FEATURE:

SITUATING THE OVERSIGHT POWERS OF CONGRESS IN THE FORMALIST-FUNCTIONALIST DEBATE *

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> *And it is provided that nothing touching the common wealth shall be confirmed and ratified unless it has been reasoned of and debated three days in the council before it be decreed. It is death to have any consultation for the commonwealth out of the council or the place of the common election. This statute, they say was made with the intent that the prince and the Tranibores might not easily conspire together to oppress the people by tyranny, and to change the state of the weal public. Therefore matters of great weight and importance be brought to the election house of the Syphogrants, which open the matter to their families and afterward, when they have consulted among themselves, they show their device to the council. Sometimes the matter is brought before the council of the whole island.*
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> — *Thomas More* [1]

INTRODUCTION

The Filipino is, once again, facing a very real test of democratic and constitutional principles. The surfacing of the "Gloriagate" tapes, the President's admission that she did in fact speak with a Comelec official before canvassing had been concluded[2] and the fiery call for the President's resignation by Susan Roces, widow of defeated presidential candidate Fernando Poe, Jr.,[3] have all fueled a whirlwind of

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[1] THOMAS MORE, UTOPIA 11-12 (Phoenix ed. 1994).

[2] Specifically, President Macapagal-Arroyo's admission is as follows: "I was anxious to protect my votes and during that time had conversations with many people, including a Commission on Elections official. My intent was not to influence the outcome of the election, and it did not. As I mentioned, the election had already been decided and the votes counted." Christine O Avendaño, *GMA: hello... its me*, Philippine Daily Inquirer, June 28, 2005, A6.

[3] Fe Zamora, *Angry Susan calls on GMA to resign; FPJ widow ready to join protest rallies*, Philippine Daily Inquirer, June 30, 2005, A1.

reactions ranging from militant street protests[4] to "Hello! Hello! Garci!" ring tones[5] and car horns.[6] Although nearly every sector of Philippine society has been marked by the accusations of electoral fraud, it is the House of Representatives that has borne the brunt of the political backlash.

Up until June 30, 2005, Congressmen had locked horns over the question of whether or not they could listen to the "Gloriagate" tapes (which the entire country was already listening to thanks to the wonders of compact disc technology).[7] The legal dilemma they faced was the apparent prohibition of listening to such imposed by Republic Act No. 4200, the Anti-Wiretapping Law of 1965.[8] Finally, however, the Members of the House Representative agreed to listen.[9]

A day prior to that breakthrough decision, a former dean of the University of the Philippines College of Law, Pacifico Agabin, and the dean of the University of the East Law School, Amado Valdez, had been invited to the House to offer their expert legal opinions on the matter.[10] Both advisers said that the tapes could be played.[11]

This same position had been taken a few days before by another legal luminary, Fr. Joaquin Bernas, S.J., who justified his position by invoking Congress' inherent power to conduct legislative investigations. Aware that the "Gloriagate tapes" were possibly being used by unscrupulous Congressmen to further their personal political agendas, he nonetheless wrote, "Indeed, individual members may have ulterior motives for wanting

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[4] Tarra Quismundo, Jhunnex Napallacan & Christian Esguerra, *Militants' rallies star countdown*, Philippine Daily Inquirer, July 1, 2005, A1.

[5] Armand Nocum & Jocelyn Uy, *Mobile phones ring: Hello! Hello! Garci!*, Philippine Daily Inquirer, June 16, 2005, A1.

[6] *Now, cars are honking, 'Hello! Hello! Garci!'*, Philippine Daily Inquirer, June 21, 2005, A1.

[7] A. Nocum & J. Uy, *op. cit. supra* note 5, at A8.

[8] The pertinent provisions of the law are sections 1 and 4 which provide for the following:

> Sec. 1. It shall be unlawful for any person, not being authorized by all the parties to any private communication or spoken word, to tap any wire or cable, or by using any other device or arrangement, to secretly overhear, intercept, or record such communication or spoken word by using a device commonly known as a dictaphone or dictagraph or detectaphone or walkie-talkie or tape recorder, or however otherwise described.
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> It shall also be unlawful for any person, be he a participant or not in the act or acts penalized in the next preceding sentence, to knowingly possess any tape record, wire record, disc record, or any other such record, or copies thereof, of any communication or spoken word secured either before or after the effective date of this Act in the manner prohibited by this law; or to replay the same for any other person or persons; or to communicate the contents thereof, either verbally or in writing, or to furnish transcriptions thereof, whether complete or partial, to any other person....
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> Sec. 4. Any communication or spoken word, or the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or any information therein contained obtained or secured by any person in violation of the preceding sections of this Act shall not be admissible in evidence in any judicial, quasi-judicial, legislative or administrative hearing or investigation.

[9] Philip Tubeza & Michael Lim Ubac, *House plays tape, finally*, Philippine Daily Inquirer, July 1, 2005, A2.

[10] Philip Tubeza & Michael Lim Ubac, *GMA allies in House foil attempt to play tape*, Philippine Daily Inquirer, June 30, 2005 at A10.

[11] *Ibid.*

to have the materials aired; but ulterior motives are irrelevant if the hearings can come under the broad category of 'in aid of legislation.'"[12] He went on to explain,

> I say "broad category" because the Philippine Congress has plenary legislative power, that is, it can legislate practically anything under the sun. And hearings in aid of legislation need not be on the subject of an actually pending bill. Hearings can be conducted precisely for the purpose of finding out whether hearings on a particular subject can lead to the filing of a bill or bills. We cannot second guess what the House will find or not find in the hearings.[13]

For this reason, Bernas took exception to section 4 of the Anti-Wiretapping Law which prohibits the introduction of wiretapped materials. He explains his position thus,

> [T]he Constitution, in authorizing Congress to conduct investigations, imposes only two limitations, namely, that the investigation be in aid of legislation and that the 'rights of persons appearing in or affected by such inquiries shall be respected.' Because of this second limitation, privacy rights may require that investigations be held in camera (not in open court/public).... In my view, however, a total prohibition of the use of wiretapped materials in congressional inquiries trenches upon the constitutionally granted authority of Congress.[14]

Dean Agabin explains this legislative power further by pointing out that the right to privacy that the Anti-Wiretapping Law seeks to protect "must be balanced against the right of people to information."[15] Thus he opined, "In the present case, nothing is more vital to the democratic polity than the issue of who was elected President in the last elections and whether or not the democratic processes had been distorted."[16] He noted that,

> Now that the President has authenticated the tape and admitted that hers is the voice on the tape, it is imperative that the people should get to know what their President had told a member of an independent constitutional commission and what the latter had replied.[17]

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[12] Joaquin Bernas, *"Playing the tapes,"* Philippine Daily Inquirer, June 27, 2005, A15.

[13] Bernas locates the legal propriety of listening to the "Gloriagate" tapes in the Constitution's "speech and debate" clause which reads: "No Member shall be questioned nor be held liable in any other place for any speech or debate in the Congress or in any committee thereof." CONST. art. VI, sec. 11. Thus he concludes that Members of the House should not fear the penalty of perpetual disqualification from office that the Anti-Wiretapping Law threatens to impose in the event of a violation of its provisions. Bernas proceeds with his argument thus:

> Our Constitution says: "No Member shall be questioned nor be held liable in any other place for any speech or debate in the Congress or in any committee thereof." Jurisprudence has interpreted 'speech and debate' as covering anything done in furtherance of the deliberative process of Congress. Thus, when a member of Congress presents a copy of the tapes and asks that they be played, what comes out is part of the legislator's "speech" and is covered by the speech and debate clause. J. Bernas, *op. cit. supra* note 12 at A15.

[14] J. Bernas, *op. cit. supra* note 12 at A15.

[15] P. Tubeza & M. Ubac, *op. cit. supra* note 10 at A10.

[16] *Ibid.*

[17] *Ibid.*

In this way, Dean Agabin deftly wove Congress' investigative power with the Constitutional "right of the people to information on matters of public concern."[18] Dean Raul Pangalangan of the University of the Philippines College of Law bolsters this argument by pointing out that section 28, article II of the 1987 Constitution adopts as state policy the "full public disclosure of all [the State's] transactions involving public interest."[19] As Dean Valdez noted, in comparison to these constitutional tenets, the Anti-Wiretapping Law is "a mere statute inferior to the provisions of the fundamental law."[20]

In closing this resounding convergence of legal opinion, one can once again turn to Fr. Bernas who concludes his argument thus:

> [W]e cannot discuss this matter without alluding to freedom of expression in general. The contents of the alleged wiretapped materials are not merely of private concern; they are matters of public interest. Even if they are the product of illegal wiretapping, there is good reason for allowing disclosure.... Privacy concerns must give way when balanced against the interest in disseminating information of paramount public importance. Anyone who accepts public office also accepts an attendant loss of privacy. Jurisprudence is replete with assertions of democracy's "national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[21]

Ultimately, therefore, all these legal experts assert that Congress not only can but in fact should examine the infamous "Gloriagate" tapes. John Stuart Mill would have referred to this as the legislature's responsibility "to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers objectionable; and to censure them if found condemnable."[22]

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[18] CONST. art II, sec. 7.

[19] Raul Pangalangan, *"GMA's confession: Legal Score, political penance,"* Philippine Daily Inquirer, July 1, 2005, A14. Dean Pangalangan continues by citing jurisprudence regarding matters of public concern such as Chavez v. Public Estates Authority, 433 Phil. 506 (2002), where Justice Carpio's declared:

> These twin provisions of the Constitution seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. These twin provisions are essential to the exercise of freedom of expression. If the government does not disclose its official acts, transactions and decisions to citizens, whatever citizens say, even if expressed without any restraint, will be speculative and amount to nothing. These twin provisions are also essential to hold public officials "at all times xxx accountable to the people," for unless citizens have the proper information, they cannot hold public officials accountable for anything. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning of any democracy. *Id.* at 529-530.

[20] P. Tubeza & M. Ubac, *op. cit. supra* note 10 at A10.

[21] J. Bernas, *op. cit. supra* note 12 at A15.

[22] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE DEMOCRACY (1947), quoted in Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*).

If the current political developments reveal anything, it is that the awesome oversight powers of Congress reflect basic principles of governance that have been adopted into the Philippine constitutional democracy. It would therefore be more than good to invest oneself in better appreciating the nature and scope of this oversight power. This paper sets for itself the modest two-fold task of (1) identifying the scope of Congress' oversight power and of (2) examining the nature of that power.

The first task is relatively simple considering that Justice Reynato S. Puno has outlined the basic contours of the oversight power of Congress in his concurring and dissenting opinion in *Macalintal v. Commission on Elections*, circa 2003.[23] This paper will follow that basic outline and supplement it only when necessary. The second task, however, proves to be a little more difficult.

The nature of the oversight power of Congress can only be properly appreciated in the context of the doctrine of the separation of powers. An early decision of the Philippine Supreme Court[24] suggests that the three powers of government — the legislative, the executive, and the judicial — are easily distinguished and identified from another. Thus it held:

> Some one has said that the powers of the legislative department of the Government, like the boundaries of the ocean, are unlimited. In constitutional governments, however, as well as governments acting under delegated authority, the powers of each of the departments of the same are limited and confined within the four walls of the constitution or the charter, and each department can only exercise such powers as are expressly given and such other powers as are necessarily implied from the given powers. The Constitution is the shore of legislative authority against which the waves of legislative enactment may dash, but over which it cannot leap.[25]

Those clear walls of division however are belied by Chief Justices Oliver Wendell Holmes, who qualified the doctrine of the separation of powers when he pronounced the following: "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to another."[26]

It is in the dim glow of this penumbra that this paper must therefore tread. One, however, is not completely lost in this hazy light. Two basic theories have been advanced to clarify the nature of the separation of powers: the formalist and functionalist theories. Unfortunately, they stand in direct opposition to one another. The formalist might be described as one insistent on restoring the great divide between light and shadow. On the other hand, the functionalists is concerned not with the strict categorization of powers but with the fruitfulness of locating a power in one of the

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[23] Macalintal v. Commission on Elections, *supra* (Puno, J., *concurring and dissenting*).

[24] Government v. Springer, 50 Phil. 259 (1927).

[25] *Id.* at 309.

[26] Springer v. Government of the Philippine Islands, 277 U.S. 189, 209 (1928).

three departments of government or even in the penumbral interstices that stand between them. Although the theoretical lines dividing formalism and functionalism are rather clearly designated, it is the position of this paper that regardless of which theoretical framework one adopts, both theories uphold the value of congressional oversight within the doctrine of the separation of powers. Put otherwise, regardless of whether you are a formalist or a functionalist, the conclusion you will arrive at is that congressional oversight has a critical place in political theory and in practical governance.

With that protracted look at the timeliness of a reflection on congressional oversight and what is hopefully a clear elucidation of the project and methodology of this paper, it is possible to begin the study of the oversight power of Congress.

I. SCOPE OF THE OVERSIGHT POWER OF CONGRESS

The power of oversight has been recently defined in Philippine jurisprudence as embracing "all activities undertaken by Congress to enhance its understanding of and influence over the implementation of legislation it has enacted."[27] Elsewhere, however, it has been referred to in even broader terms as the "review, monitoring and supervision" by Congress of "agencies, programs, activities, and policy implementation."[28] It has also been considered to include activities such as "authorization, appropriations, investigative, and legislative hearings by standing committees, specialized investigations by select committees, and reviews and studies by congressional support agencies and staff."[29] Clearly therefore, the field of congressional oversight is broad. To simplify, however, one might opt to simply heed John Stuart Mill who identifies oversight as a representative assembly's task of watching government and, when necessary, of controlling it.[30]

In the Philippine context, the legislative task of watching and controlling government might be located in the following five powers: (1) scrutiny pursuant to the power of appropriation; (2) scrutiny of department heads; (3) scrutiny pursuant to the power of confirmation; (4) legislative investigation; and, (5) veto power.[31] Clearly, the

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[27] Jacob K. Javits & Gary J. Klein, *Congressional Oversight and The Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L REV. 455, 460 (1977), quoted in Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*). Justice Puno goes on to state that,

> Clearly, oversight concerns post-enactment measures undertaken by Congress: (a) to monitor bureaucratic compliance with program objectives, (b) to determine whether agencies are properly administered, (c) to eliminate executive waste and dishonesty, (d) to prevent executive usurpation of legislative authority, and (d) to assess executive conformity with the congressional perception of public interest.

[28] Frederick Kaiser, *Congressional Oversight*, available at <http://usinfo.state.gov/usa/infousa/politics/legbranc/oversite.pdf> July 1, 2005.

[29] *Ibid.*

[30] JOHN MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 104 (1861) quoted in F. Kaiser, *op. cit. supra* note 28 at 2.

[31] It should be noted that Justice Puno, following Bertram Gross, categorizes these different oversight powers under the general headings of scrutiny, investigation and supervision. As per Justice Puno's categorization, the first three oversight powers in our enumeration would fall under the first category of "scrutiny," the fourth oversight

first four powers would fall under Mill's "watching powers." The last is a "controlling power." We now proceed to briefly examine each of the five powers of congressional oversight in the Philippine constitutional system.

A. SCRUTINY PURSUANT TO THE POWER OF THE PURSE

The first paragraph of article VI, section 29 of the Constitution provides that "no money shall be paid out of the Treasury except in pursuance of an appropriation made by law." This power is popularly referred to as the "power of the purse." Such a power James Madison considers as representative of "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[32] It is for this reason that section 25 of the same article requires that "[a]ll appropriation, revenue or tariff bills, bills authorizing increase of public debt, bills of local application, and private bills... originate exclusively in the House of Representative." The reason why such bills must originate in the House is that "district Representatives are closer to the pulse of the people than senators are and are therefore in a better position to determine both the extent of the legal burden they are capable of bearing and the benefits that they need."[33] Madison's "most complete and effectual weapon" is thus put in the hands of what comes closest in the Philippine constitutional system to the "immediate representatives of the people," i.e. the district representative sitting in the lower house of Congress.

In furtherance of the concerns of their constituents, it is incumbent upon the Members of the House to hold hearings wherein the budget proposals of administrative officials might be scrutinized. Failure to convince Congress of the propriety of appropriations in their favor could very well result in the reversal of public policy or the castigation of public officials. In fact, the Rules of the House of Representatives include amongst the capacities of the Appropriations Committee the "creation, abolition and classification of positions in government, and the determination of salaries, allowances and benefits of government personnel."[34]

To reiterate, the power to scrutinize executive functions lies in Congress because "the legislative department alone has access to the pockets of the people."[35]

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power would fall under the category of "investigation," and the last oversight power would fall under the category of "supervision." Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*).

[32] JAMES MADISON, THE FEDERALIST NO. 58.

[33] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 687 (1996 ed., 2002).

[34] RULES OF THE THIRTEENTH CONGRESS OF THE HOUSE OF REPRESENTATIVES, Rule IX, sec. 28, par. (d).

[35] JAMES MADISON, THE FEDERALIST NO. 48.

B. THE QUESTION HOUR: SCRUTINY OF DEPARTMENT HEADS

The so-called "question hour" was incorporated into the 1987 Constitution in order to provide a venue where Congress might be able to (1) elicit information from the administration, (2) request the administration to intervene in an affair of state or (3) expose abuses and seek redress.[36] Despite these firm intentions, what is now section 22, article VI of the Constitution proves to be merely permissive in nature, which is a sharp departure from its mandatory character under the 1973 Constitution.[37] Section 22 of article VI thus provides: "The heads of departments *may, upon their own initiative, with the consent of the President*, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments." (emphasis added) Fr. Bernas explains the reversion to the permissive character of the 1935 Constitution thus:

> [A]lthough the task of legislation demands upon adequate information and although the Bill of Rights guarantees the right of the people to information on matters of public concern, the dynamics of legislative-executive relations would dictate that Congress find ways of obtaining information from department heads other than by compulsion.[38]

Due to the proximity of the heads of departments to the seat of the Executive, congressional oversight with respect to them is restrained by the fundamental law. In fact the Constitution itself provides a procedural limitation in that Presidential consent must be secured in order for the inquiry to proceed. Section 22 even limits the manner in which the question hour is to be conducted: "Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto."[39] Finally, the last sentence of section

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[36] II RECORD OF THE CONSTITUTIONAL COMMISSION 46 (1986).

[37] The original tenor of the provision in the 1935 Constitution, which was permissive in nature, was adopted in the 1987 Constitution. The 1973 Constitution provided that, "There shall be a question hour at least once a month or as often as the Rules of the Batasang Pambansa may provide, which *shall be included in its agenda*, during which the Prime Minister, the Deputy Prime Minister or any Minister may be *required to appear and answer questions and interpellations* by Members of the Batasang Pambansa." CONST. (1973) art. VIII, sec. 12, par (1) (emphasis added). See also Macalintal v. Commission on Elections, *supra* (Puno, J., *concurring and dissenting*); & J. BERNAS, *op. cit. supra* note 33 at 681-684.

[38] J. BERNAS, *op. cit. supra* note 33 at 684.

[39] The RULES OF THE THIRTEENTH CONGRESS OF THE HOUSE OF REPRESENTATIVES further qualify the question hour thus:

> Sec. 93. Standards Set for Questions. - Questions shall be based on facts and asked to obtain information or press for action. No question shall: (a) contain arguments; (b) suggest its own answer; (c) include offensive or unparliamentary language or expressions; (d) pertain to *sub judice* matters; (e) seek an opinion on a question of law; (f) include names or statements other than what is strictly necessary to make the question intelligible; (g) relate to matters directly under the responsibility of another department head; (h) refer to an item of the agenda of the current month' s session or to proceedings of a committee not yet reported; (i) suggest amendments to bills before the House of Representatives; or (j) repeat a question previously asked and answered.
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> Sec. 94. Form of Questions and Answers. - In form, questions and answers of excessive length are not in order.

22 requires that "when the security of the State or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session."[40]

Despite these restrictions, "department heads should be aware that information vital to legislation legitimately requested by Congress should not, for the welfare of the nation, be withheld."[41]

C. SCRUTINY PURSUANT TO THE POWER OF CONFIRMATION

The third form of legislative scrutiny of executive action is provided for by section 18, article VI of the Constitution which organizes a Commission on Appointments consisting of members from both houses of Congress.[42] This provision of the fundamental law has been interpreted to mean that only the appointment of the following public officers requires the confirmation of the Commission of Appointments: heads of executive departments, ambassadors, other public ministers and consuls, officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in the President under the Constitution.[43]

The oversight role of the Commission on Appointments is explained thus: "Theoretically, [the power of confirmation] is intended to lessen political considerations in the appointment of officials in sensitive positions in the government. It also provides Congress an opportunity to find out whether the nominee possesses the necessary qualifications, integrity and probity required of all public servants."[44]

It in this context of checking executive power that inquiries conducted by the Commission on Appointments fall into the subcategory of "watching power" of congressional oversight.

These first three oversight powers are powers of scrutiny. To identify them with one another however would be a little contrived, for the disparity amongst the

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[40] The RULES OF THE THIRTEENTH CONGRESS OF THE HOUSE OF REPRESENTATIVES provides:

> Sec. 18. Executive Sessions. - When the House decides to hold an executive session, the Speaker shall direct the galleries and hallways to be cleared and the doors closed. Only the Secretary General, the Sergeant-At-Arms and other persons specifically authorized by the House shall be admitted to the executive session. They shall preserve the secrecy of everything read or discussed in the session.

[41] J. BERNAS, *op. cit. supra* note 33 at 684.

[42] CONST. art VI, sec. 18 provides:

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

[43] See CONST. art VII, sec. 18; Sarmiento v. Mison, G.R. No. 79974, Dec. 17, 1987; Bautista v. Salonga, G.R. No. 86439, April 13, 1989; Quintos-Deles v. Constitutional Commission G.R. No. 83216, Sept. 4,1989; Calderon v. Carale, G.R. No. 91636, April 23, 1992.

[44] Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*)

three powers is rather wide. Notice for instance that on one end of the spectrum lies the weakest power, i.e. the power to scrutinize heads of departments. The power is so weak, in fact, that Presidential consent must be secured in order to even initiate the inquiry. On the other end of the spectrum lies the strongest inquiry power, i.e., the scrutiny power of Congress pursuant to its power of the purse. This inquiry power is much more forceful than the inquiry power respecting department heads, for the reason that it can actually result in the abolition of entire administrative offices. In this sense, it is akin to legislative investigation, separated only by the fact that it can be exercised solely in connection with the power of the purse while legislative investigations, as Fr. Bernas notes, cover practically anything under the sun.[45]

D. LEGISLATIVE INVESTIGATIONS

The power to conduct legislative investigations is "so far incidental to the legislative function as to be implied."[46] Thus, even without an explicit mandate in the 1935 Constitution, the Supreme Court in 1950 upheld Congress' exercise of the power of legislative investigation. The Court through Justice Roman Ozaeta ratiocinated its position thus:

> [T]he power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to effect or change; and where the legislative body does not itself possess the requisite information — which is not infrequently true — recourse must be had to others who do possess it. Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion is essential to obtain what is needed.[47]

The duty of persons appearing before Congress has also been justified on similar presumptions:

> It 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.[48]

Because the power of investigation naturally belongs to the power to legislate, both the 1973 and 1987 Constitutions translated what was implicit in the 1935 Constitution into an express grant of power. Thus, article VI, section 21 of the 1987 Constitution provides: "The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its

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[45] J. Bernas, *op. cit. supra* note 12 at A15.
[46] Arnault v. Nazareno, 87 Phil. 29 (1950).
[47] *Id.* at 45 (internal citations omitted).
[48] Watkins v. United States, 354 U.S. 178, 187-188 (1957).

duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected."[49]

1. Scope, Distinction and Purpose of Legislative Investigation

Justice Harlan, in the case of *Barenblatt v. United States*,[50] had the opportunity to identify the breadth of Congress' power to investigate. He wrote,

> The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.[51]

The scope therefore of Congress' power to investigate is as broad as its power to legislate. Once again, quoting Bernas, that is "practically anything under the sun."[52]

Although Justice Harlan clarifies the scope of investigative power, he fails to identify exactly what it is that distinguishes legislative investigation from mere legislative scrutiny. Such a distinction is better explained in the following:

> The adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations or confirmation exercises. While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra and Whitewater has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.[53]

It is the adversarial or inquisitorial nature of legislative investigations, therefore, that distinguishes it from the other oversight powers.

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[49] The 1973 Constitution provided for substantially the same in art. VIII, sec. 12: "The Batasang Pambansa or any of its committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in such shall be respected."

[50] 360 U.S. 109 (1959).

[51] *Id.* at 111.

[52] J. Bernas, *op. cit. supra* note 12 at A15.

[53] Morton Rosenberg, *"Investigative Oversight: An Introductin to the Law, Practice and Procedure of Congressional Inquiry,"* available at <http://www.ncseonline.org/nle/crsreports/government/gov-3.cfm?&CFID=3043640&CFTOKEN=80848581> July 1, 2005.

With regard to purpose, the Philippine Senate itself has pronounced that there are basically five goals toward which legislative investigations may aim. They are as follows:

> First, Congress can investigate for the purpose of securing information relevant to its responsibility for the enactment of legislation. Second, Congress can investigate to oversee the management of departments and offices in the Executive Branch. Accordingly, legislative oversight of the Executive Branch is also inherent in legislative power. The third purpose is to inform the public. A legislature in a democratic society has an obligation to educate the public as to the need of legislation. In this manner, Congress can help crystallize or guide the formulation of public opinion. And fourth, investigation would also permit Congress to resolve questions concerning its membership or procedure, such as the conduct of elections, campaign expenditures, fitness, qualifications of members of Congress and others.
>
> It may also be added that as an incidence to the investigation proceedings, or as a consequence thereof, Congress or any of its investigating committees performs prosecutorial functions over anomalous or illegal activities, in which case it may recommend to the courts cases for appropriate action. It may likewise, as has been frequently done, recommend endorsement to the Office of the Ombudsman for investigation and filing of the necessary administrative and criminal charges against public officers for violation of the provisions of Republic Act No. 3019, otherwise known as the "Anti-Graft and Corrupt Practices Act." [54]

It becomes evident at this point that another distinguishing factor between legislative investigation and legislative scrutiny is the variety of ends which the former might realize.[55]

2. Limitations on Legislative Investigation

Returning to section 12, article VI of the Constitution, it has been suggested that the said provision does not intend to authorize legislative investigation — for, as has already been pointed out, investigation so properly belongs to the Congress that it would be available even absent an express constitutional grant — but, instead, attempts to limit its exercise.[56] The limitations laid down by the Constitution are threefold: first, the investigation must be in "aid of legislation;" second, it must be conducted "in

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[54] Powers and Functions of the Senate of the Philippines at <http://www.senate.gov.ph/about/powers.htm#Legislative_Power> July 1, 2005..

[55] With respect to the third purpose in particular, Woodrow Wilson explains:

> 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... unless Congress has and uses every means of acquainting itself with the acts and disposition of the administrative agents of the government, the country must remain in embarrassing and 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 functions. WOODROW WILSON, CONGRESSIONAL GOVERNMENT available at <http://teachingamericanhistory.org/library/index.asp?document=798> July 1, 2005.

[56] ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 163 (2002).

accordance with duly published rules of procedure;" and finally, "[t]he rights of persons appearing in or affected by such inquiries shall be respected."[57]

With regard to the first limitation, *Bengzon, Jr. v. Senate Blue Ribbon Committee*[58] stands out as an exception to the broad investigative powers of Congress for there the Court held that,

> Verily, the speech of Senator Enrile contained no suggestion of contemplated legislation; he merely called upon the Senate to look into a possible violation of Sec. 5 of RA No. 3019, otherwise known as "The Anti-Graft and Corrupt Practices Act." In other words, the purpose of the inquiry to be conducted by respondent Blue Ribbon Committee was to find out whether or not the relatives of President Aquino, particularly, Mr. Ricardo Lopa, had violated the law in connection with the alleged sale of the 36 or 39 corporations belonging to Benjamin "Kokoy" Romualdez to the Lopa Group. There appears to be, therefore, no intended legislation involved.[59]

This decision however has been sharply criticized. Justice Isagani Cruz laments that,

> The decision failed to consider that [...] the purpose of the legislative investigation was to ascertain the disposition of funds and properties claimed to be public in nature. Its findings on this matter could be the subject of legislation although it may not have been expressly stated that such was the purpose of the inquiry. As observed in the earlier and more logical case of *Arnault v. Nazareno*, "We are bound to presume that the action of the legislative body was with a legitimate object if it was capable of being so construed, and we have no right to assume that the contrary was intended."[60]

The better attitude therefore seems to be a presumption of legitimacy in favor of Congress. Besides, the 1987 Constitution clearly enumerates the subject matter beyond the pale of legislation and therefore beyond investigation as well. These include prohibitions against *ex post facto* laws and bills of attainder[61] and prohibitions against laws impairing the obligation of contracts,[62] laws granting titles of royalty or nobility,[63] and laws increasing the appellate jurisdiction of the Supreme Court without its advice and concurrence.[64]

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[57] CONST. art. VI, sec. 12.
[58] G.R. No. 89914, November 20, 1991.
[59] *Ibid.*
[60] I. CRUZ, *op. cit. supra* note 56 at 164.
[61] CONST. art. II, sec. 22.
[62] CONST. art. II, sec. 10.
[63] CONST. art. VI, sec. 31.
[64] CONST. art. VI, sec. 30.

The second limitation on investigative powers is the basic procedural due process requirement that legislative proceedings follow the published rules of procedure of their respective Houses.[65]

The final limitation on investigative power is that the rights of persons appearing in or affected by legislative investigations be respected. However, the landmark case of *Arnault v. Nazareno*[66] reveals that in practice such a limitation might easily find itself frustrated. In said case, Arnault's last defense against the Senate's move

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[65] Justice Puno summarizes the House Rules and Procedure Governing Inquiries in Aid of Legislation adopted on August 28, 2001 in the following manner:

> The conduct of legislative investigation is also subject to the rules of each House. In the House of Representatives, an inquiry may be initiated or conducted by a committee *motu proprio* on any matter within its jurisdiction upon a majority vote of all its Members or upon order of the House of Representatives through:
>
> (1) the referral of a privilege speech containing or conveying a request or demand for the conduct of an inquiry, to the appropriate committee, upon motion of the Majority Leader or his deputies; or
>
> (2) the adoption of a resolution directing a committee to conduct an inquiry reported out by the Committee on Rules after making a determination on the necessity and propriety of the conduct of an inquiry by such committee: *Provided*, That all resolutions directing any committee to conduct an inquiry shall be referred to the Committee on Rules; or
>
> (3) the referral by the Committee on Rules to the appropriate committee, after making a determination on the necessity and propriety of the conduct of inquiry by such committee, of a petition filed or information given by a Member of the House requesting such inquiry and endorsed by the Speaker: *Provided*, That such petition or information shall be given under oath, stating the facts upon which it is based, and accompanied by supporting affidavits.
>
> The committee to which a privilege speech, resolution, petition or information requesting an inquiry is referred may constitute and appoint sub-committees composed of at least one-third (1/3) of the committee for the purpose of performing any and all acts which the committee as a whole is authorized to perform, except to punish for contempt. In case a privilege speech is referred to two or more committees, a joint inquiry by the said committees shall be conducted. The inquiries are to be held in public except when the committee or sub-committee deems that the examination of a witness in a public hearing may endanger national security. In which case, it shall conduct the hearing in an executive session.
>
> The Rules further provide that "the filing or pendency of a case before any court, tribunal or quasi-judicial or administrative bodies shall not stop or abate any inquiry conducted to carry out a specific legislative purpose." In exercise of congressional inquiry, the committee has the power "to issue *subpoena* and *subpoena duces tecum* to a witness in any part of the country, signed by the chairperson or acting chairperson and the Speaker or acting Speaker." Furthermore, the committee may, by a vote of two-thirds (2/3) of all its members constituting a quorum, punish for contempt any person who: (a) refuses, after being duly summoned, to obey such summons without legal excuse; (b) refuses to be sworn or placed under affirmation; (c) refuses to answer any relevant inquiry; (d) refuses to produce any books, papers, documents or records that are relevant to the inquiry and are in his/her possession; (e) acts in a disrespectful manner towards any member of the Committee or commits misbehavior in the presence of the committee; or (f) unduly interferes in the conduct of proceedings during meetings.
>
> Nevertheless, any person called to be a witness may be represented by a counsel and is entitled to all rights including the right against self-incrimination. Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*) (internal citations omitted).

[66] Arnault v. Nazareno, 87 Phil. 29 (1950).

to hold him in contempt for refusal to submit to legislative investigation was his right against self-incrimination. The Court, in this regard, first outlined what constitutes permissible questioning allowable in a legislative inquiry:

> Once an inquiry is admitted or established to be within the jurisdiction of a legislative body to make, we think the investigating committee has the power to require a witness to answer any question pertinent to that inquiry, subject of course to his constitutional right against self-incrimination. The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject of the inquiry or investigation. So a witness may not be coerced to answer a question that obviously has no relation to the subject of the inquiry. But from this it does not follow that every question that may be propounded to a witness must be material to any proposed or possible legislation. In other words, the materiality of the question must be determined by its direct relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.[67]

The Court however noted that Arnault's inconsistent statements belied his claims of non-involvement in the criminal acts regarding which he was being questioned. Thus, it pronounced:

> As against witness's inconsistent and unjustified claim to a constitutional right, is his clear duty as a citizen to give frank, sincere, and truthful testimony before a competent authority. The state has the right to exact fulfillment of a citizen's obligation, consistent of course with his right under the Constitution. The witness in this case has been vociferous and militant in claiming constitutional rights and privileges but patently recreant to his duties and obligations to the Government which protects those rights under the law. When a specific right and a specific obligation conflict with each other, and one is doubtful or uncertain while the other is clear and imperative, the former must give way to the latter. The right to life is one of the most sacred that the citizen may claim, and yet the state may deprive him of it if he violates his corresponding obligation to respect the life of others. As Mr. Justice Johnson said in Anderson *vs.* Dunn: "The wretch beneath the gallows may repine at the fate which awaits him, and yet it is not certain that the laws under which he suffers were made for the security." Paraphrasing and applying that pronouncement here, the petitioner may not relish the restraint of his liberty pending the fulfillment by him of his duty, but it is no less certain that the laws under which his liberty is restrained were made for his welfare.[68]

That a person's rights are respected in a legislative investigation, cannot therefore be considered as an absolute restraint. In this regard it has been observed that, "practically

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[67] *Id.* at 48.

[68] *Id.* at 66-67.

any investigation can be in aid of the broad legislative power of Congress," and that, "[t]he limitation... cannot effectively prevent... 'roving commissions' or... exposure for the sake of exposure."[69]

Before closing this section, a brief look must be devoted to two peculiar fields of legislative investigation. These are the fields of legislative investigation of administrative agencies, and legislative investigation pursuant to the impeachment process.

3. Investigations of Administrative Agencies

The rise of the administrative agency has been a natural offshoot of "the growing complexity of modern life, the multiplication of the subject of governmental regulation and the increased difficulty of administering the laws."[70] As creatures of the legislature, the investigative power of Congress has on many occasions been directed at these agencies in order to check the arbitrariness of administrative processes.[71] Three things must be pointed out in this regard. First, being primarily creatures of the legislature, administrative agencies are in theory subject to the to the whimsical caprice of Congress. As one scholar notes:

> [A]n agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance — functionally similar to that provided by the separation-of-powers notion for the constitutionally named bodies — that they will not pass out of control. Powerful and potentially arbitrary as they may be, the Secretary of Agriculture and the Chairman of the SEC for this reason do not present the threat that led the framers to insist on a splitting of the authority of government at its very top. What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions to which parts of the authority of each may be lent. The three must share the reins of control; means must be found of assuring that no one of them becomes dominant. But it is not terribly important to number or allocate the horses that pull the carriage of government.[72]

Second, although Congress could theoretically abolish all the administrative agencies it has created, "it is much too late in the day to even imagine Congress abolishing important agencies such as the SEC or NLRC."[73] There is little doubt that administrative agencies are here to stay. Finally, in closing this brief detour into the realm of administrative agencies, the following observation should be noted as a general qualification on the investigative power:

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[69] J. BERNAS, *op. cit. supra* note 33 at 677 (internal citations omitted)

[70] Pangasinan Transportation Co. v. Public Service Commission, 70 Phil. 221, 229 (1940).

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

[72] Peter Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," 84 COLUM. L. REV. 573, 579-580 (1984).

[73] S. Carlota, *op. cit. supra* note 71 at 162.

> [A]s a tool to provide effective, regular control of the improper exercise of administrative power, these occasional legislative investigations on perceived abuses of certain authorities have a limited value.
>
> Lack of time, expertise and organizational aptness for continuing supervision over agency operations — the very same factors which originally compelled the delegation of power — effectively foreclose the possibility of establishing legislative control of the day to day exercises of administrative discretion.[74]

This final point will be revisited when this paper examines the functional place of congressional oversight powers.

4. Investigations of the Executive: The Impeachment Power

Although excluded by Justice Puno in his enumeration of oversight powers,[75] it is fair to consider the power to impeach as falling within the realm of congressional oversight in general and legislative investigation in particular. Louis Fischer, Senior Specialist in Separation of Powers at the Congressional Research Service of the Library of Congress writes, "The investigative power, in its most solemn form, is invoked during the impeachment process."[76]

In the Philippine jurisdiction, two sections in article XI of the Constitution govern this impeachment process.[77] The specialized roles of the upper and lower

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[74] *Id.* at 163.

[75] Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*).

[76] LOUIS FISCHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 177 (4th rev. ed., 1997).

[77] The two sections are sec. 2 and sec. 3 which provide as follows:

> Sec. 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust.
>
> Sec. 3.
>
> 1. The House of Representatives shall have the exclusive power to initiate all cases of impeachment.
> 2. A verified complaint for impeachment may be filed by any Member of the House of Representatives or by any citizen upon a resolution or endorsement by any Member thereof, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof.
> 3. A vote of at least one-third of all the Members of the House shall be necessary either to affirm a favorable resolution with the Articles of Impeachment of the Committee, or override its contrary resolution. The vote of each Member shall be recorded.
> 4. In case the verified complaint or resolution of impeachment is filed by at least one-third of all the Members of the House, the same shall constitute the Articles of Impeachment, and trial by the Senate shall forthwith proceed.
> 5. No impeachment proceedings shall be initiated against the same official more than once within a period of one year.
> 6. The Senate shall have the sole power to try and decide all cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the

houses of Congress, the creation of an impeachment court, and the grant of power to promulgate rules of impeachment reveal that the Philippine Constitution squarely grants to Congress a very specialized task of investigation in the scheme of checks and balances. The reason for such a grant is obvious: it is indispensable to defend the community against the "incapacity, negligence or perfidy of the chief Magistrate."[78] The President might "pervert his administration into a scheme of peculation of oppression. He might betray his trust to foreign powers."[79]

Fr. Bernas points out, however, that the Philippine experience "has shown impeachment as an ineffective means for removing an unwanted President."[80] He notes the failure of the impeachment processes against President Quirino in 1949, President Macapagal in 1963 and President Marcos in 1986.[81] To this list might be added the recent failure of the impeachment process against President Estrada.[82]

E. VETO POWER

Justice Puno locates the Congress' veto power under the broad heading of legislative supervision, which he defines thus:

> "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.*[83]

The veto power in particular refers to provisions of law requiring the President or an agency to present the proposed regulations to Congress, "which retains a 'right' to approve or disapprove any regulation before it takes effect."[84]

President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate.

7. Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial, and punishment, according to law.
8. The Congress shall promulgate its rules on impeachment to effectively carry out the purpose of this section.

[78] L. FISCHER, *op. cit. supra* note 76 at 178.

[79] *Ibid.*

[80] J. BERNAS, *op. cit. supra* note 33 at 989.

[81] *Ibid.*

[82] *Ibid.*

[83] Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*) (internal citations omitted; emphasis in original).

[84] *Ibid.*

In a footnote in his article on *Congressional Oversight Through Legislative Veto after INS v. Chadha*,[85] Jonathan Fellows traces in simple detail the roots and rationale of the veto power of Congress:

> The legislative veto apparently was first deployed in response to President Hoover's reorganization of the executive branch in the Legislative Appropriation Act of 1932. Although the legislative veto was employed only sparingly immediately after 1932, with the growth of the federal bureaucracy, Congress has turned to the veto device as a means of checking administrative agency actions. Congress feels that a need exists for congressional oversight of the agencies. As Senator Grassley notes, the federal regulatory matrix has become exceedingly complex and burdensome: the 'unelected' bureaucracy promulgates some 18 regulations for every statute that Congress passes.[86]

The trend in U.S. case law upholding the validity of veto provisions took a sharp turn in 1983 with the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*.[87] There the Court declared as unconstitutional the House of Representatives' power to veto an immigration judge's order suspending an alien. The Court ratiocinated that the power exercised was essentially legislative in character and that it thus required, in conformity with the Constitution, passage by a majority of both Houses and presentment to the President.[88] It might be said that the Court held strictly to the following Lockean principle:

> The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.[89]

In *Macalintal v. Comelec*,[90] the Supreme Court made a similar pronouncement with regard to the Congressional Oversight Committee's veto powers in the Overseas Absentee Voting Act of 2003. The Court declared: "The ambit of legislative power under Article VI of the Constitution is circumscribed by other constitutional provisions. One such provision is Section 1 of Article IX-A of the 1987 Constitution ordaining that constitutional commissions such as the COMELEC shall be independent."[91] Considering therefore that the veto power in the Overseas Absentee Voting Act of 2003 allowed Congress to step into the exclusive realm of an independent constitutional commission, the Court struck down such power as void for being unconstitutional.

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[85] Jonathan Fellows, *Congressional Oversight Through Legislative Veto after INS v. Chadha*, 69 CORNELL L. REV. 1244 (1984).

[86] *Id.* at 1244-1245 note 3.

[87] 462 U.S. 919 (1987).

[88] See J. Fellows, *op. cit. supra* note 85; & Emily McMahon, *Chadha and the Nondelegation Doctrine: Defining a Restricted Legislative Veto*, 94 YALE L.J. 1493 (1985).

[89] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 141, in TWO TREATISES OF GOVERNMENT 408-409 (P. Laslett ed. 1963) quoted in E. McMahon, *op. cit. supra* note 88 at 1493.

[90] Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003.

[91] *Ibid.*

Clearly therefore, the state of jurisprudence on the matter of legislative veto evinces a cautious treatment of this form of congressional oversight.

II. SEEING THROUGH THE FOG: CONGRESSIONAL OVERSIGHT IN THE FUNCTIONALIST-FORMALIST DEBATE ON SEPARATION OF POWERS

Current thought on the doctrine of the separation of powers is caught in an ongoing debate between functionalist and formalist positions. The firmest enunciation of the formalist position belongs to John Adams who wrote:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.[92]

The formalist position thus assumes as its starting point "the division of the functions of government into three distinct classes."[93] Adams' position likewise reveals the formalist rationale for its clear delineation of governmental functions, i.e. the desire to create a government, not of men, but of laws.[94]

Although laudable in its intent to protect the republic from the abuse of power, one critic has noted the following: "Formalism is thus very mechanical; if a branch, or an agency within its control, exercises any other branch's powers except where expressly permitted by the Constitution, then that branch has encroached upon the other branch and has necessarily violated the separation of powers."[95] The formalist's problem is that his doctrinaire application of the principle of a separation of governmental powers casts the three branches of government into mutually exclusive realms.

This mechanical perspective is especially suspect when it is acknowledged that modern governance is possible, as has already been noted, only through the so-called "fourth branch" of government, the administrative agencies. In this regard, one scholar opines: "In the ultimate analysis, we are really left with no choice but to adopt a more *hospitable* interpretation of the doctrine of separation of powers that can accommodate the existence of administrative agencies within the constitutional system."[96] (emphasis added)

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[92] MASS. CONST. OF 1780, pt. I, art. XXX quoted in Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1769 (1996).

[93] VICENTE G. SINCO, PHILIPPINE POLITICAL LAW; CONCEPTS AND PRINCIPLES 128 (11th ed., 1962).

[94] Justice Isagani Cruz puts it thus: "The doctrine of separation of powers is intended to prevent a concentration of authority in one person or group of persons that might lead to an irreversible error or abuse in its exercise to the detriment of our republican institutions." I. CRUZ, *op. cit. supra* note 56 at 74.

[95] Timothy T. Hui, *A "Tier-ful" Revelation: A Principled Approach to Separation of Powers*, 34 WM. & MARY L. REV. 1403, 1406-1407 (1993).

[96] S. Carlota, *op. cit. supra* note 71 at 160.

The criticism of the formalist perspective might be best crystallized in the following, where Justice Laurel, adopting Holmes' eloquent language, pronounces:

> There is more truism and actuality in interdependence than in independence and separation of powers, for as observed by Justice Holmes in a case of Philippine origin, we cannot lay down "with mathematical precision and divide the branches in watertight compartments" not only because "the ordinances of the Constitution do not establish and divide fields of black and white" but also because "even more specific to them are found to terminate in a penumbra shading gradually from one extreme to the other."[97]

The call for a penumbral perspective on the doctrine is what allows the functionalist position to makes its timely entrance.

Following Justice Laurel's call for interdependence, the functionalist position can be described as permitting "structural relationships that do not rigidly adhere to branch boundaries," with the only qualification being that the relationships should not "overly shift the balance of power toward one branch."[98] Where the formalist perspective is described as a rigid mechanical act, the functionalist position might be described as a balancing act. It is in this context that the principle of checks and balances qualifies the doctrine of a separation of powers. In this regard, Justice Laurel once again notes:

> [I]t does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely unrestrained and independent of each other. The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government.[99]

This convergence of principles should not be thought of as subverting John Adams' call for a government of laws rather than of men. In fact, James Madison explains the convergence of rationales thus:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.[100]

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[97] Planas v. Gil, 67 Phil. 62, 74 (1939), citing Springer v. Government 277 U.S. 189, 209 (1928).
[98] T. Hui, *op. cit. supra* note 95 at 1410.
[99] Angara v. Electoral Commission, 63 Phil. 139, 156-157 (1936).
[100] JAMES MADISON, THE FEDERALIST NO. 47.

Despite this apparently neat dovetailing of principles, the functionalist position is not without criticism. As has been pointed out, functionalism operates on the basis of a balancing of powers. The Philippine lesson with regard to such a balancing act, however, seems to have yielded the cliché "better safe than sorry." Take for instance the Supreme Court's struggle with the political question dilemma which has been keenly strained by the 1987 Constitution's grant of judicial power "to determine whether or not there has been a grave abuse of discretion on the part of any branch or instrumentality of the Government."[101] As a member of the Court observes, "It is not clear... what discretionary acts are subject to judicial review, outside of those specifically mentioned in the Constitution, and what acts remain prerogatives of the political departments that, even with the said enlargement of judicial power, cannot be examined by the courts of justice."[102]

Clearly therefore, the two sides are incongruous. The contention of this paper, however, is that congressional oversight might be one of the few powers in the separation of powers debate that manages to satisfy both formalist and functionalist perspectives *on their respective terms.* It thus suggests a theoretical opening which, like Hegel's synthesis, manages to bring the opposing theories. This paper does not aspire to trace the contours of that synthetic vision but does seek to reinforce confidence in its existence.[103]

A. FORMALISM: CONGRESSIONAL OVERSIGHT AS A CORE FUNCTION

It should be recalled that the formalist perspective examines governmental acts as falling neatly into one of the three branches of government. Therefore, the question that should be asked with regard to congressional oversight is, "What is the nature of such a power? Is it executive, legislative or judicial in nature?" The definition laid down earlier in this paper is that the power of oversight embraces "all activities undertaken by Congress to enhance its understanding of and influence over the implementation of legislation it has enacted."[104] The congressional powers to scrutinize and investigate must therefore be understood as locating congressional oversight clearly within the limits of legislative power. In fact, with regard to legislative inquiries in particular, it has been said that it "may be implied from the express power of legislation and does not itself have to be expressly granted."[105]

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[101] CONST. art VIII, sec. 1.

[102] I. CRUZ, *op. cit. supra* note 56 at 89. The particular political act that Justice Cruz considers as clearly being the subject of judicial inquiry is provided for by Article VII, Section 18 of the 1987 Constitution: "The Supreme Court may review... the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus or the extension thereof."

[103] Please see the second epigraph corresponding to note 2.

[104] Macalintal v. Commission on Elections, G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*). The opinion continues by stating,

> Clearly, oversight concerns post-enactment measures undertaken by Congress: (a) to monitor bureaucratic compliance with program objectives, (b) to determine whether agencies are properly administered, (c) to eliminate executive waste and dishonesty, (d) to prevent executive usurpation of legislative authority, and (d) to assess executive conformity with the congressional perception of public interest.

[105] I. CRUZ, *op. cit. supra* note 56 at 163.

In the case of *McGrain v. Daugherty*,[106] the United States Supreme Court resolved a question in favor of legislative investigations by making reference to Senate proceedings respecting an inquiry into the raid of the government armory and arsenal at Harper's Ferry in 1859. In the following quotation from the proceedings, the rhetorical questions of Senator Fessenden bear out the legislative nature of investigative powers:

> Where will you stop? Stop, I say, just at that point where we have gone far enough to accomplish the purposes for which we were created; and these purposes are defined in the Constitution. What are they? The great purpose is legislation. There are some other things, but I speak of legislation as the principal purpose. Now, what do we propose to do here? We propose to legislate upon a given state of facts, perhaps, or under a given necessity. Well, sir, proposing to legislate, we want information. We have it not ourselves. It is not to be presumed that we know everything; and if any body does presume it, it is a very great mistake, as we know by experience. We want information on certain subjects. How are we to get if? The Senator says, ask for it. I am ready to ask for it; but suppose the person whom we ask will not give it to us: what then? Have we not power to compel him to come before us? Is this power, which has been exercised by Parliament and by all legislative bodies down to the present day without dispute-the power to inquire into subjects upon which they are disposed to legislate-lost to us? Are we not in the possession of it? Are we deprived of it simply because we hold our power here under a Constitution which defines what our duties are, and what we are called upon to do?
>
> Congress have [sic] appointed committees after committees, time after time, to make inquiries on subjects of legislation. Had we not power to do it? Nobody questioned our authority to do it. We have given them authority to send for persons and papers during the recess. Nobody questioned our authority. We appoint committees during the session, with power to send for persons and papers. Have we not that authority, if necessary to legislation?...
>
> Sir, with regard to myself, all I have to inquire into is: is this a legitimate and proper object, committed to me under the Constitution; and then, as to the mode of accomplishing it, I am ready to use judiciously, calmly, moderately, all the power which I believe is necessary and inherent, in order to do that which I am appointed to do; and, I take it, I violate no rights, either of the people generally or of the individual, by that course.[107]

Clearly therefore the investigative and scrutiny powers of Congress neatly fall into the category of legislative powers which the formalists refuses to sully by way of an executive or judicial mix.

The same, however, cannot be said regarding congressional veto power. As elucidated, the veto power is a post-legislation control directly affecting future acts of

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[106] 273 U.S. 135 (1927).

[107] *Id.* at 162-163.

the Executive rather than past acts.[108] In this sense the functionalist framework is must truncate the veto power of Congress from the mass of permissible oversight powers.

B. FUNCTIONALISM: REALIZING THE FOUNDER'S VISION

In a fascinating work of legal scholarship, Professor Martin Flaherty traced the historical roots of the founding of the federal republic in order to identify the conditions under which the principle of separation of powers was actually adopted into American governance.[109] The study ultimately sought to prove that functionalist concerns, rather than clear formalist ideals, marked the beginnings of the separation of powers doctrine in both state and federal governance. Flaherty points out that the first experiment of replacing the mixed government of English constitutionalism[110] with an American brand of republicanism that located all governmental power in representative assemblies, ultimately resulted in chaos.[111] Thomas Jefferson's criticism of the state of the republic was harsh:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one.... [Government] should not only be founded on free principles, ...the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[112]

Thus, the Founders resorted to an American brand of separation of powers in order to balance the tremendous power they had granted to their legislatures. Flaherty is careful to note that the turn to the doctrine of separation of powers was thus functional in

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[108] This was seen the case in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1987).

[109] M. Flaherty, *op. cit supra* note 92.

[110] Professor Flaherty explains mixed governance in this wise:

> The mixed government approach... did not attempt to structure government around governmental functions. It instead attempted to structure government in order to balance the basic forces within society. Those forces consisted of three social orders, "each embodying within it the principles of a certain form of government: royalty, whose natural form of government was monarchy; the nobility, whose natural form was aristocracy; and the commons, whose form was democracy." Experience unhappily showed that each of these 'pure' forms would almost inevitably degenerate into either an excess of power — monarch to tyranny; aristocracy to oligarchy — or an excess of liberty, or at least licentiousness — democracy to anarchy. The English Constitution escaped these traps in two ways. First, it developed institutions — the Crown, the House of Lords, and the House of Commons — that embodied each social estate. Next, it structured these institutions to insure that they would direct power not just to provide essential services, nor simply to preserve order, but to check each other.... Through this balance, both the English state and its colonial offspring could rule efficiently enough to satisfy the dictates of power, but protect rights sufficiently to satisfy the requirements of liberty. M. Flaherty, *op. cit supra* note 92 at 1757 (internal citations omitted).

[111] See M. Flaherty, *op. cit. supra* note 92 at 1756-1774.

[112] THOMAS JEFFERSON, *Notes on the State of Virginia* in WRITINGS 123, 245 (Merrill D. Peterson ed., 1984) quoted in M. Flaherty, *op. cit. supra* note 92 at 1766 (insertions in the original).

nature. He writes, "Separation of powers, in other words, served balance rather than balance serving a rigid, formalistic view of separation of powers."[113] Flaherty's position is that the birth of the doctrine of separation of powers was hardly the application of a clearly formed system of governance. As has been observed, "Experience was not an adequate guide... Hume was silent on the subject, Montesquieu muddled, Locke too general."[114] Ultimately, Flaherty identifies the functionalist aims for the adoption of the doctrine of separation of powers as (1) balance, (2) accountability, and (3) energetic governance.[115]

Returning to congressional oversight in the Philippine political landscape, it is clear that Flaherty's first two functions are fulfilled by the powers enumerated in the first section of this paper. Clearly, the scrutiny power, legislative investigations, and even the veto power serve the purpose of balancing executive power and hold the Executive and his agents, as well as the various administrative agencies, accountable for their acts of governance. The impeachment power in particular is an excellent example of a function given to Congress which not only checks the Executive but also holds the Executive accountable for his acts. The current proceedings before the House of Representatives validate this conclusion.

It might be suggested, however, that the third function as outlined by the founders — i.e. energy and efficiency in governance — is in fact subverted by the exercise of congressional oversight powers. This is to say that congressional oversight creates another bureaucratic hurdle in the task of governance. Although such criticism is well placed, it should be acknowledged that despite such lapses, the oversight powers ultimately intend efficient governance. The best argument for this is that the power to resort to legislative investigations creates a "fire alarm system" which ultimately coerces the Executive and his agents to perform their functions effectively and honestly for fear of public reprimand or the severe budget cuts Congress choose to impose. In *Presidential Admistration*,[116] Professor Elena Kagan describes the functional place of legislative investigation in this way:

> The fire alarm system is a set of procedures and practices that enable citizens and interest groups to monitor an agency and report any perceived errors to the relevant congressional committees. Such a system allows Congress to pass on many of the costs of monitoring administrative action to non-governmental entities. The legislative sanctions backing up the system include new legislation, budget cuts, and embarrassing oversight hearings. If a fire alarm goes off, the committee can threaten and, if necessary, use one of these sanctions to bring the agency into submission.[117]

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[113] M. Flaherty, *op. cit. supra* note 92 at 1766.

[114] FORREST MCDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 38-66 (1994) quoted in M. Flaherty, *op. cit. supra* note 92 at 1782.

[115] M. Flaherty, *op. cit. supra* note 92 at 1771.

[116] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[117] *Id.* at 2258.

The threat of legislative inquiry rests as a sword of Damocles over the Executive and his agents. In this way, it manages to oil the bureaucratic gaskets of governance.

Earlier on in this paper, the criticism was raised that legislative investigation of administrative agencies has "limited value."[118] There is no doubt that such criticism is well placed considering the fact that legislature delegated the power in the first place precisely because it lacked the capacity or the specialized knowledge that agency action requires. In the context of the "fire alarm system" however, might it not be suggested that legislative investigations serve their purpose even vis-à-vis specialized administrative agencies insofar as they offer the continuing threat of bringing to the public eye "private" administrative activities? It would be wise to note that what the public sees is the tedium of legislative investigations before either house of Congress. The functional element of these investigations, however, is precisely what remains unseen, i.e. the countless tasks of governance that move forward precisely in order to avoid Congress' stern glare.

A note however must be made with regard to the veto power of Congress. This power does not fit within the "fire alarm system" with which this paper tries to redeem the oversight powers. As has been noted, the veto power creates an extra step in the bureaucratic process. It does not, therefore hang like Damocles' sword but instead gnaws like the eagle that visited Prometheus daily. Hence, we see that in both Philippine and American jurisdictions, judicial pronouncements have sharply curtailed the legislative veto as oppressive of the separation of powers doctrine. From this functionalist perspective, the formalist conclusion is thus reached and the oversight powers, with the exception of the veto power, are vindicated in the separation of powers doctrine.

CONCLUSION

The epigraph with which this work opened spoke of a Utopia where public discussion checked tyranny. There is no doubt that More's vision of check and balance has found its way into the Philippine vision of a constitutional democracy. The problem, however is though it has fallen through history into the 1987 Constitution, the exact vision of checks and balances has become muddled, and rightly so, by the demands of history and culture.

Ultimately, this paper can be described as attempting to wade through that confusion by confronting the formalist-functionalist schism that divides theorists in the separation of powers debate. It is in the "penumbral" middle ground between these two extremes that this paper has sought to tread. By looking not at the doctrine but at the oversight powers of Congress itself, this paper has attempted to show that the functionalist-formalist divide dissolves in the vibrant experience of concrete governance.

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[118] See S. Carlota, *op. cit. supra* note 71 at 163.

The task, as suggested by this paper, therefore is to put the horse before the cart and avoid muddling the concrete workings of governance with the demands of strict theoretical positions. The political turmoil that grips the Philippine nation today cannot be resolved by a simplistic application of a general theory. In closing, it would do well to heed the Justice Cruz's warning about thinking Constitutionalism. He writes,

> In fine, the Constitution cannot, like the goddess Athena, rise full-grown from the brow of the Constitutional Convention, nor can it conjure by mere fiat an instant Utopia. It must grow with the society it seeks to re-structure and march apace with the progress of the race, drawing from the vicissitudes of history the dynamism and vitality that will keep it, far from becoming a petrified rule, a pulsing, living law attuned to the heartbeat of the nation.[119]

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[119] Isagani, Cruz, *A Quintessential* Constitution, San Beda L.J. (1972), quoted in I. CRUZ, *op. cit. supra* note 56 at 13.

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