Inevitable Friction: Investigatory Oversight and the Runaway Executive

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He extends his gratitude to Mr. Jose Maria S. Katigbak II and to the rest of the *Journal*'s Board of Editors for their patience and exceptional editorial guidance. He likewise acknowledges Ms. Ma. Teresa Beatrice N. Jose and Ms. Angelique P. Leda for their outstanding research assistance and support in the writing of this Article.

Cite as 66 ATENEO L.J. 361 (2021).

I. INTRODUCTION

> *It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress* [*has*] *and use*[*s*] *every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize*[*s*] *these things and sift*[*s*] *them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.*
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> — Woodrow Wilson[1]

> *Ambition must be made to counteract ambition.*
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> — James Madison[2]

> *The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency*[*,*] *but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.*
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> — Louis Brandeis[3]

President Rodrigo Roa Duterte has openly clashed with the Senate Committee on Accountability of Public Officers and Investigations (also known as the Blue Ribbon Committee) in their investigation into the 2020 Commission on Audit (COA) findings on the utilization of the Department of Health budget, specifically in relation to the funds to be used in the fight against COVID-19.[4] The public controversy reveals a deep divide between

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1. WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (1885).
2. THE FEDERALIST NO. 51 (James Madison).
3. Myers v. United States, 272 U.S. 52, 293 (1926) (J. Brandeis, dissenting opinion).
4. *See* Sofia Tomacruz, *'Blatantly Unconstitutional': Executive Officials Obey Duterte Memo, Ignore Senate Hearing*, RAPPLER, Oct. 5, 2021, *available at* https://www.rappler.com/nation/executive-officials-ignore-senate-hearing-

the legislative and executive departments' appreciation of their respective roles in the constitutional framework once statutes cross the threshold of law-making and enter the realm of execution.[5]

In the "review, monitoring, and supervision"[6] by Congress of the Executive, in the consideration of public policy to oversee the implementation of existing laws, and even in the evaluation of whether new laws are necessary, there is unavoidable overlap or straddling of spheres. The blurring of lines between departments of the government has raised the question of whether the exercise of the congressional power of oversight ends up meddling with the Executive's performance of delegated authority.[7] These "turf wars," or the reconciling of jealously defended jurisdictions, become the source of inevitable friction.

The latest "Malacañang versus Senate" impasse[8] is not an isolated case. In the last few years of President Duterte's administration, varying situational disputes led to investigative oversight of executive branch agencies.[9] From the

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after-duterte-memo-october-2021 (last accessed Nov. 30, 2021) [https://perma.cc/R5KF-ZUWS].

5. *See generally* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 914-15 (2014).

6. MARTIN O. JAMES, CONGRESSIONAL OVERSIGHT 1 (2002). The power of the United States Congress resembles that of the Congress of the Philippines since the "principles of American Constitutional Law and Constitutional History are, consequently, of nearly as much weight in the Philippines as in the United States." George A. Malcolm, *Constitutional History of Philippines*, 6 A.B.A. J. 109, 110 (1920).

7. *See* Mark Anthony M. Parcia & Juan Paolo F. Fajardo, *From Lawmakers to Guardians: A Prolegomenon to Congressional Oversight as a Catalyst for Popular Constitutionalism*, 84 PHIL. L.J. 154, 163-64 (2009). The power of oversight "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 arbitrary acts of discretion." Parcia & Fajardo, *supra* note 7, at 163-64.

8. Resolution Expressing the Sense of the Senate Condemning the 4 October 2021 Memorandum from the Executive Secretary Directing All Officials and Employees of the Executive Department to No Longer Appear or Attend the Senate Blue Ribbon Committee Hearings on the 2020 Audit Report of the Commission on Audit for Being Violative of the Senate's Power of Legislative Inquiry and the People's Right to Information, P.S. Res. No. 931, 18th Cong., 3d Reg. Sess. (2021).

9. *See, e.g.*, Christia Marie Ramos, *Duque Abides by Duterte Memo, to Skip Next Senate Hearing on Pandemic Fund Mess*, PHIL. DAILY INQ., Nov. 3, 2021, *available at*

outset, President Duterte's unease was not so much with having to account to Congress for his branch's actions, but more so with the manner through which the Senators discharged their oversight duties at the public hearings.[10]

During this particular episode, President Duterte questioned the motivations of the Senators,[11] as well as the encroachment of the hearings upon the other branches' prerogatives.[12] Officially, he griped that the continued participation of his men in a seemingly endless investigation affected his department's ability to "fulfill its core mandates[,]" especially when needed most in a pandemic.[13] These were meticulously reasoned through public

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https://newsinfo.inquirer.net/1509790/duque-to-abide-by-duterte-memo-to-skip-senate-hearing-on-pandemic-fund-mess#ixzz7BPiiyCNE (last accessed Nov. 30, 2021) [https://perma.cc/8PM2-M3DU] & Bella Perez-Rubio, *DOH, DBM Execs Skip Senate Hearing After Duterte Formally Bars Them from Attending*, PHIL. STAR, Oct. 5, 2021, *available at* https://www.philstar.com/headlines/2021/10/05/2131987/doh-dbm-execs-skip-senate-hearing-after-duterte-formally-bars-them-attending (last accessed Nov. 30, 2021) [https://perma.cc/89QM-L2TP].

10. Ellson Quismorio, *'We Will Defend It': Duterte Welcomes Blue Ribbon Panel's SC Challenge on Controversial Memo*, MANILA BULL., Oct. 25, 2021, *available at* https://mb.com.ph/2021/10/25/duterte-welcomes-blue-ribbon-panels-sc-challenge-on-controversial-memo (last accessed Nov. 30, 2021) [https://perma.cc/9SSF-NRKV]. President Rodrigo Duterte said, "Just because you are clothed with the authority, [your] law-making power ... does not include berating people, shouting at people, forgetting the civility that has to be observed by everybody in and out of investigations[.]" Catherine S. Valente, *Duterte Not Budging on Cabinet Ban*, MANILA TIMES, Oct. 8, 2021, *available at* https://www.manilatimes.net/2021/10/08/news/national/duterte-not-budging-on-cabinet-ban/1817541 (last accessed Nov. 30, 2021) [https://perma.cc/6J27-M7YT].

11. Ruth Abbey Gita-Carlos, *Duterte Slams Senate Panel's 'Politicking' Ahead of 2022 Polls*, PHIL. NEWS AGENCY, Sept. 8, 2021, *available at* https://www.pna.gov.ph/articles/1152910 (last accessed Nov. 30, 2021) [https://perma.cc/FD2W-M3HU]. President Duterte said, "Now that the elections are coming near, nagging questions and accusations, *nandiyan na lahat* (they are all there)[.]" He moreover raised the question of whether these inquiries were "[i]n aid of election or legislation[.]" *Id.*

12. *See* DJ Yap, *Despite DOJ Plea, Duterte Keeps Cabinet Officials Off Senate Probe of Pharmally*, PHIL. DAILY INQ., Nov. 18, 2021, *available at* https://newsinfo.inquirer.net/1516532/despite-doj-plea-duterte-keeps-aides-off-senate-probe (last accessed Nov. 30, 2021) [https://perma.cc/2WAS-PHL8].

13. Office of the President, Memorandum from the Executive Secretary: Attendance in the Senate Blue Ribbon Committee Hearings on the 2020 Commission on

statements and in the Memorandum of the Executive Secretary dated 4 October 2021 (Memorandum) directing all officials and employees not to appear at or attend the Blue Ribbon hearings.[14] The Memorandum's grounds would introduce novel excuses for executive functionaries to refuse to divulge information officially subpoenaed by the Senate.[15]

How are these arguments to be reconciled with current law and jurisprudence on investigatory oversight and the recognized exceptions thereto?

This brief Article attempts to provide an answer through an overview of the congressional oversight power, with emphasis on legislative investigations. Using a comparative lens to examine American constitutional jurisprudence, the Article evaluates the enforcement of congressional subpoenas within a contemporary and historical context; discusses when privilege invoked to withhold information from Congress is adequate as justification; and considers the legal issues arising from the tension between the congressional oversight role and the Executive's requirement of reasonable discretion in the implementation of programs.

II. OVERSIGHT CANON

There are two types of hearings: (1) legislative and (2) oversight. Legislative hearings focus on particular bills.[16] In oversight hearings, on the other hand, focus remains upon "the functioning of some [ ] program or agency[,]"[17] with the agenda being "its efficiency, [or] obedience to statutory [will, reforms, or problems]," typically within the "private sector" arising from the implementation of laws.[18]

A. Definitions

Five-time House Speaker Jose de Venecia, Jr. wrote that "[t]he exercise of legislative oversight is among [ ] the most critical functions of the House of

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Audit Report (Oct. 4, 2021) [hereinafter Memorandum from the Executive Secretary].

14. *Id. See also* P.S. Res. No. 931.

15. *See* P.S. Res. No. 931, whereas cl. para. 9.

16. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 149 (1989).

17. *Id.*

18. *Id.*

Representatives. It is one of the greatest expressions of [the Philippine] system of democratic representation."[19]

Congress' definition of legislative oversight is "the process by which Congress takes an active role in understanding[,] monitoring[,] and evaluating the performance of state bodies and instrumentalities and applies this knowledge to its three other functions, namely, making laws and public policy, setting budgets, and raising revenues."[20]

The Philippine definition of legislative oversight tracks the understanding of the concept in the United States (U.S.).[21] American oversight scholar Professor Joel D. Aberbach defines oversight as the "congressional review of the actions of [ ] departments, agencies, and commissions, and of the programs and policies they administer, including review that takes place during program and policy implementation[,] as well as afterward."[22]

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19. Congressional Planning and Budget Department of the House of Representatives, Governing the Philippine Bureaucracy: Issues and Challenges of Legislative Oversight, at ix, *available at* https://cpbrd.congress.gov.ph/images/PDF%20Attachments/Special%20Publications/Oversightbook.pdf (last accessed Nov. 30, 2021) [https://perma.cc/QE8H-VPSM].

20. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 5. *See also* A Resolution Reconstituting the Congressional Oversight Committee in the House of Representatives, H. Res. No. 268, whereas cl. para. 3, 16th Cong., 1st Reg. Sess. (2013).

21. The United States (U.S.) Congress' own definition of oversight is "the review, monitoring, and supervision of the executive and the implementation of public policy[.]" Joint Committee on the Organization of Congress, Final Report on the Organization of Congress, House Report 103-413, Vol. 2; 103rd Cong., 1st Sess. (December 1993).

    The U.S. Congressional Research Service notes that the investigation of "how statutes, budgets, and policies [ ] implemented by the [E]xecutive branch enables Congress to assess whether ... programs [are administered] in an effective, efficient, and economical manner and to gather information [for] legislation." Christopher M. Davis, et al., Congressional Oversight Manual, at 2, *available at* https://crsreports.congress.gov/product/pdf/RL/RL30240/37 (last accessed Nov. 30, 2021).

22. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 5 (citing JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 2 (1990)).

The focus of effective oversight is to ensure that the congressional will is respected.[23] Legislatures represent the people as the highest policy-making body of the government.[24] Their actions and decisions are supposed to advance the interests of their constituencies.[25]

> Congress has always been and must always be the theat[er] of contending opinions; the forum where the opposing forces of political philosophy meet to measure their strength; where the public good must meet the assaults

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23. *See* Neri v. Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, 549 SCRA 77, 284 (2008) (J. Carpio, dissenting and concurring opinion).

> [T]he 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.

Neri, 549 SCRA at 284 (J. Carpio, dissenting and concurring opinion).

24. *See* Intellectual Property Association of the Philippines v. Ochoa, G.R. No. 204605, 797 SCRA 134, 168 (2016) (J. Brion, concurring opinion) (citing PHIL. CONST. art. VI, § 1). The Congress remains "supreme in its authority to enact laws[.]" *Intellectual Property Association of the Philippines*, 797 SCRA at 168 (J. Brion, concurring opinion) (citing PHIL. CONST. art. VI, § 1).

25. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 13-14.

> Thus, legislators would have enormous interest in the executive department's implementation of the laws and policies because these affect the people either as the intended beneficiaries of government services or as political constituencies of the elected leaders.
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> Essentially, the focus of oversight attention would center on immediate outputs of the agencies — in terms of efficiency, economy, and effectiveness — and the strategic outcomes of ... legislation and policy decisions[,] and how these impact [ ] the quality of life of the ordinary citizen.

Id.

> of[ ] local and sectional interests; [and] in a word, the appointed place where the nation seeks to utter its thought and register its will.[26]

B. Constitutional Basis

In the U.S., the Constitution is silent on any express oversight power.[27] And yet, it has long been treated indubitably as one inherent in or implied from the power to legislate.[28] Hence, the need for expressing the same in constitutional language was considered superfluous.[29]

The power of oversight is also derived from the various express powers of Congress.[30] Its philosophical underpinning is the Constitution's system of

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26. James A. Garfield, *A Century of Congress*, ATLANTIC, Apr. 1877, *available at* https://www.theatlantic.com/magazine/archive/1877/04/a-century-of-congress/519708 (last accessed Nov. 30, 2021) [https://perma.cc/VRN9-7CBN].

27. Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 189 (2013). However, Professor Jamelle C. Sharpe is of the opinion that the U.S. Constitution actually "explicitly contemplates" the exercise of congressional oversight in two instances limited only to "Congress's information-gathering authority[,]" namely: (1) in "Article I, Section [7, which] requires the President to include with his veto of legislation 'objections' to be considered by both houses of Congress[;]" and (2) in "Article II, Section [3, which] requires the President to 'from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.'" *Id.* at 189 n. 16 (citing U.S. CONST. art. I, § 7, cl. 2; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2181 (1990); & U.S. CONST. art. II, § 3).

28. *Id.* & Watkins v. United States, 354 U.S. 178, 187 (1957).

29. Arthur M. Schlesinger, Jr. stated that

> > no provision [of] the American Constitution gave Congress express authority to conduct investigations and compel testimony. But it was not considered necessary to make an explicit grant of such authority. The power to make laws implied the power to see whether they were faithfully executed. The right to secure needed information had long been deemed by both the British Parliament and the colonial assemblies as a necessary and appropriate attribute of the power to legislate.
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> 1 ARTHUR M. SCHLESINGER, JR. & ROGER BRUNS, CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974 xix (1975).

30. Joint Committee on the Organization of Congress, *supra* note 21.

checks and balances.[31] "It is implied in the legislature's authority, among other powers and duties, to appropriate funds, enact laws, raise and support armies, provide for a navy, declare war, and impeach and remove ... the President, Vice President, and other civil officers."[32]

In the Philippine Constitution, there is also no express constitutional mention of oversight *per se*. However, the same is conceded to be a necessary auxiliary to the legislative power of Congress.[33] Accordingly, "the power of the purse of Congress[,] or power to review appropriations[;]" the power "to create, abolish, and reorganize government agencies[;]" and the "power of impeachment and confirmation of executive appointments are [all] part of the overall oversight functions of the [legislature]."[34]

Chief Justice Reynato S. Puno,[35] in his separate opinion in *Macalintal v. Commission on Elections*,[36] captured the jurisprudential comprehension of this crucial constitutional mandate on how

31. *See* Steven D. Schwinn, *The Misguided On-Off Theory of Congressional Authority*, 95 CHI.-KENT L. REV. 551, 552 (2020).

32. Joint Committee on the Organization of Congress, *supra* note 21 (citing U.S. CONST. art. I, § 8 & art. II, §§ 2 & 4).

33. The Supreme Court has ruled that "the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function." Arnault v. Nazareno, 87 Phil. 29, 45 (1950).

34. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 6. Furthermore,

> Congress' power of impeachment and confirmation of executive appointments are part of the overall oversight functions of the legislative. Further, the role of Congress as *fiscalizer* under the 'check and balance' principle has highlighted its oversight role in curbing graft and corruption, promoting economy, efficiency[,] and effectiveness in use of public resources, and in promoting transparency and accountability in government operations.

Id. at 6-7 (emphasis supplied).

35. Chief Justice Reynato S. Puno was appointed as Chief Justice of the Supreme Court in 2006. During the promulgation of the *Macalintal v. Commission on Elections* decision, he was serving as an Associate Justice of the Supreme Court. *See* Supreme Court E-Library, Chief Justice Reynato S. Puno, *available at* https://elibrary.judiciary.gov.ph/supremecourtjustices/chiefjustice/132 (last accessed Nov. 30, 2021) [https://perma.cc/HCG5-HDFB].

36. Macalintal v. Commission on Elections, G.R. No. 157013, 405 SCRA 614 (2003).

> [t]he 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. As well stressed by one scholar, the legislature 'fixes the main lines of substantive policy and is entitled to see that administrative policy is in harmony with it; it establishes the volume and purpose of public expenditures and ensures their legality and propriety; it must be satisfied that internal administrative controls are operating to secure economy and efficiency; and it informs itself of the conditions of administration of remedial measure.'[37]

C. Methods and Purposes

A key question in the study of legislative control is the issue of agency.[38] When authority to implement a program is delegated to the bureaucracy as an agent, how does Congress provide safeguards to ensure that its legislative will is implemented as intended?

Congressional will is central to the operations of the Executive,[39] which, with the sole exception of the President, owes its existence to statutes establishing its agencies,[40] their enumerated functions and limitations,[41] and

37. *Id.* at 704-05 (J. Puno, concurring and dissenting opinion) (citing LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 592 (1948)) (emphasis omitted).

38. *See* Charles E. Gilbert & Max M. Kampelman, *Legislative Control of the Bureaucracy*, 292 ANNALS AM. ACAD. POL. & SOC. SCI. 76, 77 (1954).

39. *See, e.g.*, Philippine Constitution Association v. Enriquez, G.R. No. 113105, 235 SCRA 506, 555 (1994) (J. Vitug, concurring opinion). In the context of appropriations made by Congress, following legislative identification of and the corresponding appropriations for activities or projects, "the Executive is behooved, with exclusive responsibility and authority, to see to it that the legislative will is properly carried out." *Philippine Constitution Association*, 235 SCRA at 555 (J. Vitug, concurring opinion).

40. For example, the Introductory Provisions of the Administrative Code make reference to an "executive department *created by law*." Instituting the "Administrative Code of 1987" [ADMIN. CODE], Executive Order No. 292, § 2 (7) (1987) (emphasis supplied).

41. *See* Teng v. Pahagac, G.R. No. 169704, 635 SCRA 172, 184 (2010) (citing A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Ensure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442, art. 5 (1974) (as amended) & Philippine Apparel Workers Union v. National Labor Relations Commission, G.R. No. L-50320, 106 SCRA 444, 463-64 (1981)).

their annual appropriations for personnel, maintenance, and operating expenses.[42]

Oversight occurs through a wide variety of avenues, activities, folkways, and complexities, but it has fundamentally been associated with the legislative power to appropriate.[43] To "ensure public accountability" on enacted legislation, including the annual appropriation acts, Congress summons government agency officials to present reports and plans during budget hearings.[44] For violations and misconduct, even if such should descend to the level of crime, "blue ribbon" investigations,[45] as well as legislative inquiries,

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> In the exercise of its power to promulgate implementing rules and regulations, an implementing agency, such as the Department of Labor, is restricted from going beyond the terms of the law it seeks to implement; it should neither modify nor improve the law. The agency formulating the rules and guidelines cannot exceed the statutory authority granted to it by the legislature.

Teng, 635 SCRA at 184 (citing LABOR CODE, art. 5 & *Philippine Apparel Workers Union*, 106 SCRA at 463-64).

42. As outlined in *Guingona, Jr. v. Carague*, the second stage in the government's budgeting process involves "[l]egislative authorization[,]" where "Congress enters the picture and deliberates or acts on the budget proposals of the President, and Congress[,] in the exercise of its own judgment and wisdom[,] formulates an appropriation act precisely following the process established by the Constitution[.]" Guingona, Jr. v. Carague, G.R. No. 94571, 196 SCRA 221, 236 (1991) (emphases omitted).

43. *See also* Abakada Guro Party List v. Purisima, G.R. No. 166715, 562 SCRA 251, 287 (2008) (citing *Macalintal*, 405 SCRA at 707-24 (J. Puno, concurring and dissenting opinion)).

44. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 2. *See, e.g.*, Senate of the Philippines v. Ermita, G.R. No. 169777, 488 SCRA 1, 31 (2006).

45. In the U.S., the Senate creates select committees to investigate. In the Philippines, there is the Senate Blue Ribbon Committee, officially known as the Committee on Accountability of Public Officers and Investigations. The jurisdiction of the Committee extends to

> [a]ll matters relating to, including investigation of, malfeasance, misfeasance[,] and nonfeasance in office by officers and employees of the government, its branches, agencies, subdivisions and instrumentalities; implementation of the provision of the Constitution on nepotism; and investigation of any matter of public interest on its own initiative or brought to its attention by any member of the Senate.

are usually undertaken *ex-post*.[46] The function then of legislative oversight appears to be the "attempt[ ] to detect and remedy executive-branch violations of legislative goals."[47]

In his concurring and dissenting opinion in *Macalintal*, Chief Justice Puno discussed the three main methods through which oversight is exercised by Congress.[48] He began with *legislative scrutiny*, of which the power of appropriation is the primary base.[49] As the adage goes, "the [P]resident proposes, Congress disposes[.]"[50] Chief Justice Puno stated that, "[*c*]*onsequently, administrative officials appear every year before the appropriation committees of Congress to report and submit a budget estimate and a program of administration for the succeeding fiscal year. During budget hearings, administrative officials defend their budget proposals*."[51] Moreover, "*Congress exercises legislative scrutiny thr*[*ough*] *its power of confirmation*."[52]

Rules of the Senate, rule X, § 13 (2), 10th Cong. (July 25, 1995) (as amended). *See* Resolution Amending Section 13 (10), (13), (14), (20), (25), and (39) Rule X of the Rules of the Senate and Creating the Committee on Sustainable Development Goals, Innovation and Futures Thinking, S. Res. No. 9, at 2, 18th Cong., 1st Reg. Sess. (2019). *See also* Neri v. Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, 564 SCRA 152, 230 (2008) (resolution of motion for reconsideration) ("[I]t is evident that the Senate has determined that its main rules are intended to be valid from the date of their adoption until they are amended or repealed.").

46. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 2.

47. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984) & Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 2 (citing Keith E. Hamm & Roby D. Robertson, *Factors Influencing the Adoption of New Methods of Legislative Oversight in the U.S. States*, 6 LEGIS. STUD. Q. 133 (1981)).

48. *Macalintal*, 405 SCRA at 707-24 (J. Puno, concurring and dissenting opinion).

49. *Id.* at 707.

50. SAMUEL KERNELL, ET AL., THE LOGIC OF AMERICAN POLITICS 337 (2009). *See also Macalintal*, 405 SCRA at 721 (J. Puno, concurring and dissenting opinion) (citing Jacob K. Javits & Gary J. Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 460 (1977)).

51. *Macalintal*, 405 SCRA at 707 (J. Puno, concurring and dissenting opinion) (emphasis supplied).

52. *Id.* at 711 (emphasis supplied).

Congress also exercises oversight through *legislative supervision*.[53] Chief Justice Puno expounded on its meaning in *Macalintal* as follows —

> 'Supervision' connotes a continuing and informed awareness on the part of a congressional committee regarding *executive operations* in a given administrative area. While both congressional scrutiny and investigation involve inquiry into *past executive branch* actions in order to influence future executive branch performance, *congressional supervision allows Congress to scrutinize the exercise of delegated law-making authority, and permits Congress to retain part of that delegated authority*.
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> *Congress exercises supervision over the executive agencies through its veto power.*[54]

Chief Justice Puno further stated that "[w]hile congressional scrutiny is regarded as a passive process of looking at the facts that are readily available, [*legislative*] *investigation* involves a more intense digging of facts."[55] This most familiar method of oversight is *expressly* granted under Article VI, Section 21 of the 1987 Constitution, which provides that "[t]he Senate or the House of Representatives or any of its respective committees 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."[56]

III. LEGISLATIVE INVESTIGATION

High-profile investigatory oversight endeavors may likely constitute a fraction of the total congressional oversight efforts, operating under the radar. Routine and regular review, monitoring, and supervision also take place in other contexts. For example, "based on the nature of the [c]ongressional intent[,]" Congress relies on the following oversight procedures — "legislative, investigative, fiscal, evaluative, interpretative, supervisory, affirmative[,] and prohibitive."[57]

The importance of this investigative function in the government structure is constitutionally, and also universally, recognized —

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53. *Id.* at 719.

54. *Id.* (citing BERTRAM MYRON GROSS, THE LEGISLATIVE STRUGGLE: A STUDY IN SOCIAL COMBAT 137 (1953)).

55. *Macalintal*, 405 SCRA at 712 (J. Puno, concurring and dissenting opinion) (citing GROSS, *supra* note 54, at 138) (emphasis omitted).

56. PHIL. CONST. art VI, § 21.

57. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at 23.

> The power of the 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 [ ] [g]overnment to expose corruption, inefficiency[,] or waste.[58]

Congressional oversight of the Executive branch, with investigation being its most visible iteration, is separation of powers in action —

> It is this very separation that makes the congressional right to obtain information from the [E]xecutive so essential, if the functions of the Congress as the elected representatives of the people are adequately to be carried out. ... Unless the Congress possesses the right to obtain executive information, its power of oversight of administration ... becomes a power devoid of most of its practical content, since it depends for its effectiveness solely upon information parceled out *ex gratia* by the [E]xecutive.[59]

The unbridled delegation of administrative discretion engenders apprehensions of the erosion of democratic principles.[60] Thus, "[t]he principal value of justifying legislative monitoring of the [E]xecutive[ ] ... is to ensure the triumph of representative government by lines of accountability running through the organ that embodies popular sovereignty. Representativeness, rather than effectiveness, is the irreducible core."[61]

John Stuart Mill, British parliamentarian and philosopher, in his "Considerations on Representative Government," discussed the integral function of representative assemblies —

> [T]he proper office of a representative assembly 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 questionable; to censure them if found condemnable, and, if the men who

58. *Watkins*, 354 U.S. at 187.

59. *Ermita*, 488 SCRA at 57 (citing Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CAL. L. REV. 3, 11-12 (1959)) (emphasis omitted).

60. Bert A. Rockman, *Legislative-Executive Relations and Legislative Oversight*, 9 LEGIS. STUD. Q. 387, 414 (1984).

61. *Id.*

> compose the government abuse their trust, ... to expel them from office, and either expressly or virtually appoint their successors.[62]

Investigation serves, and is served by, another equally important function. Woodrow Wilson, "best remembered for his legislative accomplishments[,]"[63] wrote that "[q]uite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion."[64] The former President further opined that

> [i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. ... *The informing function* of Congress should be preferred even to its legislative function.[65]

Senators William S. Cohen and George J. Mitchell noted that representative government is designed "to allow a free people to drag realities out into the sunlight and demand a full accounting from those who are permitted to hold and exercise power."[66] It is through this "dragging out" of realities that Congress is able to spotlight the issues of the day, allowing informed judgments to be made about executive performance.

A. Philippine Setting

Arnault v. Nazareno,[67] decided in 1950, was the first Philippine case to have the scope of investigatory power reviewed by the Supreme Court. The controversy did not involve the Senate Blue Ribbon Committee, which was only established the year prior through the initiative of Senator Justiniano S. Montano.[68] The investigation of Jean Arnault was instead undertaken by a

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62. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 104 (1861).

63. WORLD WAR I: PEOPLE, POLITICS, AND POWER 168 (William L. Hosch ed., 2010).

64. WILSON, *supra* note 1, at 297.

65. *Id.* at 303 (emphasis supplied).

66. WILLIAM S. COHEN & GEORGE J. MITCHELL, MEN OF ZEAL: A CANDID INSIDE STORY OF THE IRAN-CONTRA HEARINGS 305 (1988).

67. Arnault v. Nazareno, 87 Phil. 29 (1950).

68. With fellow Liberal Party Senator Tomas Cabili and colleagues fiscalizing President Elpidio Quirino (as a personal political vendetta), Justiniano Montano proposed the creation of the Blue

special committee.[69] *Bengzon, Jr. v. Senate Blue Ribbon Committee*[70] followed in 1991 to establish the contours of the investigatory oversight power.[71] Both *Arnault* and *Bengzon, Jr.*, however, reviewed the exercise of the power of investigation as employed only against private individuals.

Senate of the Philippines v. Ermita[72] and *Neri v. Senate Committee on Accountability of Public Officers and Investigations*[73] are landmark cases where the Court's intervention demarcated the reach of congressional investigatory oversight in the context of the confining doctrine of the President's executive privilege. The impact of these cases on constitutional equipoise will be discussed herein. As for their effects on the exercise of oversight power, there has been a healthy history of its use by Congress and abundant proof of its utility for Congressional purposes.[74]

Ribbon Committee with the purview of investigating allegations of graft and corruption in the executive branch. John Sidel, *Walking in the Shadow of the Big Man: Justiniano Montano and Failed Dynasty Building in Cavite 1935-1972*, *in* AN ANARCHY OF FAMILIES: STATE AND FAMILY IN THE PHILIPPINES 130 (Alfred W. McCoy ed., 2009).

69. *Arnault v. Nazareno*, 87 Phil. at 32 & 34. The investigation of the Buenavista and the Tambobong Estates deal, through which the government was allegedly defrauded ₱5,000,000, was conducted by a special committee created by Senate Resolution No. 8. *Id.*

70. Bengzon, Jr. v. Senate Blue Ribbon Committee, G.R. No. 89914, 203 SCRA 767 (1991).

71. *See* Bernard Joseph B. Malibiran, *Examining Executive Privilege in Light of E.O. 464: A Comment on Senate of the Philippines, et al. v. Eduardo Ermita, et al.*, 51 ATENEO L.J. 211, 218-19 (2006) (citing *Bengzon, Jr.*, 203 SCRA at 777).

72. Senate of the Philippines v. Ermita, G.R. No. 169777, 488 SCRA 1 (2006).

73. Neri v. Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, 549 SCRA 77 (2008) & Neri v. Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, 564 SCRA 152 (2008) (resolution of motion for reconsideration).

74. Several notable controversies in contemporary local history have been investigated by the Blue Ribbon Committee, including: the Public Estates Authority (PEA)-Amari scam (1995); the "Expo Filipino" scam (1998); the *Juetengate* scandal (2000); the PIATCO-NAIA Terminal 3 scam (2002); the Macapagal Boulevard scam (2003); the Fertilizer Fund scam (2004); the "Hello *Garci*" scandal (2005); the NBN–ZTE deal corruption scandal (2007); the Euro Generals scandal (2008); the 2011 Armed Forces of the Philippines corruption scandal; the Priority Development Assistance Fund scam (2013); the Bangladesh Bank robbery (2016); the 2016 Bureau of Immigration bribery scandal; the 2017

Bureau of Customs drug smuggling scandal; the Dengvaxia controversy (2017); the Good Conduct Time Allowance and Ninja cops controversies (2019); and the Philippine Health Insurance Corporation corruption scandals (2020–2021). *See generally* Chavez v. Public Estates Authority, G.R. No. 133250, 415 SCRA 403, 413-14 (2003); Laurel v. Desierto, G.R. No. 145368, 381 SCRA 48, 54-55 (2002); Estrada v. Desierto, G.R. Nos. 146710-15, 353 SCRA 452, 478 (2001) (citing Juliet L. Javellana, *Guingona Says Erap Got ₱290M*, PHIL. DAILY INQ., Oct. 6, 2000, at A1 & A18); Agan, Jr. v. Philippine International Air Terminals Co., Inc., G.R. No. 155001, 402 SCRA 612, 723 n. 79 (2003) (J. Panganiban, separate opinion); Jess Diaz & Nikko Dizon, *COA: P1.1-B Macapagal Boulevard Not Overpriced*, PHIL. STAR, May 1, 2003, *available at* https://www.philstar.com/headlines/2003/05/01/204410/coa-p11-b-macapagal-boulevard-not-overpriced (last accessed Nov. 30, 2021) [https://perma.cc/JP8Q-VKJM]; *Ermita*, 488 SCRA at 31; David Dizon, *Senate Probe Digs Deeper Into 'Hello Garci'*, ABS-CBN NEWS, Nov. 29, 2011, *available at* https://news.abs-cbn.com/nation/11/29/11/senate-probe-digs-deeper-hello-garci (last accessed Nov. 30, 2021) [https://perma.cc/E5D5-RZ6J]; *Neri*, 549 SCRA at 103 (citing Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract With the ZTE and the Role Played by the Officials Concerned in Getting It Consummated, and to Make Recommendations to Hale to the Courts of Law, the Persons Responsible for Any Anomaly in Connection Therewith and to Plug Loopholes, If Any, in the BOT Law and Other Pertinent Legislations, P.S. Res. No. 127, 14th Cong., 1st Reg. Sess. (2007)); Dela Paz v. Senate Committee on Foreign Relations, G.R. No. 184849, 579 SCRA 521, 527-28 (2009); Christina Mendez, *Blue Ribbon to Resume Probe on AFP Corruption*, PHIL. STAR, Mar. 19, 2011, *available at* https://www.philstar.com/headlines/2011/03/19/667263/blue-ribbon-resume-probe-afp-corruption (last accessed Nov. 30, 2021) [https://perma.cc/ES7N-4MWP]; Re: Allegations Made Under Oath at the Senate Blue Ribbon Committee Hearing Held on September 26, 2013 Against Associate Justice Gregory S. Ong, Sandiganbayan, A.M. No. SB-14-21-J, 736 SCRA 12, 53 (2014); Chrisee Dela Paz, *Senate to 'Close Chapter' on William Go at 3rd Hearing on Stolen Funds*, RAPPLER, Mar. 26, 2016, *available at* https://www.rappler.com/nation/senate-probe-bangladesh-bank-heist-william-go (last accessed Nov. 30, 2021) [https://perma.cc/FEX8-7A2F]; Maila Ager, *Senators Adopt Report Recommending Raps vs BI Execs Over Bribery Scandal*, PHIL. DAILY INQ., Mar. 20, 2018, *available at* https://newsinfo.inquirer.net/976816/senate-panel-report-recommend-filing-charges-bi-execs-bureau-of-immigration-bribery-scandal (last accessed Nov. 30, 2021) [https://perma.cc/K5GC-STFD]; Resolution Directing the Senate Committee on Accountability of Public Officers and Investigations (Blue Ribbon) to Conduct an Inquiry, in Aid of Legislation, Into the P6.4 Billion Worth of Shabu Shipment From China, on the Possible Malfeasance,

IV. THE CONTEMPT POWER

The Constitution does not explicitly grant Congress the authority to access records or materials held by the Executive, or to issue subpoenas to secure documents or testimony.

In *McGrain v. Daugherty*,[75] Justice Willis Van Devanter acknowledged that although it is not directly stated under the Constitution, Congress does have the power to compel witnesses and testimony "to [obtain] information in aid of the[ir] legislative function[.]"[76]

> We are of [the] opinion that the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history — the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action [—] and both houses have employed the power accordingly up to the present time.[77]

To intelligently oversee or to simply exercise its power to legislate, however, Congress must necessarily have access to information in the custody

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Misfeasance, and Nonfeasance of Bureau of Customs (BOC) Officials and Employees, P.S. Res. No. 425, 17th Cong., 2d Reg. Sess. (2017); Jee Y. Geronimo, *Gordon Vows 'Hard-Hitting' Report as Senate Ends Dengvaxia Probe*, RAPPLER, Mar. 13, 2018, *available at* https://www.rappler.com/nation/198046-gordon-vows-hard-hitting-report-senate-ends-dengvaxia-probe/ (last accessed Nov. 30, 2021) [https://perma.cc/JRL4-SM5C]; Lian Buan, *'Palpak!' Ill-prepared BuCor List Wrongly Grants GCTA to Janet Napoles*, RAPPLER, Sept. 12, 2019, *available at* https://www.rappler.com/nation/ill-prepared-bureau-corrections-list-wrongly-grants-gcta-janet-napoles (last accessed Nov. 30, 2021) [https://perma.cc/96EJ-87CZ]; Amita Legaspi, *15 Senators Sign Blue Ribbon Report on Ninja Cops — Gordon*, GMA NEWS, Nov. 5, 2019, *available at* https://www.gmanetwork.com/news/topstories/nation/714242/14-senators-sign-blue-ribbon-report-on-ninja-cops-gordon/story (last accessed Nov. 30, 2021) [https://perma.cc/LBD9-AAM2]; & Mario Casayuran, *Gordon's Blue Ribbon Committee Report Names Garin, PhilHealth Vice Presidents, as Behind Irregularities*, MANILA BULL., Aug. 25, 2020, *available at* https://mb.com.ph/2020/08/25/gordons-blue-ribbon-committee-report-names-garin-philhealth-vice-presidents-as-behind-irregularities (last accessed Nov. 30, 2021) [https://perma.cc/ZNW9-BAPU].

75. McGrain v. Daugherty, 273 U.S. 135 (1927).

76. *Id.* at 175.

77. *Id.* at 174.

of the Executive.[78] Although there is general compliance by the Executive with requests made by Congress for information, these "requests" can sometimes be "unavailing," and such "information which is volunteered is not always accurate or complete[.]"[79]

Usually, the threat of flexing the appropriation power[80] or holding up confirmations would be enough, but when the same proves insufficient, the U.S. Supreme Court has determined that "some means of compulsion [is] essential" for Congress to secure what it needs.[81] When the information sought is blocked, or the customary negotiation and accommodation proves unproductive,[82] a subpoena *duces tecum* or *ad testificandum* may issue.[83]

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78. *See id*. at 175.

> A legislative body *cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change*; and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it.

McGrain, 273 U.S. at 175 (emphasis supplied).

79. *McGrain*, 273 U.S. at 175.

80. "Similarly, Congress may decrease or increase an agency's budget, in the annual appropriations process, in order to express its views on the mission of the agency and on whether more or less enforcement is desirable." GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 431 (2d ed. 1991).

Accordingly, the impetus of Congressional oversight is highlighted in "the persistence of Congress and its willingness to adopt political penalties for executive noncompliance. Congress can win most of the time — if it has the will — because its political tools are formidable." Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2002).

81. *McGrain*, 273 U.S. at 175.

82. Todd Garvey, Congressional Subpoenas: Enforcing Executive Branch Compliance, at 1, *available at* https://crsreports.congress.gov/product/pdf/R/R45653 (last accessed Nov. 30, 2021) (citing United States v. American Tel. & Tel. Co., 567 F.2d 121, 127 (1977) (U.S.)).

83. Garvey, *supra* note 82, at 1 (citing *American Tel. & Tel. Co.*, 567 F.2d at 127; RULES OF THE SENATE, rule XXVI (1) (U.S.); & RULES OF THE HOUSE OF REPRESENTATIVES, rule XI, cl. 2 (m) (3) (U.S.)).

A. Subpoena and Inherent Contempt

A subpoena, in the absence of process to enforce it, cannot be effective for its purpose.[84] It risks being diminished and losing its efficacy as a demand with any constitutional weight.[85] The *ratio* for the contempt power is thus expressed in the following manner — absent any contempt power, the House would be "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."[86]

The power to punish for contempt rests upon the right of self-defense[87] or self-preservation.[88] That is, in the words of Chief Justice Edward Douglass White, "the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed[,]"[89] necessitates the contempt power.

Justice Alejo Labrador, in his *ponencia* in *Arnault v. Balagtas*,[90] elaborated on this necessity —

> *The principle that Congress or any of its bodies has the power to punish recalcitrant witnesses is founded upon reason and policy. Said power must be considered implied or incidental to the exercise of legislative power, or necessary to effectuate said power. How could a legislative body obtain the knowledge and information on which to base intended legislation if it cannot require and compel the disclosure of such knowledge and information, if it is impotent to punish a defiance of its power and authority? ... And how could the authority and power become complete if for every act of refusal, every act of defiance, every act of contumacy against it, the legislative body must resort to the judicial department for the appropriate remedy, because it is impotent by itself to punish or deal therewith, with the affronts committed against its authority or dignity.*[91]

As for compliance, all are bound by the legal obligation to honor a duly issued and valid congressional subpoena, absent any valid and overriding

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84. *See* Garvey, *supra* note 82, at 2.

85. *Id.* (citing *McGrain*, 273 U.S. at 174).

86. Anderson v. Dunn, 19 U.S. 204, 228 (1821).

87. United States v. Cable News Network, Inc., 865 F. Supp. 1549, 1552 (S.D.Fla. 1994) (U.S.) (citing Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 796-98 (1987)).

88. Marshall v. Gordon, 243 U.S. 521, 542 (1917).

89. *Id.*

90. Arnault v. Balagtas, 97 Phil. 358 (1955).

91. *Id.* at 370 (emphasis supplied).

privilege or other legal justification.[92] Under Philippine case law, when the inquiry is "in aid of legislation" pursuant to Section 21 of the Constitution, such appearance is "mandatory."[93]

Congressional contempt power, implied or inherent, is more commonly used in the Philippines in contrast to the U.S., which has long since resorted to reliance on statutory mechanisms.[94] It seems that the American Legislature is ill at ease with recourse to its inherent contempt power.[95]

B. Statutory Contempt

Jurney v. MacCracken[96] provides the historical background of statutory contempt in the U.S. — the said law was enacted "because imprisonment

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92. *See Watkins*, 354 U.S. at 187-88. Further,

> [i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees[,] and to testify fully with respect to matters within the province of proper investigation.

Watkins, 354 U.S. at 187-88.

93. *Ermita*, 488 SCRA at 57-58.

94. Under the U.S. Code, "any person who 'willfully' fails to comply with a properly issued committee subpoena for testimony or documents is guilty of a misdemeanor, punishable by a substantial fine and imprisonment for up to one year." Garvey, *supra* note 82, at 4 (citing 2 U.S.C. § 192).

Further, "[t]he subpoena that gives rise to the contempt must have been issued for a legislative purpose, be pertinent to the matter under inquiry, and relate to a matter within the House or Senate committee's jurisdiction." Garvey, *supra* note 82, at 4 n. 25 (citing Senate Permanent Subcommittee v. Ferrer, 199 F. Supp. 3d 125, 134-38 (D.D.C. 2016) (U.S.)).

Accordingly, "[u]nder this process, either house of Congress may unilaterally authorize one of its committees or another legislative entity to file a suit in federal district court seeking a court order declaring that the subpoena recipient is legally required to comply with the demand for information." Garvey, *supra* note 82, at 5 (citing 2 U.S.C. §§ 288b & 288d; 28 U.S.C. § 1365; & Committee on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 94 (D.D.C. 2008) (U.S.)).

95. Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 254 (1978). "There is something unseemly about a House of Congress getting into the business of trial and punishment." *Id.*

96. Jurney v. MacCracken, 294 U.S. 125 (1935).

limited to the duration of the session was not considered sufficiently drastic [as] a punishment for contumacious witnesses."[97] The purpose of statutory contempt "was merely to supplement the [inherent] power of contempt by providing for additional punishment[.]"[98]

A recent newspaper editorial decried the abuse of the local inherent contempt power,[99] which raised a query as to why Philippine Senators could not be more like their American counterparts.[100] In similar situations, proceedings against a contumacious witness who refuses to comply with a subpoena would be delegated to the prosecutorial arm of the government.[101]

The U.S. may have augmented its arsenal through statutory enforcement, but Philippine legislators may, if so minded, also resort to the same statutory infrastructure. In fact, our Revised Penal Code allows for similar recourse. Under the chapter on "Crimes Against Popular Representation," more specifically under "Crimes Against Legislative Bodies and Similar Bodies," there is Article 144, entitled "Disturbance of Proceedings," which imposes the penalty of imprisonment or fine.[102] The chapter on "Assault Upon, and Resistance and Disobedience to Persons in Authority and Their Agents" also includes Article 150, entitled "Disobedience to Summons Issued by Congress, Its Committees or Subcommittees, by the Constitutional Commissions, Its

97. *Id.* at 151 (citing CONG. GLOBE, 34th Cong., 3d. Sess. 404-05 (1856)).

98. *Jurney*, 294 U.S. at 151 (citing In re Chapman, 166 U.S. 661, 671-72 (1897)).

99. The Manila Times, *US Congress Shows Right Use of Contempt Powers*, MANILA TIMES, Oct. 24, 2021, *available at* https://www.manilatimes.net/2021/10/24/opinion/editorial/us-congress-shows-right-use-of-contempt-powers/1819480 (last accessed Nov. 30, 2021) [https://perma.cc/BHD5-HHVP].

100. *See id.*

101. The Manila Times, *supra* note 99.

102. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815, art. 144 (1930) (as amended). Article 144 provides —

> Article 144. *Disturbance of proceedings*. — The penalty of *arresto mayor* or a fine from [f]orty thousand pesos (₱40,000) to [t]wo hundred thousand pesos (₱200,000) shall be imposed upon any person who disturbs the meetings of Congress or of any of its committees or subcommittees, Constitutional Commissions or committees or divisions thereof, or of any provincial board or city or municipal council or board, or in the presence of any such bodies should behave in such manner as to interrupt its proceedings or to impair the respect due it.

Id.

Committees, Subcommittees[,] or Divisions," which dictates a penalty of fine and/or imprisonment for its violation.[103]

Inherent contempt power is broader than statutory criminal contempt.[104] It is utilized not only to leverage subpoena non-compliance, but also to respond to "direct obstructions" or threats to the chamber's exercise of legislative power.[105]

C. Coercive Versus Punitive

Contempt power contemplates the power to arrest and detain the contemnor.[106] While "the purpose of the detention may vary, for subpoena

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103. *Id.* art. 150 (as amended). The amended Article 150 provides —

> Article 150. *Disobedience to summons issued by Congress, its committees or subcommittees, by the Constitutional Commissions, its committees, subcommittees*[,] *or divisions*. — The penalty of *arresto mayor* or a fine ranging from [f]orty thousand pesos (₱40,000) to [t]wo hundred thousand pesos (₱200,000), or both such fine and imprisonment, shall be imposed upon any person who, having been duly summoned to attend as a witness before Congress, its special or standing committees and subcommittees, the Constitutional Commissions and its committees, subcommittees, or divisions, or before any commission or committee chairman or member authorized to summon witnesses, refuses, without legal excuse, to obey such summons, or being present before any such legislative or constitutional body or official, refuses to be sworn or placed under affirmation or to answer any legal inquiry or to produce any books, papers, documents, or records in his possession, when required by them to do so in the exercise of their functions. The same penalty shall be imposed upon any person who shall restrain another from attending as a witness, or who shall induce disobedience to summons or refusal to be sworn by any such body or official.

Id.

104. Garvey, *supra* note 82, at 13 (citing *Marshall*, 243 U.S. at 543).

105. *Marshall*, 243 U.S. at 537.

106. *Contra Neri*, 549 SCRA at 307-08 (J. Corona, concurring opinion). Justice Renato Corona's concurring opinion in the initial *Neri* decision stated that following "the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee, [the] respondent Committees [were] authorized only *to detain* a witness found guilty of contempt. On the other hand, nowhere [did] the word '*arrest*' appear in either rules of procedure." This reflected a "whale of a difference between the power to *detain* and the power to *arrest*." *Neri*, 549 SCRA at 307-08 (J. Corona, concurring opinion) (emphases omitted and supplied).

non-compliance[,] the use of the power has generally not been punitive."[107] In *Marshall*, it was suggested that the power "does not embrace punishment for contempt as punishment[.]"[108]

In a subsequent case, however, the reverse was conceded. In *Jurney*, the U.S. Supreme Court ruled —

> The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed[.] ... The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. ... But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance.[109]

Jurney was cited approvingly in *Arnault v. Balagtas*,[110] where Jean Arnault, having been detained in Bilibid as a consequence of the events described in *Arnault v. Nazareno*, sought to regain his freedom.[111] He argued that he had already "purged himself of the contempt charges" by surrendering the information demanded by the Senate.[112] The Court, however, justified his continued incarceration in Bilibid and reproduced the U.S. Supreme Court's ruling in *Jurney*, saying, "Here, [the Court is] concerned not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means."[113]

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107. Garvey, *supra* note 82, at 13-14 (citing *Marshall*, 243 U.S. at 542 & 544 & *Jurney*, 294 U.S. at 148).

> However, a reverse argument could be made, considering how the Senate has not been above ordering the incarceration of contumacious witnesses with common criminals in the Pasay City Jail, rather than leaving them to ponder their defiance of the efforts at information-gathering in the confines of the Senate's own premises. Ernesto P. Maceda, Jr., *Not the End Itself*, PHIL. STAR, Nov. 20, 2021, *available at* https://www.philstar.com/opinion/2021/11/20/2142609/not-end-itself (last accessed Nov. 30, 2021) [https://perma.cc/U4G3-TTCK].

108. *Marshall*, 243 U.S. at 542.

109. *Jurney*, 294 U.S. at 147-48.

110. *Arnault v. Balagtas*, 97 Phil. at 368-69 (citing *Jurney*, 294 U.S. at 147-50).

111. *Arnault v. Balagtas*, 97 Phil. at 360.

112. *Id.* at 364.

113. *Id.* at 369 (citing *Jurney*, 294 U.S. at 149-50).

The latest word on the matter, however, comes by way of *Balag v. Senate of the Philippines*,[114] where the Court was confronted with the detention of a witness beyond session of Congress.[115] Chief Justice Alexander G. Gesmundo clarified the present jurisprudential understanding that the "power of contempt rests solely upon the right of self-preservation and does not extend to the infliction of punishment as such. It is a means to an end and not the end itself."[116]

D. Separation of Powers

When Congress exercises its inherent contempt power, it is not encroaching into the executive or judicial spheres.[117] The Court views the same as an implied legislative power not in contravention of the principle of separation.[118] It is deemed necessary only to preserve and carry out legislative authority.[119]

In *Sinclair v. United States*,[120] the U.S. Supreme Court conceded "that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits[,]" but it declared that the authority "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[121]

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114. Balag v. Senate of the Philippines, G.R. No. 234608, 870 SCRA 343 (2018).

115. *See id.* at 362.

116. *Balag*, 870 SCRA at 369 (citing Lopez v. De los Reyes, 55 Phil. 170, 178 (1930)).

117. *See Arnault v. Balagtas*, 97 Phil. at 370-71.

118. *Arnault v. Balagtas*, 97 Phil. at 370.

119. *Id.* The Court held that

> [t]he 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.

Id.

120. Sinclair v. United States, 279 U.S. 263 (1929).

121. *Id.* at 295.

Chief Justice Earl Warren observed that Congress is not "a law enforcement or trial agency[,]"[122] especially in the context of congressional investigations and the need to enforce them. Again, in *Quinn v. United States*,[123] he added that "the power [of investigation] must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."[124]

V. LIMITATIONS AND EXCEPTIONS

The power of Congress to investigate pursuant to the 1987 Constitution[125] is circumscribed by three express ground rules: (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 must be afforded their constitutional rights, including the right to be represented by counsel and the right against self-incrimination.[126] For purposes of this Article, the Author focuses on the requirement that the inquiry be in aid of legislation.

A. Scope of Inquiry

In *Bengzon, Jr. v. Senate Blue Ribbon Committee*,[127] the Court ruled against the Senate committee for having exceeded its power of legislative investigation.[128] In a privilege speech, Senator Juan Ponce-Enrile suggested possible violations in an alleged transfer of properties between the concerned characters.[129] The Senate Blue Ribbon Committee decided to investigate the transaction, purportedly in aid of legislation.[130] Summoned, the petitioners asked the Court for a restraining order, arguing that the inquiry was not in aid of legislation.[131] The Court held that "[v]erily, the speech of Senator Enrile contained *no suggestion* of contemplated legislation; he merely called upon the Senate to look into a possible violation of [Section] 5 of [Republic Act] No.

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122. *Watkins*, 354 U.S. at 187.

123. Quinn v. United States, 349 U.S. 155 (1955).

124. *Id.* at 161 (citing Kilbourn v. Thompson, 103 U.S. 168, 192-93 (1880)).

125. PHIL. CONST. art. VI, § 21.

126. *Bengzon, Jr.*, 203 SCRA at 777.

127. Bengzon, Jr. v. Senate Blue Ribbon Committee, G.R. No. 89914, 203 SCRA 767 (1991).

128. *Id.* at 786.

129. *Id.* at 773.

130. *Id.*

131. *Id.* at 774 & 777.

3019, otherwise known as 'The Anti-Graft and Corrupt Practices Act.'"[132] Thus, there appeared to be no intended legislation to be aided.[133]

A lack of intended legislation was the conclusion of the *Bengzon* Court from Senator Enrile's call to look into a possible violation of the law.[134] To Justice Teodoro R. Padilla, writing for the majority, the Senate action did not have a valid object.[135] Instead, he assumed the contrary to be the case, even if in *Arnault v. Nazareno*,[136] decided 41 years earlier, the Court already conceded that it was "bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and [it had] no right to assume that the contrary was intended."[137]

1. U.S. Rule

Investigative oversight has been given wider latitude in the U.S., but only after surviving equally constricting birth pains. *Kilbourn v. Thompson*[138] was the first occasion for the U.S. Supreme Court to consider the oversight power. The case arose after a special committee was created by the U.S. House of Representatives to investigate the bankruptcy of an investment firm holding government funds.[139] Hallet Kilbourn was held in contempt after he refused both to answer questions about the people involved and to bring records.[140]

The U.S. Supreme Court in *Kilbourn* "sharply limited" the power,[141] finding that the purpose of the inquiry therein was to pry into private affairs,

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132. *Id.* at 781 (emphasis supplied).

133. *Bengzon, Jr.*, 203 SCRA at 781.

134. *Id.*

135. *See id.* at 786.

136. Justice Roman Ozaeta, in his majority opinion in *Arnault v. Nazareno* from 41 years earlier, even cited Judge James Landis' scholarship, which was critical of *Kilbourn v. Thompson*, and which was ultimately instrumental in the liberalization of this perspective in the U.S. *Arnault v. Nazareno*, 87 Phil. at 54-55 (citing James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 216-17 (1926)).

137. *Arnault v. Nazareno*, 87 Phil. at 49 (citing People ex rel. McDonald v. Keeler, 99 N.Y. 463, 487 (N.Y. 1885) (U.S.)).

138. Kilbourn v. Thompson, 103 U.S. 168 (1880).

139. *Id.* at 195.

140. *Id.* at 200.

141. Landis, *supra* note 136, at 214 (citing *Kilbourn*, 103 U.S. at 189).

thus falling outside the scope of congressional oversight.[142] The case was not one upon which Congress could legislate, when a suit was still pending in the bankruptcy court and "the United States and other creditors were free to press their claims in that proceeding."[143] The Court reiterated that there was no legislation that could be supported by the information gathered; hence, the inquiry was judicial in character, into which Congress could not intrude.[144]

For almost half a century, until *McGrain v. Daugherty* in 1927, U.S. jurisprudence deferred to this narrow view that insisted on detail and definiteness in legislative purpose.[145]

McGrain finally articulated a broader and more sweeping view of investigatory oversight in the context of legislative-executive relations. The

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142. *See Kilbourn*, 103 U.S. at 190.

143. *McGrain*, 273 U.S. at 171 (explaining the factual premise and doctrinal relevance of *Kilbourn*).

144. *See Kilbourn*, 103 U.S. at 194.

> The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative.

Kilbourn, 103 U.S. at 194.

145. *See* Landis, *supra* note 136, at 217.

> Instead of assuming the character of an extraordinary judicial proceeding, the inquiry, placed in its proper background, should have been regarded as a normal and customary part of the legislative process.
>
> Detailed definiteness of legislative purpose was thus made the demand of the Court in *Kilbourn v. Thompson*. But investigators cannot foretell the results that may be achieved. The power of Congress to exercise control over a real estate pool is not a matter for abstract speculation but one to be determined only after an exhaustive examination of the problem. Relationships, and not their probabilities, determine the extent of Congressional power. Constitutionality depends upon such disclosures. Their presence, whether determinative of legislative or judicial power, cannot be relegated to guesswork. Neither Congress nor the Court can predicate, prior to the event, the result of [the] investigation.

Landis, *supra* note 136, at 217 (citing Grain Futures Act, Pub. L. No. 331, § 3, 42 Stat. 998, 999 (1922); Board of Trade of City of Chicago v. Olsen, 262 U.S. 1 (1923); Transportation Act of 1920, Pub. L. No. 152, § 422, 41 Stat. 456, 489 (1920); & Dayton-Goose Creek Ry. Co. v. United States, 263 U.S. 456 (1924)).

resolution authorizing the investigation did not specify that it was "intended to be in aid of legislation; but it [did indicate] that the subject to be investigated was the administration of the Department of Justice[.]"[146] Hence, the U.S. Supreme Court "created the presumption" that as the subject was "appropriate for legislation," then a valid legislative purpose could be conceded.[147] "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."[148]

The Court acknowledged that the only reason for the Senate to order the investigation was to aid in its legislative function, and "that the presumption should be indulged that this was the real object."[149] If the Senate had articulated this expressly, then less confusion would likely have ensued. However, the Court did not require the purpose of aiding in the legislative function as a pre-condition for investigation.

There is currently no Anglo-American requirement, in the investigation on the Executive, that Congress identify future legislation "in advance[.]"[150] Nor is it required that every investigation culminate in a proposed bill.[151] "The very nature of the investigative function — like any research — is that it takes the searchers up some 'blind alleys' and into non[-]productive enterprises."[152]

2. Philippine Experience

Though aware of these very precedents, *Ermita* and *Neri* still subscribed to *Bengzon, Jr.*'s narrow view. To the Court, for now, "in aid of legislation" means that there needs to be an avowed proposed bill or statutory language in

146. *McGrain*, 273 U.S. at 177.

147. Minnesota Law Review Editorial Board, *The Application of the Fourth Amendment to Congressional Investigations*, 52 MINN. L. REV. 665, 668 (1968).

148. *McGrain*, 273 U.S. at 177.

149. *Id.* at 178.

150. *In re Chapman*, 166 U.S. at 670. Moreover, "it was certainly not necessary that the resolution[ ] should declare in advance what the [S]enate meditated doing when the investigation was concluded." *Id.*

151. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975). "To be a valid legislative inquiry[,] there need be no predictable end result." *Eastland*, 421 U.S. at 509.

152. *Eastland*, 421 U.S. at 509.

which possible legislation is identified for the investigation to pass constitutional muster, even when exercised against the executive department.

In *Ermita*, a unanimous Court, through Justice Conchita Carpio-Morales, ruled on the constitutionality of Executive Order No. 464,[153] which required executive officials to secure Presidential approval before appearing at Congressional hearings or complying with requests for information.[154] The Court acknowledged Congress' "right to information from the [E]xecutive" department when in aid of legislation.[155] If information is withheld as privileged, it must be asserted with the reasons therefor clearly given and stating "why it must be respected."[156]

Justice Carpio-Morales, expounding preliminarily on the power of inquiry in general terms (which was not in issue in this case), reiterated that, as in *Bengzon, Jr.*, an inquiry not properly in aid of legislation is "beyond the constitutional power of Congress."[157] Thinking aloud, she casually suggested that

> *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*

153. Office of the President, 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, Executive Order No. 464, Series of 2005 [E.O. No. 464, s. 2005] (Sept. 28, 2005).

The E.O. was issued as the Senate was investigating the North Rail Project overpricing claims and the 2004 national electoral fraud evidenced by taped conversations between President Gloria Macapagal-Arroyo and Commissioner Virgilio Garcillano of the Commission on Elections. *Neri*, 549 SCRA at 185 (C.J. Puno, dissenting opinion) (discussing the parallelism of the issue therein with *Ermita*).

154. E.O. No. 464, s. 2005, § 1.

155. *Ermita*, 488 SCRA at 72. The decision also noted that there are "clear distinctions between the *right of Congress to information*[,] which *underlies the power of inquiry*[,] and the right of the people to information on matters of public concern. *Id.* at 70 (emphases supplied).

156. *Id.* at 70.

157. *Id.* at 43-44 (citing *Bengzon, Jr.*, 203 SCRA at 786).

> *room for speculation on the part of the person invited on whether the inquiry is in aid of legislation*.[158]

Justice Carpio-Morales' soft suggestion in *Ermita* was abruptly transformed from a possible solution into a hard requirement in the later case of *Neri*. *Neri* examined the claim of executive privilege made by Commission on Higher Education (CHED) Chair Romulo Neri in refusing to answer three questions from the Senate panel on the controversial multimillion-dollar National Broadband Network (NBN) Project.[159] The *ponente*, Associate Justice Teresita Leonardo-de Castro, writing for a narrow 9-6 majority, formalized this mutation of the *Ermita* test's constitutional meaning into a hard requirement.

> *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.' Compliance 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.[160]

In contrast, Senior Associate Justice Antonio Carpio, during his time on the Court, understood that such a formulaic invocation of this constitutional litmus test would stymie the core power of Congress to craft laws.[161] In his dissenting and concurring opinion in *Neri*, he wrote —

> This power of legislative inquiry is so searching and extensive in scope that the inquiry need not result in any potential legislation, and may even end without any predictable legislation. The phrase 'inquiries in aid of legislation' refers to inquiries to aid the enactment of laws, inquiries to aid in overseeing

158. *Ermita*, 488 SCRA at 44 (emphasis supplied).

159. *Neri*, 549 SCRA at 105-06.

160. *Id.* at 132 (citing *Ermita*, 488 SCRA at 44) (emphases omitted).

161. *See Neri*, 549 SCRA at 282-83 (J. Carpio, dissenting and concurring opinion). "Without the power of inquiry, the Legislature cannot discharge its fundamental function and thus becomes inutile." *Neri*, 549 SCRA at 282-83 (J. Carpio, dissenting and concurring opinion).

> the implementation of laws, and even inquiries to expose corruption, inefficiency[,] or waste in executive departments.[162]

Under this more liberal view, which was the U.S. rule for almost a century, the phrase "in aid of legislation" should also be understood to mean "in connection with a legislative purpose," i.e., "to shine a light in dark places, to expose anomalies, to publicize findings" even when it would appear that no output would ensue, or even if no specific legislation is avowed.[163] Once again, from *Watkins* — "[i]t 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."[164]

Finally, the guidance of Fr. Joaquin G. Bernas, S.J. caps the urgency of relaxing, rather than adhering to, the limits of *Bengzon, Jr.*'s classic but outdated formulation, acknowledging the enormity of the scope of the Legislature's power. This "requirement that the investigation be 'in aid of legislation[,]'" as described by Fr. Bernas, is one "which is not difficult to satisfy because, unlike in the [U.S.], where legislative power is shared by the [U.S.] Congress and the states legislatures, the totality of legislative power is possessed by the [Congress] and its *legislative field is well-nigh unlimited*.[165]

B. Executive Privilege

"Even where the inquiry is in aid of legislation, there are still recognized exemptions [from] the power of inquiry," such as those which fall under the category of executive privilege.[166] In the Philippine setting, the term "executive privilege" references the power of the President to withhold

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162. *Neri*, 549 SCRA at 283-84 (J. Carpio, dissenting and concurring opinion) (citing *McGrain*, 273 U.S. at 177-78; *Eastland*, 421 U.S. at 509; & *Watkins*, 354 U.S. at 187).

163. Ernesto P. Maceda, Jr., *Managing or Meddling*, PHIL. STAR, Oct. 23, 2021, *available at* https://www.philstar.com/opinion/2021/10/23/2136014/managing-or-meddling (last accessed Nov. 30, 2021) [https://perma.cc/5GPV-FFVJ].

164. *Watkins*, 354 U.S. at 187.

165. 2 JOAQUIN G. BERNAS, S.J., CONSTITUTIONAL RIGHTS AND DUTIES: A COMMENTARY ON THE 1973 PHILIPPINE CONSTITUTION 96 & 96-97 (1974) (emphasis supplied).

166. *Ermita*, 488 SCRA at 44.

certain types of information from the Courts, the Congress, and the public.[167] Apart from diplomatic and military secrets and the identity of government informers, other types of information covered by executive privilege relate to information on "internal deliberations" comprising the process by which government decisions are reached or by which "policies are formulated[,]" as well as information on investigations of crimes by law enforcement agencies before the prosecution of the accused.[168]

The President, in the discharge of his responsibilities as Chief Executive, Commander-in-Chief, and Architect and Chief Implementer of Foreign Policy, may require reasonable leeway and discretion, given the sensitive nature of the information he holds.[169] Also, to encourage candid exchanges with men of his confidence, his communications with them are entitled to be shielded from publicity.[170]

Like congressional oversight, executive privilege is also not constitutionally provided. Justice Carpio, in *Neri*, defines executive privilege as

> the implied constitutional power of the President to withhold information requested by other branches of the government. The Constitution does not expressly grant this power to the President but courts have long recognized implied Presidential powers if 'necessary and proper' in carrying out powers and functions expressly granted to the Executive under the Constitution.[171]

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167. *Id.* at 45 (citing Schwartz, *supra* note 59, at 3). The Court cited American legal literature to define executive privilege — "Schwartz defines executive privilege as 'the power of the Government to withhold information from the public, the courts, and the Congress.' Similarly, Rozell defines it as 'the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.'" *Ermita*, 488 SCRA at 45 (citing Schwartz, *supra* note 59, at 3 & Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1069 (1999)).

168. *Ermita*, 488 SCRA at 46 (citing 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770-71 (2000)).

169. *Neri*, 549 SCRA at 275-76 (J. Carpio, dissenting and concurring opinion) (citing PHIL. CONST. art. VII, §§ 1, 17, 18, & 21).

170. United States v. Nixon, 418 U.S. 683, 708 (1974).

171. *Neri*, 549 SCRA at 274-75 (J. Carpio, dissenting and concurring opinion) (citing Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 691-92 & 694-95 (1989); Marcos v. Manglapus, G.R. No. 88211, 178 SCRA 760, 763-64 (1989) (resolution of motion for reconsideration); & *Myers*, 272 U.S. at 118). *See also* WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916).

In *Ermita*, *ponente* Justice Carpio-Morales expounded on the high bar of its invocation, to wit —

> 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.[172]

Indeed,

> the denial of information to Congress must, finally, be regarded as a more serious threat to the balance of government than the denial of evidence to a prosecutor, because [ ] Congress can neither legislate, nor investigate, nor impeach, if it lacks information to determine when to exercise these political powers, which ultimately are the only effective checks on a runaway Executive.[173]

Former Chief Justice Puno, in his dissent in *Neri*, acknowledged that "[a]djudication on executive privilege in the Philippines is still in its infancy stage, with the Court having had only a few occasions to resolve cases that directly deal with the privilege."[174]

VI. INTERBRANCH TENSION

Today, legislators can grow more occupied with "administering the [complex] bureaucracy" than with the conventional "legislative functions of debating and voting" on issues of national importance.[175] As such, Congressmen have been referred to in some quarters as "ombudsmen for the administrative state."[176]

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172. *Ermita*, 488 SCRA at 70.

173. Norman Dorsen & John H.F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 8 (1974). This Article's title is derived from the foregoing excerpt.

174. *Neri*, 549 SCRA at 182-83 (C.J. Puno, dissenting opinion).

175. Mark B. Liedl & Douglas A. Jeffrey, Congressional Ethics and the Administrative State (U.S. Congress Assessment Project Study, Dec. 13, 1989), at 2, *available at* http://s3.amazonaws.com/thf_media/1989/pdf/bg743.pdf (last accessed Nov. 30, 2021) [https://perma.cc/77PP-AU47].

176. *Id.*

This transformation has heralded an increasingly adversarial relationship between branches of the government.[177]

Mill also astutely observed that

> one of the dangers of a controlling assembly[is] that it may be lavish of powers, but afterwards interfere with their exercise; may give power by wholesale[,] and take it back in detail, by multiplied single acts of interference in the business of administration. ... No safeguard can[,] in the nature of things[,] be provided against this improper meddling, except [by] a strong and general conviction of its injurious character.[178]

In the separation of powers ecosystem, scholarship routinely acknowledges this tension between the Imperial Congress versus the Imperial Presidency.[179] To keep pace with the complexities of modern government, Congress articulates "broad policy goals" and sets "statutory standards," but allows "the choice of policy options" to parties not necessarily involved in the "development of those [legislative] aims."[180] Often, as a result, the "reverse of [the] constitutional scheme" is encountered — "Congress proposes, the Executive disposes."[181] The ballooning executive-administrative structure,[182]

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177. *See id.* at 1-2.

178. MILL, *supra* note 62, at 109.

179. *See* Joint Committee on the Organization of Congress, *supra* note 21.

> A pendulum effect [—] a strong or dominant presidency followed in time by a reinvigorated legislature [—] has been seen as characterizing some inter-branch relations. Yet even within periods when one branch appears to dominate the other, this dominance may not extend across the board to all issue areas, policies, and other interactions between the branches.
>
> Over the past 30 years, for instance, the impression of a pendulum effect has been apparent. Indeed, each branch has alternately been portrayed as [']imperial[] during this period.

Joint Committee on the Organization of Congress, *supra* note 21.

180. Javits & Klein, *supra* note 50, at 460.

181. *Id.*

182. Compared to the present government, the First Philippine Republic began with seven executive departments. Today, there are several requiring confirmation and several more of cabinet rank. *See* Dawn Ottevaere Nickeson, *First Philippine Republic*, *in* THE ENCYCLOPEDIA OF THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS: A POLITICAL, SOCIAL, AND MILITARY HISTORY 496 (Spencer C. Tucker ed., 2009).

to which Congress yields subordinate rule-making and adjudicatory powers by both choice and inevitable necessity,[183] has become a trial and tribulation to oversee effectively.

Conversely, a pervasive point of criticism is how oversight has been "intrusive, meddling, short-sighted, counterproductive[,] and involved micromanagement on a grand scale[.]"[184]

> In the [U.S.], testimony before a bi-partisan task force on executive oversight lamented the demand on capacities. In fact, agencies spend up to only half of their time invested in mission-related efforts. The rest is devoted to complying with oversight requirements. Additionally, compliance efforts are unfunded, thus pushing scarce resources to the limit.[185]

When it comes to oversight, there will always be the inescapable contradiction between Congress and the Executive on their views of their respective institutional roles in the Constitution's framework.

Yet not all legislators have the time, inclination, expertise, or resources to seriously pursue this function.[186] As such, "[i]t is alleged that the task of investigating any of the complex activities of a modern government agency or

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In the U.S., the initial number was four. Under the current administration, there are 15 departments. *See* LINDSAY M. CHERVINSKY, THE CABINET: GEORGE WASHINGTON AND THE CREATION OF AN AMERICAN INSTITUTION 5 (2020).

183. Eastern Shipping Lines, Inc. v. Philippine Overseas Employment Administration (POEA), G.R. No. L-76633, 166 SCRA 533, 544-45 (1988).

184. Maceda, Jr., *Managing or Meddling*, *supra* note 163 (citing James S. Van Wagenen, *Critics and Defenders: A Review of Congressional Oversight*, STUD. INTELLIGENCE, Issue No. 1, 1997, at 97).

Bert A. Rockman wrote that scholars tend to be partisans of the institutions they write about. If studying the executive, they often "disapprove of what they see as legislative meddling in matters better left in the hands of the knowledgeable and experienced ... ." Rockman, *supra* note 60, at 388 (citing Francis E. Rourke, *Bureaucratic Autonomy and the Public Interest*, 22 AM. BEHAVIORAL SCIENTIST 537 (1979)).

185. Maceda, Jr., *Managing or Meddling*, *supra* note 163 & Bipartisan Policy Center, Oversight Matters: Balancing Mission, Risk, and Compliance: Recommendations from the BPC Task Force on Executive Branch Oversight, at 9, *available at* https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/07/Oversight-Matters-Balancing-Mission-Risk-and-Compliance.pdf (last accessed Nov. 30, 2021) [https://perma.cc/B25P-MHCF].

186. *See* William C. Warren, *Congressional Investigations: Some Observations*, 21 FOOD DRUG COSM. L.J. 40, 47 (1966).

business organization requires [ ] many hours [ ] spent in preliminary concentrated study of intricate detail. ... Consequently, [c]ongressional inquiry is frequently inept, repetitious, and unproductive."[187]

The bitter reality is that Congress tends, after it has enacted legislation, to "pass it and forget it."[188] Former Makati Representative Teodoro L. Locsin, Jr. wrote that "[n]o sooner is a law begotten than it is forgotten."[189]

"[V]igilant oversight of administration[ ]" may be equated with lawmaking,[190] but in the Philippines, there is a scarce number of legislators who are passionate enough to carry out this function on a sustained basis. From the House, Representatives Jose Sarte Salceda, Sharon S. Garin, Stella Luz A. Quimbo, and Rosanna V. Vergara are some members of Congress who come to mind.[191] In the Senate, Senators Sherwin T. Gatchalian, Grace L. Poe, Nancy S. Binay, and Risa N. Hontiveros are among those on the front lines.[192]

187. Warren, *supra* note 186, at 47.

188. Walter J. Oleszek, Congressional Oversight: An Overview, at 14, *available at* https://sgp.fas.org/crs/misc/R41079.pdf (last accessed Nov. 30, 2021) [https://perma.cc/T6UU-PJZP].

189. Congressional Planning and Budget Department of the House of Representatives, *supra* note 19, at xi.

190. Wilson, *supra* note 1, at 297.

191. *See, e.g.*, A Resolution Urging the Committee on Public Accounts to Conduct an Investigation, in Aid of Legislation, on the Release and Utilization of Appropriations Authorized Under Republic Act No. 11494, Otherwise Known as the Bayanihan to Recover as One, H. Res. No. 1558, 18th Cong., 2d Reg. Sess. (2021).

192. *See, e.g.*, Resolution to Direct the Appropriate Senate Committee to Conduct an Inquiry in Aid of Legislation Into Reports of Public Funds Being Spent on Troll Farms That Spread Misinformation and Fake News in Social Media Sites, P.S. Res. No. 768, 18th Cong., 3d Reg. Sess. (2021); Resolution Directing the Appropriate Senate Committee to Conduct an Investigation in Aid of Legislation on the Payment Claims Issues Between Philhealth and Private Hospitals With the End in View of Ensuring Uninterrupted Health Care and Social Protection for Filipinos, P.S. Res. No. 880, 18th Cong., 3d Reg. Sess. (2021); & A Resolution Directing the Appropriate Committee to Conduct an Inquiry, in Aid of Legislation on the Plans and Preparations of the Department of Energy, Other Government Energy Agencies, and Private Energy Stakeholders to Ensure Continuous Supply of Electricity During the 2022 National and Local Elections, P.S. Res. No. 867, 18th Cong., 3d Reg. Sess. (2021).

"The high[-]profile cases [—] bread and butter of investigation as against the less glamorous categories of oversight such as scrutiny or supervision [—] will always attract interest and see committee members jostle for 'prime time' coverage, especially as elections draw near."[193] Thus, investigations have drawn ire for being "motivated by a desire for publicity[,]" but have also been defended as "significant and useful stimuli" in the political process.[194]

VII. THE BLUE RIBBON INVESTIGATION AND THE EXECUTIVE SECRETARY'S MEMORANDUM

In August 2021, Senate investigatory oversight of the Departments of Health (DOH) and Budget and Management (DBM) and their use of appropriated funds, including their procurement and accounting processes, was triggered by COA findings that ₱42.41 billion of the DOH's COVID-19 response fund was transferred to the DBM procurement office or implementing partner agencies without the benefit of a memorandum of agreement.[195] Allotments totaling ₱11.89 billion also remained unobligated as of 31 December 2020.[196]

193. Maceda, Jr., *Managing or Meddling*, *supra* note 163.

194. Warren, *supra* note 186, at 50.

195. Butch Fernandez & Claudeth Mocon-Ciriaco, *₱42-B Fund Transfer from DOH to DBM Illegal, Insists Drilon*, BUSINESSMIRROR, Aug. 25, 2021, *available at* https://businessmirror.com.ph/2021/08/25/%E2%82%A742-b-fund-transfer-from-doh-to-dbm-illegal-insists-drilon (last accessed Nov. 30, 2021) [https://perma.cc/S7AL-8BXN].

196. Lian Buan, *Unused P3.4-B COVID-19 Foreign Aid Due to DOH 'Dilly Dallying' — COA*, RAPPLER, Aug. 14, 2021, *available at* https://www.rappler.com/nation/coa-rejoinder-dilly-dally-doh-explanation-covid-funds (last accessed Nov. 30, 2021) [https://perma.cc/EKE5-RAP9].

Resolutions and privilege speeches from Senators Grace Poe,[197] Panfilo Lacson,[198] Franklin M. Drilon,[199] Risa Hontiveros,[200] and Leila De Lima,[201] among others, called for the Senate to conduct an immediate investigation. Blue Ribbon Committee Chairperson Senator Richard J. Gordon was on record as being initially hesitant to investigate the DOH.[202] In an interview, Senator Gordon said, "*We are reviewing it. You know, I don't want to investigate in the midst of a pandemic because we are losing focus on eradicating the disease*."[203]

197. Resolution Directing the Appropriate Senate Committee/s, to Conduct an Inquiry in Aid of Legislation, on the Department of Health's Deficiencies in Utilizing the ₱67.32 Billion COVID-19 Fund as Stated in the 2020 Commission on Audit Report, With the End in View of Ensuring That Future Funds Allocated to the Department Are Utilized Properly and Immediately for Its Intended Purpose, P.S. Res. No. 853, 18th Cong., 3d Reg. Sess. (2021).

198. *See* CNN Philippines Staff, *Senate to Probe DOH Over Audit Report on ₱67-B Pandemic Funds*, CNN PHIL., Aug. 12, 2021, *available at* https://www.cnnphilippines.com/news/2021/8/12/Senate-DOH-probe.html (last accessed Nov. 30, 2021) [https://perma.cc/VQ9G-CJ6F].

199. Franklin M. Drilon, Minority Leader, Senate, Speech at Senate Blue Ribbon Hearing on COA Audit of DOH COVID-19 Funds (Aug. 18, 2021) (transcript *available at* https://legacy.senate.gov.ph/press_release/2021/0818_drilon1.asp (last accessed Nov. 30, 2021) [https://perma.cc/U8HZ-AXE8]).

200. *See* Senate of the Philippines, Statement of Senator Risa Hontiveros on the Recent COA Findings on DOH, *available at* http://legacy.senate.gov.ph/press_release/2021/0812_hontiveros2.asp (last accessed Nov. 30, 2021) [https://perma.cc/8PAG-2ZVU].

201. Resolution Directing the Appropriate Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Findings of Commission on Audit (COA) Report on the Department of Health (DOH) on the Reported Unspent Funds, Misstatements, Irregularities and Deficiencies, With the End View of Addressing Recurrent Issues That Has Plagued Its Services, as Well as the Persistent Faults and Lapses That Give Rise to Wastage Even Amidst Times of Scarcity and Shortage, and Identifying and Holding Accountable Those Responsible for the Same, P.S. Res. No. 859, 18th Cong., 3d Reg. Sess. (2021).

202. Hana Bordey, *Gordon Not Keen on Probing Deficiencies in DOH's COVID-19 Funds Amid Current Health Situation*, GMA NEWS, Aug. 12, 2021, *available at* https://www.gmanetwork.com/news/news/nation/799029/gordon-not-keen-on-probing-deficiencies-in-doh-s-covid-19-funds-amid-current-health-situation/story (last accessed Nov. 30, 2021) [https://perma.cc/QJ22-6FGF].

203. *Id.* (emphasis supplied).

Senator Gordon ultimately decided to proceed with an investigation before the Senate plenary could act on the referrals.[204] The investigation was categorized as a *motu propio* initiative.[205] With the spotlight cast on previously unmonitored[206] practices of DOH and DBM agencies conducted without transparency, the public came to know of dealings between executive agencies

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204. Senate of the Philippines, Gordon: Malacañang's Order Giving DOH, DBM 10 Days to Release Health Workers' Benefits a Vital Progress to Blue Ribbon's Probe, *available at* https://legacy.senate.gov.ph/press_release/2021/0821_gordon1.asp (last accessed Nov. 30, 2021) [https://perma.cc/3ZDW-LZ5U].

205. *See id.* & S. Rules of Procedure Governing Inquiries in Aid of Legislation, §§ 2 & 11, 15th Cong. (Aug. 9, 2010).

> Sec. 2. *Initiation of Inquiry*. Inquiries may be initiated by the Senate or any of its Committees if the matter is within its competence, or upon petition filed or upon information given by any Senator or by any person not a member thereof.
>
> ...
>
> Sec. 11. *Executive Session and Public Hearing*. (1) If the Committee believes that the interrogation of a witness in a public hearing might endanger national security, it may, *motu proprio* or upon motion of any interested party, conduct its inquiry in an executive session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in public hearing; (2) Attendance at executive sessions shall be limited to members of the Committee, its staff, other Members of the Senate, and other persons whose presence is requested or allowed by the Chairman; and (3) Testimony taken or material presented in an executive session, or any summary thereof, shall not be made public, in whole or in part, unless authorized by the Committee.

S. Rules of Procedure Governing Inquiries in Aid of Legislation, §§ 2 & 11.

206. Senator Gordon's reluctance to investigate is emblematic of the deference extended to the DOH and other agencies involved in the pandemic effort.

See, e.g., Antonio G.M. La Viña & Jayvy R. Gamboa, *Decentralization of What? Thoughts on a Legally Permissible and Necessary Decentralization of Power to Local Government Units*, 65 ATENEO L.J. 1179, 1233 (2021) (citing An Act Establishing the Corona Virus Disease 2019 (COVID-19) Vaccination Program Expediting the Vaccine Procurement and Administration Process, Providing Funds Therefor, and for Other Purposes [COVID-19 Vaccination Program Act of 2021], Republic Act No. 11525, §§ 3, 4, 6, & 11 (2021)).

and private contractors, as well as of flaws in the bureaucratic processes that allowed such questionable transactions to occur.[207]

Given the foregoing, the Author now considers the Senate Blue Ribbon hearings and the Executive Secretary's Memorandum earlier discussed.

First, the threshold question of whether the investigation is being conducted in the exercise of an oversight function is easily answered in the affirmative. Implicated for review are faithfulness to the congressional will of the DOH, the DBM Procurement Service, their procedures and accounting processes, and, as unearthed in the course of the investigation, the role of the Presidential Economic Adviser.[208]

Second, there is a refusal by executive officials to divulge information or to even appear pursuant to a duly issued subpoena. The Memorandum speaks for itself. Since its issuance on 4 October 2021, Secretary Francisco Duque III and DBM officials have not been in attendance, citing the Memorandum.[209]

Third, is the refusal justified? Under *Ermita*, only military, diplomatic, national security, and confidential communications with the President will justify resort to this "extraordinary" privilege.[210] According to *Ermita* —

> 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.[211]

The Memorandum, however, invoked the following bare grounds: the motivations of the Senators;[212] the encroachment of the hearings upon the

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207. Chief Justice Warren Burger's language in *Eastland* is enlightening. He stated, "The very nature of the investigative function — like any research — is that it takes the searchers up some 'blind alleys' and into non-productive enterprises." *Eastland*, 421 U.S. at 509.

208. *See generally* Jodesz Gavilan, *Duterte and Michael Yang's Friendship Through the Years*, RAPPLER, Sept. 14, 2021, *available at* https://www.rappler.com/newsbreak/iq/rodrigo-duterte-michael-yang-friendship-timeline/ (last accessed Nov. 30, 2021) [https://perma.cc/9EJY-YA4M].

209. Tomacruz, *supra* note 4 & Perez-Rubio, *supra* note 9.

210. *Ermita*, 488 SCRA at 50-51 (citing Chavez v. Presidential Commission on Good Government, G.R. No. 130716, 299 SCRA 744, 764 (1998) & Chavez v. Public Estates Authority, G.R. No. 133250, 384 SCRA 152, 188 (2002)).

211. *Ermita*, 488 SCRA at 51 (emphasis omitted).

212. Memorandum from the Executive Secretary, para. 2.

mandates of the other branches;[213] and that continued participation of executive officials in the seemingly endless investigation was adversely affecting the executive department's "ability to fulfill its core mandates[,]" especially during a pandemic.[214]

For this reason alone, the Memorandum may be invalidated. It does not even pretend to be an invocation of executive privilege, and yet the issuance would unrepentantly withhold information from Congress.

The Court, in *Ermita*, "clearly emphasized [the] restrictive, contingent, and evidence-dependent character [of executive privilege] as a presumption. For this reason, the use of executive privilege should be viewed circumspectly, since it creates an exemption from the constitutional policies favoring and mandating the disclosure of information."[215]

A refusal to divulge information without indication of the grounds therefor was treated in *Ermita* as an implied invocation of executive privilege.[216] The Court proceeded to review whether the grounds for its valid exercise were present —

> *The letter dated* [*28*] *September* [ ] *2005 of respondent Executive Secretary Ermita to Senate President Drilon illustrates the implied nature of the claim of privilege authorized by E.O. 464.*
>
> ...
>
> *The letter does not explicitly invoke executive privilege or that the matter on which these officials are being requested to be resource persons falls under the recognized grounds of the privilege to justify their absence.*
>
> ...
>
> *Inevitably, Executive Secretary Ermita's letter leads to the conclusion that the executive branch, either through the President or the heads of offices authorized under E.O. 464, has made a determination that the information required by the Senate is privileged, and that, at the time of writing, there has been no contrary pronouncement from the President. In fine, an implied claim of privilege has been made by the* [*E*]*xecutive*.[217]

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213. *Id.*

214. *Id.* para. 1.

215. Diane A. Desierto, *Universalist Constitutionalism in the Philippines: Restricting Executive Particularism in the Form of Executive Privilege*, 42 L. & POL. AFR., ASIA & LATIN AM. 80, 94-95 (2009) (citing *Ermita*, 488 SCRA at 68-69).

216. *Ermita*, 488 SCRA at 61-62.

217. *Id.* (emphasis supplied).

The Court found implied claims of privilege to be problematic, stating that

> there is, in an implied claim of privilege, a defect that renders it invalid *per se*. By its very nature, ... the implied claim authorized by Section 3 of E.O. 464 is not accompanied by any specific allegation of the basis thereof (e.g., whether the information demanded involves military or diplomatic secrets, closed-door Cabinet meetings, etc.). ... Congress is left to speculate as to which among them is being referred to by the [E]xecutive.[218]

Further, *Ermita* recognized that "Congress has the right to know why the [E]xecutive considers the requested information privileged[,]" and that "[a] claim of privilege, being a claim of exemption from an obligation to disclose information, must, therefore, be clearly asserted."[219]

Ermita then went on to cite applicable American cases. For example, *Ermita* reproduced the following excerpt from *United States v. Reynolds*,[220] where it was ruled that

> [t]he 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.[221]

Thus, "[a]bsent [ ] a statement of the specific basis of a claim of executive privilege, there is no way of determining whether it falls under one of the

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218. *Id.* at 63 (emphasis omitted).

219. *Id.* at 63 & 64.

220. United States v. Reynolds, 345 U.S. 1 (1953).

221. *Ermita*, 488 SCRA at 64 (citing *Reynolds*, 345 U.S. at 7-8 (citing Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353, 354 & 355-56 (D.C.E.D. Pa. 1912) (U.S.); In re Grove, 180 F. 62, 67 & 70 (3d Cir. 1910) (U.S.); 1 DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR (LATE VICE PRESIDENT OF THE UNITED STATES) FOR TREASON, AND FOR A MISDEMEANOR, IN PREPARING THE MEANS OF A MILITARY EXPEDITION AGAINST MEXICO, A TERRITORY OF THE KING OF SPAIN, WITH WHOM THE UNITED STATES WERE AT PEACE 186 (1808); Duncan v. Cammell, Laird & Co. Ltd., [1942] AC 624, 638-42 (U.K.); & Hoffman v. United States, 341 U.S. 479, 486 (1951))) (emphases omitted).

traditional privileges, or whether, given the circumstances in which it is made, it should be respected."[222]

Ermita also cited *Black v. Sheraton Corporation of America*,[223] stating —

> [T]he Court has little more than its *sua sponte* speculation with which to weigh the applicability of the claim. An improperly asserted claim of privilege is no claim of privilege. Therefore, despite the fact that a claim was made by the proper executive as *Reynolds* requires, the Court can not recognize the claim in the instant case because it is legally insufficient to allow the Court to make a just and reasonable determination as to its applicability. To recognize such a broad claim in which the Defendant has given no precise or compelling reasons to shield these documents from outside scrutiny, would make a farce of the whole procedure.[224]

The Court would thus be compelled to indulge in impermissible speculation on what the privilege refers to and as to what particular information or documents the privilege applies. The refusal in the case at bar, however, does not even merit the entitlement of being presumptively privileged.

> Executive privilege must be invoked with *specificity* sufficient to inform the Legislature and the Judiciary that the matter claimed as privileged refers to military, national security or diplomatic secrets, or to confidential Presidential communications. A claim of executive privilege accompanied by sufficient specificity gives rise to a presumptive executive privilege. *A generalized assertion of executive privilege, without external evidence or circumstances indicating that the matter refers to any of the recognized categories of executive privilege, will not give rise to presumptive executive privilege.*[225]

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222. *Ermita*, 488 SCRA at 64 (citing TRIBE, *supra* note 168, at 770-71).

223. Black v. Sheraton Corporation of America, 371 F. Supp. 97 (1974) (U.S.).

224. *Ermita*, 488 SCRA at 65-66 (citing *Black*, 371 F. Supp. at 101 (citing O'Neill v. United States, 79 F. Supp. 827, 830 (E.D. Pa. 1948) (U.S.); Alltmont v. United States, 174 F.2d 931 (3d Cir. 1949) (U.S.); Alltmont v. United States, 339 U.S. 967 (1950); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2019 (1970); & Joseph W. Bishop, Jr., *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 481 n. 16 & 482 n. 19 (1957))) (emphases omitted).

225. *Neri*, 549 SCRA at 279-80 (J. Carpio, dissenting and concurring opinion) (citing *Ermita*, 488 SCRA at 64-65 (citing Smith v. Federal Trade Commission, 403 F. Supp. 1000, 1017 (1975) (U.S.) & United States v. Article of Drug, 43 F.R.D. 181, 190 (1967) (U.S.))).

In the explanatory footnote, Justice Carpio quoted an excerpt from *Smith v. Federal Trade Commission*, which was likewise cited in *Ermita* — "[T]he lack of

Fourth, is the inquiry in aid of legislation?[226]

Notably, administration lawmaker Senator Francis N. Tolentino was one to validate the utility of the hearings in exposing gaps in the law.[227] He has proposed, among others, to limit the authority of Officers in Charge (OICs) to bind the government in long-term, big-ticket contracts.[228]

Senator Gordon acknowledged that the hearings facilitated an agreement between the COA and the DOH "towards a more liberal interpretation of the law on the grant of the special risk allowance under Section 4[(h)] of Republic

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specificity renders an assessment of the potential harm resulting from disclosure impossible, thereby preventing the Court from balancing such harm against plaintiffs' need to determine whether to override any claims of privilege." *Id.*

226. *See, e.g.*, P.S. Res. No. 853, whereas cl. para. 21; CNN Philippines Staff, *supra* note 198; Drilon, *supra* note 199; Senate of the Philippines, *supra* note 200; & P.S. Res. No. 859, whereas cl. para. 30.

227. An Act Amending Section 17, Chapter V, Title I, Book III and Section 27, Chapter V, Title I (A), Book V of Executive Order No. 292 or the Administrative Code of 1987, S.B. No. 2434, explan. n., 18th Cong., 3d Reg. Sess. (2021). The explanatory note of Senate Bill No. 2434, which was introduced by Senator Francis N. Tolentino, highlighted that the "Blue Ribbon Committee Hearings on the 2020 Commission on Audit (COA) Report on the Department of Health (DOH) and other issues related to the utilization of the national budget" during the pandemic "revealed gaps in the law[.]" *Id.*

228. *Id.* § 2. *See also* Christia Marie Ramos, *Senate Bill Seeks Limitations on Powers of Designated OICs*, PHIL. DAILY INQ., Oct. 13, 2021, *available at* https://newsinfo.inquirer.net/1501328/senate-bill-seeks-limitations-on-powers-of-designated-oics (last accessed Nov. 30, 2021) [https://perma.cc/4ZYE-G7DZ]. Moreover,

> [a]mong those measures [Senator] Tolentino was able to device from the said Senate inquiry include the proposed amendment to the Administrative Code of 1987, so that those so-called 'officers-in-charge' (OICs) will have time-bound limited powers and limited signing authorities; the proposed amendment to the Government Procurement Act which seeks to limit the Government Procurement Policy Board (GPPB) from frequently amending its own implementing rules and regulations (IRRs); and a bill that seeks to institutionalize[ ] a 'Filipino First policy' in the government procurement system.

Senate of the Philippines, Senate Inquiry Shouldn't Be Used for Political Mudslinging — Tolentino, *available at* http://legacy.senate.gov.ph/press_release/2021/1005_tolentino1.asp (last accessed Nov. 30, 2021) [https://perma.cc/V99H-BE6X].

Act [No.] 11469 or the Bayanihan to Heal as One Act."[229] The value of the investigation as a lens to assess governance for urgent policy reform through legislation has been undeniable.

Fifth, is the manner by which the Senators conducted the hearings also a ground for assertion of the privilege? Blatant disrespect of witnesses has been a continuing *cassus belli* for Malacañang.[230] As for this latest investigation, ulterior motives were alleged, i.e., that the hearings were being conducted "in aid of election[s]."[231]

Justice Felix Frankfurter wrote that "[t]o find that a committee's investigation has exceeded the bounds of legislative power[,] it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive."[232] According to Justice Potter Stewart in a later case, without such a finding, courts should not hastily "speculate as to the motivations that may have prompted the decision of individual members" to summon the witnesses.[233] As per *Watkins* —

> [A] solution to [the] problem is not to be found in testing the motives of committee members for this purpose. Such is not [the] function [of the Committee]. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.[234]

In her resolution of the Motion for Reconsideration in *Neri*, Justice Leonardo-de Castro references the oft-quoted catchphrase of Chief Justice Warren in *Watkins* — "[t]here is no Congressional power to expose for the sake of exposure."[235] But a namesake of the Chief, former Columbia Law Dean William Warren, observed conversely that

> there have been many occasions in our history when exposure solely for the political purpose of exposure has had salutary effects. Such occasions ... will arise again, for the arenas of politics and commerce afford many opportunities

229. Senate of the Philippines, @senatePH, Tweet, TWITTER, Aug. 25, 2021: 1:20 p.m., *available at* https://twitter.com/senateph/status/1430399655783792641 (last accessed Nov. 30, 2021).

230. Valente, *supra* note 10.

231. Gita-Carlos, *supra* note 11.

232. Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

233. Wilkinson v. United States, 365 U.S. 399, 412 (1961).

234. *Watkins*, 354 U.S. at 200.

235. *Neri*, 564 SCRA at 220 (resolution of motion for reconsideration) (citing *Watkins*, 354 U.S. at 200).

> for conduct which, while within the law and beyond the ambit of existing legal process, is nevertheless undesirable and not in the best interests of the country. In such cases, exposure for its own sake serves a valid and highly desirable purpose.[236]

"In times of political passion," according to Justice Frankfurter in *Tenney v. Brandhove*,[237] "dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed[,]"[238] but it is "[s]elf-discipline and the voters"[239] that would discourage such abuses. The role of the courts should be limited to determining whether a committee's investigation "may fairly be deemed within its province."[240]

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236. Warren, *supra* note 186, at 49-50.

237. Tenney v. Brandhove, 341 U.S. 367 (1951).

238. *Id.* at 378 (citing Irving Dilliard, *Congressional Investigations: The Role of the Press*, 18 U. CHI. L. REV. 585, 586 & 589-90 (1951)).

Justice Pedro Tuason's dissent in *Arnault v. Nazareno* cites Judge John Henry Wigmore, who spoke candidly about the congressional investigations of the U.S. Department of Justice during his time —

> The senatorial debauch of investigations — poking into political garbage cans and dragging the sewers of political intrigue — filled the winter of 1923-24 with a stench which has not yet passed away. Instead of employing the constitutional, manly, fair procedure of impeachment, the Senate flung self-respect and fairness to the winds. As a prosecutor, the Senate presented a spectacle which cannot even be dignified by a comparison with the persecutive scoldings of Coke and Scroggs and Jeffreys, but fell rather in popular estimate to the level of professional searchers of the municipal dunghills.

Arnault v. Nazareno, 87. Phil. at 77 (J. Tuason, dissenting opinion) (citing John H. Wigmore, *Comments on Recent Cases*, 19 ILL. L. REV. 452, 453 (1925)).

239. *Tenney*, 341 U.S. at 378.

240. *Id. See also* Charles S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 780, 813 (1926).

> That there is possibility of occasional abuse for partisan purposes, and that sometimes private matters are unduly exposed to the public gaze, is perhaps inevitable in a government of fallible men, but it must not be forgotten that the injuries done in these ways are infinitesimal compared to the evil consequences that would result from depriving the people's representatives of the power to know all there is to be known about the conduct of the public business, or from hampering them in getting at the facts, by a narrow legalistic attitude on the part of the courts.

Potts, *supra* note 240, at 813.

VIII. CONCLUSION

In the U.S., a 1992 study by the National Academy of Public Administration's Panel on Congress and the Executive emphasized the tension in inter-branch relations — "[s]truggling in a climate of partisanship and distrust, Congress and the Executive [ ] often appear paralyzed, locked in a permanent political standoff. More often they relate to each other as adversaries, not as responsible partners in governing."[241]

At the peak of his popularity and for the greater part of his administration, the President enjoyed solid political capital in Congress, buoyed by the supermajority he commanded in both houses.[242] Congress and the Executive were partners in governing.

After years of executive hegemony, however, there is renewed critical vigor from lawmakers.[243] Many have found their lost voices, fueled by popular indignation at the anomalies unearthed by the Senate Blue Ribbon hearings.[244] Neither can one discount the proximity of the national elections.[245] The pendulum effect has, once again, come into play.[246]

The Senate has filed a Petition with the Court to assert its power in inquiries in aid of legislation as provided under Article VI, Section 21 of the 1987 Constitution.[247] Senators, being nationally elected,[248] are best suited to

241. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, BEYOND DISTRUST: BUILDING BRIDGES BETWEEN CONGRESS AND THE EXECUTIVE 1 (1992).

242. Walden Bello, *The Spider Spins His Web: Rodrigo Duterte's Ascent to Power*, PHIL. SOCIOLOGICAL REV., Volume No. 65, Special Issue: Imagined Democracies, at 32.

243. *See, e.g.*, P.S. Res. No. 853, whereas cl. paras. 19-21; CNN Philippines Staff, *supra* note 198; Drilon, *supra* note 199; Senate of the Philippines, *supra* note 200; & P.S. Res. No. 859, whereas cl. paras. 24-29.

244. *See generally* P.S. Res. No. 853, whereas cl. paras. 19-21; CNN Philippines Staff, *supra* note 198; Drilon, *supra* note 199; Senate of the Philippines, *supra* note 200; & P.S. Res. No. 859, whereas cl. paras. 24-29.

245. *See* Gita-Carlos, *supra* note 11 & Maceda, Jr., *Managing or Meddling*, *supra* note 163.

246. Joint Committee on the Organization of Congress, *supra* note 21.

247. Tetch Torres-Tupas, *Senate Asks SC to Nullify Duterte Memo Barring Cabinet Execs from Senate Probe*, PHIL. DAILY INQ., Nov. 11, 2021, *available at* https://newsinfo.inquirer.net/1513502/senate-asks-sc-to-nullify-duterte-memo-barring-cabinet-execs-from-senate-probe (last accessed Nov. 30, 2021) [https://perma.cc/5JL6-GNSS].

248. Chavez v. Judicial and Bar Council, G.R. No. 202242, 696 SCRA 496, 524 (2013) (J. Leonen, dissenting opinion) & PHIL. CONST. art. VI, § 2.

check executive overreach.[249] Though there is no assurance that President Duterte's intransigence will be sustained by future occupants of Malacañang, the Senate should rightly attempt to quash any potential for restatements from the Court.

It is unlikely that new categories of exemption in the canon of executive privilege will be created. However, it would serve their legislative purpose, and the nation's own through them as representatives, to argue more effectively to broaden the interpretation given to inquiries having to be "in aid of legislation."

After all, Court decisions, though binding, are still subject to scrutiny.[250] As separation of powers specialist Louis Fisher articulated, "[w]hat is 'final' at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Supreme Court doctrines. Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation."[251]

It may come at a weighty political cost to stonewall when Congress is just doing its job. Nevertheless, the President has welcomed the filing of the Senate petition.[252] As he unhesitatingly announced, he is inclined to take his chances with the Court.[253]

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249. *See Abakada Guro Party List*, 562 SCRA at 286.

> [C]ongressional oversight is not unconstitutional *per se*, meaning, it neither necessarily constitutes an encroachment on the executive power to implement laws nor undermines the constitutional separation of powers. Rather, it is *integral to the checks and balances inherent in a democratic system of government*. It may in fact even *enhance the separation of powers as it prevents the over-accumulation of power in the executive branch*.

Abakada Guro Party List, 562 SCRA at 286 (emphases supplied).

250. In the Matter of the Allegations Contained in the Columns of Mr. Amado P. Macasaet Published in Malaya Dated September 18, 19, 20 and 21, 2007, A.M. No. 07-09-13-SC, 561 SCRA 395, 433 (2008).

251. Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 747 (1985).

252. DJ Yap, et al., *Duterte Welcomes Senate Challenge to Bring Snub Order to SC*, PHIL. DAILY INQ., Oct. 27, 2021, *available at* https://newsinfo.inquirer.net/1506988/duterte-welcomes-senate-challenge-to-bring-snub-order-to-sc (last accessed Nov. 30, 2021) [https://perma.cc/PFW5-LBKJ].

253. Catherine S. Valente, *Duterte Dares Senate to Bring Snub Order to Supreme Court*, MANILA TIMES, Oct. 7, 2021, *available at*

It is the lack of more definitive judicial guidance, though, that has resulted in these divergent views on the scope of executive privilege. As this latest episode bears out, the Executive will jealously invoke constitutional objections against efforts to obtain information that the President treats as privileged.

The one certainty supplied by jurisprudence and tradition is the recognition that the branches of government should try to accommodate each other.[254] Thus, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[255] Hence, conflicts are resolved less by resort to clearly defined standards than by balancing of interests, should the branches be unable to come to terms.[256]

Professor Josh Chafetz concisely articulated how best to approach this coming to terms — "[a] better way of dealing with such controversies, a way that is truer to our constitutional traditions and history, requires recognizing that, in such high-level separation-of-powers fights, the line between law and politics breaks down almost entirely."[257]

In the meantime, the nightmare scenario persists. Officials have spurned Senate invitations.[258] This is the Philippine-style, personality-based turf war[259]

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https://www.manilatimes.net/2021/10/07/latest-stories/duterte-dares-senate-to-bring-snub-order-to-supreme-court/1817475 (last accessed Nov. 30, 2021) [https://perma.cc/AR8U-R25B].

254. Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, G.R. Nos. 171947-48, 643 SCRA 90, 138 (2011) (J. Sereno, dissenting opinion) (citing *American Tel. & Tel. Co.*, 567 F.2d at 133 (citing *Myers*, 272 U.S. at 293 (J. Brandeis, dissenting opinion))). *See also Nixon*, 418 U.S. at 707.

255. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (J. Jackson, concurring opinion).

256. *See* Garvey, *supra* note 82, at 33.

257. Josh Chafetz, *If the House Holds Holder in Contempt, What Then?*, WASH. POST., June 21, 2012, *available at* https://www.washingtonpost.com/opinions/if-the-house-censures-holder-what%20then/2012/06/21/gJQATRPEtV_story.html?utm_term=.85ee229865de (last accessed Nov. 30, 2021) [https://perma.cc/2U5P-3JQB].

258. Perez-Rubio, *supra* note 9.

259. *See* WATARU KUSAKA, MORAL POLITICS IN THE PHILIPPINES: INEQUALITY, DEMOCRACY AND THE URBAN POOR 39 (2017). "[W]hat the civic sphere tends to oppose is politics characterized by corruption, cronyism, *personality*, and elite

that could lead to government gridlock (and all in a day's work). Already, the Senate has responded by flexing its appropriation power, itself another major component of oversight.[260]

If the President makes good on his dare to order resistance to Senate arrests, then the nightmare worsens.[261] Attempts by congressional security forces to arrest or detain executive officials may result in a standoff, which not even the Court can resolve.[262]

What the Court may resolve is the possible recourse by Congress to statutory strategy. Article 150 of the Revised Penal Code on disobedience to summons[263] is arguably applicable in cases of inattention to duty by the concerned executive officials.

The U.S. experience in this regard is, however, cautionary. The U.S. Legislature could hardly compel the government's prosecutorial arm to proceed against colleagues in the Executive.[264] The U.S. Justice Department has adopted the position that Congress does not have the authority to enforce

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domination of the poor through clientelism." KUSAKA, *supra* note 259, at 39 (emphasis supplied).

260. *See, e.g.*, Melvin Gascon, *Senators Warn of 'Zero Budget' for PCOO*, PHIL. DAILY INQ., Sept. 28, 2021, *available at* https://newsinfo.inquirer.net/1493888/senators-warn-of-zero-budget-for-pcoo (last accessed Nov. 30, 2021) [https://perma.cc/5JCR-68ZZ].

261. Zacarian Sarao, *Duterte to Police, Military: Don't Arrest Anyone Ignoring Senate's Subpoena*, PHIL. DAILY INQ., Oct. 1, 2021, *available at* https://newsinfo.inquirer.net/1495455/duterte-orders-police-and-military-not-to-arrest-anyone-ignoring-senates-subpoena (last accessed Nov. 30, 2021) [https://perma.cc/WMS5-W7RL].

262. But inherent contempt would require a jump to such vulgar considerations almost immediately. Further, "[t]o say the least, it would be impractical and unwise for congressional security forces to attempt to detain executive branch officials and haul them off to the congressional brig[.]" Wright, *supra* note 5, at 933 (citing Adam Cohen, *Congress Has a Way of Making Witnesses Speak: Its Own Jail*, N.Y. TIMES, Dec. 4, 2007, *available at* https://www.nytimes.com/2007/12/04/opinion/04tue4.html (last accessed Nov. 30, 2021) [https://perma.cc/8XWA-KUQZ]).

263. REV. PENAL CODE, art. 150 (as amended).

264. *See* Morton Rosenberg, When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry, at 210, *available at* https://www.thecre.com/forum8/wp-content/uploads/2017/05/WhenCongressComesCalling.pdf (last accessed Nov. 30, 2021) [https://perma.cc/K93M-LXFY].

subpoenas against executive officials, "even if there is no claim of [executive] privilege."[265] Even if not acting under the President's direction, the Department of Justice (DOJ) has argued that "it retains authority to make an independent assessment of whether the official has violated the criminal contempt statute."[266]

As Professor Andrew McCanse Wright acknowledged, "it is hard to imagine the [e]xecutive [b]ranch standing idly by as congressional security forces seek forcible detention of a cabinet official. The [e]xecutive [b]ranch has more guns."[267] He likewise supplied an observation that captures today's popular sentiment towards the President's threats of armed resistance — "[i]t would be incredibly damaging to the constitutional scheme if ... even the specter of violence between the political branches [is incentivized]."[268]

The Philippines' own DOJ has yet to be tested on the fidelity of this interpretation to the Constitution if it were ever to be called in to prosecute an executive branch official on a statutory contempt charge. At the subject Blue Ribbon investigation, however, Secretary of Justice Menardo Guevarra shared his sense of the executive department's respect for this legislative power — "From where I stand, I view the [M]emorandum issued by the Office of the President not to defy the constitutional prerogative of the Congress to conduct legislative inquiries[.]"[269] Rather than being labeled as a form of defiance, the Memorandum was deemed "a protest on the manner [by which] the Senate Blue Ribbon [C]ommittee has conducted its hearings, which have

265. Rosenberg, *supra* note 264, at 210.

266. Todd Garvey & Daniel J. Sheffner, Congress's Authority to Influence and Control Executive Branch Agencies (Congressional Research Service, R45442), *available at* https://www.everycrsreport.com/files/2021-05-12_R45442_e34a620d03eb5880bbfc8d4e1a1803d034487826.pdf (last accessed Nov. 30, 2021) [https://perma.cc/ES4X-FYG9] (citing Letter *from* Ronald C. Machen, Jr., United States Attorney, U.S. Department of Justice, *to* John A. Boehner, Speaker, U.S. House of Representatives (Mar. 31, 2015)).

267. Wright, *supra* note 5, at 934.

268. *Id.*

269. Christia Marie Ramos, *DOJ Chief: Duterte Memo Meant Not to 'Defy' Congress But 'Protest' Blue Ribbon's Handling of Probe*, PHIL. DAILY INQ., Oct. 6, 2021, *available at* https://newsinfo.inquirer.net/1497825/doj-chief-duterte-memo-meant-not-to-defy-congress-but-protest-blue-ribbonshandling-of-probe (last accessed Nov. 30, 2021) [https://perma.cc/55BC-G5U5].

taken a lot of valuable time from executive officials who are urgently addressing a public health emergency[.]"[270]

The Philippine President's power has been seen in some quarters as even greater than that of the U.S. President,[271] despite recognition of the latter post as the most powerful position in the world. It is critical that sentinels to his supremacy be strengthened, as the very point of the checks and balances principle would otherwise become illusory.[272]

Archibald Cox disabuses minds of any illusions of allowing the Executive to run away — "[t]he claim of privilege is a useful way of hiding inefficiency, maladministration, breach of trust or corruption, and also a variety of potentially controversial executive practices not authorized by Congress."[273] Left uncontested, the President's "gag" order guts the constitutional authority of the Senate to not only check the personal excesses of any given president, but to also oversee the entire executive branch.[274]

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270. Rey E. Requejo, *DOJ: Memo to Cabinet on Senate Probe Not to Defy But to Protest Treatment*, MANILA STAND., Oct. 7, 2021, *available at* https://www.manilastandard.net/news/national/366813/doj-memo-to-cabinet-on-senate-probe-not-to-defy-but-to-protest-treatment.html (last accessed Nov. 30, 2021) [https://perma.cc/7PWZ-FJF7].

271. Jürgen Rüland, *Constitutional Debates in the Philippines: From Presidentialism to Parliamentarianism?*, 43 ASIAN SURV. 461, 468 (2003) (citing JOEL ROCAMORA, THE CONSTITUTIONAL AMENDMENT DEBATE: REFORMING POLITICAL INSTITUTIONS RESHAPING POLITICAL CULTURE 14 (1997)).

272. "The threat of an overreaching, unrestrained executive is an ever-present, built-in reality of our separated but balanced plan of government. Vigilance through continuous and aggressive oversight is indispensable. The current failure to meet executive challenges to Congress' core prerogatives is an abdication of its constitutional responsibility." Rosenberg, *supra* note 264, at 211.

273. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1433 (1974).

274. According to Justice Antonio T. Carpio,

> [t]he Senate is now faced with an existentialist threat that would prevent it from discharging its basic function — to enact laws. If the Senate cannot compel Cabinet members and executive officials to attend its inquiry, then it would be enacting laws blindly, without accurate information as to the problems of the nation and the causes of such problems. Naturally, without such information, the Senate cannot intelligently enact laws to address the problems of the nation. The President's directive will effectively make the Senate, and also the House of Representatives, completely inutile.

The "very definition of tyranny[,]" James Madison wrote, is what "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced[.]"[275] The prevention of tyranny is the whole *raison d'etre* of separation.[276] Thus, "the great security against a gradual concentration of the several powers in the same department[ ] consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[277] Accordingly, "[*a*]*mbition must be made to counteract ambition*."[278] This makes it harder to mount united action, but it protects against the likelihood of abuse — "[t]hrough this process of interaction ... , all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional values."[279]

Ambition is the driving force, for men themselves and for their institutions. Madison opined that "[t]he interest of the man must be connected with the constitutional rights of the place."[280] To acquiesce meekly will be the fastest route to tyranny.

Antonio T. Carpio, *Existentialist Threat to the Senate*, PHIL. DAILY INQ., Oct. 7, 2021, *available at* https://opinion.inquirer.net/144984/existentialist-threat-to-the-senate (last accessed Nov. 30, 2021) [https://perma.cc/S7P4-V2GA].

275. THE FEDERALIST NO. 47 (James Madison).

276. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 678 (2009). Similarly, Fr. Joaquin G. Bernas, S.J. wrote that the very "purpose of separation of powers and 'checks and balances' is to prevent concentration of powers in one department and thereby to avoid tyranny." *Id.*

277. THE FEDERALIST NO. 51 (James Madison).

278. *Id.* (emphasis supplied).

279. *Congress, the Court, and the Constitution: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 105th Cong. 23 (1998) (statement of Louis Fisher, Senior Specialist in Separation of Powers, Congressional Research Service). *See also* Louis Fisher, *Congressional Checks on the Judiciary*, *in* CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 35 (Colton C. Campbell & John F. Stack, Jr. eds., 2001).

280. THE FEDERALIST NO. 51 (James Madison).