpretative change of the airtime limits under RA No. 9006. The Comelec, through Chairman Sixto Brillantes, explained that the new interpretation was prompted by the need to level the playing field among the candidates. This explanation apparently simply assumed that the previous interpretation no longer addressed the 2013 needs, although no supporting basis in evidence and reason was given to support this assumption.

Second, RA No. 9006 on its face does not require that the maximum allowable airtime should be on an "aggregate total" basis. This finds support from the Sponsorship Speech of Senator Raul Roco on RA No. 9006. Also, the fact that RA No. 9006 repealed RA No. 6646's (or the Electoral Reforms Law of 1987) provision (that prohibits radio broadcasting or television station from giving or donating air time for campaign purposes except through the Comelec) reinforces the Comelec's earlier and consistent interpretation that the airtime limits apply on a "per station" basis.

Third, Comelec Resolution No. 9615 infringes on the people's right to be duly informed about the candidates and the issues, citing *Bantay Republic Act or BA-RA 7941 v. Commission on Elections*.[3]

Fourth, Comelec Resolution No. 9615 violates the candidates' freedom of speech because it restricts their ability to reach out to a larger audience.

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1 See Comelec Minute Resolution No. 04-0113.
2 Comelec Resolution No. 6520.
3 551 Phil. 1 (2007).

Fifth, Comelec Resolution No. 9615 violates the people's right to suffrage.

Sixth, the lack of a prior notice and hearing is fatal to the validity of Comelec Resolution No. 9615. The Comelec should have given petitioners prior notice and opportunity for hearing before adopting Comelec Resolution No. 9615 because of the radical change it introduced. Citing *Commissioner of Internal Revenue v. Court of Appeals*,[4] prior notice and hearing is required if an administrative issuance "substantially adds to or increases the burden of those governed."

Discussion

A. Grave Abuse of Discretion Issue

a. Due Process and Basic Fairness

I agree with the *ponencia* that basic fairness demands that after consistently adopting and using an interpretation of a legal provision, any subsequent change in interpretation that the Comelec would adopt and that would seriously impact on both the conduct and result of the elections should have ***reasonable basis and be adequately explained to those directly affected***.

The petitioner owners/operators of radio/television networks are directly affected by the Comelec's new interpretation since they normally sell their airtime to candidates and registered political parties who buy airtime to conduct their campaign and as part of their campaign strategy. With respect to the candidates and as the Comelec very well knows, the effectiveness of their campaign strategy spells the difference between winning and losing in Philippine elections. The Comelec's knowledge of this basic fact limits the discretion that it otherwise would normally and broadly have as the constitutional body tasked with the enforcement and administration of our election laws.[5]

Interestingly, in **2001** (the year RA No. 9006 was enacted), the Comelec initially interpreted the airtime limits under RA No. 9006 to be applicable on an **aggregate total basis** in the manner the assailed Comelec Resolution No. 9615 now does. At the instance of petitioner Kapisanan ng Mga Brodkaster sa Pilipinas (*KBP*), the Comelec (through its Election and Information Department Director) then held conferences to discuss the present petitioners' proposed changes.

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4 329 Phil. 987 (1996).

5 Article IX-C, Section 2(1), 1987 Constitution.

On February 18, 2004, the Comelec adopted petitioner KBP's proposal. Since then and until the 2010 elections, the Comelec interpreted the equality-of-access thrust of the law to mean that a national candidate or a registered political party could avail of up to 120 minutes and 180 minutes for ***each*** broadcast radio station and television's airtime, respectively, for campaign advertisements. This interpretation was only changed for the 2013 elections under the assailed Comelec Resolution No. 9615.

Under these facts, even common sense demands that the Comelec explain to the petitioners the justification for the change, *i.e.,* why the previous interpretation would no longer be in tune with the equality-of-access thrust of the law that remains unchanged in all these elections. This is particularly true for the current petitioners who were the very same parties who actually and successfully prodded the Comelec to reconsider its 2001 interpretation.

As the *ponencia* observed, in the hearing conducted by the Comelec ***after*** the promulgation of Comelec Resolution No. 9615, the Comelec Chairman offered the petitioners no reasonable explanation; he only relied on the Comelec's "prerogative to amplify" under RA No. 9006 and on the blanket invocation of the need to level the playing field among candidates.

While the Court has acknowledged the Comelec's wide discretion in adopting means to carry out its mandate of ensuring free, orderly, and honest elections, this discretion cannot be unlimited and must necessarily be within the bounds of the law[6] under the prevailing rule of law regime in our country. The legal limitations include those imposed by the fundamental law, among them, the right to due process where governmental action has been ***substantively unreasonable*** or ***its procedures and processes are unduly harsh***.

The Comelec's failure to sufficiently explain the basis for the change of interpretation it decreed under Resolution No. 9615, in my view, falls within this limitation. Even without going into the niceties and intricacies of legal reasoning, basic fairness[7] demands that the Comelec provides a reasonable justification, considering particularly the Comelec's own knowledge of the dynamics of campaign strategy and the influence of the radio and television as medium of communication.

b. Lack of prior notice and hearing

I similarly agree with the *ponencia* that the lack of prior notice and hearing is fatal to the validity of Comelec Resolution No. 9615.

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6 *Tolentino v. COMELEC*, 465 Phil. 385 (2004).

7 See *Senate v. Ermita*, G.R. Nos. 168777, 169659, 169660, 169667, 169834 and 171246, April 20, 2006, 488 SCRA 1, 72.

Parenthethically, the need for prior notice and hearing actually supports the conclusion that the Comelec's discretion is not unbridled. Giving the petitioners prior opportunity to be heard before adopting a new interpretation would have allowed the Comelec to make a reasonable evaluation of the merits and demerits of the 2004-2010 interpretation of airtime limits and the needs to satisfy the demands of the 2013 elections.

In my discussions below, I shall supplement the *ponencia*'s observations (which cited the case *Commissioner of Internal Revenue v. Court of Appeals)*[8] that prior notice and hearing are required if an administrative issuance "substantially adds to or increases the burden of those governed". I do so based on my own assessment that ***the validity or invalidity of the assailed Comelec Resolution essentially rises or falls on the Comelec's compliance with the legal concept of due process or, at the very least, the common notion of fairness.*** In the latter case, the prevailing circumstances and the interests at stake have collectively given rise to the need to observe basic fairness.

1. The Comelec's powers

As an administrative agency, the powers and functions of the Comelec may be classified into quasi-legislative and quasi-judicial.

The **quasi-judicial power** of the Comelec embraces the power to resolve controversies arising from the enforcement of election laws, and to be the sole judge of all pre-proclamation controversies; and of all contests relating to the elections, returns, and qualifications. In the exercise of quasi-judicial power, the Comelec must necessarily ascertain the existence of facts, hold hearings to secure or confirm these facts, weigh the presented evidence, and draw conclusions from them as basis for its action and exercise of discretion that is essentially judicial in character.[9] When exercising this power, due process requires that prior notice and hearing must be observed.[10]

The remedy against an improvident exercise of the Comelec's quasi-judicial power is provided under Article IX-A, Section 7,[11] in relation with Article IX-C, Section 3 of the Constitution[12] and with Rule 64 of the Rules of Court.

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8 *Supra* note 4.

9 *Bedol v. Commissions on Elections*, G.R. No. 179830, December 3, 2009, 606 SCRA 554.

10 See *Namil v. Commission on Elections*, 460 Phil. 751 (2003); and *Sandoval v. Commission on Elections*, 380 Phil. 375 (2000).

11 This provision reads:

> Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof.

12 This provision reads:

On the other hand, the Comelec's **quasi-legislative power**, which it may exercise hand in hand with its power to administer and enforce election laws, refers to its power to issue rules and regulations to implement these election laws. In the exercise of quasi-legislative power, administrative law distinguishes between an administrative rule or regulation (**legislative rule**), on the one hand, and an administrative interpretation of a law whose enforcement is entrusted to an administrative body (**interpretative rule**), on the other.[13]

Legislative rules are in the nature of subordinate legislation and, as this label connotes, are designed to implement a law or primary legislation by providing the details of the law. They usually implement existing law, imposing general, extra-statutory obligations pursuant to the authority properly delegated by Congress and reflect and effect a change in existing law or policy that affects individual rights and obligations.[14]

A subset of legislative rules are **interpretative rules** that are intended to interpret, clarify or explain existing statutory regulations under which the administrative body operates. Their purpose or objective is merely to construe the administered statute without regard to any particular person or entity that may be covered by the law under construction or interpretation.[15] Understood along these lines, it becomes easy to grasp that the requirements of prior notice and hearing, unless expressly required by legislation or by the rules, do not apply to them.[16]

2. The requirement of notice and hearing in the exercise of quasi-legislative power

a. Statutory Requirement for Notice and Hearing.

In earlier cases, the Court observed that the issuance of rules and regulations in the exercise of an administrative agency's quasi-

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> Section 3. The Commission on Elections may sit en banc or in two divisions, and shall promulgate its rules of procedure in order to expedite disposition of election cases, including pre- proclamation controversies. All such election cases shall be heard and decided in division, provided that motions for reconsideration of decisions shall be decided by the Commission en banc.

[13] *Victorias Milling Company, Inc. v. Social Security Commission*, G.R. No. L-16704, March 17, 1962; *Misamis Oriental Association of Coco Traders, Inc. v. Department of Finance Secretary*, G.R. No. 108524, November 10, 1994, 238 SCRA 63.

[14] *Republic v. Drugmakers' Laboratories, Inc.*, G.R. No. 190837, March 5, 2014, citing *Commissioner of Internal Revenue v. Court of Appeals*, 329 Phil. 987, 1007 (1996), in turn citing *Misamis Oriental Association of Coco Traders, Inc. v. Department of Finance Secretary*, G.R. No. 108524, November 10, 1994, 238 SCRA 63, 69; *First National Bank of Lexington, Tennessee v. Sanders*, 946 F. 2d 1185 (1991); and *Animal Legal Defense Fund v. Quigg and Verity*, 932 F. 2d 920, 18 USPQ. 2d 1677 (1991).

[15] *Republic v. Drugmakers' Laboratories, Inc.*, G.R. No. 190837, March 5, 2014, citing *Commissioner of Internal Revenue v. Court of Appeals*, 329 Phil. 987 (1996); and Nachura, Antonio E. B., Outline Reviewer in Political Law (2009), p. 416

[16] See also *Tañada v. Hon. Tuvera*, 230 Phil. 528 (1986).

legislative or rule making power generally does not require prior notice and hearing[17] ***except if the law provides otherwise.***[18] The requirement for an opportunity to be heard under the exception is provided for under Book VII, Chapter 2, Section 9 of Executive Order (*EO*) No. 292 (the ***Administrative Code of 1987***). This provision reads:

> Section 9. *Public Participation.* –
>
> (1) If not otherwise required by law, an agency shall, **as far as practicable**, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule.

A patent characteristic of this provision is its permissive language in requiring notice and the opportunity to be heard. The non-mandatory nature of a prior hearing arises from the nature of the proceedings where quasi-legislative power is exercised: the proceedings do not involve the determination of *past events or facts* that would otherwise have to be ascertained as basis of an agency's action and discretion. On the contrary, the proceedings are intended to govern future conduct. Accordingly, the requirement of prior notice and hearing is not indispensable for the validity of the exercise of the power.[19]

It is in this light that the pronouncement in *CIR* case that the *ponencia* cited, should be understood.

In *CIR* case, the CIR issued a memorandum circular that classified certain brands of cigarettes *of a particular manufacturer* under a particular category. The classification resulted in subjecting the cigarette manufacturer to higher tax rates imposed under a new law (that had yet to take effect when the memorandum circular was issued) without affording the cigarette manufacturer the benefit of any prior notice and hearing.

In ruling in the manufacturer's favor, the Court *immediately assumed* that the CIR was exercising its quasi-legislative power when it issued the memorandum circular[20] and quoted a portion of *Misamis Oriental Association of Coco Traders, Inc. v. Department of Finance Secretary*[21] as follows:

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[17] Administrative Law, Law on Public Officers and Election Law, Ruben Agpalo, 2005 ed., citing *Phil. Communications Satellite Corp. v. Alcuaz*, 259 Phil. 707 (1989). See also *Dagan, et al. v. Philippine Racing Commission, et al.*, 598 Phil. 406 (2009).

[18] *Central Bank of the Philippines v. Cloribel*, 150-A Phil. 86 (1972).

[19] *Corona v. United Harbor Pilots Association of the Philippines*, 347 Phil. 333, 342 (1997); *Philippine Consumers Foundation, Inc. v. Secretary of Education, Culture and Sports*, 237 Phil. 606 (1987).

[20] The Court said: "Like any other government agency, however, the CIR may not disregard legal requirements or applicable principles in the exercise of its quasi-legislative powers" and then proceeded to "distinguish between two kinds of administrative issuances — a *legislative rule* and an *interpretative rule*."

[21] *Supra* note 13.

> x x x a legislative rule is in the *nature of subordinate legislation, designed to implement a primary legislation by providing the details thereof. In the same way that laws must have the benefit of public hearing, it is generally required that before a legislative rule is adopted there must be hearing* x x x (italics in the original).

On the basis of this assumption and the *Misamis Oriental* ruling, the Court held that while an interpretative rule does not require prior notice and hearing (since "it gives no real consequence more than what the law itself has already prescribed"), *"an administrative rule x x x that substantially adds to or increases the burden of those governed [requires] the agency to accord at least to those directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given the force and effect of law."*

While the Court's quoted dictum in the case is sound, the facts of the case however reveal that the CIR was not actually wearing its quasi-legislative hat when it made the disputed classification; it was in fact exercising its quasi-judicial power when it issued the memorandum circular.[22] As discussed elsewhere in this Opinion, prior notice and hearing was in fact indispensable.

This apparent disconnect, however, is rendered academic by the directory requirement of prior notice and hearing under EO No. 292 quoted above: when an agency issues a legislative rule, the issue of whether compliance with the notice and hearing requirement was "practicable" under the circumstances might depend on the extent of the burden or the adverse effect that the new legislative rule imposes on those who were not previously heard. Effectively, this is the rule that assumes materiality in the case, not the misdirected ruling in the cited *CIR* case.

In the present case, the requirement of prior notice and opportunity to be heard proceeds from the nature of Comelec Resolution No. 9615 as a **legislative rule**[23] whose new provision on airtime limits ***directly impacts on the petitioners as a distinct group among the several actors in the electoral process***.

On the one hand, the revenues that the petitioners may potentially lose under the Comelec's "restrictive" interpretation indeed have adverse effects on the petitioners' operations. On the other hand, substantially limiting the allowable airtime advertisements of candidates would have

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[22] See Separate Opinion of Justice Josue Belosillo in *Commissioner of Internal Revenue v. Court of Appeals*, *supra* note 4.

[23] While the Comelec under resolution 9615 merely "interpreted" (or more accurately, re-interpreted) the same provision of RA 9006, one should not confuse resolution 9615 simply as an interpretative rule since every election is distinct from the previous ones and different guidelines in order to ensure that the rules are updated to respond to existing circumstances (*Arroyo v Department of Justice*, G.R. No. 199082, September 18, 2012, 681 SCRA 181). Hence, in issuing resolution 9615, the Comelec was not simply "interpreting" the elections laws but is actually exercising its power of subordinate legislation.

serious repercussions on their campaign activities and strategies, and ultimately on their ability to win in the elections. These are serious considerations that make prior notice and hearing in the present case more than "practicable."

Still more important than these individual considerations is the perceived adverse effect, whether true or not, of the reduction of the airtime limits under Comelec Resolution No. 9615 on the electorate.

We should not also lose sight of the Comelec's equally noble objective of ***leveling the playing the field between and among candidates, which objective is itself constitutionally recognized***.[24] In addition, as one Comelec Commissioner remarked,[25] the restrictive interpretation was intended ***to encourage candidates to comply with an equally relevant statutory regulation on campaign finance***.[26]

At the center of these competing considerations that directly impact on the election system and in the electoral process as a whole is the Comelec. Given its constitutional mandate to enforce and administer all election laws and regulations with the objective of holding free, orderly, honest, peaceful, and credible elections,[27] these considerations, in my view, compulsorily required the Comelec to give the petitioners and all those concerned reasonable opportunity for discourse and reasonable basis and explanation for its conclusion.

In other words, while the petitioners do not have any absolutely demandable right to notice and hearing in the Comelec's promulgation of a legislative rule, the weight and seriousness of the considerations underlying the change in implementing the airtime limit rule, required a more circumspect and sensitive exercise of discretion by the Comelec, in fact, the duty to be fair that opens the door to due process considerations. The change touched on very basic ***individual, societal and even constitutional values and considerations*** so that the Comelec's failure to notify and hear all the concerned parties amounted to a due process violation amounting to grave abuse in the exercise of its discretion in interpreting the laws and rules it implements.

While the Comelec admittedly conducted a hearing ***after*** promulgating Comelec Resolution No. 9615, this belated remedy does not at all cure the resolution's invalidity.

The requirement of prior notice and hearing is independently meant to reinforce the requirement of reasonable basis and adequate explanation of the Comelec's action as part of the petitioners' due

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[24] Section 4, Article IX-C, 1987 Constitution.

[25] See http://tcdn05.abs-cbnnews.com/nation/06/13/13/sans-tro-9-senate-bets-buhay-breached-ads-cap.

[26] See Sections 100 and 101 of Batas Pambansa Blg. 881, as amended by Section 13 of RA No.7166.

[27] Section 4, Article IX-C, 1987 Constitution.

process rights. To state the obvious, in the election setting that Comelec Resolution No. 9615 governed, time is of the essence so that the lack of due process might have irremediably affected the concerned parties by the time the post-promulgation hearing was called. Additionally and more importantly, concluding that a post-promulgation hearing would suffice in Comelec Resolution No. 9615 setting would have signified the lack of limitation, even temporarily, on the Comelec's otherwise broad discretion. In the fine balancing that elections require, such remedial actions would not suffice.

As specifically applied to the realities of the present case, the requirement of prior notice and hearing is an opportunity for ***both*** the petitioners and the Comelec to support their respective positions on the proper interpretation of the airtime limits under RA No. 9006. This is especially true when we consider that under RA No. 9006, the Comelec is expressly empowered to "amplify" the guidelines provided in the law, among them, the provision on airtime limits. As will be discussed later in this Opinion, the Comelec's express power to "amplify" supports the conclusion I reached.

Based on these considerations, the *ponencia* could very well have ended further consideration of other issues as the violation of due process already serves as ample basis to support the conclusion to invalidate Comelec Resolution No. 9615. Instead, the *ponencia* proceeded to consider other constitutional grounds that, in my view, were not then appropriate for resolution.

B. Judicial Power and *Lis Mota*

When questions of constitutional significance are raised, the Court can exercise its power of judicial review only if the following requisites are present: (1) the existence of an actual and appropriate case; (2) the existence of personal and substantial interest on the part of the party raising the constitutional question; (3) recourse to judicial review is made at the earliest opportunity; and (4) the constitutional question is the *lis mota* of the case.[28]

The thrust of my discussion focuses on the last requisite.

Lis mota literally means "the cause of the suit or action." This last requisite of judicial review is simply an offshoot of the presumption of validity accorded to executive and legislative acts of our co-equal branches and of the independent constitutional bodies. Ultimately, it is rooted in the principle of separation of powers.

Given this presumption of validity, the petitioner who claims otherwise carries the initial burden of showing that the case cannot be

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[28] *General v. Urro*, G.R. No. 191560, March 29, 2011, 646 SCRA 567.

resolved unless the constitutional question he raised is determined by the Court.[29] From the Court's perspective, it must avoid resolving constitutional issues unless their resolution is absolutely necessary and clearly unavoidable.

By holding that the Comelec must have reasonable basis for changing their interpretation of the airtime limits under RA No. 9006 and that, impliedly its absence in the present case constitutes a violation of the petitioners' right to due process, the *ponencia* in effect recognized the Comelec's duty under the circumstances to provide for a reasonable basis for its action, as well as its competence to adequately explain them as the constitutional body tasked to enforce and administer all elections laws and regulations. This recognition is consistent with the Court's similar recognition that the Comelec possesses wide latitude of discretion in adopting means to carry out its mandate of ensuring free, orderly, and honest elections , but subject to the limitation that the means so adopted are not illegal or do not constitute grave abuse of discretion.[30]

Given this recognition and in light of the nullity of Comelec Resolution No. 9615, the Court, for its part, should also recognize that it should not preempt the Comelec from later on establishing or attempting to establish the bases for a new interpretation that is not precluded on other constitutional grounds. The Comelec possesses ample authority to so act under the provision that airtime limits, among others, **"**may be amplified on by the Comelec."

I choose to part with the *ponencia* at this point as I believe that with the due process and fairness grounds firmly established, this Court should refrain from touching on other constitutional grounds, particularly on a matter as weighty as the one before us, unless we can adequately explain and support our dispositions. The oft-repeated dictum in constitutional decision-making is the exercise of judicial restraint.[31] The Court will not or should not pass upon a constitutional

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29 *Id.*

30 *Tolentino v. COMELEC, supra* note 6.

31 In *Demetria v. Alba*,[134] this Court, through Justice Marcelo Fernan cited the "seven pillars" of limitations of the power of judicial review, enunciated by US Supreme Court Justice Brandeis in *Ashwander v. TVA*[135] as follows:

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.'
>
> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'
>
> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'

question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This, to my mind, is the dictum most particularly fit for the current legal situation before us, as I will explain below.

C. The *ponencia*'s bases for nullifying Comelec Resolution No. 9615

Based on its second to fifth grounds, the *ponencia* suggests that even if the Comelec came up with a reasonable and adequate explanation for its new interpretation of the airtime limits under RA No. 9006, the Comelec resolution is doomed to fail because, *first*, it does not find support under RA No. 9006 (the statutory reason); and, *second*, it violates several constitutional rights (the constitutional reason).

I disagree with these cited grounds.

1. Statutory reason

RA No. 9006 provides:

> **Section 6.** *Equal Access to Media Time and Space*. – All registered parties and bona fide candidates shall have equal access to media time

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4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained . . . In *Fairchild v. Hughes*, the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In *Massachusetts v. Mellon*, the challenge of the federal Maternity Act was not entertained although made by the Commonwealth on behalf of all its citizens.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided (citations omitted).

The foregoing "pillars" of limitation of judicial review, summarized in *Ashwander v. TVA* from different decisions of the United States Supreme Court, can be encapsulated into the following categories:

1. that there be absolute necessity of deciding a case
2. that rules of constitutional law shall be formulated only as required by the facts of the case
3. that judgment may not be sustained on some other ground
4. that there be actual injury sustained by the party by reason of the operation of the statute
5. that the parties are not in *estoppel*
6. that the Court upholds the presumption of constitutionality.

> and space. **The following guidelines may be amplified on by the COMELEC.**
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> x x x x
>
> **6.2. (a) Each bona fide candidate or registered political party for a nationally elective office shall be entitled to not more than one hundred twenty (120) minutes of television advertisement and one hundred eighty (180) minutes of radio advertisement whether by purchase or donation.**
>
> **(b) Each bona fide candidate or registered political party for a locally elective office shall be entitled to not more than sixty (60) minutes of television advertisement and ninety (90) minutes of radio advertisement whether by purchase or**
>
> For this purpose, the COMELEC shall require any broadcast station or entity to submit to the COMELEC a copy of its broadcast logs and certificates of performance for the review and verification of the frequency, date, time and duration of advertisements broadcast for any candidate or political party.
>
> 6.3. All mass media entities shall furnish the COMELEC with a copy of all contracts for advertising, promoting or opposing any political party or the candidacy of any person for public office within five (5) days after its signing. In every case, it shall be signed by the donor, the candidate concerned or by the duly authorized representative of the political party.
>
> x x x x
>
> In all instances, **the COMELEC shall supervise the use and employment of press, radio and television facilities insofar or the placement of political advertisements is concerned to ensure that candidates are given equal opportunities under equal circumstances** to make known their qualifications and their stand on public issues within the limits set forth in the Omnibus Election Code and Republic Act No. 7166 on election spending.

I raise three observations with respect to the *ponencia*'s statutory reason.

First, the *ponencia* has not explained the implication of the Comelec's power to "amplify" under Section 6 of RA No. 9006 in relation with Comelec Resolution No. 9615.

In light of the Comelec's power to "amplify," I cannot support the *ponencia*'s simplistic statement that "the law, on its face, does not justify a conclusion that the allowable airtime should be based on the totality of possible broadcast in all television or radio stations." In fact, even a superficial reading of RA No. 9006 reveals that **the law is silent on the basis of computing the allowable airtime limits**. The *ponencia* should have at the very least explained the law's silence in relation with the Comelec's power to amplify.

Contrary to the *ponencia*'s observation, nothing is evident from the Sponsorship Speech of Senator Raul Roco on RA No. 9006 (that the *ponencia* cited) to support the conclusion that the Comelec's interpretation is unwarranted under RA No. 9006.

Second, the fact that RA No. 9006 repealed Section 11(b) [the political advertisement ban] of RA No. 6646 **has no bearing on the issue** of the correct interpretation of the airtime limits under RA No. 9006. The thrust of RA No. 9006 involves a qualified, not an absolute, right to politically advertise, whether airtime limits are based on a per station or an aggregate total basis.

Third, the House and Senate bills that eventually became RA No. 9006 originally contained the phrase "per day per station" as the basis for the computation of the allowed airtime limits. According to the Comelec, the dropping of this phrase in the law reveals the intent of Congress to compute the airtime limits on an aggregate total or per candidate basis.

In rejecting the Comelec's argument, the *ponencia*, again, oddly stated that this change in language "meant that the computation must not be based on a 'per day' basis," completely ignoring the additional "per station" qualifier that is also no longer found in the present law.

These three considerations, in my view, collectively point to the inadequacy of the *ponencia*'s reasons in striking down Comelec Resolution No. 9615.

i. Statutory Validity of a Regulation

The Comelec's power to "amplify" on the airtime limits would have been the key in determining whether the Comelec overstepped its limitations in the exercise of its quasi-legislative power. For a legislative rule to be valid, all that is required is that the regulation should be **germane** (*i.e.*, appropriate and relevant) to the objects and purposes of the law, and that the regulation **should not contradict, but should conform with**, the standards prescribed by the law.[32]

RA No. 9006 simply provides that "***each*** bona fide [national] candidate or registered political party" is "**entitled** to not more than one hundred twenty (120) minutes of television advertisement and one hundred eighty (180) minutes of radio advertisement."

A very basic rule in statutory construction is that words (which make up a sentence) should be construed in their ordinary and usual

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[32] *Orceo v. Commission on Elections*, G.R. No. 190779, March 26, 2010, 616 SCRA 684.

meaning[33] and that legislative record are powerless to vary the terms of the statute when the wordings of the statute is otherwise clear.[34]

In the present case, the word ***"each"*** *(defined as everyone in a group)*[35] ***pertains to the candidate and registered political parties themselves***; the law then proceeds to define the limits of entitlement of "each" to radio and television advertisement to a certain number of minutes.

The provision's distinct and unambiguous wording shows that the allowable number of minutes for advertisement in radio and television refers to "each" of the candidates and registered political parties. Under the presently plain and clear wordings of the law, ***the allowable number of minutes does not pertain to the radio and television station themselves***. Accordingly, in promulgating Comelec Resolution No. 9615, it cannot be said that the Comelec "went beyond its legal mandate" because the Comelec's interpretation finds plain textual support from the law itself.

Pursuant to Section 4, Article IX-C of the 1987 Constitution, Congress enacted RA No. 9006 and declared as a matter of state principle that during the election period the State may supervise and regulate "the enjoyment or utilization of all franchises or permits for the operation of media of communication or information." The avowed purpose is to "guarantee or ensure equal opportunity for public service, including access to media time and space for public information campaigns and fora among candidates."[36] After Congress enacted RA No. 9006, which by its terms textually support Comelec Resolution No. 9615, it cannot be said that the resolution is not germane to the purpose of the law or that it is inconsistent with the law itself.

ii. The Power to Amplify

If only the *ponencia* considered Congress' express intent to grant the Comelec the power to "amplify" on Section 6.2 of RA No. 9006, then it would not have been blinded by its apprehensions that the Comelec's resolution would "undermine" and "frustrate" "political exercise as an interactive process."

More than anyone else perhaps, Congress knows that weighty considerations underlie the regulation of the airtime limits of candidates and of registered political parties. As earlier discussed, these considerations include the revenues that the petitioners may potentially

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33 *Romualdez v. Sandiganbayan*, G.R. No. 152259, July 29, 2004, 435 SCRA 371.

34 See *Southern Cross Cement Corporation v. Philippine Cement Manufacturers Corporation*, G.R. No. 158540, July 8, 2004, 434 SCRA 65. In the present case, the ponencia does not even disclose the terms of the legislative intent which Senator Cayetano has called the Court's attention to.

35 www.yourdictionary.com/each.

36 Section 2, RA No. 9006.

and directly lose under the Comelec's "restrictive" interpretation, and the Comelec resolution's indirect effect on the petitioners' freedom of the press; the serious repercussions of restrictive airtime limits on candidates' campaign strategy and their ability to win in the elections; the perceived adverse (and/or beneficial) effect, whether true or not, of the reduction of the airtime limits under the Comelec resolution on the electorate since the elections are considered the highest form of exercise of democracy; the noble objective of leveling the playing field between and among candidates, which objective is itself constitutionally recognized;[37] and the equally important and relevant state objective of regulating campaign finance.[38]

Since the Comelec is the body tasked by the Constitution with the enforcement and supervision of all election related laws with the power to supervise or regulate the enjoyment of franchises or permits for the operation of media of communication or information, Congress found the Comelec to be the competent body to determine, within the limits provided by Congress, the more appropriate regulation in an ever changing political landscape.

Reading RA No. 9006 and all the above considerations together, it is not difficult to grasp that the 180 and 120 minute limitations for *each* candidate under the law should be understood as the maximum statutory threshold for campaign advertisement. This is by the express provision of RA No. 9006. **The Comelec's on a "per station" interpretation (effective from 2004 until 2010), on the other hand, may be considered as another maximum limit for campaign advertisement**, **based on the Comelec's authority to "amplify."** This Comelec ruling, standing as presented, should be valid for as long as it does not exceed the statutory ceiling on a per station basis.

This interpretation, in my view, takes into account all the competing considerations that the Comelec, as the proper body, has the primary authority to judiciously weigh and consider.

To put this examination of Comelec Resolution No. 9615 in its proper context, however, I hark back to my previous statement on judicial restraint: find no clear and urgent necessity now to resolve the constitutional issues discussed in the *ponencia*, more especially given the manner that these issues were approached. I only discuss the constitutional issues to point out my concurrence and divergence from the *ponencia.* What we should hold, and I support the *ponencia* on this point, is that Comelec Resolution No. 9615 now stands nullified on due process grounds.

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37 Section 4, Article IX-C, 1987 Constitution.

38 See Sections 100 and 101 of Batas Pambansa Blg. 881, as amended by Section 13 of RA No.7166.

2. Constitutional Reason

i. Right to Information

With due respect, I observe that the *ponencia* has not fully explained how Comelec Resolution No. 9615 violates the people's right to be duly informed about the candidates and issues, and the people's right to suffrage. *Bantay Republic Act or BA-RA 7941 v. Commission on Elections*,[39] which the *ponencia* cited, is inapplicable because that case involves an **absolute refusal by the Comelec to divulge the names of nominees in the party-list election**. In the present case, the Comelec is not prohibiting the candidates from placing their campaign advertisements on the air but is simply limiting the quantity of the airtime limits they may use. As previously discussed, the basis for its action and interpretation is textually found in RA No. 9006 itself.

ii. Freedom of speech

a. Candidates and political parties

The *ponencia* also claims that Comelec Resolution No. 9615 violates the candidates' freedom of speech because it restricts their ability to reach out to a larger audience. While freedom of speech is indeed a constitutionally protected right, the *ponencia* failed to consider that the **Constitution itself expressly provides for a limitation to the enjoyment of this right during the election period.** Article IX-C, Section 4 of the Constitution reads:

> **Section 4.** The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.

In *National Press Club v. Commission on Elections*,[40] the petitioner raised arguments similar to the constitutional reasons now used by the *ponencia* against the constitutionality of Section 11(b) of RA No. 6646.[41] This provision prohibits the sale or donation of airtime to

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39 *Supra* note 3.

40 G.R. No. 102653, March 5, 1992, 207 SCRA 1.

41 **Section 11.** ***Prohibited Forms of Election Propaganda.*** - In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:

political candidates but directs the Comelec's procurement and allocation of airtime to the candidates (*Comelec time*).

Ruling against the claim that Section 11(b) of R.A. No. 6646 violates the freedom of speech, the Court in *National Press Club* said:

> x x x Withal, the rights of free speech and free press are not unlimited rights for they are not the only important and relevant values even in the most democratic of polities. In our own society, equality of opportunity to proffer oneself for public office, without regard to the level of financial resources that one may have at one's disposal, is clearly an important value. One of the basic state policies given constitutional rank by Article II, Section 26 of the Constitution is the egalitarian demand that "the State shall guarantee *equal access to opportunities for public service* and prohibit political dynasties as may be defined by law."
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> The technical effect of Article IX (C) (4) of the Constitution may be seen to be that no presumption of invalidity arises in respect of exercises of supervisory or regulatory authority on the part of the Comelec for the purpose of securing equal opportunity among candidates for political office, although such supervision or regulation may result in *some* limitation of the rights of free speech and free press.
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> x x x x
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> Put in slightly different terms, there appears no present necessity to fall back upon basic principles relating to the police power of the State and the requisites for constitutionally valid exercise of that power. **The essential question is whether or not the assailed**

(b) for any newspaper, radio broadcasting or television station, or other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Sections 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcement or personality who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period.

Sections 90 and 92 of BP Blg No. 881 pertinently reads:

Sec. 90. *Comelec space.* — The Commission *shall procure space* in at least one newspaper of general circulation in every province or city: *Provided, however,* That in the absence of said newspaper, publication shall be done in any other magazine or periodical in said province or city, which shall be known as "Comelec Space" wherein candidates can announce their candidacy. Said space shall be *allocated, free of charge, equally* and *impartially* by the Commission *among all candidates* within the area in which the newspaper is circulated.

x x x x

Sec. 92. *Comelec time.* — The Commission *shall procure radio and television time* to be known as "Comelec Time" which shall be *allocated equally* and *impartially* among the candidates within the area of coverage of all radio and television stations. For this purpose, the franchise of all radio broadcasting and television stations are hereby amended so as to provide radio or television time, free of charge, during the period of the campaign. (Emphasis supplied)

> **legislative or administrative provisions constitute a permissible exercise of the power of supervision or regulation of the operations of communication and information enterprises during an election period, or whether such act has gone beyond permissible supervision or regulation of media operations so as to constitute unconstitutional repression of freedom of speech and freedom of the press**. The Court considers that Section 11 (b) has not gone outside the permissible bounds of supervision or regulation of media operations during election periods.
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> x x x x
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> Section 11 (b) does, of course, limit the right of free speech and of access to mass media of the candidates themselves. **The limitation, however, bears a clear and reasonable connection with the constitutional objective set out in Article IX(C) (4) and Article II (26) of the Constitution**. For it is precisely in the unlimited purchase of print space and radio and television time that the resources of the financially affluent candidates are likely to make a crucial difference. Here lies the core problem of equalization of the situations of the candidates with deep pockets and the candidates with shallow or empty pockets that Article IX(C) (4) of the Constitution and Section 11 (b) seek to address. That the statutory mechanism which Section 11 (b) brings into operation is designed and may be expected to bring about or promote equal opportunity, and equal time and space, for political candidates to inform all and sundry about themselves, cannot be gainsaid.

Six years later, another challenge against Section 11(b) of R.A. No. 6646 was brought before the Court in *Osmena v. Comelec*.[42] The Court maintained its *National Press Club* ruling and held that unlike the other cases where the Court struck down the law or the Comelec regulation,[43] the restriction of speech under Section 11(b) of RA No. 6646 is merely incidental and is no more than necessary to achieve its purpose of promoting equality of opportunity in the use of mass media for political advertising. The restriction is limited both as to time and as to scope.

In other words, the Court found Section 11(b) of R.A. No. 6646 to be a content-neutral regulation and, thus, only needs a substantial government interest to support it. Governmental interest is substantial if it passes the test formulated in the *United States v. O' Brien*:[44] a government regulation is sufficiently justified –

(i) if it is within the constitutional power of the Government;
(ii) if it furthers an important or substantial governmental interest;

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42 351 Phil. 692 (1998).

43 *Blo Umpar Adiong v. Commission on Elections*¸ G.R. No. 103956, March 31, 1992, 207 SCRA 712*; Sanidad v. Commission on Elections*, G.R. No. 90878, January 29, 1990, 181 SCRA 529; and *Mutuc v. COMELEC,* L-32717, November 26, 1970, 36 SCRA 228.

44 391 U.S. 367, 377, 20 L. Ed. 2d 672, 680 (1968).

(iii) if the governmental interest is unrelated to the suppression of free expression; and
(iv) if the incident restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[45]

Accordingly, in determining whether a regulation violates freedom of speech, one must identify its nature and, concomitantly, the kind of interest that the government must have to support it.

Under this type of constitutional analysis, a first basic step for the *ponencia* was to establish the nature of Comelec Resolution No. 9615 as a content-based restriction on the candidates' freedom of speech before jumping to the conclusion that restrictions on "political speech" must be "justified by a compelling state interest." Without a clear established finding that the resolution is a content-based restriction, the Court would leave the public guessing on our basis in reaching a conclusion different from that we reached in *Osmena*.

In question form, are we saying that the allocation of a maximum of 180 minutes and 120 minutes of radio and television advertisements, respectively, to *each* national candidate (under Comelec Resolution No. 9615) unduly restricts freedom of speech, while the arrangement where the Comelec shall exclusively procure "Comelec time" *free of charge*[46] and allocate it equally and impartially among the candidates within the area of coverage of all radio and television stations does not?

If the Court answers in the affirmative, then the Court must expressly and carefully draw the line. In that event, I expressly reserve my right to modify this Opinion on the ground that Comelec Resolution No. 9615 is a content-neutral restriction.

The absence of the required constitutional analysis is made worse by the *ponencia*'s citation of *Buckley v. Valeo*,[47] a US case which declared the statutory limits on campaign expenditure unconstitutional for violating freedom of speech on the theory that speech is money. *Osmena* already put into serious question the applicability of the US Supreme Court's reasoning in this case[48] in our jurisdiction given the

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[45] See also *Social Weather Station v. Commission on Elections*, G.R. No. 147571, May 5, 2001, 357 SCRA 496.

[46] *Telecommunications and Broadcast Attorneys of the Philippines v. Commission on Elections, Inc.*, 352 Phil. 153 (1998).

[47] 424 U.S. 1; 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

[48] In *Osmena v. Comelec*, the Court observed:

> Do those who endorse the view that government may not restrict the speech of some in order to enhance the relative voice of others also think that the campaign expenditure limitation found in our election laws is unconstitutional? How about the principle of one person, one vote, is this not based on the political equality of voters? Voting after all is speech. We speak of it as the voice of the people - even of God. **The notion that the government may restrict the speech of some in order to enhance the**

presence of Section 4, Article IX-C in the 1987 Constitution and our own unique political and social culture. Thus, to me, citing *Buckley* to back up a myopic view of freedom of speech is seriously disturbing.

b. Radio and television stations

The Constitution's approval of "[r]estricting the speech of some in order to enhance the relative voice of others" neither applies to the candidates nor to the *medium* in which this speech may be made, *i.e.*, to television and the radio stations themselves. During elections, the candidates and these stations go hand-in-hand, bombarding the public with all kinds of election related information one can imagine.

Under Comelec Resolution No. 9615, the "restrictions" on the airtime limits of candidates and registered political parties only *indirectly* affect the radio and broadcast stations' more specific freedom of the press, as will be discussed below.[49] If at all, it is their potential revenues that are *directly* affected by the Comelec resolution. But even this effect does not give them any cause to complain.

In *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. Commission on Elections*,[50] the Court ruled that radio and television stations may be compelled to grant free airtime to the Comelec for the purpose of allocating and distributing these equally among candidates since under the Constitution, their franchises may be amended for the "common good" – in this case, the public will benefit because they will be fully informed of the issues of the election.

In the present case, will we have a different result because the Comelec effectively reduces the maximum number of minutes each radio and television may sell or donate to a candidate or a registered political party? I do not think so.

It may be argued that while the quantity of campaign advertisements is reduced, ***this reduction inversely and proportionately increases the radio and television stations' own time*** **- the freedom of the press at its very basic**[51] - to actively perform their duty to assist in the functions of public information and education.[52] Thus, contrary to the *ponencia*'s very broad statements, the press is not in any way "silenced" or "muffled under Comelec Resolution No. 9615"; what the resolution affects is merely the duration of allowable of radio and television advertisements by the candidates and registered political parties. In the same manner, under Comelec Resolution No. 9615, the

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relative voice of others may be foreign to the American Constitution. It is not to the Philippine Constitution, being in fact an animating principle of that document.

49 Section 4, Article III, 1987 Constitution.

50 *Supra* note 46.

51 See Section 24, Article II and Section 10, Article XVI of the 1987 Constitution.

52 See Section 4, RA No. 7252.

radio and television networks themselves are not hindered in pursuing their respective public information campaigns and other election-related public service activity. I incidentally find the *Pentagon Papers* case, which the *ponencia* found pertinent to quote, to be simply inapplicable.

Given these observations, the *ponencia*'s conclusion that Comelec Resolution No. 9615 is violative of the right to suffrage cannot but equally stand on very shaky constitutional ground.

D. Closing

The foregoing discussions simply reinforce my view that in enacting RA No. 9006, Congress has allowed the Comelec considerable latitude in determining, within statutory limits, whether a strict or liberal application of the airtime limits in a particular election period is more appropriate. Unless the Comelec has no reasonable basis and adequate explanation for its action and unless the parties directly affected are not given opportunity to be heard on this action – as in the present case – the Court should withhold the exercise of its reviewing power.

In these lights, I submit that, unless adequately explained, the resolution of the substantive constitutional issues should be left for future consideration as they are not absolutely necessary to the resolution of this case.

ARTURO D. BRION
Associate Justice