FROM LAWMAKERS TO GUARDIANS: A PROLEGOMENON TO CONGRESSIONAL OVERSIGHT AS A CATALYST FOR POPULAR CONSTITUTIONALISM*

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> *"But while opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must already be in the nation."*
>
> - *Archibald Cox*[1]

> *"It must be remembered that legislatures are the ultimate guardians of the liberties of the people in quite as great degree as the courts."*
>
> - *Justice Holmes*[2]

INTRODUCTION

"A transparent government is one of the hallmarks of a truly republican state."[3] Justice Conchita Carpio-Morales opened her main opinion in the 2006 case of *Senate v. Ermita*[4] with these words, probably to

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[1] VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS: CASES AND MATERIALS 243 (2004 ed.) *citing* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 117-18 (1976).

[2] Missouri, Kansas & Texas Railway Co. v. May, 194 U.S. 267, 270 (1904).

[3] Senate v. Ermita, G.R. No. 169777, 488 SCRA 1, Apr. 20, 2006.

[4] *Id.*

underscore the "obfuscation and prevarication"[5] that has become synonymous with the Executive Branch of a Philippine Republic whose agents have recently been called before the Legislature to answer for one scandal after another.[6]

This spate of controversies has sparked a heightened interest within the Legislature to probe the inner workings of executive agencies with the hope of assuaging the growing distrust and discontent of the people in the government. As such, Congress has gone on a hearing-spree for the purpose of unearthing valuable information necessary to hold the culprits involved accountable to the people and in the process, score additional brownie points for the next election.

Back in 2005, the emergence of wiretapped tapes depicting the president talking to a COMELEC official and conspiring to commit electoral fraud had tarnished the integrity of the highest office of the land. Congress was then called to determine a controversial issue: the legality of admitting wiretapped evidence into the house investigating committee.

Shortly thereafter, Senator Juan Ponce Enrile, in his 2005 privileged speech, urged the Senate to investigate the alleged overpricing and other unlawful provisions of the contract covering the railway project of the North Luzon Railways Corporation with the China National Machinery and Equipment Group (The North Rail Project). The Committee of the Senate as a whole issued invitations to various officials of the Executive Department[7] for them to appear as resource speakers in a public hearing on the North Rail Project.[8]

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[5] Joaquin Bernas, S.J., *Sounding Board: The Limits of Executive Privilege,* PHIL. DAILY INQUIRER, Feb. 17, 2008, *available at* http://opinion.inquirer.net/inquireropinion/columns/view/20080217-119534/The-limits-of-executive-privilege.

[6] "…the Armed Forces controller whose family had $100,000 in undeclared cash (and we would have looked the other way had it not been for the US Customs authorities); the "euro generals" with 105,000 euros in travel funds (again unreported, had it not been for the Russians); the $329-million national broadband network deal with ZTE Corp. of China (almost forgotten, but for star witness Jun Lozada); the P500,000 in cash given by a Malacañang lawyer to Jun Lozada when Lozada was about to testify against Arroyo (from my own private funds, the lawyer claimed, and purely out of the goodness of my heart); the NorthRail scam (exposed by the Senate, but almost forgotten but for ZTE); the P.5 million loot bags given away to the governors inside Malacañang during a breakfast meeting with the President ("Not from us!" they said); the P.5 million bags given away to the congressmen a few days later (I can't even recall the explanation here); and now the P728-million fertilizer fund diverted to her presidential campaign." Raul Pangalangan, *Passion for Reason: Damaged Institutions Protect the Damagers*, PHIL. DAILY INQUIRER, Dec. 12, 2008, *available at* http://opinion.inquirer.net/inquireropinion/columns/view/20081212-177520/Damaged-institutions-protect-damagers.

[7] "…the Commanding General of the Philippine Army, Lt. Gen. Hermogenes C. Esperon; Inspector General of the AFP Vice Admiral Mateo M. Mayuga; Deputy Chief of Staff for Intelligence of the AFP Rear Admiral Tirso R. Danga; Chief of the Intelligence Service of the AFP Brig. Gen. Marlu Q. Quevedo; Assistant Superintendent of the Philippine Military Academy (PMA) Brig. Gen. Francisco V. Gudani; and Assistant

Invoking Executive Order No. 464, Executive Secretary Eduardo Ermita sought to shield these officials from the prying eyes of Congress under the auspices of Executive Privilege.[9] Fortunately, the Court in *Ermita* viewed the Privilege as a claim of exemption from an obligation to disclose information,[10] the specific grounds for which must be asserted and weighed against the backdrop of public interest.[11]

In 2007, the Department of Transportation and Communication (DOTC) entered into a contract with Zhong Xing Telecommunications Equipment (ZTE) for the supply of equipment and services for the National Broadband Network (NBN) Project in the amount of U.S. $ 329,481,290 (approximately P16 Billion Pesos).[12] The Senate Committees[13] tasked to investigate the contract, invited then Director General of the National Economic Development Agency (NEDA) Romulo L. Neri to appear before them amidst allegations that several high executive officials (including the President) and power brokers were using their influence to push the approval of the NBN Project by the NEDA.

The emergence of *Neri* as a potential whistleblower whose testimony could very well shake the foundations of the Executive Department fueled a hype unparalleled in recent history. It created a media frenzy that had the public glued to their television sets for the better part of that year. One media reporter described the phenomenon in this wise:

> The appearance of former socioeconomic planning secretary Romulo Neri in the Senate was hyped for a whole week in the tri-media as no other event has been in recent memory.
>
> There were melodramatic allegations about his life being in danger and invoking prayers for his safety. So many groups, including members of that colored movement, kept breathing down the poor

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Commandant, Corps of Cadets of the PMA, Col. Alexander F. Balutan." (Senate v. Ermita, G.R. No. 169777, 488 SCRA 1 Apr. 20, 2006).

[8] Ermita.

[9] *Id.*

[10] *Id.*

[11] "The doctrine of executive privilege is thus premised on the fact that certain information must, as a matter of necessity, be kept confidential in pursuit of the public interest. The privilege being, by definition, an exemption from the obligation to disclose information, in this case to Congress, the necessity must be of such high degree as to outweigh the public interest in enforcing that obligation in a particular case." (Ermita, 488 SCRA, at 68).

[12] Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al., G.R. No. 180643, 549 SCRA 77, Mar. 25, 2008.

[13] "…Senate Committees on Accountability of Public Officers and Investigations (Blue Ribbon Committee), Trade and Commerce, and National Defense and Security" (Neri, 549 SCRA at 103).

> Cabinet official's neck for him to "tell the truth" and it seemed he hyped it all the more by making them believe he had the smoking gun.[14]

The Supreme Court however, in the case of *Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al*[15] practically handed the embattled former NEDA Chair a get-out-of-jail card when it allowed the latter to walk away from the three most crucial questions surrounding the controversy[16] with Executive Privilege covering his backside. "The bomb proved to be a dud."[17]

Suddenly, Executive Privilege had become the President's favorite shield against the incursion of Congress into the activities of her alter-egos. However, Fr. Joaquin G. Bernas, S.J., had this to say about the government's recent fixation with Executive Privilege:

> In the flurry of current investigations, every time an executive officer is summoned by an investigating body the knee jerk reaction of the executive arm is to refuse to appear on the ground of executive privilege. Is executive privilege really such a powerful tool and an all-enveloping mantle that it can thwart attempts to uncover unsavory or even incriminating truth kept within the secret bosom of the powerful?[18]

Meanwhile, the momentum over the ZTE-NBN inquiry resurged when 2008's media darling, Rodolfo Noel "Jun" Lozada Jr. surfaced to affirm before a Senate Committee, the President's involvement in pushing for the over-priced inter-government deal with China.

A. SEPARATION OF POWERS REDUX

These controversies and the subsequent Supreme Court cases that have resulted therefrom reveal a rather interesting dynamic between the three constitutionally-defined branches of our democratic government.[19]

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[14] Belinda Olivares-Cunanan, *Hyping Up Neri,* PHIL. DAILY INQUIRER, Sep. 26, 2007, *available at* http://opinion.inquirer.net/inquireropinion/columns/view/20070926-90937/Hyping_up_Neri.

[15] G.R. No. 180643, 549 SCRA 77, Mar. 25, 2008.

[16] "a) Whether the President followed up the (NBN) project? b) Were you dictated to prioritize the ZTE? c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?" (Neri, 549 SCRA at 106).

[17] Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al., G.R. No. 180643, 549 SCRA 77, Mar. 25, 2008.

[18] Bernas, *supra* note 5.

[19] "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may rise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." CHARLES DE MONTESQUIEU, THE SPIRIT OF

The cases of *Ermita* and *Neri* both involve 1) allegations of wrongdoing and abuses of discretion committed by public officials under the patronage of executive powers; 2) the exercise by Congress of powers textually committed to it by the Constitution i.e. congressional oversight; 3) the invocation of Executive Privilege; and 4) the judiciary serving as an arbiter between the executive and the legislative, under its powers of review.

It bears noting however, that while both decisions concurred upon the validity of the privilege, there was a sharp divide in *Neri* among the members of the Court in ascertaining whether or not the same was properly invoked.[20] This however, will be further discussed in the latter part of this paper.

The tension between the legislative and the executive in these controversies is a direct result of a separation of powers underlying Philippine society today, which differs greatly from its original incarnation.[21] Baron de Montesquieu's classical separation of governmental powers contemplates executive, legislative, and judicial powers functioning independently of one another in order to avoid the inevitable evils that would result from the concentration of such powers in one branch:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.[22]

However, there is more truism and actuality in interdependence than in independence and separation of powers, for as observed by Justice Holmes in a case of Philippine origin, we can no longer lay down "with mathematical precision and divide the branches into watertight compartments" not only because "the great ordinances of the Constitution do not establish and divide fields of black and white" but also because "even

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THE LAWS, Book XI, Chap. 6. *in* 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Encyclopedia Britannica, Inc., Maynard Hutchins ed., 1982).

[20] "The Supreme Court, voting 9-6, granted the petition of Commission on Higher Education (CHED) Chairman Romulo Neri to enjoin the Senate from forcing him to answer three questions in the probe on the controversial $329-million ZTE national broadband network (NBN) project as these are covered by executive privilege." Mike Frialde, *SC Votes 9-6 for Neri on Executive Privilege,* PHIL. STAR, Mar. 26, 2008, *available at* http://www.newsflash.org/2004/02/hl/hl107274.htm.

[21] Oscar Franklin Tan, *It is Emphatically the Duty of Congress to Say What Congress Is,* 79 PHIL. L.J. 39, 41 (2004), *citing* Enrique Fernando, *The Doctrine of Separation of Powers: Its Past Primacy and its Present Relevance,* 24 U.S.T. L.J. 8, 17-19 (1974).

[22] CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS, Book XI, *Ch. 6. in* 38 GREAT BOOKS OF THE WESTERN WORLD 70.

the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[23]

With the emergence of the administrative state, the government has become ever reliant on administrative agencies which possess specialized expertise[24] and are thus theoretically more capable of performing regulatory functions usually reserved for the legislative. As such, it has become commonplace for Congress to delegate a number of policy decisions to these agents.

The Supreme Court had the occasion to contemplate on the logic behind subordinate lawmaking among executive departments:

> Administrative agencies are clothed with rule-making powers because the lawmaking body finds it impracticable, if not impossible, to anticipate and provide for the multifarious and complex situations that may be encountered in enforcing the law.[25]

It further opined that:

> The grant of the rule-making power to administrative agencies is a relaxation of the principle of separation of powers and is an exception to the non-delegation of legislative powers. Administrative regulations or 'subordinate legislation' calculated to promote the public interest are necessary because of "the growing complexity of modem life, the multiplication of the subjects of governmental regulations, and the increased difficulty of administering the law."[26]

This development however, has given rise to a number of difficulties: a) such delegation attenuates the relationship between Congress and such agencies; b) it weakens the link between the policies chosen by these agencies and the preferences of the people; and c) the policy choices made by such agencies often escape the scrutiny of the people to whom they are not directly accountable.[27]

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[23] Planas v. Gil, G.R. No. 46440, 67 Phil. 62, Jan. 18, 1939, *citing* Springer vs. Government, 277 U. S. 189 (1928); 72 Law. ed., 845, 852.

[24] RICHARD PIERCE, THE ROLE OF THE JUDICIARY IN IMPLEMENTING AN AGENCY THEORY OF GOVERNMENT, 1244 (1989).

[25] People v. Maceren, G.R. No. 32166, 79 SCRA 450, 457-58, Oct. 18, 1977, *citing* People v. Exconde, No. 9820, 101 Phil. 1125, 1129, Aug. 30, 1957; Dir. of Forestry v. Munoz, G.R. No. 24796, 23 SCRA 1183, 1198, Jun. 28, 1968; Geukeko v. Araneta, No. 10182, 102 Phil. 706, 712, Dec. 24, 1957.

[26] *Id.* at 458, *citing* Calalang v. Williams, No. 47800, 70 Phil. 726, 732, Dec. 2, 1940; People v. Rosenthal and Osmena, No. 46077, 68 Phil. 328, 343, Jun. 12, 1939.

[27] *See* PIERCE, *supra* note 24.

These difficulties aptly describe the delicate balance between the need to empower administrative agencies to respond to the growing demands of government and the duty of Congress as the State's most majoritarian branch to remain faithful to its role as the ultimate arbiter of the people's will.[28]

It is argued that oversight, flowing from the institutional competencies of Congress as envisioned in the Constitutional framework of government, and its myriad facets provide the proper mechanism for maintaining this balance and addressing the abovementioned difficulties on a number levels: First, it draws Congress, as the symbolic and legal representative of the popular will, closer to the executive implementation of delegated legislative power.

This becomes crucial especially since department heads are appointed and not elected. Thus, certain checks and balances must be in place to ensure that these departments are faithful to the legislative intent and are ultimately accountable to the people.

According to Chief Justice Puno:

> Congress checks the other branches of government primarily through its law making powers. Congress can create administrative agencies, define their powers and duties, fix the terms of officers and their compensation. It can also create courts, define their jurisdiction and reorganize the judiciary so long as it does not undermine the security of tenure of its members. The power of Congress does not end with the finished task of legislation. Concomitant with its principal power to legislate is the auxiliary power to ensure that the laws it enacts are faithfully executed.[29]

Second, in the context of an executive branch perennially plagued by one scandal after another, a political remedy must be in place in order to expediently inject public confidence in the political process. Congressional oversight, particularly legislative investigations, serves this unique function when it calls upon public officials to answer allegations of corruption and abuse of discretion in the face of a public desperately seeking to hold those responsible accountable for betraying the public trust.

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[28] Oscar Franklin Tan, *It is Emphatically the Duty of Congress to Say What Congress Is,* 79 PHIL. L.J. 39, 58 (2004), *citing* ALEXANDER HAMILTON OR JAMES MADISON, *The Federalist No. 49 ("Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention"), in* 43 GREAT BOOKS OF THE WESTERN WORLD 160.

[29] Macalintal v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, 704-05, Jul. 10, 2003 (Puno, J., *concurring* and *dissenting*).

The rationale behind congressional oversight powers, its specific legal bases, and its place in the evolving relationship between the executive and legislative departments, become even more important when discussed in conjunction with the present debate on Executive Privilege. Its relevance becomes apparent on three levels: First, should the exercise of that power be encouraged? Second, given its apparent character, should it be prioritized over Executive Privilege? Third, as the final arbiter of constitutionally defined powers and duties, should the Courts adopt an attitude of deference or activism, given that cases involving oversight and privilege often transpire before a greater political backdrop.

Thus, this paper seeks to use the cases of *Ermita* and *Neri* to analyze the proper place of oversight in our tripartite system of government and in the context of a republican state.[30] Prescinding therefrom, it will attempt to draw from these cases the present attitude of the Court towards oversight and proceed with a value judgment as to whether not this attitude is appropriate given how oversight has emerged in the greater political scheme.

First, the paper will argue that oversight, in its myriad aspects, is a power constitutionally committed to Congress as the most majoritarian branch of government in response to a growing administrative state where policy decisions are gradually being made by unelected officials. As such it will discuss the textual support behind such power, its theoretical underpinnings and the historical path of its development with the aim of capturing its fundamental value in upholding the structural integrity of our system of government.

Second, the paper will then focus on two specific powers of oversight, namely the powers of supervision and investigation which will necessarily involve a review of the most recent jurisprudential pronouncements regarding their validity and limits.

With respect to investigation, this paper aims to explore the Supreme Court's most controversial decisions regarding the applicability of Executive Privilege as a valid measure of avoidance. It will evaluate the propriety of the Court's intervention in the case *Neri* in light of their decision in *Ermita.* As such, it will include a discussion on the Political Question doctrine and how the factual backdrop of *Neri* gives rise to its liberal application. Ultimately it will argue that the Courts should exercise caution in wielding the power of review as against legislative investigations

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[30] *See* CONST. art. II, § 1.

precisely because such is within the province and duty of Congress. Therefore, Congress should be left to determine for itself whether or not the greater public interest rests in its exercise.

Third, this paper will highlight the need for greater emphasis on oversight, as an effective means of harnessing public opinion into Constitutionalism and Rule of Law in these present crises, instead of allowing these to spill over into extrajudicial changes of government and mass actions.

Constitutionalism here includes demanding accountability of government and defining the powers of the separate branches. But at the highest level of accountability, it also involves defining the grounds for impeachment and standard of integrity for public service (Art. XI, a public office is a public trust), and that is what is crystallizing in these recent controversies.

Finally, this paper seeks to contextualize congressional oversight in the recent scandals that have rocked the highest echelons of our nation's government. During these pivotal moments, oversight as a tool for harnessing public opinion rides high in the waves of political momentum while the public is in desperate search for accountability. As such, it is during these great political moments that the Supreme Court with its potent powers of review should exercise restraint to prevent itself from becoming the unwitting obstacle to an otherwise legitimate political exercise.

I. CONGRESSIONAL OVERSIGHT

A. GENERAL CONCEPT AND RATIONAL UNDERPINNINGS

Congressional oversight has been "restrictively" defined as embracing "all activities undertaken by Congress to enhance its understanding of and influence over the implementation of legislation it has enacted."[31] This definition highlights the implicit role of oversight as an instrument of political accountability in a constitutional system of checks and balances[32] wherein Congress must ensure that the Executive's "post enactment activities" are faithful to the former's legislative intent. However, this characterization is "restrictive" in the sense that it ignores the full

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[31] Jacob Javits, & Gary Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis,* 52 N.Y.U. L. REV 455, 460 (1977).

[32] *Id.*

breadth of oversight powers, which includes either "review or investigation of executive branch action or aggressive participation in the effectuation and administration of policies,"[33] and confines it within the four corners of Congress' law-making function.[34]

Justice Puno, in his separate opinion in *Macalintal v. Commission on Elections*, provides a more expansive view of Congressional Oversight:

> [T]he power of oversight embraces all activities undertaken by Congress to enhance its understanding of and influence over the implementation of legislation it has enacted. Clearly, oversight concerns post-enactment measures undertaken by Congress: (a) to monitor bureaucratic compliance with program objectives, (b) to determine whether agencies are properly administered, (c) to eliminate executive waste and dishonesty, (d) to prevent executive usurpation of legislative authority, and (d) to assess executive conformity with the congressional perception of public interest.[35]

Jonathan Simon, Associate Dean of University of California Berkley Law, expands Justice Puno's framework as a countermeasure against the Executive's war powers in the context of neo-terrorism and other salient threats to national security. In such circumstances, the war making powers of the executive branch may lead to various violations of individual private rights:

> In many parliamentary democracies at the beginning of the twentieth century such committees were seen as a key way for legislative bodies to exercise oversight of the burgeoning power of the executive branch, especially in the context of war powers.[36]

Clearly, this mechanism was intended to maintain parity between the Legislature and the Executive in the system of checks and balances, given the rise of administrative agencies (including regulatory commissions like the Securities and Exchange Commission and Federal Reserve Boards[37]) and a strengthening Executive Branch. It allows Congress to retain, in an era of inevitable delegation, safeguards against agency officials who deviate from the proper execution of delegated powers and who commit any abusive and

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[33] *Id.*

[34] *Id.* at 461.

[35] Macalintal v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, 705, Jul. 10, 2003, *citing* Javits & Klein, *Congressional Oversight and The Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L.REV. 455, 460 (1977).

[36] Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror,* 114 YALE L.J. 1419, 1429 (2005).

[37] Macalintal.

arbitrary acts of discretion. Furthermore, oversight serves as a compromise between those who fear the rise of administrative agencies and question their constitutionality and those who believe that agencies are a necessary component of the modern state.[38]

The nature of oversight powers as a necessary legislative measure to the growing complexities of delegated power to administrative agencies and its dangers was succinctly illustrated by Jacob K. Javits and Gary J. Klein:

> …the complexities of modern government have often led Congress-whether by actual or perceived necessity – to legislate by declaring broad policy goals and general statutory standards, the leaving the choice of policy options to the discretion of an executive officer. Congress articulates legislative aims, but leaves their implementation to the judgment of parties who may or may not have participated in or agreed with the development of those aims.[39]

A failure on the part of the Legislature, whose policies must be reflective of the interests of its constituents, will ultimately result in the failure to uphold its popular mandate and ultimately the failure of executive agencies. Associate Dean Simon purports a similar idea by saying that this "prolonged pattern of failure of congressional oversight was identified as a contributing factor in the failure of agencies in the executive branch."[40]

As John Stuart Mill wrote, cited by Justice Puno: "the duty of the Legislature is 'to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers objectionable; and to ensure them if found condemnable."[41]

This treatment on congressional oversight revolves around Justice Renato S. Puno's framework and discussion since his work is more attuned to the context of the Philippine Legal system. However, this writer takes a position of deference to Congress' broad mandate, and emphasizes that Congressional practice must be upheld. It must be noted that the idea of a congressional oversight committee with power to reject implementing rules was not itself rejected in *Macalintal*. In addition to Justice Puno, many

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[38] *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 HARV. L. REV. 613, 614 (2007).

[39] Javits & Klein, *supra* note 31.

[40] Simon, *supra* note 36, at 1447.

accomplished American legal theorists were cited in order to reinforce the framework.

B. SYMBOLIC ROLE OF CONGRESS UNDER REPUBLICANISM

If oversight power was generally designed as an instrument of accountability in a system of checks and balances, why should Congress be the one to wield it? Why not the Judiciary?

Article II, Section 1 of the 1987 Constitutions characterizes our government in this wise:

> The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.[42]

From the aforementioned provision, it is clear that one of the cornerstones of our government is that it is both democratic and republican. Justice Isagani A. Cruz had the occasion to define what a republic is:

> A republic is representative government, a government run by and for the people. It is not a pure democracy where the people govern themselves directly. The essence of republicanism is *representation* and *renovation*, the selection by the citizenry of a corps of public functionaries who derive their mandate from the people and act on their behalf, serving for a limited period only, after which they are replaced or retained at the option of their principal.[43]

This definition stems from the rationale that while all men are naturally in a state of freedom,[44] in exchange for entering an ordered society, they "give up all their natural power to the society they enter into, and that community puts legislative power into the such hands as they think fit, with the trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature."[45]

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[42] CONST. art. II, § 1.

[43] ISAGANI CRUZ, PHILIPPINE POLITICAL LAW, 52 (2002 ed.)

[44] Tan, *supra* note 28, at 56, *citing* JOHN LOCKE, *An Essay Concerning the True Original Extent and End of Civil Government, in* 35 GREAT BOOKS OF THE WESTERN WORLD 25.

[45] *Id.* at 56.

Thus, on the one hand, the elected Congress to whom legislative power is vested by our Constitution[46] can be properly called the consensus-building branch of government as it is inherently majoritarian. It is the ultimate arbiter of the people's will, the body tasked to determine its expression because it is in theory the branch "able to plead their cause most successfully with the people."[47]

Judicial review, on the other hand, under the Judiciary's expanded certiorari powers in the 1987 Constitution[48] is inherently seen as "a counter-majoritarian force,"[49] "undemocratic,"[50] and a "deviant institution"[51] in a democracy that "thwarts the will of representatives of the actual people of the here and now."[52] Professor Alexander Bickel observed that judicial review has "a tendency over time seriously to weaken the democratic process";[53] "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."[54]

Based on the foregoing contrast between Congress and the Judiciary, the former is better equipped to exercise such checks and balances over the executive with the view of upholding the popular will. The unelected Judiciary is far too insulated[55] from the political process so as to properly approximate majoritarian interests without any consensus-building capacity.

More importantly, it is this consensus-building nature of Congress which heightens the public perception on oversight as a stronger tool for maintaining and enforcing public accountability among the agents of government. As one author puts it:

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[46] CONST. art. VI, § 1 provides: "The legislative power shall be vested in the congress of the Philippines which shall consist of a senate and a house of representatives, except to the extent reserved to the people by the provision on initiative and referendum."

[47] Tan, *supra* note 28, at 58 *citing* ALEXANDER HAMILTON OR JAMES MADISON, *The Federalist No. 49 ("Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention"), in* 43 GREAT BOOKS OF THE WESTERN WORLD 160.

[48] CONST. art. VIII, § 1.

[49] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 16-18 (1962).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*, *see also* Flast v. Cohen, 392 U.S. 83 (1968) (Douglas J., *concurring*).

[55] *See* Juan Paolo Fajardo, *The Judicial Rule-making Function: An Non-Interpretive Perspective to the Role of the Judiciary,* unpublished (2008).

> Congress thus plays a legitimizing role in the most essential of democratic exercises, and by its very nature, it is the only body capable of doing so.[56]

C. CONGRESSIONAL OVERSIGHT: NAME YOUR WEAPON

Prescinding from this theoretical framework of oversight, the legislative duty to keep a watchful eye over the actions of administrative agencies can be properly categorized into three general powers: scrutiny, investigation, and supervision.[57]

Legislative scrutiny over the operations of government activities encompasses three levels: 1) scrutiny pursuant to the power of appropriation; 2) scrutiny of department heads; and 3) scrutiny pursuant to the power of confirmation. Investigation includes legislative investigations which are textually committed to Congress by the Constitution, while veto power properly belongs to legislative supervision of administrative agencies.

1. Scrutiny

Congressional scrutiny is the least controversial among the other categories of oversight. It is a regular function primarily geared toward determining the financial state and efficiency of the operation of government activities. Scrutiny must be seen as a relatively passive, as described by Justice Puno, and routine function. This is reflected, for example, in the power of Congress to request cabinet officials to appear before them with respect to their functions. According Justice (now Chief Justice) Puno:

> Congressional scrutiny implies a lesser intensity and continuity of attention to administrative operations. Its primary purpose is to determine economy and efficiency of the operation of government activities. In the exercise of legislative scrutiny, Congress may request information and report from the other branches of government. It can give recommendations or pass resolutions for consideration of the agency involved.[58]

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[56] Tan, *supra* note 28, at 59 *citing* Stephen Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887,* 56 FLA. L.REV. 541, 567 (2004).

[57] Macalintal v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, 707, Jul. 10, 2003 (Puno, J., *concurring* and *dissenting*).

[58] *Id.*

a. Under the Powers of Appropriation

Under Article VII, Section 22 of the Constitution, "The President shall submit to the Congress within thirty (30) days from the opening of every regular session, as the basis of the general appropriations bill, a budget of expenditures and sources of financing including receipts from existing and proposed revenue measures." Corollary to this, Article VI, Section 29 (1) provides further that "no money shall be paid out of the Treasury except in pursuance of an appropriation made by law." These provisions demonstrate a textual commitment of the power of appropriation to Congress as the holder of the "power of the purse."[59] Along with the Legislature's constitutional mandate to implement a system of taxation,[60] and to review the president's appropriations proposal,[61] Congress has been empowered to determine the sources of government funds and to specify the government projects or activities to be funded.[62]

The House of Representatives is specifically vested with the power of appropriation[63] with the concurrence of the Senate under the presumption that "district Representatives are closer to the pulse of the people…and are therefore in a better position to determine both the extent of the legal burden they are capable of bearing and the benefits that they need."[64] However, the magnitude of this "weapon" and the degree of accountability expected of our representatives to wield it, exposes them to greater public skepticism and finger pointing. Absent the power of scrutiny, accusations of corruption and mismanagement against our elected lawmakers will be left unanswered and will eventually metamorphose into an irreparable social stigma that will slowly erode the public's confidence in the political system. As such they must be allowed to ascertain whether such funds have been disbursed for the purposes authorized in the appropriation act.[65]

The Senate employs budget hearings in order to "monitor bureaucratic compliance with program objectives, to eliminate executive waste and dishonesty…and to assess executive conformity with the

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[59] Phil. Const. Ass'n. v. Enriquez, G.R. No. 113105, 235 SCRA 506, 522, Aug. 19, 1994.
[60] CONST. art. VI, § 28.
[61] art. VI, § 25 & art. VII, § 22.
[62] Macalintal.
[63] CONST. art. VI, § 24.
[64] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 687 (2003 ed.).
[65] Macalintal.

congressional perception of the public interest."[66] Without such scrutiny, the government may become more vulnerable to breaches of trust, which could bring about even graver ramifications to the integrity of our political institutions. Congress' seeming incompetence in protecting the country's coffers may encourage members of various groups to take extralegal measures in articulating their interests and securing their demands. This may effectively contribute to the erosion of popular adherence to the Constitution. As such, the rule of law may become a thing of the past.

In legislative scrutiny, congressional committees may request information and reports from executive agencies and departments during budget hearings. Under Rule X, Section 13(4) of the Senate Rules of Procedure:

> SEC. 13. After the organization of the Senate in the manner provided in Rule IX, the following permanent committees shall be formed, with the duties, powers and general jurisdiction specified hereunder:
> …
> (4) Committee on Finance. - Seventeen (17) members. All matters relating to funds for the expenditures of the National Government and for the payment of public indebtedness; auditing of accounts and expenditures of the National Government; claims against the government; inter-governmental revenue sharing; and, in general, all matters relating to public expenditures.

Congress' power of appropriations, while "a prime historical tool of oversight," however, does not provide a "foolproof means of ensuring executive conformity with legislative intentions."[67] The utility of appropriations is severely limited as it only "affects matters that are dependent on [government] spending"[68] while only indirectly touching upon the exercise of other policymaking and regulatory powers. Furthermore, this power has been weakened, if not rendered totally useless, by the issuance of Presidential Decree 1177[69] by then President Marcos which grants the President the power to cut and realign items in the budget. The President, through the Department of Budget, can refuse to release funds for projects he did not like; hence, it can be used as a tool to "bribe" administration lawmakers and to suppress the opposition. This Martial Law decree remains in force and effect up to this date. Thus, in order to bolster the public

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[66] Javits & Klein, *supra* note 31, at 461.
[67] *Id.* at 465
[68] *Id.*
[69] "Budget Reform Decree of 1977" (Revising the Budget Process in Order to Institutionalize the Budgetary Innovations of the New Society, July 30, 1977).

accountability of executive agencies, Congress must rely on the full spectrum of oversight powers which also includes scrutiny over department heads and the power of confirmation.

b. Revisiting the Question Hour

Originally permissive in nature, legislative scrutiny of department heads first found its way into Philippine Law under the 1935 Constitution. According to Article VI, Section 24 of the aforementioned constitution:

> The heads of departments upon their own initiative or upon the request of either House may appear before and be heard by such House on any matter pertaining to their departments, unless the public interest shall require otherwise and the President shall so state in writing."

The provision is permissive in character in that it admits an exception: unless *the public interest shall require otherwise* and that the same shall be submitted in writing by the President. This grants the President the power to refuse to subject any department head to the legislative "question hour" provided he or she demonstrates a legitimate public interest which may be affected. Furthermore questions propounded during question hour are limited to matters pertaining to the subject's department.

This express *proviso* offers a unique compromise between upholding "the separation of powers of the Executive and the Legislative Branches"[70] and fulfilling the need to "elicit concrete information from the administration, to request its intervention, and when necessary, to expose abuses and seek redress."[71] This balance strikes at the heart of the formalist-functionalist debate on the separation of powers, where a number of legal theorists prefer a "more hospitable interpretation of the doctrine of separation of powers that can accommodate the existence of administrative agencies"[72] while entertaining the need to prevent their potential and actual abuse, from a mathematically precise division of the branches of government into watertight compartments.[73]

The legislative power to scrutinize department heads later on found its way into the 1973 Constitution under Article VIII, Section 12 (1), which

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[70] Macalintal.

[71] *Id., citing* II Record 46.

[72] Salvador Carlota, *Legislative and Judicial Control of Administrative Decision-Making,* 68 PHIL. L.J. 159, 162-63 (1993).

[73] Spring v. Government 277 U.S. 189, 209 (1928).

used the term "question hour" for the first time. This was within the context of a parliamentary form of government. Under the aforementioned provision:

> There shall be a question hour at least once a month or as often as the rules of the National Assembly may provide, which shall be included in its agenda, during which the Prime Minister or any Minister may be required to appear and answer questions and interpellations by Members of the National Assembly. Written questions shall be submitted to the Speaker at least three days before a scheduled question hour. Interpellations shall not be limited to the written questions, but may cover matters related thereto. The agenda shall specify the subjects of the question hour. When the security of the State so requires and the Prime Minister so states in writing, the question hour shall be conducted in executive session.[74]

The 1973 version however did not mirror the permissive character of its 1935 counterpart. The textual design of Section 12(1) contemplates of a mandatory and more pervasive mechanism in which the Prime Minister or any Minister for that matter may be called before the National Assembly to respond to issues which have no cognizable boundaries. Another distinction is the absence of the President's power to object to the question hour, which has been replaced by the Prime Minister's option to hold the same in executive session (closed doors) where the security of the state so requires. Nevertheless, a minister has no power to refuse outright, an invitation from the Assembly to be questioned.

Under the 1987 Constitution, the question hour was retained despite a return to a presidential form of government. Article VI, Section 22 provides:

> The heads of departments may, upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the State or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.

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[74] CONST. art. VIII, § 12.

The present constitution emulates most of the language originally used under the 1973 Constitution. However, upon second glance a number of immediate distinctions become manifest. First, while the mandatory aspect of its predecessor has been retained, the present text allows the House of Representatives to formulate rules of procedure governing question hour. This addition provides more flexibility to an otherwise clear and express constitutional mandate. Second, while the present text maintains the option to conduct the question hour in executive session,[75] it adopted from the 1935 Constitution the standard of "public interest," in addition to "security of the state" as basis for requiring the conduct of scrutiny under closed doors. Finally, the current text no longer falls under the heading "Question Hour."

The basis for this reversion to a permissive character was succinctly explained by Justice Conchita Carpio-Morales in *Ermita*. In the case at bar, the Committee of the Senate as a whole issued invitations to various officials of the Executive Department for them to appear as resource speakers in a public hearing on the railway project of the North Luzon Railways Corporation with the China National Machinery and Equipment Group. The public hearing was sparked by a privilege speech of Senator Juan Ponce Enrile urging the Senate to investigate the alleged overpricing and other unlawful provisions of the contract covering the North Rail Project.

Justice Carpio-Morales therein had the occasion to explain the rationale behind the question hour:

> The framers of the 1987 Constitution removed the mandatory nature of such appearance during the question hour in the present Constitution so as to conform more fully to a system of separation of powers. To that extent, the question hour, as it is presently understood in this jurisdiction, departs from the question period of the parliamentary system.[76]

She however qualifies:

> That department heads may not be required to appear in a question hour does not, however, mean that the legislature is rendered powerless to elicit information from them in all circumstances. In fact, in light of the absence of a mandatory question period, the need

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[75] CONST. art. VI, § 22.
[76] Senate v. Ermita, G.R. No. 169777, 488 SCRA 1, 56, Apr. 20, 2006.

> to enforce Congress' right to executive information in the performance of its legislative function becomes more imperative.[77]

Nonetheless, the Question Hour as a mode of legislative inquiry is not an unfettered license to engage in a congressional witch hunt or an unguided interrogation of executive agents. While it recognizes the people's right to information,[78] it must be "canalized within the banks"[79] of the written text. As such, the phrase section 22 has been interpreted to mean that:

> When Congress merely seeks to be informed on how department heads are implementing the statutes which it has issued, its right to such information is not as imperative as that of the President to whom, as Chief Executive, such department heads must give a report of their performance as a matter of duty. In such instances, Section 22, in keeping with the separation of powers, states that Congress may only request their appearance.[80]

This is in contrast to legislative investigations as embodied in Article VI, Section 21 which partakes of a mandatory character. This however, will be further discussed in the later parts of this paper.

Nonetheless, it bears noting that while the power to conduct a question hour and the power to conduct inquiries in aid of legislation are wholly distinct, they are considered complementary. This dynamic between them and the common objective they fulfill underscore the inherent role of congress as the representative of the people[81] and further establishes its duty not only to elicit concrete information from the administration, to request its intervention, and to expose abuses and seek redress[82] but also to provide the opposition with a means of discovering the government's weak points.[83] Along with the publicity it generates, it has a salutary influence on the administration[84] and therefore opens the window for the public to take a

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[77] *Id.*

[78] CONST. art. VI, § 7. "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law."

[79] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Cardozo, J., *concurring*).

[80] Ermita.

[81] "Simply, it is the ultimate arbiter of the people's will, the body tasked to determine its expression…" (Tan, *supra* note 28, at 58).

[82] Macalintal, v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, 710, Jul. 10, 2003 (Puno, J., *concurring and dissenting).*

[83] *Id.*

[84] *Id.*

more participative role and clamoring for change and therefore revitalizes popular movement towards its higher law-making function.[85]

c. Oversight under the Power of Confirmation

Article VI, section 18 provides:

> There shall be a Commission on Appointments consisting of the President of the Senate, as ex officio Chairman, twelve Senators, and twelve Members of the House of Representatives, elected by each House on the basis of proportional representation from the political parties and parties or organizations registered under the party-list system represented therein. The chairman of the Commission shall not vote, except in case of a tie. The Commission shall act on all appointments submitted to it within thirty session days of the Congress from their submission. The Commission shall rule by a majority vote of all the Members.[86]

The characterization of the power of confirmation was carefully described by Chief Justice Puno, thus:

> Through the power of confirmation, Congress shares in the appointing power of the executive. Theoretically, it is intended to lessen political considerations in the appointment of officials in sensitive positions in the government. It also provides Congress an opportunity to find out whether the nominee possesses the necessary qualifications, integrity and probity required of all public servants.[87]

The function of the Commission on Appointments (COA) is to act as an administrative check on the appointing power of the Chief Executive.[88] While the Commission is assembled through the instrumentality of the two Houses of Congress, it is itself an independent constitutional body.[89] Nonetheless such powers of confirmation act as bar against the Executive from packing appointive positions with personalities based on political favors and patrimonial ties, rather pure merit.

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[85] *Id.*
[86] CONST. art. VI, § 18.
[87] Macalintal, 405 SCRA at 711.
[88] BERNAS, *supra* note 64, at 736.
[89] *Id.* at 735.

2. Supervision

Also called the Legislative veto, supervision is the "most encompassing"[90] manifestation of Congressional oversight power. This aspect of oversight goes beyond inquiry and the Congressional hearing one associates with it. This tool involves a delegation of lawmaking functions to an administrative agency, with Congress reserving a right to reject the agency's proposed rules. This was adequately described by Jacob K. Javits and Gary J. Klein:

> Statutory provision for a legislative veto permits Congress to monitor the implementation of its policies by the Executive without the enactment of additional legislation. The devise typically required the President or an appropriate department head to submit a proposal to Congress that effects the policies of the legislation. The proposal does not become law until it is "approved" by congressional action or inaction within a time period…[91]

Under Philippine Jurisprudence, the Supreme Court had the occasion to define legislative veto as

> …a statutory provision requiring the President or an administrative agency to present the proposed implementing rules and regulations of a law to Congress which, by itself or through a committee formed by it, retains a "right" or "power" to approve or disapprove such regulations before they take effect.[92]

Such power is concretely manifested in statutes which provide the formation of Joint Congressional Oversight Committees empowered to review the rules and regulations promulgated by the agency subject of the statute. Under Philippine Law for example, Section 19 of the Anti-Money Laundering Law[93] provides:

> There is hereby created a Congressional Oversight Committee composed of seven (7) members from the Senate and seven (7) members from the House of Representatives. The members from the Senate shall be appointed by the Senate President based on the proportional representation of the parties or coalitions therein with at least two (2) Senators representing the minority. The members from the House of Representatives shall be appointed by the Speaker also

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[90] Macalintal, 405 SCRA at 719.
[91] Javits & Klein, *supra* note 31, at 456.
[92] ABAKADA Guro Partylist v. Purisima, G.R. No. 166715, 562 SCRA 251, 287, Aug. 14, 2008.
[93] Rep. Act No. 9160.

> based on proportional representation of the parties or coalitions therein with at least two (2) members representing the minority.
>
> The Oversight Committee shall have the power to promulgate its own rules, to oversee the implementation of this Act, and to **review or revise the implementing rules issued by the Anti-Money Laundering Council within thirty (30) days from the promulgation of the said rules.** (Emphasis supplied)

A number of other statutes[94] also provide for Joint Congressional Oversight Committees. These provisions commonly define the extent of the veto powers exercised by such committees, their composition, and the manner by which its members are selected.

Veto power can be distinguished from scrutiny and investigation in that the latter ones involve inquiry into past executive branch action in order to influence future executive branch performance.[95] While they allow congress to review the exercise of delegated power, their prospective reach is severely limited, as they do not permit Congress to retain any part of that authority that has been delegated. In contrast, legislative veto allows Congress to participate prospectively in the approval or disapproval of the rules enacted by executive agencies pursuant to such delegated power[96] acting as sort of an additional congressional leash to an agency to which Congress has by law initially delegated broad powers.[97]

Another manifestation of this protective mechanism can be found in section 25 of the Overseas Absentee Voting Act of 2003[98] where the law mandates the formation of a joint Congressional Oversight Committee, although that section of the Act was declared unconstitutional for proposing to review rules promulgated by the Commission on Elections under its

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[94] Rep. Act No. 9189 § 25 otherwise known as the Overseas Absentee Voting Act of 2003; Rep. Act No. 8792, § 35 otherwise known as the E-Commerce Act; Rep. Act No. 9003, § 60 otherwise known as the Solid Waste Management Act; Rep. Act No. 9275, § 33 otherwise known as the Clean Water Act; Rep. Act No. 8749, § 53 otherwise known as the Clean Air Act; Rep. Act No. 9139, § 62 otherwise known as the Administrative Naturalization Law of 2000; Rep. Act No. 8435, § 114 otherwise known as the Agricultural and Fisheries Modernization Act; Rep. Act No. 9165, § 95 otherwise known as the Dangerous Drugs Act; Rep. Act No. 8424, § 290 otherwise known as the National Internal Revenue Code; Rep. Act No. 8182, § 8 otherwise known as the Official Development Assistance Law; Rep. Act No. 9054, art. XVIII, § 3, otherwise known as the ARMM Organic Act; Rep. Act No. 9184, § 74 otherwise known as Government Procurement Act; Rep. Act No. 9175, § 11 otherwise known as the Chain-Saw Act; Rep. Act No. 9285, § 52 otherwise known as the Alternative Dispute Resolution Act; Rep. Act No. 9335, § otherwise known as Lateral Attrition Act of 2005; Rep. Act No. 9239, § 33 otherwise known as the Optical Media Board; Rep. Act No. 8436, § 27 now under Rep. Act No.9369 otherwise known as Automated Election System Act.

[95] Javits & Klein, *supra* note 31, at 461.

[96] *Id.* at 462.

[97] Purisima, 562 SCRA at 288.

[98] Rep. Act No. 9189, § 25.

exclusive power granted by the Constitution. While a legislative veto arises directly from the lawmaking power of Congress, it affords a deeper probe of a particular agency's workings than a mere hearing or investigation.

> Congress exercises supervision over the executive agencies through its veto power. It typically utilizes veto provisions when granting the President or any executive agency the power to promulgate regulations with the force of Law. These provisions require the President or an agency to present the proposed regulations to Congress, which retains a "right" to approve or disapprove any regulation before it takes effect.[99]

This measure was intended as the Legislature's counterweight against executive power. It allows Congress to delegate a considerable amount of authority to the Executive Department while keeping one foot in the door. This kind of relationship allowed the Executive and Congress to maintain a balance of power between them by accommodating the need for legislative delegation of powers with an option to cancel such delegation without having to repeal an existing law. "They contend that this arrangement promotes democratic accountability as it provides legislative check on the activities of unelected administrative agencies."[100]

Ernest Gellhorn, Dean and Law Professor of Arizona State University, provides with a clearer distinction among the three categories:

> In contrast with these traditional oversight techniques, review under a legislative veto scheme is specifically and narrowly focused on the substance of proposed rules. Thus the veto, unlike any of the traditional oversight techniques, permits regular and systematic examination of the substantive details of an agency's program.[101]

The issue against legislative veto is rooted in the concept of separation of powers. Some consider it an unjustifiable encroachment upon executive prerogatives. Its proponents claim the flipside, saying that the separation may be positively supplemented by an existing barrier against the executive accumulating too much power.

Justice Puno, in his three-tiered framework, emphasized how supervision and the legislative veto constitute the deepest level of oversight. It must further be emphasized that, from the standpoint of popular

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[99] Javits & Klein, *supra* note 31.

[100] LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 142 (2000).

[101] *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 HARV. L. REV. 1369, 1423 (1977).

constitutionalism, the legislative veto exposes a greater portion of government operations to the popular mandate of Congress, and adds another layer of accountability to appointed officials. It must be further noted that agency rules are as binding as laws passed by Congress.

a. The Validity of the Legislative Veto in U.S. Jurisprudence

In American jurisdiction, the issue of the validity of the legislative veto was first raised in the case of *Buckley v. Valeo.*[102] In the aforementioned case, various candidates for a federal office and political parties and organizations brought action challenging constitutionality of the Federal Election Campaign Act.

Subsequent American jurisprudence further discussed legislative veto in *Immigration and Naturalization v. Chadha.*[103] Here, the House of Representative vetoed the decision of an immigration judge to suspend the deportation of Chadha based on section 244(c)(2) of The Immigration and Nationality Act "authorizing either House of Congress, by resolution, to invalidate the decision of the executive branch to allow a particular deportable alien to remain the United States."[104]

Eventually, the U.S. Supreme Court declared this provision unconstitutional. However, rather than dealing with the issue of how the legislative veto affects the tripartite system; it chose to ground the decision on Congress' violation of constitutional procedures for bicameralism. Justice White in his dissenting opinion argued that the decision should have been reasoned through the rationale of separation of powers rather than the technicalities of bicameralism:

> Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance. And it is for this reason that the Court would have been well-advised to decide the case, if possible, on the narrower grounds of separation of powers, leaving for full consideration the constitutionality of other congressional review statutes operating on such varied matters as war powers and agency

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[102] 424 U.S. 1, 140 (1976).

[103] 462 U.S. 919 (1983).

[104] Macalintal, v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, 722, Jul. 10, 2003 (Puno, J., *concurring and dissenting*).

> rulemaking, some of which concern the independent regulatory agencies.[105]

b. Philippine Jurisprudential Development of Veto Power

Macalintal v. Commission on Elections

In the Philippines, the landmark *Macalintal v. Commission on Elections* also failed to make a definitive judgment over the constitutionality of placing legislative vetoes within the implementing rules and regulations (IRR) of executive agencies on the basis of the more fundamental issue of separation of powers. Instead the majority of the Supreme Court justices presiding over the case at bar decided to circumvent the real issue in lieu of broader grounds which is the autonomy of the COMELEC due to its constitutional mandate:

> The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. *It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created – free, orderly and honest elections.*[106]

This decision in *Macalintal* had an implicit admission. The power of legislative veto is not unconstitutional per se. In fact, what the case at bar presents is an illustration of how Congressional Powers of Oversight are within the necessary mechanisms utilized by the Legislature in conducting effective law-making and that "the scope of its power of inquiry…is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[107] Furthermore, that it is also a limited power.

Macalintal unwittingly explains how the system of oversight fits perfectly well with our system of checks and balances. On the one hand the executive may be given a lot of delegated legislative power. On the other hand it cannot arbitrarily exercise such mandate without the scrutiny and review of the legislative.

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[105] Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317, 13 Envtl. L. Rep. 20, 663.

[106] Macalintal, 405 SCRA at 655, *citing* Sumulong v. Commission on Elections, No. 48609, 73 Phil. 288, 294, Oct. 10, 1941, *cited in* Espino v. Zaldivar, G.R. No. 22325, 21 SCRA 1204, 1224, Dec. 11, 1967.

[107] Macalintal, 405 SCRA at 712-13, *citing* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

ABAKADA Guro Party List v. Purisima

In the case of *ABAKADA Guro Party List v. Purisima*[108] however, the high tribunal made a more definitive ruling as to the legitimate position of congressional veto power in our tripartite system of government. According to the factual milieu of the case, petitioner party list sought to prevent respondent Secretary of Finance from implementing Republic Act No. 9335 otherwise known as Attrition Act of 2005 which was enacted to optimize the revenue-generation capability and collection of the Bureau of Internal Revenue (BIR) and the Bureau of Customs (BOC).[109] The aforementioned law intends to encourage BIR and BOC officials and employees to exceed their revenue targets by providing a system of rewards and sanctions through the creation of a Rewards and Incentives Fund (Fund) and a Revenue Performance Evaluation Board (Board).

Section 12 of the aforementioned statute provides:

> There is hereby created a Joint Congressional Oversight Committee composed of seven Members from the Senate and seven Members from the House of Representatives. The Members from the Senate shall be appointed by the Senate President, with at least two senators representing the minority. The Members from the House of Representatives shall be appointed by the Speaker with at least two members representing the minority. After the Oversight Committee will have approved the implementing rules and regulations (IRR) it shall thereafter become functus officio and therefore cease to exist.

Petitioners therein assailed the creation of a congressional oversight committee on the ground that it violates the doctrine of separation of powers as the creation of the congressional oversight committee permits legislative participation in the implementation and enforcement of the law.[110]

While Justice Corona, in the main opinion, recognized that congressional oversight does not necessarily constitute encroachment on the executive power to implement laws nor does it undermine the constitutional separation of powers,[111] he ruled however that in order to forestall the danger of congressional encroachment 'beyond the legislative sphere,' oversight must be confined to the following:

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[108] ABAKADA Guro Party List v. Purisima, G.R. No. 166715, 562 SCRA 251, Aug. 14, 2008.
[109] *Id.* at 267.
[110] *Id.* at 269.
[111] *Id.* at 286.

> (1) scrutiny based primarily on Congress power of appropriation and the budget hearings conducted in connection with it, its power to ask heads of departments to appear before and be heard by either of its Houses on any matter pertaining to their departments and its power of confirmation; and
>
> (2) investigation and monitoring of the implementation of laws pursuant to the power of Congress to conduct inquiries in aid of legislation.[112]

Legislative veto powers however, were found to be beyond the permissible forms of oversight as the same encroaches upon judicial power, which is a power arrogated by the Constitution upon the courts. Working on the premise that Rules and Regulations enacted by administrative agencies have the force and effect of law and therefore enjoy the presumption of constitutionality and regularity,[113] the courts ruled that any question with respect to their validity falls squarely within their competence and can only be raised in an appropriate case.

In the considered opinion of Justice Tinga, the Courts even went so far as to say that the powers of congressional veto usurp what is within the exclusive province of the Executive to determine. He opined that once a law or statute becomes effective, the Executive acquires the duties and powers to execute the said law. As such, "a provision that requires Congress or its members to approve the implementing rules of a law after it has already taken effect shall be unconstitutional, as is a provision that allows Congress or its members to overturn any directive or ruling made by the members of the Executive Branch charged with the implementation of the law."[114]

The Supreme Court decidedly refused to touch upon similar provisions existing in various statutes. Instead, the Court ruled in this wise:

> …While there may be similar provisions of other laws that may be invalidated for failure to pass this standard, the Court refrains from invalidating them wholesale but will do so at the proper time when an appropriate case assailing those provisions is brought before us.[115]

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[112] *Id.* at 287.
[113] *Id.* at 288-89.
[114] *Id.* at 296-98.
[115] *Id.* at 298.

3. Investigation

The most constitutionally controversial examples of oversight are in the area of legislative investigations in aid of legislation. Firstly, legislative investigations are considered by some authors as not genuinely included in the subject of legislative oversight. While the latter raises separation of powers problems, the principal dilemma in legislative investigations falls within the sphere of privacy rights. Moreover, Congressional investigations involve a much more intense accumulation and clarification of fact.

a. The US Experience

Landmark cases in the United States historically provide compelling examples of the exercise of the power to investigate in aid of legislation. From *Killbourn vs. Thompson*,[116] the pendulum of application of the doctrine has shifted from one that strictly requires demonstration of "legislative purpose" to a much more tolerant application that gives leeway to the legislative will. A few examples of the latter include *McGrain v. Dougherty*[117] and *Watkins v. U.S.*,[118] cases which allow the exercise of legislative investigations over a broad range of legislative subjects, absent express an express stipulation in the Federal constitution that mandates otherwise. Hence, exercise of the power has been held to be an "essential and appropriate auxiliary"[119] to the legislative function as means of exposing the suspected corruption, mismanagement, or inefficiencies of government officials.

Tolerant application, however, is not unlimited. In *McGrain*, the Supreme Court made sure that there was an existing nexus between the subject of investigation and the exercise by congress of its prerogative to ensure the proper administration of the power delegated by it.

> …the subject to be investigated by the congressional committee was the administration of the Department of Justice – whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution.[120]

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[116] 103 U.S. 168 (1881).
[117] 273 U.S. 135 (1927).
[118] 354 U.S. 178 (1957).
[119] Macalintal, v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, 714, Jul. 10, 2003 (Puno, J., *concurring and dissenting*), *citing* Arnault v. Nazareno, No. 3820, 87 Phil. 29, 45, Jul. 18, 1950.
[120] McGrain v. Daugherty. 273 U.S. 135 (1927), 47 S.Ct. 319, 329.

In *Watkins*, the American Court admonished that the power to exercise investigation must be "in aid of legislation."

> "In conducting investigation, Congress is not a law enforcement or trial agency and no inquiry is an end in itself, but it must be related to and in furtherance of a legitimate task of Congress."[121]

The United States model of investigation uses the contempt power in order that Congress "may act with ultimate force in response to actions which obstruct legislative process in order to punish the contemnor and/or to remove the obstruction."[122] This element of the U.S. model has raised questions of constitutionality involving privacy and the right to be protected from warrant less arrests and seizures. Such a tool was often used by the American Congress during the late 60's, during the McCarthyist era, in which private individuals were subpoenaed for accusations of being Communist. The threat of investigation during those days was its potential to catalyze an indiscriminate witch hunt.

b. The Philippine Experience

Prior to the 1987 Constitution, the foundation of the power of legislative investigation and the means of enforcing it were stated by Justice Ozaeta thus in *Arnault v. Nazareno*:[123] The Supreme Court ruled on the constitutionality of the legislative to question Jean L. Arnault, a witness to the alleged defrauding of government of P5,000,000. Arnault refused to respond to the questions of the Senate claiming that it violated his right against self-incrimination. The Court wrote:

> Although there is no provision in the Constitution expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative functions advisedly and effectively, such power is so far incidental to the legislative function as to be implied. In other words, the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which legislation is intended to affect or change; and where the legislative body does not itself possess the

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[121] Watkins v. United States 354 U.S. 178 (1957), 77 S.Ct. 1173, 1187.

[122] Morton Rosenburg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* (1995), *available at* http://www.fas.org/sgp/crs/misc/95-464.pdf.

[123] No. 3820, 87 Phil. 29, Jul. 18, 1950.

> requisite information — which is not frequently true — recourse must be had to others who do possess it.[124]

In the past decade, the Philippines has had very recent experience with the congressional prerogative for investigation. Congress subpoenaed a number of witnesses for interrogation to shed light on the some of the most controversial issues such the Estrada Jueteng Scandal, the Brunei Beauties investigation, and the Kuratong Baleleng Rubout. At present, the 1987 Constitution provides:

> The Senate or the House of Representatives or any of its respective committee may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.[125]

The requirement of reasonable connection between subject and proper administration of legislative power in aid of legislation has been expressly placed in Article VI Section 21 in order to minimize any violation of due process requirements in any congressional investigation.

In his dissent in *Macalintal v. Comelec*,[126] Chief Justice Puno, then Associate Justice, outlines the modes by which the House of Representatives could initiate an inquiry in aid of legislation. He writes:

> …an inquiry may be initiated or conducted by a committee *motu propio* on any matter within its jurisdiction upon a majority vote of all its members through:
> (1) the referral of a *privilege speech* containing or conveying a request or demand for the conduct of an inquiry, to the appropriate committee, upon motion of the Majority Leader or his deputies; or
> (2) the adoption of a *resolution* directing a committee to conduct an inquiry reported out by the Committee on Rules after making a determination on the necessity and propriety of the conduct of an inquiry by such committee: *Provided*, That all resolutions directing any committee to conduct an inquiry shall be referred to the Committee on Rules; or
> (3) the referral by the Committee on Rules to the appropriate committee, after making a determination on the necessity and propriety of the conduct of inquiry by such committee, of a *petition* filed or information given by a Member of the House requesting such inquiry and endorsed by the Speaker: *Provided*, That such petition or

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[124] *Id.* at 45.
[125] CONST. art. VI, § 21.
[126] G.R. No. 157013, 405 SCRA 614, Jul. 10, 2003.

> information shall be given under oath, stating the facts upon which it is based, and accompanied by supporting affidavits.[127]

c. Limits on Legislative Investigation

Regardless of the mode, however, this power of Congress is subject to constitutional limitations. Then Chief Justice Puno further writes:

> "As now contained in the 1987 Constitution, the power of Congress to investigate is circumscribed by *three limitations*, namely: (a) it must be in aid of its legislative functions, (b) it must be conducted in accordance with duly published rules of procedure, and (c) the persons appearing therein are afforded their constitutional rights."[128]

i. "In Aid of Legislation"

The first requisite – that the inquiry must be *in aid of legislation* – was enforced by the Supreme Court in *Bengzon, Jr. v. Senate Blue Ribbon Committee*.[129] Here, the Court barred the Senate Blue Ribbon Committee from investigating the alleged transfer of some property of "Kokoy" Romualdez to the Lopa Group of Companies for not being in "aid to legislation."

> Verily, the speech of Senator Enrile contained no suggestion of contemplated legislation; he merely called upon the Senate to look into a possible violation of Sec. 5 of RA No. 3019, otherwise known as 'The Anti-Graft and Corrupt Practices Act.' In other words, the purpose of the inquiry to be conducted by respondent Blue Ribbon Committee was to find out whether or not the relatives of President Aquino, particularly, Mr. Ricardo Lopa, had violated the law in connection with the alleged sale of the 36 or 39 corporations belonging to Benjamin 'Kokoy' Romualdez to the Lopa Group. There appears to be, therefore, no intended legislation involved.[130]

It thus appears from the foregoing ruling that a "suggestion of a contemplated or intended legislation" must be contained in the privilege speech conveying a request or demand for the conduct of an inquiry. Logically, the same requirement could as well be applied if the mode of adopted for initiating the investigation is through a resolution or petition.

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[127] *Id.* at 717, *citing* House Rules and Procedure Governing Inquiries in Aid of Legislation, adopted on August 28, 2001., §§ 1(b.1) -(b.4).

[128] *Id.* at 716.

[129] G.R. No. 89914, 203 SCRA 767, Nov. 20, 1991.

[130] *Id.* at 781.

In the recent case of *Senate v. Ermita*, the Supreme Court, speaking thru Justice Carpio Morales suggested a possible remedy to avoid an outcome similar to that in *Bengzon*:

> Parenthetically, one possible way for Congress to avoid such a result as occurred in *Bengzon* is to **indicate in its invitations** to the public officials concerned, or to any person for that matter, **the possible needed statute which prompted the need for the inquiry**. Given such statement in its invitations, along with the usual indication of the subject of inquiry and the questions relative to and in furtherance thereof, there would be less room for speculation on the part of the person invited on whether the inquiry is in aid of legislation.[131] (emphasis supplied)

Associate Justice Carpio, in his dissenting opinion in *Neri v. Senate*,[132] adheres to a more liberal interpretation of the phrase "in aid of legislation". Citing US cases, he explains:

> This power of legislative inquiry is so searching and extensive in scope that the inquiry need not result in any potential legislation,[133] and may even end without any predictable legislation.[134] The phrase 'inquiries in aid of legislation' refers to inquiries to aid the enactment of laws, inquiries to aid in overseeing the implementation of laws, and even inquiries to expose corruption, inefficiency or waste in executive departments.[135]

This, we believe, is the better view – that investigations in aid of legislation need not be so restricted nor confined within the murals of law-

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[131] G.R. No. 169777, 488 SCRA 1, 44, Apr. 20, 2006.

[132] G.R. No. 180643, 549 SCRA 77, 283-84, Mar. 25, 2008.

[133] McGrain v. Daugherty, 273 U.S. 135, 177 (1927). The U.S. Supreme Court stated: "It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice - whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year."

[134] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975). The U.S. Supreme Court declared: "To be a valid legislative inquiry there need be no predictable end result."

[135] Watkins v. United States, 354 U.S. 178, 187 (1957). The U.S. Supreme Court declared: "[T]he power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." (Emphasis supplied).

making. They may be appropriately resorted to by Congress to ensure that the legislative policy behind the laws is properly implemented. Associate Justice Carpio, citing Professor Lawrence Tribe, further expounds:

> Thus, the Legislature can conduct inquiries not specifically to enact laws, but specifically to oversee the implementation of laws. This is the mandate of various legislative oversight committees which admittedly can conduct inquiries on the status of the implementation of laws. In the exercise of the legislative oversight function, there is always the potential, even if not expressed or predicted, that the oversight committees may discover the need to improve the laws they oversee and thus recommend amendment of the laws. This is sufficient reason for the valid exercise of the power of legislative inquiry. Indeed, the oversight function of the Legislature may at times be as important as its law-making function.[136]

ii. "In Accordance with Duly Published Rules of Procedure"

One of the most sensitive issues in the power to investigate lies in the capacity to put private parties under such inquiry. Since private rights are involved, Article VI Section 21 of the Constitution imposes further safeguards to protect the constitutional rights of witnesses. In *Neri*, the Supreme Court, chastised the Senate Committees for violating Section 21 of Article VI of the Constitution, requiring that the inquiry be in accordance with the *"duly published rules of procedure."* Upholding the contention of the Solicitor General, the Highest Court held that:

> The phrase 'duly published rules of procedure' requires the Senate of every Congress to publish its rules of procedure governing inquiries in aid of legislation because every Senate is distinct from the one before it or after it. Since Senatorial elections are held every three (3) years for one-half of the Senate's membership, the composition of the Senate also changes by the end of each term. Each Senate may thus enact a different set of rules as it may deem fit. *Not having published its Rules of Procedure, the subject hearings in aid of legislation conducted by the 14th Senate, are therefore, procedurally infirm.*[137]

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[136] 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 790-91 (3rd ed.). Professor Tribe comments thus: "… it is important to note an implicit or ancillary power belonging to Congress that is at times every bit as important as the power to which it is supposedly appurtenant. That, of course, is the power of investigation, typically and most dramatically exemplified by hearings, some of them in executive session but most of them in the glare of klieg lights and with the whole nation watching. Such investigations have served an important role in ventilating issues of profound national concern."; Louis Fisher & David Gray Adler, AMERICAN CONSTITUTIONAL LAW 227 (7th ed.). Fisher and Adler write: "Oversight is not subordinate to legislation."

[137] Neri, 549 SCRA at 135-36.

Violation of the foregoing rule would be an affront to due process. The duty to publish appears to be an indispensable requirement under Section 21. In his separate opinion on the motion for reconsideration in *Neri*, Associate Justice Leonardo Quisumbing explained in this wise:

> The significance of the second limitation on the investigatory power - that the inquiry be "in accordance with its duly published rules of procedure" - can, perhaps, be appreciated by considering it side by side with the control Congress has over its rules when they affect merely matters internal to it. As already seen in *Osmeña, Jr. v. Pendatun*, where Congress suspended the operation of a House rule which could have protected Congressman Osmeña, the Supreme Court accepted the view that parliamentary rules "may be waived or disregarded by the legislative body." This view can be accepted as applicable when private rights are not affected. *When, however, the private rights of witnesses in an investigation are involved, Section 21 now prescribes that Congress and its committees must follow the "duly published rules of procedure."* Moreover, Section 21 may also be read as requiring that Congress must have "duly published rules of procedure" for legislative investigations. Violation of these rules would be an offense against due process.[138] (emphasis supplied)

Noncompliance by Congress with the publication requirement under Section 21 of Article VI of the Constitution renders the Rules of Procedure void for being violative of due process.[139]

iii. "The Rights of Persons shall be Respected"

The third limitation on investigatory power in aid of legislation is that *"the rights of persons appearing in or affected by such inquiries shall be respected."* This third limitation really creates no new constitutional right but merely emphasizes such fundamentals as the right against self-incrimination and unreasonable searches and seizures and the right to demand, under due process, that Congress observe its own rules.[140] The power of legislative inquiry does not reach into the private affairs of citizens.[141] This is the essence of the often invoked right to privacy of communications and correspondence.[142] Congress cannot also violate the witness' right against self-incrimination.[143]

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[138] BERNAS, *supra* note 64, at 740-41.

[139] Neri, (Carpio, J., *dissenting).* "The failure of the Senate to publish its *Rules of Procedure* as required in § 22, Article VI of the Constitution renders the *Rules of Procedure* void."

[140] BERNAS, *supra* note 64.

[141] Kilbourn v. Thompson, 103 U.S. 168 (1880).

[142] CONST. art. III, § 3(1).

[143] art. III, § 17.

Also protected is the right to due process, which means that a witness must be given "fair notice" of the subject of the legislative inquiry. Fair notice is important because the witness may be cited in contempt, and even detained, if he refuses or fails to answer.[144] Moreover, false testimony before a legislative body is a crime.[145] Thus, the witness must be sufficiently informed of the nature of the inquiry so the witness can reasonably prepare for possible questions of the legislative committee. "To avoid doubts on whether there is fair notice, the witness must be given in advance the questions pertaining to the basic nature of the inquiry."[146]

As distinguished from "question hour" under Section 22 of Article VI, legislative investigation in aid of legislation carry with it the inherent powers of compulsion traditionally wielded by Congress. These include the power to order the arrest of a witness who refuses to appear,[147] to cite in contempt,[148] and to detain a witness who refuses to answer.[149] Citing several cases, Justice Carpio explains the rationale for the exercise of these powers:

> The inherent power of the Legislature to arrest a recalcitrant witness remains despite the constitutional provision that "no warrant of arrest shall issue except upon probable cause to be determined personally by the judge."[150] The power being inherent in the Legislature, **essential for self-preservation**,[151] and not expressly withdrawn in the Constitution, the power forms part of the "legislative power…vested in the Congress."[152] The Legislature asserts this power independently of the Judiciary.[153] A grant of legislative power in the Constitution is a grant of all legislative powers, including inherent powers.[154]
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> The Legislature can cite in contempt and order the arrest of a witness who fails to appear pursuant to a subpoena *ad testificandum*. There is no distinction between direct and indirect contempt of the

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[144] Neri, 549 SCRA at 285 (Carpio, J., *dissenting*), *citing* Watkins v. United States, 354 U.S. 178 (1957).

[145] *Id., citing* REV. PEN. CODE, art. 183.

[146] Neri, 549 SCRA at 285-86 (Carpio, J., *dissenting*).

[147] Lopez v. De los Reyes, No. 34361, 55 Phil. 170, Nov. 5, 1930.

[148] *Id.*

[149] Arnault v. Nazareno, No. 3820, 87 Phil. 29, Jul. 18, 1950.

[150] CONST. art. III, § 2.

[151] Lopez, 55 Phil. at 179-80. The Court declared that the Legislature's "power to punish for contempt rests solely upon the right of self-preservation."; Negros Oriental II Electric Cooperative v. Sangguniang Panlungsod of Dumaguete, supra note 61 at 430. The Court stated: "The exercise by the Legislature of the contempt power is a matter of self-preservation as that branch of the government vested with the legislative power, independently of the judicial branch, asserts its authority and punishes contempts thereof."

[152] CONST. art. VI, § 1.

[153] Lopez.

[154] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, Sep. 15, 1989, and 178 SCRA 760, Oct. 27, 1989.

> Legislature because both can be punished *motu propio* by the Legislature upon failure of the witness to appear or answer. Contempt of the Legislature is different from contempt of court.[155]

iv. "Executive Privilege"

Although not mentioned in Section 21, Executive Privilege has been recognized in our jurisprudence as a limitation on the power of Congress to conduct inquiry in aid of legislation. It was first touched upon in the case *Commissioner Jose T. Almonte, et al. vs. Conrado M. Vasquez, et al.*[156] In the aforementioned case, then Ombudsman Conrado M. Vasquez issued a *subpoena duces tecum* requiring petitioners Nerio Rogado and Elisa Rivera, as chief accountant and record custodian, respectively, of the Economic Intelligence and Investigation Bureau (EIIB) to produce "all documents relating to Personal Services Funds for the year 1988 in relation to a letter alleging that funds representing savings from unfilled positions in the EIIB had been illegally disbursed.[157]

In upholding the *subpoena duces tecum*, the Court outlined two instances under which privilege may be invoked to preclude the disclosure of government information through the compulsory processes of an investigating body, namely: 1) the presumptive privilege for Presidential communications and correspondence[158] and 2) the privilege based on the need to protect military, diplomatic or other national security secrets.

In recognizing the first type of privilege, the Court cited *United States v. Nixon*[159] wherein the U.S. Supreme Court held that:

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[155] Lopez, 55 Phil. at 178. The Court declared: "…In the second place, the same act could be made the basis for contempt proceedings and for a criminal prosecution. It has been held that a conviction and sentence of a person, not a member, by the House of Representatives of the United States Congress, for an assault and battery upon a member, is not a bar to a subsequent criminal prosecution by indictment for the offense. (U.S. vs. Houston [1832], 26 Fed. Cas., 379.) In the third place, and most important of all, the argument fails to take cognizance of the purpose of punishment for contempt, and of the distinction between punishment for contempt and punishment for crime. Let us reflect on this last statement for a moment. The implied power to punish for contempt is coercive in nature. The power to punish crimes is punitive in nature. The first is a vindication by the House of its own privileges. The second is a proceeding brought by the State before the courts to punish offenders. The two are distinct, the one from the other."; Arnault v. Balagtas, *supra* note 62 at 370. The Court declared: "The process by which a contumacious witness is dealt with by the Legislature in order to enable it to exercise its legislative power or authority must be distinguished from the judicial process by which offenders are brought to the courts of justice for the meting of the punishment which the criminal law imposes upon them. The former falls exclusively within the legislative authority, the latter within the domain of the courts; because the former is a necessary concomitant of the legislative power or process, while the latter has to do with the enforcement and application of the criminal law."

[156] G.R. No. 95367, 244 SCRA 286, May 23, 1995.

[157] *Id.*

[158] *Id.*

[159] 418 U.S. 683 (1974).

> A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. *These are the considerations justifying a presumptive privilege for Presidential communications.* The privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution. . . .[160]

The Court however qualified that:

> …where the claim of confidentiality does not rest on the need to protect military, diplomatic or other national security secrets but on a general public interest in the confidentiality of his conversations, courts have declined to find in the Constitution an absolute privilege of the President against a subpoena considered essential to the enforcement of criminal laws.[161]

This simply means that as a general rule, presidential communications are considered presumptively privileged. Thus, the party invoking the privilege need only allege the presidential character of the communication. This is in contrast to the second privilege which requires the invoking party to specifically allege the contemplated dangers to national security. However, where such information is essential to the enforcement of criminal laws as in this case, the invoking party may no longer rely on a general public interest in the confidentiality of presidential communication to justify the presumption.

Citing the U.S. case of *Unites States v. Reynolds*[162], the Court adopted a more stringent standard in allowing a party to invoke privilege based on state secrets: "that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect…"[163]

Justice Vicente V. Mendoza however, ultimately ruled that in the absence of any reasonable danger, the presumptive privilege cannot take effect especially in the context of the Ombudsman's constitutionally committed mandate to serve as the "protectors of the people" and as such is required by it "to act promptly on complaints *in any form or manner* against

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[160] Almonte, 244 SCRA at 295.
[161] *Id.* at 297.
[162] United States v. Reynolds, 345 U.S. 1 (1953).
[163] *Id.* at 296.

public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporation."[164]

It bears noting however, for purposes of our discussion, the following factual peculiarities of *Almonte*: First, the discussion on Presidential Privilege was a mere *obiter dictum* as the controversy involved an invocation of privilege based on state secrets. Therefore, it cannot be considered categorical. Second, the privilege was not invoked in the context of legislative oversight, but rather during the initial process of investigation conducted by the Office of the Ombudsman under the auspices of Article XI, Section 12 of the Constitution. As such, the Court's ruling therein provides little clarification as to the place of executive privilege vis-à-vis the separation of powers.

Fortunately, the later case of *Senate v. Ermita* properly framed the debate on Executive Privilege within the more controversial confines of Congressional Oversight. As culled from the factual discussion of the case, the Committee of the Senate as a whole issued invitations to various officials of the Executive Department for them to appear as resource speakers in a public hearing on the railway project of the North Luzon Railways Corporation with the China National Machinery and Equipment Group.[165]

Shortly thereafter, President Gloria Macapagal Arroyo issued Executive Order No. 464, "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation Under the Constitution, and For Other Purposes." The order expanded the scope of Executive Privilege as contemplated in *Almonte* to include the following:

> …Conversations and correspondence between the President and the public official covered by this executive order; Military, diplomatic and other national security matters which in the interest of national security should not be divulged; Information between inter-government agencies prior to the conclusion of treaties and executive agreements; Discussion in close-door Cabinet meetings; Matters affecting national security and public order… [166]

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[164] CONST. art. XI, § 12.
[165] Senate v. Ermita, G.R. No. 169777, 488 SCRA 1 Apr. 20, 2006.
[166] *Id.* at 25-26.

Furthermore, the Order qualified specifically who were covered by the privilege:

> …Senior officials of executive departments who in the judgment of the department heads are covered by the executive privilege; Generals and flag officers of the Armed Forces of the Philippines and such other officers who in the judgment of the Chief of Staff are covered by the executive privilege; Philippine National Police (PNP) officers with rank of chief superintendent or higher and such other officers who in the judgment of the Chief of the PNP are covered by the executive privilege; Senior national security officials who in the judgment of the National Security Adviser are covered by the executive privilege; and Such other officers as may be determined by the President.[167]

The controversy arose when Executive Secretary Eduardo R. Ermita conveyed the officials' refusal to appear before the Committee for having failed to acquire the requisite consent from the President pursuant to Section 3 of the aforementioned Executive Order.[168]

In her famous *ponencia,* Justice Conchita Carpio Morales clarified that Executive privilege attaches based on the acceptability of the ground invoked to support it, and not the executive character of the official invoking it. Hence, she opined that:

> Executive privilege, whether asserted against Congress, the courts, or the public, is recognized only in relation to certain types of information of a sensitive character. While executive privilege is a constitutional concept, a claim thereof may be valid or not depending on the ground invoked to justify it and the context in which it is made. Noticeably absent is any recognition that executive officials are exempt from the duty to disclose information by the mere fact of being executive officials.[169]

The Court found Sections 2(b)[170] and 3[171] of the aforementioned Order unconstitutional for allowing executive officials from making an

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[167] *Id.*

[168] Appearance of Other Public Officials Before Congress. All public officials enumerated in § 2 (b) hereof shall secure prior consent of the President prior to appearing before either House of Congress to ensure the observance of the principle of separation of powers, adherence to the rule on executive privilege and respect for the rights of public officials appearing in inquiries in aid of legislation.

[169] Ermita, 488 SCRA at 51.

[170] Who are covered.- The following are covered by this executive order:

Senior officials of executive departments who in the judgment of the department heads are covered by the executive privilege;

Generals and flag officers of the Armed Forces of the Philippines and such other officers who in the judgment of the Chief of Staff are covered by the executive privilege;

implied claim of privilege without asserting or alleging the basis for the invocation. By requiring Presidential consent before a public official may appear before Congress in an investigation, these provisions effectively allow the president to solely determine whether or not the privilege attaches. Thus, while Secretary Ermita's letter to the Senate Committee does not explicitly invoke executive privilege, the officials' "failure to obtain the consent of the President" meant that the chief executive had made a sole determination of their privileged status.

This runs contrary to the nature of executive privilege as a mere exemption from the obligation to disclose information as emphasized in the case of *Reynolds v. U.S.*:

> The privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[172]

Although *Ermita* held that Courts provide the proper forum before which the validity of the claim of privilege may be assessed,[173] it also recognized that "congress has the right to know why the executive considers the requested information privileged"[174] and to deny [Congress] the opportunity to consider the objection or remedy is in itself a contempt of its authority and an obstruction of its processes which constitutes 'a patent evasion of the duty of one summoned to produce papers before a congressional committee[, and] cannot be condoned.'"[175]

Philippine National Police (PNP) officers with rank of chief superintendent or higher and such other officers who in the judgment of the Chief of the PNP are covered by the executive privilege;

Senior national security officials who in the judgment of the National Security Adviser are covered by the executive privilege; and

Such other officers as may be determined by the President.

[171] Appearance of Other Public Officials Before Congress – All public officials enumerated in Section 2(b) hereof shall secure prior consent of the President prior to appearing before either House of Congress to ensure the observance of the principle of separation of powers, adherence to the rule on executive privilege and respect for the rights of public officials appearing in inquiries in aid of legislation.

[172] Ermita, 488 SCRA at 64, *citing* U.S. v. Reynolds, 345 U.S. 1 (1953).

[173] *Id.*

[174] *Id.* at 63.

[175] *Id.* at 66, *citing* McPhaul v. U.S., 364 U.S. 372 (1960).

This right of congressional determination flows from the inherent need to weigh executive privilege on a case to case basis[176] and against the greater value of public interest. After all, legislative investigations and executive privilege mutually flow from the same standard of public interest.

Prescinding from the foregoing discussion, what must be emphasized is the Court's adherence to legislative investigation as an inherent congressional power. Thus, it can be safely presumed that its exercise is intimately related to the popular will from which it derives its mandate. Only when this presumption is overcome, can executive privilege attach.

The role of Congress as the primary representative of the popular will can be further inferred from *Ermita's* treatment of the public's right to information. According to Justice Carpio Morales:

> To the extent that investigations in aid of legislation are generally conducted in public, however, any executive issuance tending to unduly limit disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid of legislation, is presumed to be a matter of public concern. The citizens are thereby denied access to information which they can use in formulating their own opinions on the matter before Congress' opinions which they can then communicate to their representatives and other government officials through the various legal means allowed by their freedom of expression. Thus holds *Valmonte v. Belmonte*:
>
> > It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, **this open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit**. (emphasis supplied)
>
> The impairment of the right of the people to information as a consequence of E.O. 464 is, therefore, in the sense explained above, just as direct as its violation of the Legislature's power of inquiry.[177]

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[176] *Id.* at 63.
[177] *Id.* at 70-71.

In *Neri*, the Senate Committees involved in the investigation of the ZTE-NBN Deal issued an order citing petitioner Secretary Romulo Neri in contempt and ordering his arrest for his failure to appear and testify in several subsequent hearings conducted by the Senate. Neri filed a petition for *certiorari* questioning the contempt order issued against him. The Supreme Court upheld the claim of executive privilege by Neri in refusing to answer the three (3) questions propounded by the Senate Committees conducting the investigation, and ruled that the respondent Committees committed grave abuse of discretion in issuing the contempt order. Thus Court thus ruled:

> *First*, there being a legitimate claim of executive privilege, the issuance of the contempt Order suffers from constitutional infirmity.
>
> *Second*, respondent Committees did not comply with the requirement laid down in *Senate v. Ermita* that the invitations should contain the "possible needed statute which prompted the need for the inquiry," along with "the usual indication of the subject of inquiry and the questions relative to and in furtherance thereof."
> …
> *Fourth*, …respondent Committees likewise violated Section 21 of Article VI of the Constitution, requiring that the inquiry be in accordance with the "duly published rules of procedure." [178]

The decision is predicated upon 1) proper invocation of executive privilege and 2) noncompliance with limitations imposed by Article VI Section 21 of the Constitution, to *wit*: i) the investigation must be in aid of legislation and ii) the inquiry must be in accordance with duly published rules of procedure.

The Court was satisfied that the doctrine of executive privilege, as an exception to the investigative power of Congress, found its way from the United States to our jurisprudence. Using the standards set forth in *Nixon, In Re Sealed* and *Judicial Watch Cases*, the Court held that:

> [W]e are convinced that, indeed, the communications elicited by the three (3) questions are covered by the **presidential communications privilege**. ***First***, the communications relate to a "quintessential and non-delegable power" of the President, i.e. the power to enter into an executive agreement with other countries. This authority of the President to enter into *executive agreements* without the concurrence of the Legislature has traditionally been

[178] Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al., G.R. No. 180643, 549 SCRA 77, 132, 135, Mar. 25, 2008.

> recognized in Philippine jurisprudence. ***Second***, the communications are "received" by a close advisor of the President. Under the "operational proximity" test, petitioner can be considered a close advisor, being a member of President Arroyo's cabinet. And ***third***, there is no adequate showing of a compelling need that would justify the limitation of the privilege and of the **unavailability** of the information elsewhere by an appropriate investigating authority.[179]

The Court also held that the claim of executive privilege was properly invoked by the President through the letter of Executive Secretary Ermita. This was enough compliance with the formal requisites in *Ermita*. The Court ruled in this wise:

> The Letter dated November 17, 2007 of Executive Secretary Ermita satisfies the requirement. It serves as the formal claim of privilege. There, he expressly states that "**this Office is constrained to invoke the settled doctrine of executive privilege as refined in *Senate v. Ermita*, and has advised Secretary Neri accordingly**." Obviously, he is referring to the Office of the President. That is more than enough compliance.[180]

As to the first constitutional limitation – that the investigation must be in aid of legislation, the Supreme Court said that:

> …[C]ompliance with this requirement is imperative, both under Sections 21 and 22 of Article VI of the Constitution. This must be so to ensure that the rights of both persons appearing in or affected by such inquiry are respected as mandated by said Section 21 and by virtue of the express language of Section 22. Unfortunately, despite petitioner's repeated demands, respondent Committees did not send him an advance list of questions.[181]

It seems then that the strict interpretation espoused in *Bengzon* has been validated in the recent case of *Neri*, which cited *Ermita*. However, it must be clarified that Justice Carpio Morales in *Ermita* did not categorically cite *Bengzon* as the controlling doctrine with respect to the requirement that invitations to appear before a congressional investigation in aid of legislation should contain the "possible needed statute which prompted the need for the inquiry."[182] In fact the language used in *Ermita* was merely suggestive, prescribing that the same should be attached only for purposes of avoiding the situation in *Bengzon*.

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[179] *Id.* at 122.
[180] *Id.* at 130.
[181] *Id.* at 132.
[182] Senate v. Ermita, G.R. No. 169777, 488 SCRA 1, 44, Apr. 20, 2006.

According to the exact words of Justice Carpio Morales:

> For one, as noted in *Bengzon v. Senate Blue Ribbon Committee* the inquiry itself might not properly be in aid of legislation, and thus beyond the constitutional power of Congress. Such inquiry could not usurp judicial functions. Parenthetically, one possible way for Congress to avoid such a result as occurred in Bengzon is to indicate in its invitations to the public officials concerned, or to any person for that matter, the possible needed statute which prompted the need for the inquiry.[183]

Anent the second constitutional limitation, the Supreme Court admonished Congress for lack of compliance with the publication requirement. The Court explained that failure of the Senate to publish its rules of procedure is a violation of due process and renders the same void. The Supreme Court ruled:

> **Fourth**, we find merit in the argument of the OSG that respondent Committees likewise *violated Section 21 of Article VI of the Constitution*, requiring that the inquiry be in accordance with the *'duly published rules of procedure.'*[184]

II. INVESTIGATION AND SUPERVISION THROUGH THE LENS OF JUDICIAL REVIEW VIS-À-VIS THE POLITICAL QUESTION DOCTRINE

Still tormented by nightmares brought about by the martial law years, the framers of the 1987 Constitution, in response to the frequency[185] with which the Supreme Court had appealed to the "political question" doctrine during that period,[186] expanded the existing provision on Judicial Power[187] to include following:

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a

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[183] *Id.* at 43-44.

[184] Neri, 549 SCRA at 135.

[185] *See* Javellana v. Exec. Sec., 50 SCRA 30, 138, 140-41, Mar. 31, 1973; Aquino Jr. v. Enrile, G.R. No. 35546, 59 SCRA 183, Sep. 17, 1974; Garcia-Padilla v. Enrile, G.R. No. 61388, 121 SCRA 472, 490-491, Apr. 20, 1983.

[186] BERNAS, *supra* note 64, at 919, *citing* I RECORD OF THE CONSTITUTIONAL COMMISSION 434 (1986).

[187] CONST. (1973) art. X, § 1. "The Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law. The Batasang Pambansa shall have the power to define, prescribe and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section five thereof."

> grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[188]

Prescinding from the abovementioned provision, it is clearly established that the Constitution now imposes a duty upon the courts to assume jurisdiction and settle the case and controversy presented before them. However, the phrase "any branch or instrumentality of the Government" expands the scope of judicial review under Rule 65 Section 1 of the Rules of Court, which was originally limited to "any tribunal, board or officer exercising judicial or quasi-judicial functions", to wit:

> When any tribunal, board or officer *exercising judicial or quasi-judicial functions* has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require. (Emphasis supplied)[189]

Thus, practically any officer under our system of government can be subjected to the power of judicial review, regardless of the nature of his office. As long as there was an allegation of "grave abuse of discretion" and the complaint satisfies the conditions for the exercise of judicial review,[190] the courts will assume the "duty" of resolving the complaint. The courts cannot hereafter evade this duty to settle matters of this nature, by claiming that such matters constitute a political question.[191]

With respect to the exercise of legislative actions, the Supreme Court will brush aside the political question doctrine whenever there can be found constitutionally-imposed limits on the exercise of powers conferred

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[188] CONST. art. VIII, § 1.

[189] RULES OF COURT, Rule 65, § 1(a).

[190] Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003, citing Angara v. Electoral Commission, No. 45081, 63 Phil. 139, 158, Jul. 15, 1936: "the courts' power of judicial review, like almost all powers conferred by the Constitution, is subject to several limitations, namely: (1) an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have "standing" to challenge; he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest possible opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case."

[191] I RECORD OF THE CONSTITUTIONAL COMMISSION 434-36 (1986).

upon the Legislature.[192] There is indeed a plethora of cases in which this Court exercised the power of judicial review over congressional action.[193]

However, it bears noting that the while the expanded certiorari powers of the judiciary were largely reactionary to the abuses of the executive during the Martial Law years, the augmentation of the constitutional provision on judicial power was not meant to do away with the political question doctrine itself. Truly political questions are still intended to be beyond the scope of judicial review.[194]

The Supreme Court has defined the term "political question" as "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the Legislature or the executive branch of the Government."[195]

The decision of the US Supreme Court in *Baker v.* Carr[196] presents a more exhaustive characterization of this doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the

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[192] MENDOZA, *supra* note 1, *citing* BERNAS, *supra* note 64, at 861.

[193] *See* Francisco v. House of Representatives, 415 SCRA at 132-33, enumerating cases involving the exercise of judicial review over the acts of the Legislature: "Thus, in *Santiago v. Guingona, Jr.*, this Court ruled that it is well within the power and jurisdiction of the Court to inquire whether the Senate or its officials committed a violation of the Constitution or grave abuse of discretion in the exercise of their functions and prerogatives. In *Tanada v. Angara*, in seeking to nullify an act of the Philippine Senate on the ground that it contravened the Constitution, it held that the petition raises a justiciable controversy and that when an action of the legislative branch is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to settle the dispute. In *Bondoc v. Pineda*, this Court declared null and void a resolution of the House of Representatives withdrawing the nomination, and rescinding the election, of a congressman as a member of the House Electoral Tribunal for being violative of § 17, Article VI of the Constitution. In *Coseteng v. Mitra*, it held that the resolution of whether the House representation in the Commission on Appointments was based on proportional representation of the political parties as provided in § 18, Article VI of the Constitution is subject to judicial review. In *Daza v. Singson,* it held that the act of the House of Representatives in removing the petitioner from the Commission on Appointments is subject to judicial review. In *Tanada v. Cuenco,* it held that although under the Constitution, the legislative power is vested exclusively in Congress, this does not detract from the power of the courts to pass upon the constitutionality of acts of Congress. In *Angara v. Electoral Commission,* it ruled that confirmation by the National Assembly of the election of any member, irrespective of whether his election is contested, is not essential before such member-elect may discharge the duties and enjoy the privileges of a member of the National Assembly."

[194] I RECORD OF THE CONSTITUTIONAL COMMISSION 443 (1986).

[195] MENDOZA, *supra* note 1, *citing* Tañada v. Cuenco, No. 10520, 103 Phil. 1051, Feb. 28, 1957.

[196] 369 U.S. 186 (1962).

> impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Fr. Bernas classifies the political questions from *Baker* into three categories:

> *textual:* where there "is found a textually demonstrable constitutional commitment of the issue to a political department."
>
> *functional:* where there is "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for a non-judicial discretion."
>
> *prudential:* where there is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[197]

The first kind is arguably the most familiar segment of *Baker* in Philippine jurisprudence. Its rationale is simply the majoritarian nature of textual commitments to political branches including the importance of promoting political debates outside the courts.[198] Under the 1935 Constitution, the Court consistently refused to exercise judicial review in matters involving the disciplinary power of Congress over its own members, as can be gleaned from the cases of *Alejandrino v. Quezon* and *Osmeña,Jr. v. Pendatun*.[199] Likewise, in *Arroyo v. De Venecia*,[200] the Court declined to intervene in a case where Congress was said to have disregarded its own rules. The Court ruled that the matter of formulating rules have been textually conferred by the Constitution on Congress itself, in which case the Court will without authority to intervene provided that no violation of a constitutional provision or injury to private rights was involved.[201]

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[197] Tan, *supra* note 28, *citing* BERNAS, *supra* note 64, at 953-54.

[198] Tan, *supra* note 28.

[199] BERNAS, *supra* note 64, at 954; *see* Alejandrino v. Quezon, No. 22041, 46 Phil. 83, Sep. 11, 1924; Osmeña, Jr. v. Pendatun, No. 17144, 109 Phil. 863, Oct. 28, 1960.

[200] G.R. No. 127255, 277 SCRA 268, Aug. 14, 1997.

[201] BERNAS, *supra* note 64, at 955.

The question is not political when the Court can find legal standards for resolving the issue. This is the inverse of the second category of political questions. These legal standards come in the form of constitutionally-imposed limits on powers conferred upon the political branches.[202] Under the 1973 and 1987 Constitutions, the suspension of a member of Congress must be concurred in by at least two-thirds of all the members.[203] This aspect of disciplinary power, therefore, has become a justiciable question.[204]

The third type – the *prudential* type of political questions – has been practically eliminated by the expanded certiorari jurisdiction of the Supreme Court.[205] It seems now that only the formation of a revolutionary government could be a prudential concern momentous enough to validly give rise to a political question.[206]

If the power of congressional oversight satisfies the definition set forth for "truly political questions", it follows then that cases involving its exercise are outside the ambit of judicial review.

Notwithstanding the ruling in *ABAKADA v. Purisima*,[207] it is submitted that cases involving legislative veto possess a textually demonstrable constitutional commitment of the issue to the Legislative Branch. Since traditionally, the power of legislative veto is attached to the power of delegating lawmaking functions to an administrative agency, it is safe to say that what has been delegated is inherently a legislative power. Imposing restrictions on this delegated authority through the veto power, Congress is merely acting within the sphere of legislation – a power textually committed to Congress under the Constitution. Thus, the exercise of legislative veto respecting matters of delegated rule-making power does not intrude upon executive prerogatives.

Furthermore, when Congress delegates rule-making power to the administrative agency, the latter is constituted as "legislative agent"[208] of the former, in which case the latter is not acting in its capacity as the *alter ego* of the President.

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[202] *Id.* at 956.
[203] CONST. (1973) art. VII, § 7(3); CONST. art. VI, § 16(3).
[204] BERNAS, *supra* note 64, at 957, *citing* Powell v. McCormack, 395 U.S. 486 (1969).
[205] *Id.* at 959.
[206] Tan, *supra* note 28, at 79, *citing* Lawyers League for a Better Phil. v. Aquino, G.R. No. 73748, May 22, 1986 and Estrada v. Desierto, G.R. No. 146710, 356 SCRA 452, 492, Mar. 2, 2001.
[207] G.R. No. 166715, 562 SCRA 251, Aug. 14, 2008.
[208] ABAKADA Guro Party List v. Ermita, G.R. 168056, 469 SCRA 1, 123, Sep. 1, 2005.

In so far as this delegated power is concerned, courts should give the delegating authority, Congress in this case, as much leeway as possible to ensure that the legislative policy is properly encapsulated in the crafting of the implementing rules.

The courts, however, should exercise judicial review in cases involving legislative investigations, only to the extent of determining whether there was compliance with the limitations set forth under Section 21 Article VI of the Constitution. Absent a violation of an individual right, courts should exercise restraint from intruding into the political arena and allow the political process to run its course. As Justice Brandeis succinctly said: "The most important thing we decide is what not to decide."[209]

The qualified exercise of judicial review in assessing legislative investigations vis-à-vis executive privilege can be further analyzed through the lens of coordinacy as espoused by James Bradley Thayer. Coordinacy has been summarized in this wise:

> Under the coordinacy theory, a distinction exists between the Constitution and the judicial construction of the Constitution. The Judiciary is not the exclusive oracle of constitutional meaning. Other branches may interpret the Constitution independently.[210]

In responding to the question of which branch of government possesses the power to say what the law is, Prof. Paulsen made a similar claim, in this wise:

> The power to interpret federal law--the power, in Marbury v. Madison's famous words, "to say what the law is"--is not a specifically enumerated or delegated power of any branch of the federal government. Rather, it is an implied power incidental to each branch's functions. The courts interpret law as a consequence of their duty to decide "cases" and "controversies" of a certain description, not as a result of a constitutional assignment of a special competence or superiority vis-à-vis the other branches in this regard.[211]

Following this logic, it is safe to assert that Congress possesses a right to interpret the Constitution impliedly granted under its law-making

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[209] MENDOZA, *supra* note 1, at 91, *citing* Paul Freund, *"Mr. Justice Brandeis"*, ON LAW AND JUSTICE 119, 140 (1968).

[210] Tan, *supra* note 28, *citing* Robert Schapiro, *Judicial Deference and Interpretative Coordinacy in State and Federal Constitutional Law,* 85 CORNELL L. REV. 656, 662-63 (2000).

[211] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What The Law Is,* 83 GEO. L.J. 217 (1994).

function. Coordinacy recognizes this right and provides a basis for the Court to defer or to uphold another branch's construction just as it may reject them.[212] Deference to Congressional interpretation is founded on the nature of Congress as the majoritarian arbiter of the people's will as discussed above. Such deference, according to Justice Puno:

> …is anchored on a heightened regard for democracy. It accords intrinsic value to democracy based on the belief that democracy is an extension of liberty into the realm of social decision-making. Deference to the majority rule constitutes the flagship argument of judicial restraint which emphasizes that in democratic governance, majority rule is a necessary principle.[213]

The expanded certiorari jurisdiction of the Supreme Court was arguably a knee-jerk reaction to the harrowing experience during the Martial Law. It was a time when the Head of State was so much like the kings of the Middle Ages, less the romanticists' notions of cavalry and nobility. He wielded so much power, even taking away the "power of the purse" from Congress.[214]

The framers of the present Constitution sought to restore the balance of powers among the three branches. The expanded certiorari jurisdiction was thus intended primarily as a check on the abuses of the Executive more than the Legislative Branch. If then, there is an available counter-weight to executive abuses in the political arena, the courts should exercise restraint and allow that counter-weight to restore the balance.

Hence, if the Legislature wields the Excalibur of congressional oversight to pierce through the impenetrable Asgardian walls of the executive, prudence dictates that the courts must wait until the dust has settled.

Furthermore, in our tri-partite system of government with a strong head of state, the concentration of executive powers in a single individual runs the risk of misuse and abuse. Hence, the slings and arrows of judicial intervention should be aimed more at the citadel of Executive powers than the halls of Congress. To do otherwise is to stifle the chances of our people, through their representatives in Congress, to mature politically and correct

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[212] Tan, *supra* note 28, *citing* Robert Schapiro, *Judicial Deference and Interpretative Coordinacy in State and Federal Constitutional Law,* 85 CORNELL L. REV. 656, 665-66 (2000).

[213] Francisco v. The House of Representatives, G.R. No. 160261, 415 SCRA 44, 205, Nov. 10, 2003 (Puno, J., *concurring and dissenting*).

[214] *See* Pres. Dec. No. 1177.

their mistakes through political experience. The people are deprived of the benefit of correcting their errors through "moral education and stimulus that come from fighting the question out in the ordinary way."[215]

Looking back at *Neri*, Congress flexed its arm by utilizing a power textually committed to it under the Constitution – the power of inquiry in aid of legislation. The flare of public's interest in the controversy was fueled by the relentless print and broadcast media coverage that attended the hearings. Momentum for political awareness was building up like a cyclone in the middle of the Pacific. Yet even before the storm of public clamor made a landfall, it slowly dissipated into isolated showers and drizzle when Secretary Neri filed his petition before the Supreme Court. It was indeed an anti-climactic ending to what an otherwise could have been a flood of political awareness. This is aptly what Justice Douglas referred to as the "serious evil" of judicial intervention in a political moment such as that in *Neri*:

> …to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[216]

III. POPULAR CONSTITUTIONALISM

A. CONSTITUTIONALISM AND THE HISTORICAL MOVEMENT TOWARDS POPULAR SOVEREIGNTY

Under constitutionalism, the powers of leaders and government institutions are primarily limited to prevent any arbitrary use of power. Written or unwritten constitutions serve as definite standards for determining the extent of authority of each government branch or agency.

Giovanni Sartori identified five fundamental attributes of liberal constitutionalism:

1) A constitution, written or unwritten
2) Powers of Judicial Review
3) An Independent Judiciary
4) Due Process of Law
5) A Binding Procedure Establishing the Methods of Law.[217]

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[215] Flast v. Cohen, 392 U.S. 83 (1968) (Douglas, J., *concurring*).
[216] *Id.*
[217] GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISTED 309 (1987).

These elements embody a constitutional system designed to restrain the political branches' discretionary powers. Integrating these, Justice Irene Cortes simplifies constitutionalism as "a determinate, stable legal order which prevents the arbitrary exercise of political power ad subjects both the governed and the governors to 'one law for all men.'"[218]

She purports that constitutionalism "is the ordering of political processes and institutions on the basis of a constitution, which lays down the pattern of formal political institutions and embodies the basic political norms of society."[219] This definition, however, does not limit constitutionalism to merely a system of regulating interaction among the branches of government. It more prominently includes the reasonable restraint of government's discretionary powers which are a necessary byproduct of a written constitution. John Locke explicates in *treatise* why such discretionary powers exist and why they need to be curbed:

> For legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by common law of Nature a right to make use of it for the good of the society…This power to act according to discretion for the public good…is that which is called prerogative.
>
> If men were so void of reason and brutish as to enter into society upon such terms, prerogative might indeed be, what some men would have it, an arbitrary power to do things hurtful to the people.[220]

Constitutionalism originated from the concept of a customary constitution. The term constitution during the earlier manifestations of organized governments had multiple meanings. Based on its first incarnation, "constitution" was an "arrangement of exiting laws and practices that literally, constituted government or ordinary law, making it possible to speak of a law being unconstitutional without it also being illegal"[221]. Yet another incarnation is "constitution" equated with "fundamental law, the phrase most commonly employed to denote

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[218] Irene Cortes, *Constitutionalism in the Philippines-A View from Academia,* 59 PHIL. L.J. 338 (1984), *quoting* J. DUNNER, DICTIONARY OF POLITICAL SCIENCE 120 (1964).

[219] *Id.* at note 1.

[220] JOHN LOCKE, SECOND TREATISE*, Ch. 14.*

[221] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 17 (2004).

immutable principles beyond the reach of any institution of government."[222] However, despite its numerous paradigms throughout history, constitutions commonly meant the existence of a "fundamental or constitutional law whose terms "mark[ed] out and fix [[ed] the chief lines and boundaries between the authority of rulers, and the liberties and privileges of the people."[223]

The most basic element of the fundamental law or the "Ancient Constitution"[224] is that it is anchored upon a mutual agreement or contract between rulers and their constituents. The latter conferred specific powers, retained basic privileges and generally concurred with a proposed system of governance.

It involved settled principles like inalienable rights such as the right to jury and due process of the law. However these principles only became part of the fundamental law as the written constitution evolved and became subject to changes in the political climate.

Dean Larry Kramer clarified that this form of 18th century Constitutionalism was really modeled after British Constitutionalism. The Americans opposed the British model of Parliamentary sovereignty in enforcing the customary constitution and instead championed the cause of popular sovereignty.

According to James Bradley Thayer, the terms of a constitution were enforced by various means, - "by forfeiture of the characters, by Act of Parliament, by the direct annulling of legislation by the Crown, by judicial proceedings and an ultimate appeal to the Privy Council."[225] Interpretation of the constitution was left predominantly to external bodies. Whoever the interpreting body was, the constitution was more of an imposition upon the people. This was a significant departure from the original idea of the constitution as a contract between lawmakers and their constituents and that "Government ought to be, and is generally considered as founded on consent, tacit or express, on a real, or quasi, compact."[226]

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[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] JAMES THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW 131 (1893).

[226] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW; RICHARD WOODDESON, ELEMENTS OF JURISPRUDENCE TREATED OF IN THE PRELIMINARY PART OF A COURSE OF LECTURES ON THE LAWS OF ENGLAND 35 (1792).

B. POPULAR CONSTITUTIONALISM VIS-À-VIS JUDICIAL REVIEW AND THE ROLE OF CONGRESS

> *Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it.*[227]

Justice Vicente V. Mendoza talks about the transcendental symbolic role of the unelected Judiciary as a higher moral compass and educator of society. He cites Archibald Cox, in *The Role of the Supreme Court in American Government,* whose words describe the United States Supreme Court as a catalyst for society's political maturity: "The Court's opinion may… sometimes be the voice of the spirit, reminding us of our better selves. … [I]t provides a stimulus and quickens moral education"[228] Such a role, however, is exercised sparingly and many times as an exception to a general rule. Judicial Review has been termed as a "deviant institution,"[229] in Bickel's words, based on no majoritarian consensus. It will be hard to imagine the judiciary as the institution suited for romancing the people to be faithful to the constitution.

In contrast to the counter-majoritarian dilemma of judicial review, University of the Philippines College of Law Dean Raul C. Pangalangan described a constitutional movement geared towards restoring a "constitutionalism more attuned to the public temper."[230] The contemporary practice of distinguishing "constitutional democracy"[231] as opposed to a "populist democracy"[232] has led to a "chronic fetishism of the Constitution"[233] wherein constitutional law, seen as "higher law,"[234] has become detached from the majority. Judicial Review is then considered as an arrogant treatment of the public as "ignorant, emotional and simple-minded"[235] ordinary people, confined in the realm of "ordinary law."[236]

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[227] JOHN LOCKE, SECOND TREATISE, *Ch. 4*.
[228] MENDOZA, *supra* note 1.
[229] *Id.*
[230] Raul Pangalangan, *Chief Justice Hilario G. Davide, Jr.: A Study in Judicial Philosophy, Transformative Politics and Judicial Activism,* 80 PHIL. L.J. 538, 546 (2006).
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*

This movement draws us back to a "Populist Sensibility"[237] where constitutionalism transcends this condescension towards society and reinvigorates majority rule as its primary goal, thereby channeling "popular political energy"[238] into the formal institutions of government.

> "Legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[239]

Justice Oliver Wendell Holmes believed in Congress as that branch of government capable of sustaining such an ideal. Stanford Dean Larry Kramer also comes to the same conclusion:

> "To nudge popular institutions out of the life of the Constitutions is to impoverish both the Constitution and the republican system it is meant to establish."[240]

In Philippine Jurisprudence, Justice Jose P. Laurel shared the same confidence in the political branches. He opined that the "success of our government in unfolding years to come [will] be tested in the crucible of Filipino minds and hearts than in consultation rooms and court chambers."[241] In *Angara v. Electoral Commission*, he quoted James Madison:

> "The people who are authors of this blessing must also be its guardians…their eyes must be ever ready to mark, their voice to pronounce…aggression on the authority of their constitution."[242]

James Bradley Thayer expounded:

> "Now, it is the Legislature to whom this power is given, - this power not merely of enacting laws, but of putting an interpretation on the constitution which shall deeply affect the whole country, enter into, vitally change, even revolutionize the most serious affairs, except as some."[243]

This revitalized recognition of congress as a bulwark of popular democracy is attributable to its institutional competencies and scope of power. Its constitutional framework enables congress to be most intimately

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[237] *Id.*
[238] *Id.*
[239] Missouri, Kansas & Texas Ry Co. v. May, 194 U.S. 270 (1940)
[240] KRAMER, *supra* note 221.
[241] Angara v. Electoral Commission, No. 45081, 63 Phil. 139, 159, Jul. 15, 1936.
[242] *Id.*
[243] THAYER, *supra* note 225, at 36.

accountable to the people. It is thereby the best institutional facilitator of such a movement.

i. The Nature of Congress as a Consensus Building Branch

Congress, working within the institutional design of checks and balances, fulfills four fundamental legislative powers. These legislative functions serve as instruments for channeling public opinion into the framework of government.

Our government functions within the unique framework of Separation of Powers. Its traditional conception originates from Baron de Montesquieu's famous theoretical work.

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.[244]

However, each branch of government is neither wholly distinct nor wholly separate. The Constitution "enjoins upon its branches separateness but interdependence and autonomy but reciprocity."[245] Our country's own departure from the antiquated concept of absolute separation of powers toward a system of checks and balances first emerged in the Supreme Court's resolution in *Angara*: "[t]he Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government."[246]

Congress, in both the Philippine and American Constitutions, wield a number of major legislative functions, they include:

1) Lawmaking
2) Checking the administration
3) Conducting political education for the public
4) Providing representation for several kinds of clientage.[247]

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[244] BARON DE MONTESQUIEU. SPIRIT OF THE LAWS, *Ch.* 6.
[245] Youngstown Sheet & Tube Co, v. Sawyer, 343 U.S. 579, 635 (Jackson, J. *concurring*)
[246] Angara, 63 Phil. at 156.
[247] Reynato Puno, *Legislative Investigations and the Right to Privacy*, 32 IBP L.J. NO. 2, 1, 2 (2006).

It is through the dynamics between these major legislative functions and the separation of powers that congress is able to derive the powers of oversight as "an incident of the power to legislate."[248]

Lawmaking, as "The hallmark of legislative power,"[249] is a reactive power of the Legislature which responds to drastic changes in government and the expanding needs and demands of an exponentially growing society. The demand for new laws increases in proportion with the "multiplication of government functions."[250] Advancements in knowledge, communication, and information dissemination necessarily affect the way individuals in society interact with one another, resulting in the "growing complexity" of society. Thus in order to maintain "a tranquility of mind arising from the opinion each person has of his safety,"[251] "new standard means of adjusting conflict and for new forms of social control"[252] have become essential products of legislation.

Laws are a result of the Legislature's dynamic relationship with external parties. "The chief executive, administrative agencies, political interest groups, and various party agencies and party spokesmen," all have distinct capacities to rally popular support for their respective interests in the hopes of increasing the chance for congress to pass laws in their favor. Civil society in the form of NGO's, PO's and other pressure groups has "to mobilize their members and seek a governmental solution."[253] Greater society must be pushed to participate in the political process and "become intensely concerned"[254] with issues that may potentially become those "great constitutional moments"[255] that they, as the people must ultimately embrace. Influential partisan politics and the absence of "strong counter pressures to defend the status quo"[256] may turn the political tide toward policy change. Popular movements, political parties, and pressure groups all have leverage over lawmakers in the form of the people's right to suffrage and enormous clout they possess in their respective sectors.

> As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate

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[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] JOHN LOCKE, SECOND TREATISE, *Ch. 2.*
[252] *Id.,* note 246.
[253] *Id.*
[254] *Id.*
[255] Bruce Ackerman, *Constitutional Politics/ Constitutional Law,* 99 YALE L.J. 453 (1989).
[256] Puno, *supra* note 247, at 3.

> dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.[257]

Congress' correlative duty to lawmaking is its responsibility of ensuring that the laws it has promulgated are administered faithfully according to its legislative intent. Its "long-established concern with inquiring into administrative conduct and the exercise of administrative discretion,"[258] provides the rationale behind its controversial but necessary powers of oversight to "enhance its understanding of and influence over the implementation of legislation it has enacted."[259] Through legislation, participation in the appointment process, and its formidable power to appropriate funds for the conduct of government, the Legislature constantly exercises its power of review over the executive branch of government.

The purpose of oversight goes beyond merely establishing some form of accountability between the political branches of government. It is rooted in the Legislature's accountability to the people and its symbolic teaching function of informing and instructing the public.

Congressional debates and committee investigations are the Legislature's primary tools of instruction. Media exposure of privilege speeches and debates in congress concerning drafted bills gives the people a glimpse of how the political machinery functions, increasing their interest in the process itself and the avenues by which they can participate. Moreover, it gives the people "time to focus its attention on the issue at hand."[260]

Legislators engage in committee investigations to expose anomalies and dubious practices by government agencies and even private groups. Although past experience of such investigations in the Philippine context has demonstrated that such committees are potential avenues for abuse and political showboating, it doesn't preclude the fact that a high-level inquiry irks the public's interest.

> No aspect of congressional activity other than investigations is as capable of attracting the attention of the public and of the communications facilities that both direct and reflect public interest.[261]

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[257] THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).
[258] Puno, *supra* note 247, at 3.
[259] *Id.*
[260] *Id.* at 4.
[261] *Id.*

Time always seems to slow down at that precise moment in history when the rest of the nation watches as a government official or a high profile personality stands before the mercy of its elected representatives. This is the moment when an "ordinary person's" political opinion becomes relevant and important as he engages in a "higher lawmaking track."[262]

Representing different clientele is the fourth major function of the Legislature and also the underlying principle behind all its other major functions. Members of Congress as representatives of the people are expected to communicate with their constituents in order demonstrate their accountability to their supporters. Lawmakers are also expected to be "guardians of their own locality's interest."[263] "The legislator's representative role also covers the mobilization of popular consent for new public policies and maintaining consent for continuing policies; it is essential that consultation and interchange continuously occur between those who hold and exercise political power and those who are affected by it."[264]

This discourse on the nature of Congress provides us, not only with a clearer perspective of the major functions of the Legislature, but its underlying principles. The observable nature of legislative functions is that they always involve, one way or another, value-judgments concerning the best interests of society. Whether it be the lawmaking, administrative, investigative, instructive, or representative function, Congress is always placed under the microscope by the public eye. Over and beyond the specific objectives of each of these functions, the overlying value of congressional power is its direct correspondence with the popular majority. This provides Congress with the unique opportunity to channel popular political energy to a more proactive role in government, effecting change through its institutions without resorting to extra-legal means of transferring power or changing policy.

Prof. Bruce Ackerman in his proposed dualist system of democracy discusses the "lower" and "higher" lawmaking track in categorizing the mindset of the ordinary democrat as he contemplates how the political system works, and his preferential degree of involvement. The dualist system of democracy "promises to provide the liberal democrat with some political insurance for the millions of people who have better things to do than follow the goings-on in Washington, D.C."[265] Lower track lawmaking occurs

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[262] Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution Law*, 94 YALE L.J. 453, 1039 (1984).
[263] Puno, *supra* note 247, at 4.
[264] *Id.*
[265] Ackerman, *supra* note 262.

at that normal phase of the public's ambivalence toward the political goings-on in Congress. Such a hands-off attitude by the people can be attributed to the insurance promised by the dualist system which shields the liberal democrat from any change in "fundamental political principles"[266] as long as no such movement has gained any momentum in pushing for reform.

The liberal democrat may either find value in nonchalantly participating in the system or he may discover a more profound meaning in those "rare occasions when the American people do even more-when, after sustained debate and struggle, they hammer out new principles to guide public life."[267] Upon the rare occasion that the latter presents itself, the higher law making track serves as a means for the democrat to "amplify the voice of the People in a way that will arrest attention for a long time to come."[268]

He furthers this discussion by saying that:

> "This is our Republic's evolving commitment to dualistic democracy: its recurring emphasis on the special importance of those rare moments when political movements succeed in hammering out new principles of constitutional identity that gain the considered support of a majority of American citizens after prolonged institutional testing, debate, decision."[269]

Congress through its institutions exposes the public to its lawmaking functions. Since it is a branch of government beholden to majoritarian will, its actions inevitably will find their way to the court of public opinion. As society witnesses its Legislature engaging in public debates and policy discussions, it channels the people's attention, not merely upon the lower track lawmaking process, but more importantly the contemporary issues that surround them and the political movements that fuel them. Suddenly, ordinary people see themselves joining the tide of popular dissent, with a predisposition to subscribe the formal avenues of change. Thus, the people elevate themselves to the higher lawmaking track.

The nature of Congress is to be close to the people, feel the pulse of the people, and be attuned to popular sentiment. They are sensitive to it because of frequent reelection and small constituencies. Oversight is a focused tool of people's representatives to continually evaluate the

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[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] Ackerman, *supra* note 255.

government operations, demand accountability, and, congress is easily a forum for people to air views on governance whether by the congressmen or witnesses.

IV. LIMITATIONS OF OVERSIGHT: SOME CLARIFICATIONS

As previously discussed, oversight is subject to two apparent limitations: first, jurisprudence has clearly imposed standards upon the Legislature to limit such prerogatives "in aid of legislation." Second, the legislative is limited in its inquiry into the acts of independent constitutionally mandated bodies such as the Commission on Election. Prof. Emily McMahon introduces a third requisite: "bicameralism assures that the legislative power is exercised only after opportunity for study and debate in two separate settings."[270]

> The COMELEC is, however, subject to congressional scrutiny especially during budget hearings. But Congress cannot abolish the COMELEC as it can I case of other agencies under the executive branch. The reason is obvious. The COMELEC is not a mere creature of the Legislature: It owes its origin from the constitution.[271]

A clarification must be made on "in aid of legislation"[272] limitation on congressional oversight. This limitation was derived from Congress' laws making powers, respecting its right to inform itself in lieu of legislation. However, lawmaking is not the only major legislative function to which oversight is attributed. Justice Puno enumerates three major legislative functions as was previously discussed in this paper.

Of all the powers of oversight, checking the administration is the second most important legislative function. Although investigation also falls under this function, it broadly encompasses specific legislative powers which pertain to other oversight mechanisms. Participation in the appointment process[273] and the power to appropriate funds[274] are uniquely in the province of the Legislature and are expressly provided by the Constitution. Thus, Oversight powers of scrutiny and supervision, which are not limited by "in aid of legislation," serve as appropriate mechanisms for ensuring that

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[270] Emily McMahon, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto,* 94 YALE L.J. 1493, 1499 (1985).

[271] Macalintal, v. Commission on Elections, G.R. No. 157013, 405 SCRA 614, 727, Jul. 10, 2003 (Puno, J., *concurring and dissenting*).

[272] *Id.* at 717.

[273] CONST. art. VII, § 16.

[274] art. VI, § 24.

executive departments and agencies fulfill their mandated and delegated powers.

Father Joaquin Bernas, S.J. in elaborating on the legality of playing the wiretapped CDs and tapes in the House at the height of the Hello Garci scandal, admonished that "the [wiretap] hearings are being held 'in aid of legislation.' If they are not, then there is no reason for the hearings to go on."[275] This statement is focused on the explicit texts of the Constitution. Oversight as opposed to investigation is broader and contemplates of other legislative competencies.

It is indeed difficult to set definitive boundaries to congressional oversight. After all, it has had limited application in Philippine Jurisprudence. However, this paper wants to transcend constitutionality in its discussion of congressional oversight and focus instead on its potential to strengthen our republican government and to consolidate our democracy. Oversight may bring constitutional interpretation back to popular will in a manner that tempers violent reason and transforms into a legitimate interest that can formally subscribe to the Legislature as its representative and its institutions. The pragmatic discussion will attempt to tie back the concept of congressional oversight with the notion of popular constitutionalism.

Congressional oversight as a means of intensifying and channeling popular political energy into legitimate constitutionally mandated institutions for interest articulation is best illustrated through the dynamic relationship of the government with civil society. Civil society embodies those political, social, and economic movements trying to gain voice in government through the achievement of critical mass. Ackerman identifies these interest-driven movements as essential elements for increasing the awareness of ordinary people to issues pertaining to governance. Thus it is through the interaction of lawmakers and civil society groups engaging in constitutional and policy-forming debates that individual members of society are enticed to involve themselves in higher lawmaking functions.

In order to clearly establish the link between congressional oversight and popular constitutionalism, the role of society in engaging Congress at an institutional level must be established. The link must be specifically drawn from actual controversies in politics where the highest level of accountability has been demanded from public officials, resulting in the establishment of

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[275] Joaquin Bernas, S.J., *Playing the Tapes*, PHIL. DAILY INQUIRER, Jun. 27, 2005, at A15.

proper and guidelines for reform and punishment and ultimately the public demand for promotion of the public as a public trust.

V. CIVIL SOCIETY AND THE LEGISLATURE

Fr. Joseph Magadia, PhD in his paper, Contemporary Civil Society in the Philippines defines civil society as such:

> Civil Society refers to that complex of networks and association in society, composed of formally organized non-profit reform-oriented groups concerned with collective welfare goals, and involved in political processes and which are distinct from and autonomous of formal conventional political institutions like political parties and government agencies.[276]

In the Philippine scenario, civil society has been synonymous with Non-Government Organizations and People's Organizations. NGO's are considered "private, non-profit professional organizations with a distinctive legal character, concerned with public welfare goals"[277] while PO's are "local, non-profit, membership-based associations which organize and mobilize in support of collective welfare goals."[278] These sectoral groups represent a plethora of interests from the adjustment of minimum wage to the maintenance of ecological balance in the environment to Agrarian reform and Urban Housing, employing different strategies in getting their agenda across to the relevant government institutions. Dean Kramer attributes the emergence of civil society from "The new thinking, associated most closely with Robert Dahl and Joseph Schumpeter, denigrated democratic politics as a site for developing substantive values and replaced it with a self-interested competition among interest groups."[279]

Civil Society indeed blossomed into the embodiment of a democratic culture spurned by a Marcos Regime bent on maintaining power.

The mobilization of civil society had evolved over the years. In the height of political struggle, numerous civil society groups emerged and took to the streets in mass protest, lead by former party leaders who could no longer reap the fruits of partisan politics, silenced by the 1972 declaration of

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[276] Jose Magadia, *Contemporary Civil Society in the Philippines*, SOUTHEAST ASIAN AFFAIRS (1999).
[277] *Id.*
[278] *Id.*
[279] Larry Kramer, *The Brennan Center for Justice at NYU School of Law Article,* 92 CAL. L.REV. 959, 964 (2004).

Martial Law.[280] From mass protests, gradually civil society seemed to take on a new form and a new method of infiltrating the government, moving from political protest to influence. The 1987 Constitution paved the way for the public to directly influence policy-making. In Article II Section 23, "The state shall encourage non-governmental, community-based, or sectoral organizations that promote the welfare of the nation."[281] In line with this state principle, various pieces of legislation were proposed and ratified to formalize civil society's involvement in government. The Initiative and Referendum Act, The 1991 Local Government Code, the 1995 law for party-list representation are but few of the pieces of legislation introduced by Congress to empower civil society. This amounted to enormous pressure from below the grassroots upon the agents of government.

Is conviction and belief in the justness of one's cause adequate components to win a day in Congress? Patricia Ann V. Paez wrote:

> If they are to succeed in pursuing their legislative agenda and making their voices heard in a cacophony of other voices, civil society organizations must understand how the complex labyrinth of Congress works and what motivates the players within it.[282]

Beyond NGO's and PO's there are other sectors engaged in mobilizing Public sentiment, such as the Catholic Church, the Academe, the Media.

How does civil society and public discourse relate with congressional powers of oversight? How does this go back to the concept of popular democracy?

As was discussed in the previous part of this paper, congressional oversight exists in three categories, namely: scrutiny, investigation, or supervision/legislative veto. Among the three, congressional scrutiny is the most salient and regularly employed mode of oversight, mostly proceeding within closed doors. Investigation and supervision on the other hand often take place in public hearings where civil and media groups are allowed to participate in the proceedings as passive observers.

Legislative hearings and investigations are an all too familiar sight to the public. Congressmen and members of the Senate are often caught in

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[280] Magadia, *supra* note 276.
[281] CONST. art II, § 23.
[282] Patricia Ann Paez, *State-Civil Society Relations in Policy-Making. Focus on the Legislative*, 39.

heated debates consciously showboating and demonstrating their own brand of political bravado. Individuals, public or private, who are subject to such investigations become celebrities overnight as they engage in whistle blowing, exposing scandals involving top offices in the country and endearing themselves to a sympathetic public. However, congressional oversight goes beyond the typical witch hunts in Philippine Politics.

Although such investigations are open to abuse and political showboating, the greatest counterweight to abusive and incompetent committee is the heightened awareness and political maturity of the electorate exposed to the government's inner workings and mindful of its occasional lapses in judgment.

We have seen in legislative inquiries state actors involved in *jueteng*, electoral fraud, overseas prostitution, dubious million dollar infrastructure projects, and inter-government loan contracts that are over-priced and questionable at best. Thus the breadth of political issues encapsulated in inquiries gradually exposes the public to quagmires and dilemmas plaguing the system and challenges them to engage it head-on, not through the practice of lawlessness, but the integrity of lawfulness.

Legislative supervision or the power of legislative veto is essential precisely because it has a more substantial impact on popular constitutionalism than the other two mechanisms. In a nutshell, congressional powers of supervision allow Congress to veto an agency's Implementing Rules and Regulations, if so specified in the enabling law. It "connotes a continuing and informed awareness on the art of a congressional committee regarding executive operations in a given administrative area."[283]

How does civil society's pressure translate into legislative supervision? According to Patricia Ann V. Paez, civil society groups may directly do battle in the legislative arena. Mass mobilization and lobbying are not their only avenues for change.

> It takes a master strategist, an astute tactician with lots of political savvy, a public relations expert, a diplomat and a wily negotiator with the patience of Job – all rolled into one – to win the day in Congress. If they are to succeed in pursuing their legislative agenda and making their voices heard in a cacophony of other voices, civil society

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[283] GROSS, THE LEGISLATIVE STRUGGLE: A STUDY IN SOCIAL COMBAT 132 - 37 (1953).

> organizations must understand how the complex labyrinth of Congress works and what motivates the players within it.[284]

Indirect Intervention is also a primary tool. Civil society can lobby for media support:

> Since their support for legislation depends mainly on what their constituents think and say about the measure, members of Congress are attuned to the public pulse. It is therefore important for civil society to rev up the engine of public opinion. The primary source of information of the voting public is the broadsheets, tabloids, radio and TV. The attention of the mass media, both in Manila and the provinces, must be stirred up in order to trigger grassroots support for the issue.[285]

By increasing Congress' involvement in the implementation of its laws, popular will is given a fresh new perspective on how to involve itself in government. Congressional oversight returns constitutional interpretation as an equal prerogative of Congress. This is the vehicle towards popular constitutionalism, as the people are given a hand to impress upon Congress its demands and interests and at the same time compel Congress as a co-equal branch of government to exercise self-determination. Further, as seen in recent Congressional oversight hearings, civil society actors may themselves partake of the institutional backing of Congress and appear in its halls under the limelight of media.

Through civil society, the voiceless public is now given an instrument for change. They can pressure Congress to utilize oversight as means to promote popular will. Even without external pressure, Congress already represents popular will and is therefore subject to changes in the forces of will as it continues to dissatisfy an insatiable populace.

A. EDSA II

In a Senate session on October 5, 2000, Senator Teofisto Guingona invoked Article VI Section 11 of 1987 Constitution exercising his right to a privilege speech.[286] "I accuse Joseph Ejercito Estrada" resounded through

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[284] Paez, *supra* note 282, at 35.

[285] *Id.* at 51.

[286] CONST. art. VI, § 11. A Senator or Member of the House of Representatives shall, in all offenses punishable by not more than six years imprisonment, be privileged from arrest while Congress is in session. No Member shall be questioned nor be held liable in any other place for any speech or debate in Congress or in any committee thereof.

the halls of Senate, signaling the start of a long, arduous, yet lawful transfer of power.

> I accuse Joseph Ejercito Estrada, President of the Republic of the Philippines, of betraying public trust…[287]

Whether or not the accession to power of Gloria Macapagal Arroyo is legitimate is beyond the scope of this discussion. What is relevant are the different political processes which Congress underwent in its transition toward a formal impeachment trial and the factors which pressured Congress to be strictly adherent the rule of law and due process.

Congressional oversight through investigation in this circumstance was very procedural. Prior to holding a Senate hearing over the accusation thrown by Sen. Guingona against the incumbent president, Sen. Tatad recalls his suggestion to Senate President Drilon to defer the inquiry for just one more day "to allow for preliminary consultations within the committee chosen to preside over the investigation"[288] in accordance with the Senate Rules regarding inquiry.

The constitutionality of the investigation was questioned by some of the senators, basing their sentiments upon the potential of the inquiry to condone congressional encroachment into the exclusive province of the Executive.[289] However, mounting public pressure compelled Congress to once again examine the legality of such an investigation and determine the necessary procedures for Presidential impeachment. In fact, the Senate was so careful not to provoke the Public into violent protest that it had decided to censure the House of Congress for unjustifiably barring Chavit Singzon from delivering his testimony before its members.

The gravity of the constitutional issue elevated the debate beyond the halls of Congress and into the media spotlight. Every action of the Legislature was put under the microscope.

> "Overnight the obscure little man would become the darling of the media – talking nonstop on every channel, and hogging all newspaper headlines. But on the day before the Senate hearing, he had been barred from speaking before the House Committee on Public Order. That made terrible headlines for the House of Representatives."[290]

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[287] FRANCISCO TATAD, A NATION ON FIRE 41 (2002).
[288] *Id.* at 46.
[289] *Id.*
[290] *Id.* at 48.

With popular political energy[291] channeled into the congressional investigation, ordinary citizens began to embrace what would inevitably be another constitutional moment in Philippine history[292]. People saw themselves, through their contributions to popular support, actively participating in higher track lawmaking.[293] Congressional oversight gradually convinced the people that accountability could be answered and liability could be established. And instead of resorting to mob rule, Philippine society allowed the congressional investigation to reach a conclusion.

This case illustrates how congressional powers of oversight, while broad in scope, goes beyond the establishment of accountability and embraces a greater symbolical role in bringing popular sovereignty back to our constitutional system of government.

B. ROMULO NERI, JUN LOZADA, AND THE ZTE-NBN DEAL

Without mincing words and with a burning passion, Dean Raul Pangalangan had this to say about Romulo Neri's recent stunt of invoking Executive Privilege to circumvent the coercive powers of congressional investigations and to cover the president's involvement in the ZTE-NBN Deal:

> The most lasting legacy of President Gloria Macapagal-Arroyo, the Philippines' equivalent of George W. Bush, is the destruction of our institutions of government. She took the elaborate system of checks and balances in our Constitution post-EDSA People Power and perverted them to cover up, stonewall and frustrate every attempt by citizens to hold her accountable.[294]

While a majority of the people shared this outrage, one wonders whether or not they also shared Dean Pangalangan's timidity and wisdom of tempering passion with his constant appeal to the legitimate political processes of our democratic system. However, one thing was for sure, political momentum was riding high towards holding the executive accountable for the recent spate of scandals. The question was whether or

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[291] Ackerman, *supra* note 255.

[292] *Id.*

[293] *Id.*

[294] Raul Pangalangan, *Passion for Reason:Damaged Institutions Protect the Damagers*, PHIL. DAILY INQUIRER, Dec. 12, 2008, *available at* http://opinion.inquirer.net/inquireropinion/columns/view/20081212-177520/Damaged-institutions-protect-damagers.

not the public was willing to translate such momentum into political action and if so, in what form.

The public's reluctance to support another EDSA-type demonstration was evident during the February 29, 2008 mass action in Makati City where "the turnout of warm bodies… lagged behind intentions of support for calls for the resignation of President Gloria Macapagal-Arroyo over the $329-million national broadband network (NBN) scandal."[295] Such turnout "underscores the need for caution in relying on expressions of support for political movements. It shows that there's a long way to go before intentions, reported in opinion polls, translate into political action."[296]

> Although there are signs of increasing public outrage over the NBN scandal, a higher state of outrage is needed to send huge numbers of people to the streets. The military is watching the size of the crowd before it makes a move either to remain loyal to the commander in chief or withdraw support, like it did in 2001, when the general staff dumped Estrada.[297]

According to a survey conducted during the height of the whistleblower Rodolfo Noel Lozada, Jr.'s popularity:

> … from Feb. 21 to 24, on the eve of the 22nd anniversary of the 1986 People Power Revolution, the poll group Pulse Asia found that 69 percent of respondents in Metro Manila would support protest actions calling for the resignation of government officials. However, out of the 69 percent who supported demonstrations, only 16 percent said they would join the rallies, while 53 percent said they would not. Asked why they would not join the rallies, 26 percent said they had "more important things to do," another 26 percent said there would be no change in government, 21 percent said they needed to earn a living, 7 percent said, there was no alternative leader, and 6 percent said they were "tired" of people power.[298]

However, in another survey:

> …61 percent of Metro Manila residents believed there was a "big possibility" that the testimony of Rodolfo Noel Lozada Jr., key

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[295] Amando Doronilla, *Analysis: Cold Statistics and Warm bodies*, PHIL. DAILY INQUIRER, Mar. 4, 2008. *Available at* opinion.inquirer.net/inquireropinion/columns/view/20080304-122788/Cold-statistics-and-warm-bodies

[296] *Id.*

[297] Amando Doronilla, *Analysis: Mounting Outrage, Little Momentum*, PHIL. DAILY INQUIRER, Feb. 22, 2008.

[298] *Id.*

> witness at the Senate investigation in the NBN deal would lead to the downfall of the Arroyo government.[299]

What the Neri-Lozada-ZTE-NBN deal underscores is the gradual withdrawal of the people over the years from the Philippine tradition/culture of pandering to People Power as a first resort in neutralizing a government on the verge of collapse. Public outrage therein clamored for the government to uphold the political process.

VI. CONCLUSION

The Philippine government's integrity has been eroded by scandal after scandal. Controversies have tarnished the image of our highest offices and have left its constituents in complete and utter distrust in the democratic system of government. Many, if not all, of these controversies involve alleged acts of abuse conducted by members of specific executive departments or administrative agencies.

As Congress can create administrative agencies, define their powers and duties, fix the terms of officers and their compensation through its law making function, it is inherently empowered to check on these agencies and to ensure that they conform to the contours of the enacting statue creating them.

From a general perspective, on the one hand, congressional oversight can come as a post-enactment measure as in the case of supervision and investigation wherein congress may review certain acts of administrative agencies after the same has already been performed. Subject of course to certain limitations and conditions. On the other hand, it may come as a pre-enactment measure as in the case of a legislative veto, wherein congress is statutorily allowed to block the effectivity of a rule or regulation promulgated by an administrative agent pursuant to the subordinate law-making power delegated to it by the Legislature. This dynamic between the Legislature and Executive, as previously discussed, is the offspring of an emergent administrative state. As described by Javits & Klein:

> Administrative organization is particularly a matter of legislative concern. Details of administration, it is true, lie within the control of a particular departmental or bureau head and within his powers of correction. But the major problems of administrative organization concern Congress, for Congress has determined what duties shall be

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[299] *Id.*

> exercised by what officials, over what subjects the visitorial powers of a certain bureau or department shall extend, whether for example, prohibition enforcement is better entrusted to the Treasury or to the Department of Justice. [300]

It can be inferred therefrom that the power to inquire or to look into the activities of an administrative agency by Congress rests on two justifications: 1) A specific power of oversight is textually committed by the constitution to the Legislative; and 2) Such power flows from its implied institutional competencies as derived from its law making function.

From a practical standpoint, it can be argued that Congress plays a legitimizing role for governmental activity as the theoretical representative of the majority. For it is an essential matter of statecraft for public confidence to ride high on the legitimacy of its government and its agents. As such Congress is and should be the appropriate body to exercise such checks and balances.

Scrutiny allows Congress to play out its legitimizing role on a regular basis. As opposed to its more controversial siblings, scrutiny in the form of Congress' power of appropriation, confirmation, and the so-called question meets very little opposition from the executive branch. As such, while it may not be a full-proof mechanism against executive abuses of delegated power, it injects a steady stream of legitimacy into the activities of these agencies. The public can be said to rely more on its theoretical application rather than its practical implementation.

The validity of the Legislative Veto has been the subject of intense debate:

> Statutes containing a legislative veto provision have been criticized as a violation of the separation of powers doctrine on two grounds. First, it is argued that the Constitution forbids the delegation of any legislative power to the Executive. The second line of criticism, in contrast, concedes that Congress may delegate legislative power, but maintains that the retention of a right to veto the exercise of the delegated power is impermissible, that is, that Congress having delegated power to make law cannot retain any control over it.[301]

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[300] J. Landis, *Congressional Power of Investigation*, 40 HARV. L.REV. 169, 197 (1926).

[301] Javits & Klein, *supra* note 32, at 466 *citing Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on* S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Committee on Government Operations, 94th Cong. 2d Sess. 76, 124-25 (1976)(testimony of Antonin Scalia, Assistant Attorney General); J. BOLTON, THE LEGISLATIVE VETO 32 (1977).

While the U.S. case of Immigration Naturalization Service v. Chadha[302] and the much later Philippine case of *ABAKADA Guro Partylist v. Purisima*[303] both concur in the invalidity of the legislative veto as a violation of the principle of separation of powers, it has been argued that the legislative veto is not an encroachment into executive power as the same only pertains to delegated legislative power which does not lose such character upon delegation:

> The power to share the lawmaking role must be flexible…In delegating such authority to the Executive and reserving the right to limit thereafter the use of that authority, Congress is not exercising any power that it would have been unable to exercise in the first instance by legislation. It is doing what it regards as "necessary and proper" to effect its legislative will and to share the lawmaking power by the most efficient mechanism available. The proper use of the legislative veto neither reduces the power of the executive nor increases that of Congress.[304]

The claim that veto power violates the separation of powers presupposes that once Congress delegates a legislative power, that power ceases to be legislative, and is therefore unreachable by Congress except by statutory enactment. This is not required by either terms of the Constitution or any case law interpretations.[305]

> It is further suggested that:
> …to think of the legislation [delegating powers to the regulatory agencies] as unfinished law which the administrative body must complete before it is ready for application. In a very real sense the legislation does not bring to a close the making of the law. The congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choices between policies…[306]

As such, delegated power may properly be referred to as "inchoate law" which requires the "additional exercise of discretion" before it governs the circumstances of any case.[307] It bears noting however, that oversight isn't merely confined to a legislative review of specific rules and regulations promulgated by administrative agencies. Oversight also includes

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[302] 462 U.S. 919 (1982).
[303] G.R. No. 166715, 562 SCRA 251, Aug. 14, 2008.
[304] Javits & Klein, *supra* note 32, at 473.
[305] *Id.* at 474.
[306] *Id.* at 475, *citing* FTC v. Ruberoid Co., 343 U.S. 470 (1952).
[307] *Id.*

administrative organization and administrative efficiency. On the one hand, the inclusion of administrative organization has been included in this wise:

> Details of administration, it is true, lie within the control of a particular departmental or bureau head and within his powers of correction. But the major problems of administrative organization concern Congress, for Congress has determined what duties shall be exercised by what officials, over what subjects the visitorial powers of a certain bureau or department shall extend, whether for example, prohibition enforcement is better entrusted to the Treasury or to the Department of Justice. [308]

On the other hand, administrative efficiency is described in the terms below:

> Administrative Efficiency, even want of integrity may be due to such details of organization, but to determine whether the blame is referable to the quality of the administrative personnel or to imperfect organization demands often an extensive inquiry into the abuses alleged to exist. For such an inquiry the legislative committee with power to send for persons and papers is a necessary instrument.[309]

It is within this broad spectrum that legislative investigation has been used to inquire into the anomalous activities of administrative agencies. The exercise of such power is subject to clear constitutional limits particularly that the same must be exercised in aid of legislation, with respect to the rights of the witnesses appearing therein and in accordance with duly published rules of procedure.

Given the relative youth of our democracy, the government's efforts towards promoting popular constitutionalism does not necessarily have to result in some elaborate development of meaning. Given the youth of the post-Marcos Philippine democracy and the propensity for some political actors to call for extra-constitutional changes of administration or military adventurism, the mere popular notion of adherence to the constitutional institutions is itself a significant affirmation of popular constitutionalism. If one seeks the constitutional meaning crystallizing foremost in public opinion at present, then one infers people are setting a standard for the grounds for impeaching a sitting president and the integrity demanded of those holding a public trust.

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[308] Landis, *supra* note 302, at 197.
[309] *Id.*

The efficacy of Arroyo's vague apology and whether the acts glossed over constitute betrayal of the public trust or culpable violation of the constitution may well arise in an impeachment trial, and senator-judges may seek resonance from the opinion that prevails in the frenetic debate. The key, again, is that Congress' institutional strengths and constitutional design precisely make such a rise of popular constitutionalism possible.

The power of Congressional oversight recognizes that the system of government is no longer anchored upon the traditional Lockean concept of Constitutionalism. Rather, it departs from the image of a constitution of restraint to one that is inherently representative. Through scrutiny, investigation, and supervision, the legislature has become the great fiscalizer of the government, ensuring that its laws truly manifest the political interests transmitted by the majority through its power of suffrage.

Civil society groups, being the best catalysts of popular political energy, are the best means by which relevant issues and concerns may earn a formal voice in government. We've seen them assist in the removal of a dictatorship and a corrupt president.

However, they can also serve as a legitimizing force for legislative institution to re-channel popular support back into the formal institutions of government.

Prescinding from the potential of oversight to divert popular energy into the political process, the court's exercise of judicial review in evaluating the propriety of executive privilege in avoiding investigation must be properly framed on two levels: first the doctrinal/logical, which is articulate, and second, the intuitive/political, which is by and large kept subtle.[310]

On the one hand, it is worth noting once again that the expanded certiorari jurisdiction of the Supreme Court was not intended to totally abandon the political question doctrine. Yet, regardless of the current status of this doctrine in our jurisprudence, it is high time for the courts to allow, if not empower, another political department to check on the abuses of the Executive. After all, the Constitution has textually conferred upon Congress, a coordinate political department, the power of oversight in all its forms as a counterweight vis-à-vis the awesome powers of the Executive.

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[310] Pangalangan, *supra* note 230, at 562.

Prudence and restraint on the part of the courts from interrupting an otherwise could have been a momentous political exercise would facilitate the development of political experience of our people through their elected representatives in our Republican system of government. To borrow the words of Justice Holmes, "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."[311]

On the other hand, the court must be mindful of the greater political backdrop before which *Neri* is staged. During the height of the ZTE-NBN deal, the legislative investigation was riding high on the powerful sentiments and political passions of the general public. What is interesting to note is that the public was less willing to engage in another extra-constitutional movement and more willing to observe and participate in the legitimate political exercises at hand. Congressional oversight was the best instrument to harness this momentum. The court's should take care in not allowing itself to be an unwitting ruse in the president's attempt to erode such momentum.

The Courts must try to avoid the ill-effects that judicial review had brought in deciding the case of *Nixon*. In the aforementioned case, the Supreme Court managed to overshadow the impeachment process which had been, and should have continued to be, primary. That impact stemmed from two sources: the Court's timing and the Court's reasoning.[312]

The interval between the Court decision and presidential response afforded just enough time for the completion of the House Judiciary Committee debate and for the adoption of three articles of impeachment. But the turnover of the tapes compelled by the Court made floor debate in the House and trial in the Senate unnecessary; instead of running its full course, the impeachment process was short-circuited.[313]

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[311] Missouri, Kansas & Texas Railway Co. v. May, 194 U.S. 267, 270 (1904).

[312] Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process,* 22 U.C.L.A. L.REV. 30, 31-35 (1974)

[313] *Id.*