FEATURE:

WHY THE JOURNEY TOWARDS THE *MESOTES* CAN BE ASYMPTOTIC: RUMINATIONS ON THE CHALLENGES TO AND THE VALUE OF THE OVERSIGHT POWERS OF CONGRESS*

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> *We may thus conclude that virtue or excellence is a characteristic involving choice, and that it consists in observing the mean relative to us, a mean which is defined by a rational principle, such as a man of practical wisdom would use to determine it. It is the mean by reference to two vices: the one of excess and the other of deficiency.*
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> — *Aristotle, Nichomachean Ethics: Book II*

INTRODUCTION

The oversight powers of Congress are precariously lodged somewhere along the vast and complex terrain of local politics and law. On the one hand, because these powers are an exception to the separation of functions as the general state of affairs, they inevitably come with a presumption of unacceptability and fragility. On the other hand, they retain some legitimacy because the presumption nonetheless remains brittle in the face of the perils for which the oversight powers were created.

This instability necessitates a conscious effort to ensure that the oversight powers of Congress are exercised in a state of dynamic equilibrium, in different but interrelated levels. This paper stands to assert that this journey to the mean cannot be undertaken without addressing factual and corporeal issues that are just as substantial as legal metaphysics. If indeed it was at all possible to strike a balance, then challenges to the practical application and use of the oversight powers should likewise be taken into consideration. Consequently, should present mechanisms prove to be impotent in the face of these challenges, reforms ought to be made so as to address them adequately. Otherwise, the journey towards the *mesotes* will be incurably asymptotic — infinitely moving, but never quite arriving.

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This paper begins with an exposition of the doctrine of separation of powers, with emphasis on the essential requirement for checks and balances. It then proceeds with an explication of the oversight powers of Congress as one such safeguard, focusing on its power to investigate the executive. The third and final section delves into the difficulties inherent in the nature and extent of such a power. In this section, the paper dissects the practical complexities borne by the sizable latitude within which the oversight powers may be, and are usually exercised, using Michel Foucault's philosophical take on power. The paper ends with an exploration into the possibilities in view of these complexities, using Jurgen Habermas' discursive view of politics.

I. SEPARATION OF POWERS

A. HISTORY

Although the doctrine of the separation of powers has long been embedded in Philippine legal thought, ancient civilization did not contemplate the separation of powers. However, Jose M. Aruego says that this should not be taken to mean that the separation of powers was developed only during modernity.[1] Prior to its advent, Aristotle had already classified governmental powers into deliberative, magisterial and judicial.[2] Aruego notes, however, that it took French intellectual Baron de Montesquieu to hone the idea from novelty into a fundamental principle of political science.[3]

In Aruego's text, he explains that Montesquieu's views became part of the philosophical bases of the French revolution.[4] Curiously, he says that it was only incorporated into its constitution before the close of the eighteenth century, and did not influence the Constitutional Laws of France upon which the government under the Third Republic was built.[5] Despite the limited influence it exerted in France, Montesquieu's philosophy gained much ground in the United States. Aruego reiterates what the United States Supreme Court in *Kilbourne v. Thompson*[6] had to say on the separation of powers:

> It is believed to be one of the chief merits of the American system of written constitutional law that all the powers instructed to government whether state or national, are divided into three grand departments, the executive, the legislative and the judicial... It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, but the law of its creation, be limited to the powers appropriated to its own department, and no other.[7]

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[1] JOSE M. ARUEGO, PHILIPPINE GOVERNMENT IN ACTION 223 (1953).
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] 103 U.S. 168, 190.
[7] *Id.* at 224.

B. CONCEPT

According to Perfecto Fernandez, "The separation of powers is an institutional arrangement or situation within government, which combines a definite structure of government with a set of relationships among the component elements of the structure called the Tripartite System."[8] The system contemplates the rather distinct and separate operation of three elements: the executive, legislative and judiciary. Fernandez outlines it with great particularity:

> 1. The legislative branch is separate and distinct from the Executive and Judicial branches. It exercises the Legislative Power, but may not exercise either Executive or Judicial power.
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> 2. The executive branch is separate and distinct from the Legislative and Judicial branches. It exercises Executive Power, but may not exercise either Legislative or Judicial Power.
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> 3. The Judicial Branch is separate and distinct form the Legislative and Executive branches. It exercises Judicial Power, but may not exercise either Executive or Legislative power.[9]

The legislature is primarily tasked with the creation of the general law as per expression of society's general will.[10] Fernandez enumerates the methods necessary for the fulfillment of this function: "(1) adequate representation of social interests, (2) free debate as the method of determining consensus, and (3) institution of majority vote for securing a decision on controversial matters."[11]

The judiciary, for its part, creates particular law in the form of judgments.[12] Its social function is the realization of justice according to the law. Once more, Fernandez mentions the methods established to carry out this social function:

> (1) the judgment must be the same outcome of a proceeding before an independent tribunal,
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> (2) the proceeding must be initiated by a proper pleading filed in the name of the person with the right to do so,
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> (3) the party charged with the violation must be brought before the court,
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> (4) there must be a hearing in which the parties are provided the opportunity to present their evidence in support of their respective positions on the issues, and

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[8] Perfecto Fernandez, *Separation of Power as Juristic Imperative*, 58 Phil L.J 245 (1983).
[9] *Id.* at 245-246.
[10] *Id.* at 232.
[11] *Id.* at 232.
[12] *Id.* at 233.

> (5) the judge must frame the judgment in accordance with independent consideration of evidence, findings of fact and law applicable to the case.[13]

Finally, the executive mobilizes the people in the form of directives and orders for the speedy administration of the general law.[14] Its social function is hinged on its capacity to function efficiently according to the best interest of the nation. The executive is characterized by the rather wide latitude, which allows for the exercise of discretionary, rather than merely ministerial authority.[15]

The purpose of the delineation is "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."[16] The delineation is not explicitly stated in the Philippine Constitution in the same way that the guarantees of the Bill of Rights are. However, in delegating the executive, legislative and judicial powers to their respective branches, the delineation is made.

> Sec. 1. The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.[17]

> Sec. 1. The executive power shall be vested in the President of the Philippines.[18]

> Sec. 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.[19]

The essence of the principle is its aversion to the convergence of power and the formation of tyrannical institutions. As such, its value is limited only to the extent that it protects civilization from these evils. Hence, if the mechanism of separating powers does not serve the end sought, then the delineation can be validly intruded upon. These exceptions, however, must likewise dilute power so as not to expose society to the dangers of tyranny. Otherwise, these exceptions might very well be written off in the same way.

Of equal importance is the view that breaches made on the separation of powers are inevitable because of the close proximity of the functions of the three branches to each other. In a sense, this view attributes the gaps created by the breaches to the difficulty inherent in making appropriate distinctions. In *Planas v. Gil*, Justice Laurel quoted Justice Holmes to strengthen this assertion:

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[13] *Id.* at 233.
[14] *Id.* at 233.
[15] *Id.* at 233.
[16] ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 74 (2002 ed.).
[17] CONST. art VI, sec. 1:
[18] CONST. art VII, sec. 1.
[19] CONST. art VIII, sec 1, par (1).

> We cannot lay down with mathematical precision and divide the branches into watertight compartments, not only because the ordinances of the Constitution do not establish and divide fields of black and white, but also because even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other.[20]

Indeed, there is no absolute separation of powers and functions of the three branches of government. Exceptions permeate through the three spheres, either for the purpose of executing checks and balances, or self-sustenance. The next section shall illustrate this complex dynamic between the executive and the legislative branches of government.

II. OVERSIGHT: A NECESSARY EXCEPTION TO THE STRICT SEPARATION OF POWERS

A. THE FOURFOLD POWER OF CONGRESS

Justice Reynato Puno enumerates four major legislative powers under the Philippine Constitution: "(1) lawmaking, (2) providing representation for several kinds of clientage, (3) conducting political education for the public, and (4) checking the administration."[21]

Lawmaking is the primary function the legislature is beholden to carry out. This power to create, repeal or alter laws is plenary in nature because there is no constitutionally imposed limitation as regards what matters the legislature may legislate on.[22] The extent, breadth and the pace of legislation are essentially left to the prerogative of the legislators as well. Elaborating on this matter, Justice Puno says that the chances of legislation increase in the following instances:

> (1) when influential pressure groups mobilize their members and seek a governmental solution,
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> (2) when the unorganized public becomes intensely concerned with the matter, or is indifferent to the special measures sought by a pressure group, and
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> (3) when the parties and powerful legislators take up the cudgels and when the formation of strong counter-pressures to defend the status quo fails to materialize.[23]

Equally important to the lawmaking functions of the legislators is their duty to represent. This duty is owed to the fact that they remain accountable to the people who elected them into office. District representatives from the Lower House answer to their

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[20] Planas v. Gil, 67 Phil. 62 (1939).

[21] Reynato Puno, *Legislative Investigations and the Right to Privacy* (Chief Justice Hilario G. Davide, Jr. Distinguished Lecture Series for 2005, U.P. College of Law, February 28, 2005).

[22] JOAQUIN BERNAS, THE 1987 PHILIPPINE CONSTITUTION A REVIEWER-PRIMER 260 (2002).

[23] R. Puno, *op. cit. supra* note 21.

constituencies from their respective districts, while party-list representatives answer to the sectors which their respective organizations represent.[24]

Although without a pervasive presence, the function of the legislature of informing and instructing the public is no less noteworthy than the two preceding powers. This remains a pertinent function because inherent in the Legislature's nature as a public office is the moral imperative to make relevant matters transparent to the public. Likewise, because of the authority accorded these positions, there is a concurrent obligation on the part of the legislators to be sufficiently learned and instructive on matters of the law, or at the very least, of law making. Their capacity to govern through legislation is after all, a consideration that should have ideally been taken into account by the voting public.

Rather proximate to the lawmaking powers of the Legislature is the duty to check and oversee the acts of the Executive. Justice Puno clearly explained this particular function:

> The responsibility to govern is vested in the executive, but the legislature has a long established concern with inquiring into administrative conduct and the exercise of administrative discretion under the acts of the legislature, and with ascertaining compliance with legislative intent. This role of the legislature consists of questioning, reviewing and assessing, modifying and rejecting policies of the administration. *Broadly considered, this power referred to as congressional oversight, embraces al activities undertaken by Congress to enhance its understanding of and influence over the implementation of legislation it has enacted.*[25] (emphasis supplied)

B. OVERSIGHT POWERS: CONCEPT, MODES AND DEMARCATIONS

Any analysis of the oversight powers of Congress entails defining its metes and bounds. Some distinctions must likewise be made to determine the tenor and intensity of this power. This precision is necessary, even at the risk of being accused of hairsplitting distinctions. What follows is a threshing out of fundamental differences on two levels, as identified by Joseph Harris, so as to develop a test for determining whether an act by the Legislature indeed falls under the exercise of its oversight powers: "(1) between oversight powers and control, and (2) between oversight powers and coordination."[26]

1. Between Oversight Powers and Control

The Legislature can exercise control over the power to administer formally or informally.[27] The former includes the passage of laws creating executive departments or agencies, the drafting of the form of these departments' organization, regulation of

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[24] CONST. art VI, sec. 1.

[25] R. Puno, *op. cit. supra* note 21.

[26] JOSEPH HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 9 (1964).

[27] *Id.* at 8.

personnel by prescribing procedures and methods of work, among others.[28] Appropriation and investigations are likewise included in the cluster of formal controls. Informal controls are exhausted in committees through their consultations with executive officers, and may take up the form of suggestions, instructions advice and oral commitments.[29]

It is at this point that the first demarcation must be drawn: Controls as described in the immediately preceding paragraph, must be distinguished from oversight. On the one hand, control refers to legislative action or decisions made before the issuance or execution of the relevant administrative action.[30] Oversight on the other hand, refers to re-views.[31] This presupposes that an issuance has been made, or that an execution has taken place. Congressional committees, in performing oversight as a delegated power, investigate or scrutinize government activities under their respective jurisdiction to determine whether laws are being implemented according to the legislative intent. Oversight may include inquiries about policies that are or have been in effect, investigations of past administrative actions, and the calling of executive officers to account for their financial transactions.[32]

Sans the stigma attached to the equivalence of oversight powers to control, Justice Puno's classification of the modes of oversight powers is most befitting. According to him, these powers may be exercised in the form of "(1) legislation, (2) participation in the appointment process, (3) power to appropriate funds for the conduct of the government, and (4) investigation."[33]

The power to legislate as a form of review is one of the most obvious and justified, consistent with the plenary nature of the legislative power. To a certain extent, this power is also made manifest through the coordination of the Legislature and the Executive. The exercise of congressional oversight through participation in the appointment process is one of the more accepted forms of review, having been explicitly granted in the Constitution.[34] The same is true with the power to appropriate funds for the Government[35] and the power to conduct investigations in aid of legislation.[36]

In this jurisdiction, the oversight powers are most known to be exemplified by the Oversight Committee of Congress. The Committee's jurisdiction involves all matters relating to joint initiatives of the legislative and executive departments, including priority measures referred to it, and those pursued through the Legislative-Executive

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[28] *Id.* at 8.
[29] *Id.* at 8.
[30] *Id.* at 8.
[31] *Id.* at 8.
[32] *Id.* at 8.
[33] R. Puno, *op. cit. supra* note 21.
[34] CONST. art VI, sec. 18.
[35] CONST. art VI, sec. 24.
[36] CONST. art VI, sec. 21.

Development Advisory Council (LEDAC), and the review and evaluation, on a continuing basis and in aid of legislation, of government policies, programs, projects and contracts, and of the implementation, application and execution of laws, their rules and regulations.[37]

The LEDAC came into existence through Republic Act No. 7640 on December 9, 1992. It was created to serve as a consultative and advisory body to the President, and has the following set of functions:

> 1. Determine and recommend socioeconomic development goals in pursuance of established policies which shall guide the formulation and implementation of the national development plan.
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> 2. Provide policy advice to the president on vital issues affecting the socioeconomic development of the country.
>
> 3. Direct the study of measures to ensure that regional development plans and programs are integrated into the national development plan.
>
> 4. Receive and in appropriate cases, require repots on, and study measures to improve, the implementation of official development assistance from multilateral and bilateral entities.
>
> 5. Assess effectiveness of implementation of the national development plant.
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> 6. Integrate environmental concepts, principles and practices into the national development plan for a balanced and cohesive approach to national development.
>
> 7. Review the relationship of the legislative agenda to the national development plan to ensure the integration of both.
>
> 8. Study and recommend to the President and to Congress sources of revenue as well as measures to reduce unnecessary expenditures to the end that the resources of the Government will be used to the optimum.[38]

2. Between Oversight Powers and Coordination

Here the second demarcation seems most appropriate: While the mandate of the Oversight Committee includes within its jurisdiction those covered by the LEDAC, it should be stressed that the oversight powers is somewhere in between the power of Congress to control, and its prerogative to coordinate with the executive, rather than in perfect synchrony with the latter. This distinction is in order because oversight necessitates that there be a distance between Congress as the overseer, and the executive as that which is overseen. Any assertion otherwise would necessarily contemplate a

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[37] *Rep. Suarez Explains Oversight Powers*, available at <http://www.congress.gov.ph/committees/commnews/commnews_det.php?newsid=42> June 28, 2005.

[38] X. Nitaftan, *The Legislative-Executive Development Advisory Council* (LEDAC), in POLICY DIGEST 42 (1998).

complete blending of powers, rather than a controlled one The general proposition of separation of powers is necessarily violated beyond the extent permitted by logic.

It seems that drawing the parameters around the concept of oversight powers is not so complicated as regards the first three modes identified by Justice Puno. The identification of the oversight powers as lodged somewhere between the power to control and the prerogative to coordinate can be extended to adequately address whatever imbalance exists in theses three modes. Insofar as these actuations are ends in themselves, the demarcations drawn can serve as potent tests for weighing whether the power thus exercised can properly be called oversight or not. Conversely, however, the fourth mode does not seem to qualify for the test as easily.

Investigations have a tendency to be immediately adversarial. The one conducting the investigation necessarily puts the investigated in a weak and defensive position. Investigations, although possibly used as a mechanism for the exercise of the recognized oversight powers, are immediately accompanied by the presumption of excess and invasion. In this context, the test earlier identified becomes impotent. More severe hairsplitting is necessary if oversight powers in the form of investigations are to be adequately identified from fallacious ones.

C. INVESTIGATIONS

The power to investigate in aid of legislation is expressly granted to the legislature by the 1987 Constitution. Prior to the conception of the present constitution, there were no provisions to this effect. The case of *Arnault v. Nazareno*, however, recognized this power, despite the absence of any stipulation in the 1935 Constitution. In this case, the Court said,

> In other words, the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absences 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 is not infrequently true — recourse must be had to others who possess it.[39]

Insofar as the 1973 Constitution incorporated provisions embodying the essence of the Arnault decision, it is a vast improvement of the 1935 Constitution.

> Sec. 12(1) There shall be a question hour at least once a month or as often as the rules of the National Assembly may provide, which shall be included in its agenda, during which the Prime Minister or any Minister may be required to appear and answer questions and interpellations by Members of the National Assembly. Written questions shall be submitted to the Speaker at least three days before a scheduled question hour. Interpellations shall not be limited to the written questions, but may cover matters related thereto. The agenda shall specify the subjects for the question hour. When the security of the State so requires, and the

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

> Prime Minister so states in writing, the question hour shall be conducted in executive session.
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> (2) The National Assembly 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 investigations shall be respected.[40]

The 1987 Constitution provided for the same powers in two separate but consecutive sections of article VI:

> Sec. 21. The 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.[41]
>
> Sec. 22. The heads of departments may upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before his scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the State or the public interest so requires and the President so sates in writing, the appearance shall be conducted in executive session.[42]

From these provisions, it may be gleaned that determining whether or not an investigation is conducted in the exercise of oversight powers necessitates a determination of the reason for which it is conducted. It should either be for purposes of legislation or for checking the acts of the Executive.

This test may be used, for instance, in determining whether or not the Chief Executive may be validly called for investigation by the Legislature. Certainly, if President X were to be called regarding an executive act for the purpose of simple legislation, then there seems to be no problem. However, if President X were to be called, purportedly for the purpose of legislation, although with the real intent to use whatever information may be derived in the filing of an impeachment case, for instance, the admissibility of said information, as well as the propriety of the invitation is bound to merit much controversy because of the blatant circumvention of the requirement. Theoretically however, the investigation can still be made, if not under the pretense of legislation, then perhaps under the general grant to conduct checks on the executive. Much in the same way that the first test works, the determination of the purpose for which the investigation is conducted likewise necessitates an inquiry into whether or not the intended legislation is within the mean of control and coordination. The same is also true in determining whether or not the exercise falls under the mandate to check the executive.

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[40] CONST. (1973), art VIII, sec. 12.
[41] CONST. art VI, sec. 21.
[42] CONST. art VI, sec. 22.

Although sound, these tests, admittedly having been drawn in broad strokes, do not prove instructive in the face of more complex issues.

D. SYNTHESIS

Exceptions rarely enjoy the presumption of validity. As was mentioned in the prelude, the exercise of the oversight powers of Congress is not saved from this difficulty. The oversight powers as an exception to the separation of powers is more commonly assailed because of the indeterminate extent and breadth that it covers. As has been demonstrated, the parameters may be drawn by looking at the purpose for which oversight is exercised. However, there remain various issues involving legislative investigations and the wide latitude within which it may be exercised. Justice Puno for one has taken up the matter of privacy vis-à-vis investigations to great lengths.[43] Likewise, much has been written about the adversarial nature of these investigations, usually hidden in the guise of legislative queries.[44]

The oversight powers necessarily quell inevitable evils inherent in the doctrine of the separation powers. For this reason, challenges to the oversight functions of Congress must be recognized, and to the extent possible, addressed. Otherwise, the powers will not rebut the presumption of unacceptability, and will consequently be impotent even in the face of the reasons for which they were created.

The following section focuses on other challenges plaguing the oversight powers as a legitimate legislative exercise.

III. PRACTICAL CHALLENGES TO THE OVERSIGHT POWERS OF CONGRESS

The earlier section chose to step away from addressing practical issues. Practical, for this paper's immediate purposes, shall pertain to issues, which imperil effective implementation. It may be argued that this would more squarely fall under the jurisdiction of the social sciences. However, as has been constantly asserted by this paper, if the doctrine and the concurrent exception thereto were to make any sense at all, then issues pertaining to it, however concrete and pragmatic, should be pursued as well. Likewise, the results of queries related to these issues may prove to be necessary in modifying present legal assertions. In this and other similar instances, an overlap between law and the social sciences seems most appropriate.

Joseph Harris identifies several challenges to the exercise of the Legislature's oversight power through investigation. First, he says that investigations can place a heavy burden of work on executive departments and agencies.[45] Second, he asserts that investigations can easily lead to inefficiencies.[46] Unless the persons making the

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[43] R. Puno, op. cit. *supra.* note 21.

[44] Bernard Corrubias, *Investigation or Inquisition: The Power of Legislative Inquiry*, 70 PHIL L.J. 507 (1995).

[45] JOSEPH HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 274 (1964)

[46] *Ibid.*

investigation have sufficient knowledge of a given subject, and the necessary available time to conduct an adequate inquiry, the investigative process becomes an inefficient method of legislative oversight. Because public hearings are replete with irrelevant and repetitive testimonies, it is important that informed questioners, who can sift through the impertinent data, conduct the investigation.

Most interesting among the challenges that Harris notes, pertains to undue influence. According to him, larger investigations of executive anomalies are most likely to be influenced by partisan considerations.[47] For instance, in other jurisdictions, investigations have often been instituted at the behest of a minority of Congress or by a few members who are not interested in a *bona fide* inquiry into the facts so as to advance the point of view of a special interest group. Although in this jurisdiction, this may seldom be more than a nuisance to the legislative body, partisanship or allying is a substantial challenge, which can paralyze whatever utility of the oversight powers.

To some extent, delving into the matter of partisanship is a futile attempt at making theoretical sense of too concrete a problem. However, insofar as the occurrence of this challenge may serve to invalidate the fragile legitimacy of the exercise of oversight powers, it is worth inquiring into. The following section therefore, focuses on whether or not these oversight powers can go beyond mere rhetoric despite the challenges to its application.

B. SUBSTANTIVE VIS-À-VIS RELATIONAL POWERS

At this point, it is necessary to identify what kind of power has so far been discussed. The oversight powers of the legislature, as well as the powers shared and contended for by all three branches are manifestations of substantive power. Power is vested in the positions themselves. However, inasmuch as the separation of powers and the exception thereto form a logical and coherent system of governance, practical challenges prove that there exists a different kind of power, which though situated on another level, affects the successful exercise of substantial power nonetheless.

Michel Foucault believes that all power is in fact, relational rather than substantive. Although this paper asserts that substantive power exists as much as relational power does, Foucault's take on relational power will be explicated to elucidate the issue at hand. Foucault said that power is "the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization."[48] He says that power is in fact produced by ceaseless struggles and confrontations. It either forms a chain of power or disjunctions and contradictions, which further isolate the forces from one another. Not too dissimilar from Heraclitus' view of constructive struggle, Foucault believes that power is as dynamic as the relations that create it.

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[47] *Id.* at 271.

[48] MICHEL FOUCAULT, HISTORY OF SEXUALITY: VOLUME 1 92 (1990)

He proceeds by saying that the condition of possibility for power is not lodged in the primary existence of a central point, which may be the source of sovereignty, "from which secondary and descendant forms would emanate."[49] Rather, he says, it is the moving substrate of force relations, which by virtue of their inequality constantly engender states of power that are always local and unstable.[50]

As has been mentioned, the schema of the separation of powers as the general state of affairs and the oversight powers as the exception is an exhibition of substantive power. However, experience belies the smooth dynamic of this schema. To be more specific, the exercise of substantive power is limited by the dynamics of relational power.

Relational power may be manifested in heavy politicking, railroading and stonewalling. The need to resolve this is urgent and pervasive because although on the level of thought, the difference drawn between substantive and relational powers seem clear and irrelevant to execution, it is anything but that. There is once more, the inevitable need to find the middle ground or the *mesotes* between two opposite poles: this time between substantive and relational powers.

The question can be more appropriately phrased in the following ways: Are the oversight powers still worth anything in the face of challenges to its execution? If they are, where does their worth lie? What is the *mesotes*?

C. INVESTIGATIONS AS DISCURSIVE[51]

Jurgen Habermas' model of discursive politics proves instructive at this point. According to the procedural concept of democracy he proffers, discourse is moved by the desire to understand. The deliberative process creates relationships among pragmatic articulation, compromise and discourses of understanding and justice. This eventually paves the way for effective decision-making. Its justification is essentially measurable by the level of freedom and exactitude by which information is relayed and received. Thus, the process gives high regard to the rules of discourse and kinds of argumentation.

There are two elements important for the actual implementation of deliberative politics: "(1) the institutionalization of processes and conditions of communication, and (2) the co-ordination of previously established deliberative processes into the informal means by which the public's opinion is gathered."[52] At this point, Habermas points out that the discursive view of deliberative politics synthesizes two key features of republicanism and liberalism: popular sovereignty and political systems. The effect is

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[49] *Ibid.*

[50] *Ibid.*

[51] This section derives mostly from two of Jurgen Habermas' works on Politics: THE INCLUSION OF THE OTHER (1999) & THE POSTNATIONAL CONSTELLATION (2001).

[52] JURGEN HABERMAS, THREE NORMATIVE MODELS OF DEMOCRACY IN THE INCLUSION OF THE OTHER 239-252 (1999).

directly responsive to Foucault's relational power theory insofar as legitimation comes from a continuity of forces, rather than from a fixed center point.

Habermas envisions an ideal discursive situation as emblematic of his philosophical program. However, he does recognize that this situation is difficult, if not impossible to attain. This is the reason he insists on the laying down of basic rules to be observed in institutionalization and co-ordination:

> a. Procedures of deliberation take place in argumentative form that is through the regulated exchange of information and reasons among parties who introduce and critically test proposals.
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> b. Deliberations are inclusive and public. No one may be excluded in principle; all of those who are possibly affected by the decisions have equal chances to enter and take part.
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> c. Deliberations are free of any external coercion. The participants are sovereign insofar as they are bound only by the presuppositions of communication and rules of argumentation.
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> d. Deliberations are free of any internal coercion that could detract from the equality of the participants. Each has an equal opportunity to be heard, to introduce topics, to make contributions, to suggest and criticize proposals. The taking of the yes/no positions is motivated solely by the force of the better argument.
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> e. Deliberations aim in general at rationally motivated agreement and can in principle be indefinitely continued or resumed at any time.
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> f. Political deliberations extend to any matter that can be regulated in the equal interest of all.
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> g. Political deliberations also include the interpretation of needs and wants and the change of pre-political attitudes and preferences.[53]

Viewed through the lens of deliberative democracy, the worth of the oversight powers of Congress remains unwavering in the light of the chasm between its theoretical basis and its practical application. Party-affiliations and vested interests certainly curtail the honest representation of stands and the objective ascertainment of facts. However, it seems that however stated, this could not adequately serve to debunk the legitimacy of the oversight powers vested in Congress.

These powers allow for issues to be placed at the foreground. Legislative action may perhaps be limited by other motives, such that resolutions on the issues may not always be as constructive. But the observation of procedures, however difficult at times, will always be for the best interest of democratic institutions. It seems that the essence of the power of investigation as a manifestation of oversight power can be

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[53] JURGEN HABERMAS, BETWEEN FACTS AND NORMS, 305-306 (1998).

found along the points of convergence between engaging in discourse and conducting investigations. Quite simply, as long as investigations are taken to mean as the embodiment of discourse, their value is not diminished, not even by practical challenges to their application.

Discourse presupposes two elements: the "I" and an "other" with whom the "I" discourses. Ideally, discourse commences because those who engage in it aim to achieve an understanding of difference. This implies that the participants who engage in discourse assume that they have equal rights in articulating their interests. By virtue of the equality they share and the principle of justice that governs the whole process of discourse, the end does not tend to mere compromise. If this were the goal of discourse, the parties would not engage in it at all because they want to achieve what is just, or best for everyone. They would instead do so because they believe that they could push for what they want, and nothing more. This defeats the whole purpose of allowing everyone to speak, and to listen.

Hence, what discourse offers is a concrete course of action, which holds more water than mere compromise. It bears collective action inspired by the force of the better argument. The difference between the two is interesting. On the one hand, compromise silences differences altogether, without the assurance that such silence connotes understanding and acceptance. On the other hand, with the force of the better argument, there is a fleshing out, as it were, of each side's fundamental assertions. Thus, only that which is recognized by those concerned as the most plausible approach is found to merit action

The value of investigations seen as discourse will never be diminished because discourse is the best means by which the *mesotes* can be reached. Habermas will argue that it is in fact, the best means by which consensus on anything will be reached. However, asymptotic or seemingly futile the end is, discourse does not lose its luster. This is because other than being the means to a particular end (i.e. solutions to the practical challenges posited by partisanship in investigations), it serves as an end in itself. In opening the gates to dialogue and deliberation, discourse allows for the free movement of ideas as well as power. Investigations can open the avenue for deliberation, much in the same way that discourse does.

The practical challenges earlier mentioned necessitate practical solutions. The deliberative nuance posited in the next preceding paragraph is certainly anything but practical. However, the identification of discourse with investigations illustrates a very important starting point: even in the face of practical challenges, investigations as a mode of the oversight powers of Congress remain of value.

This paper had earlier asserted that if the oversight powers of Congress were to mean anything, they must be justified not only on the level of legal metaphysics, but also on the more corporeal level of application. Interestingly, the practical challenges to the oversight powers of Congress can only be resolved by first, abstracting from the facts. Of course, however sound as this may seem on the level of ideas, it is undeniable that

much remains to be explored at the pragmatic level. It is in fact possible that the chasm between the ideal and the real may never be bridged — and it is because of this that the journey towards the mean can be asymptotic. However, it is likewise undeniable that other possibilities for exploration remain. Given for instance the right mechanisms, the seemingly asymptotic journey, can at certain points be the *mesotes* itself.

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