OUT OF COMMISSION: AN INQUIRY INTO THE TRUTH BEHIND THE PRESIDENTIAL POWER OF INVESTIGATION*

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> *The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.*
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> –Woodrow Wilson[1]

I. SITUATIONER: JUDICIAL INVALIDATION OF THE PHILIPPINE TRUTH COMMISSION OF 2010

On June 29, 2010, a day before his inauguration, President Benigno Simeon Aquino III announced his intention to "set up a 'truth commission' to investigate the alleged crimes of outgoing leader Gloria Macapagal-Arroyo and her allies."[2] The commission was to look into "any and all"[3] matters relating to the anomalies of former President Arroyo's administration – specifically, her alleged cheating in the 2004 general elections, her alleged profiting from the ZTE-NBN deal, and her allies' alleged involvement in the well-known fertilizer fund scandal.[4] Two days later, Presidential Spokesperson Edwin Lacierda defended the President's decision, remarking that "[i]t is not a witch-hunt. It will not be an act of vengeance on his part. It is meant to bring closure

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[1] WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (HOUGHTON, MIFFLIN & CO., 14TH IMPRESSION, 1900).

[2] Manny Mogato, *Aquino to create 'truth commission'*, ABS-CBN News, Jun. 29, 2010, ¶ 1, *available at* http://www.abs-cbnnews.com/print/104375.

[3] *Id.*, ¶ 7.

[4] *Id.*, ¶¶ 8-10.

to the scandals that have happened in the past."[5] Surprisingly, a week later, Chief Justice Renato Corona, appointed by President Arroyo barely a month before her term ended, commented that the President's resolution to form a truth commission was "a step in the right direction."[6] More elaborately, he stated:

> It's always a step in the right direction to find out the truth in any presidency, in any administration, in any government. You cannot go wrong in finding out what the truth is. So whether it's for the good, for the bad, the people have the right to know what the truth is.[7]

He even made a comparison of the truth commission's function with that of the Presidential Anti-Graft Commission ("PAGC").[8]

Opposition to and doubt as to the validity of President Aquino's proposed formation of the "truth commission" soon gained traction and momentum. Senator Joker Arroyo commented that the commission would be merely an investigative body without subpoena power because it will not be a legislative creation, rendering it virtually useless without congressional empowerment.[9] When the executive order[10] creating the "Philippine Truth Commission of 2010" was promulgated on July 30, 2010, the criticisms only multiplied. Representative Edcel Lagman of the First District of the Province of Albay and Minority Floor Leader of the House of Representatives in the Fifteenth Congress, threatened to challenge the executive order in court because of its "constitutional infirmities."[11] He enumerated the following reasons for his contemplated legal challenge:

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[5] *Palace: Truth commission not a witch-hunt*, ABS-CBN News, Jul. 1, 2010, ¶ 3, *available at* http://www.abs-cbnnews.com/print/104713.

[6] Willard Cheng, *Supreme Court Chief backs Truth Commission*, ABS-CBN News, Jul. 7, 2010, ¶ 1, *available at* http://www.abs-cbnnews.com/print/105428.

[7] *Id.*, ¶ 3.

[8] *Id.*, ¶ 4.

[9] *Joker: Truth Commission useless unless Congress arms it*, ABS-CBN News, Jul. 29, 2010, *available at* http://www.abs-cbnnews.com/print/108362.

[10] Exec. Order No. 1 (2010).

[11] *Opposition to question legality of Truth Commission*, ABS-CBN News, Aug. 1, 2010, ¶ 2, *available at* http://www.abs-cbnnews.com/print/108750.

> The creation and funding of offices and commissions is a legislative power of Congress and consequently, the Truth Commission cannot be constituted by mere executive fiat;
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> The equal protection clause of the Constitution may be violated by targeting a specific group of officials for investigation; and,
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> The Truth Commission duplicates the constitutional mandate of the Office of the Ombudsman as well as the statutory jurisdiction of the Department of Justice.[12]

Senator Miriam Defensor-Santiago, on her part, "could not hide her dismay at Malacañang's move"[13] and demanded anyone to "[s]how [her] where in the Constitution is there a general provision their power to create an office" and to "[s]how [her] a law passed by Congress that gives [the Executive] the power to create agencies."[14]

Barely a month after Executive Order No. 1 was enacted, Rep. Edcel Lagman, as expected, along with Reps. Rodolfo Albano, Jr., Simeon Datumanong, and Orlando Fua, Sr., in their capacities as legislators, and Louis Biraogo in his capacity as a citizen and taxpayer, instituted two special civil actions (*certiorari* and prohibition on the part of the legislators, and prohibition on the part of Biraogo) before the Supreme Court, which were eventually consolidated by the same. The Court promulgated on December 7, 2010 its much-criticized decision[15] declaring the Philippine Truth Commission of 2010 unconstitutional for violating the Equal Protection Clause [16] of the Constitution.

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[12] *Id.*, ¶¶ 7-9.

[13] Ron Gagalac, *Miriam blasts Noynoy's Truth Commission*, ABS-CBN News, Aug. 3, 2010, ¶ 1, *available at* http://www.abs-cbnnews.com/print/108951.

[14] *Id.*, ¶ 4.

[15] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010.

[16] CONST., art. III, § 1. "No person shall be deprived of life, liberty, or property without due process of law, *nor shall any person be denied the equal protection of the laws.*" (Emphasis supplied)

II. SUBMISSION: INHERENCE OF INVESTIGATION IN PRESIDENTIAL POWER

The decision of the Supreme Court in *Biraogo v. Philippine Truth Commission of 2010* presents students of constitutional law with a dangerous proposition: the President, vested with executive power, has the power of investigation or fact-finding to ensure the faithful execution of the laws, and the power to create or designate the person or body for the purpose of assisting in this function. However, the President may not investigate his predecessor's administration because it merely constitutes part of a class (past administrations) and "not a class of its own." To not "include past administrations similarly situated constitutes arbitrariness which the equal protection clause cannot sanction" because "[s]uch discriminating differentiation clearly reverberates to label the commission as a vehicle for vindictiveness and selective retribution."[17] In other words, the Chief Executive, who must necessarily be fully informed of all matters related to the current conditions of the national and local governments, cannot use his inherent power of investigation and fact-finding to elucidate the alleged irregularities of his predecessor because it would constitute biased earmarking of a member of a class of past administrations. Although each administration is composed of numerous officials and subordinates assigned to multitudinous offices and departments that may have very few substantive commonalities aside from being under the supervision and control of a President, such reasoning is, in the opinion of the majority of the Court, sufficient to invalidate a perfectly reasonable and necessary action intended by the Executive branch to ensure the faithful execution of the laws. This is despite the fact that "the Marcos, Ramos and Estrada administrations were already investigated by their successor administrations. This alone is incontrovertible proof that the Arroyo administration is not being singled out for investigation or prosecution," and the fact that "the only living President whose administration has not been investigated by its successor administration is President Arroyo."[18]

The opinion of the majority of the Court, however, did not invalidate the inherent power of the presidency to conduct investigations and create fact-finding bodies. The Court expressly recognized both acts as stemming from the President's constitutional mandate provided by the Faithful Execution

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[17] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010.
[18] *Id.*, (Carpio, J., *dissenting*).

Clause.[19] Still, the decision's use of the Equal Protection Clause as basis has established a precedent that may be worrisome if it were applied to other important areas. The power of Congress to conduct inquiries and investigations in aid of legislation[20] and to oversee the Executive department,[21] especially as regards past executive actions, may also be severely curtailed on the mere ground that the official or office being investigated or overseen is an official or office among a class composed of other officials or offices, and that all members of such class should be treated equally before the law.

This author reiterates the Court's recognition of the necessary inclusion of the powers of investigation and fact-finding, and the power to designate or create the person or body to conduct the same, within the scope of presidential power. In order to acquire the necessary information for a streamlined and seamless administration of executive functions, and to ensure that all laws are followed and their objectives are accomplished, the President must be armed with the necessary facts surrounding all entities under his supervision and control. In fact, it would be a violation of equal treatment before the law if the President, being vested with the executive power of government,[22] would be denied the opportunity to fulfill his constitutional mandate by the curtailment of the presidency's investigative power on unsubstantiated grounds, whilst a coordinate and coequal branch of government, such as Congress, is fully granted the same power without such unusual curtailment. Congress has plenary power to investigate the actions of current and past administrations, but the President cannot investigate the actions of his predecessor just because it is suddenly discriminatory. Obviously, there is a disconnect.

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[19] CONST., art. VII, § 17. "The President shall have control of all the executive departments, bureaus, and offices. *He shall ensure that the laws be faithfully executed.*" (Emphasis supplied)

[20] CONST., art. VI, § 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."

[21] CONST., art. VI, § 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 . . . ."

[22] CONST., art. VII, § 1. " The executive power shall be vested in the President of the Philippines."

The presidential power of investigation is also necessary for the proper and balanced interaction between the Executive and other branches of government. Other constitutional bodies are expressly given the power of investigation or inquiry, such as Congress, [23] the Ombudsman, [24] the Commission on Elections,[25] the Commission on Audit,[26] and the Commission

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[23] CONST., art. VI, §§ 21-22.

[24] CONST., art. XI, § 13. "The Office of the Ombudsman shall have the following powers, functions, and duties:

(1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

. . .

(4) Direct the officer concerned, in any appropriate case, and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered into by his office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action.

(5) Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents.

(6) Publicize matters covered by its investigation when circumstances so warrant and with due prudence.

(7) Determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations for their elimination and the observance of high standards of ethics and efficiency.

(8) Promulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law."

[25] CONST., art. IX-C, § 2. "The Commission on Elections shall exercise the following powers and functions:

. . .

(6) . . . investigate, and, where appropriate, prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offenses, and malpractices . . . ."

[26] CONST., art. IX-D, § 2. "(1) The Commission on Audit shall have the power, authority, and duty to examine, audit and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies or instrumentalities, including government-owned and controlled corporations with original charters…"

§ 4. "The Commission shall submit to the President and the Congress, within the time fixed by law, an annual report covering the financial condition and operation of the Government, its subdivisions, agencies, and instrumentalities, including government-owned or controlled corporations, and non-governmental entities subject to its audit, and recommend measures necessary to improve their effectiveness and efficiency. It shall submit such other reports as may be required by law."

on Human Rights.[27] Still, there are others whose investigative powers are implied as a corollary to the power to supervise their respective departments.. The Supreme Court is granted the same by necessary implication because of its express powers of administrative supervision[28] and discipline over all courts and court personnel.[29] The Civil Service Commission is likewise granted the power of administrative supervision over the civil service.[30] Each of these instrumentalities of the Philippine republican state exercises its investigative powers to ensure the proper direction of the affairs within its particular sphere of authority and jurisdiction, as well as to ensure that other instrumentalities properly fulfill their own mandates. The diffusion of investigative and fact-finding powers among the various instrumentalities of government allows each to compensate for the inaction or shortfalls of others in exercising the same. For example, if the Ombudsman declines to investigate a case, Congress, on its own initiative, may conduct inquisitorial hearings on the matter at either the plenary or committee level, or the President may designate an *ad hoc* committee or commission that will actually examine documents, evidence, and make recommendations to the President and the public.

This paper examines the origins, nature, scope, issues, and problems of presidential investigation, especially vis-à-vis the coordinate power of Congress to do the same. It is this author's opinion that the *raison d'être* of congressional inquiries is almost identical to that of presidential fact-finding bodies and *ad hoc* commissions or committees, in the sense that such power helps these bodies to fulfill their constitutional mandates. While Congress conducts inquisitorial hearings for the purpose of gathering data and

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[27] CONST., art. XIII, § 18. "The Commission on Human Rights shall have the following powers and functions:

(1) Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;

. . .

(7) Monitor the Philippine Government's compliance with international treaty obligations on human rights;

(8) Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority; …"

[28] CONST., art. VIII, § 6. "The Supreme Court shall have administrative supervision over all courts and the personnel thereof."

[29] CONST., § 11. ". . . The Supreme Court *en banc* shall have the power to discipline judges of lower courts, ..."

[30] CONST., art. IX-B, § 1. "(1) The civil service shall be administered by the Civil Service Commission . . . ."

information for more efficient and more prudent legislation, as well as for the purpose of enlightening the public-at-large with regard to the circumstances surrounding matters of national importance, the President exercises his investigative powers to attain a more informed and responsive level of administration of executive functions. To deny the President this inherent power would be to create undermine the doctrine of separation of powers. The individual efforts of all instrumentalities of government in exercising the power of investigation should result in the collective pursuit of truth and information for the betterment of the republican state. The curtailment of even just one individual effort may hamper the entire collective effort.

For the right balance and exercise of powers among the segregated branches and instrumentalities of government, constant reexamination of the same is required. An inquiry into the truth behind the presidential power of investigation juxtaposed with the congressional power of inquiry is now in order.

III. BENCHMARK: INITIAL DISCUSSION OF THE LEGISLATIVE POWER OF INQUIRY

Nature

In her graduate thesis, Avelina San Miguel-Salacup explains that the necessity of legislative inquiry comes from the "growing expansion of governmental activities and functions, brought about by social and economic changes."[31] She further explains that

> With this great increase in government functions, ushered in by social and economic metamorphoses, government responsibilities have increased accordingly. Ways and means to meet these responsibilities have to be devised. New policies have to be formulated in order to meet changing conditions. *With the need for new policies came the need for more information concerning the policies that are to be formulated.* The task of formulating new policies to meet these new developments necessitates more and more information. *This*

[31] Avelina San Miguel-Salacup, The Congressional Power of Investigation with Particular Reference to Special Investigative Committees of the Philippine Congress, 11 (February 1958) (unpublished thesis for Master of Arts, University of the Philippines Graduate School, on file with the University Archives & Records Depository).

> *increasing need for more information, in turn, has resulted in the wide use of the investigative powers of Congress. Congressmen have to keep close tab of every new development if the policies they are to formulate are intended to be responsive to the public needs.* In view of this, they necessarily turn to the use of legislative inquiry. Moreover, legislators have to be informed as to the proper operation of the policies they have formulated. They have to be apprised of whether the policies they have formulated are meeting the needs for which the policies were specifically created.[32] (Emphasis supplied)

In other words, Salacup emphasizes the congressional responsibility to ensure that legislation is informed, timely, and responsive. "As the direct representatives of the people, Congress has taken upon itself the duty of protecting the interests of society."[33] One key method of protecting these interests is through the power of Congress to investigate. The main reasons for the power, according to Salacup, are fourfold:

1. to obtain information
2. to supervise or check the administration
3. to inform the public and to ventilate facts to the public
4. to crystallize or mould public opinion[34]

The first reason is apparent. "A law, in order to adequately meet the needs for which it is enacted, must be based on an adequate knowledge of prevailing conditions that are responsible for its passage."[35] Verily, "sound policies can only be enunciated by adequately and effectively informed policy-makers."[36] Unfortunately, Congress, powerful and influential as it may be, does not have all the sufficient data and information it needs for lawmaking. "The need for first-hand information which would direct legislators in their work"[37] leads to the necessary inclusion of investigation in the legislative process. Also, "[c]ongressional investigations are not only resorted to in order to obtain information and facts necessary for formulating new legislations. They are likewise utilized to obtain knowledge about the operation of laws which have

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[32] *Id.*, at 14-15.
[33] *Id.*, at 19.
[34] *Id.*, at 23.
[35] *Id.*
[36] *Id.*, at 26.
[37] *Id.*, at 25.

already been enacted, with a view to their possible amendments or outright repeal."[38]

The second reason is for the "surveillance of administration,"[39] especially in response to the "increased delegation of authority by the legislatures."[40] It is "through the power of inquiry" that "the administration is held accountable to the people, through the people's representatives."[41] This is also corollary to the congressional power of the purse, "for the control over appropriations would lose much of its meaning if it were not accompanied by an authority to scrutinize the uses to which appropriations have been put."[42] Indeed, congressional investigation serves as a "break against executive dominance"[43] and that "[t]ruly, investigations by legislative committees can be one of the most effective antidotes to the danger of greater executive power."[44]

The third reason comes from the "desire to expose malpractices in the government" and "to inform or educate the public" since "being the ultimate sovereign, the public has a right to know about the goings-on of government."[45] As aptly put by Salacup, congressional inquiries "have served as deterrents or prophylactic against the commission of future evils."[46] To educate the public, "[l]egistations under consideration are dissected, examined, analyzed, and explored to the minutest details."[47] Rep. Joaquin Roces, Chairman of the Committee on Good Government of the House of Representatives in the Fourth Congress during the subsistence of the 1935 Constitution, points out in his treatise on congressional investigation[48] that "congressional investigations have the salutary effect of keeping the public informed of what is happening in their government, since congressional

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[38] *Id.*, at 28.
[39] *Id.*, at 30.
[40] *Id.*, at 31.
[41] *Id.*, at 30.
[42] *Id.*
[43] *Id.*
[44] CHARLES EDWARD MERRIAM & ROBERT MERRIAM, THE AMERICAN GOVERNMENT 159 (1954).
[45] Salacup, *supra* note 31 at 40.
[46] *Id.*, at 42.
[47] *Id.*, at 43.
[48] JOAQUIN ROCES, A LEGAL TREATISE: THE CONGRESSIONAL POWER OF INVESTIGATION (COMMITTEE ON GOOD GOVERNMENT, HOUSE OF REPRESENTATIVES, 1959).

investigations are invariably accorded wide publicity and coverage by the press, radio, and even television."[49] He further opines:

> [A]s has been brought out by one authority, considering that in a representative democracy like ours Congress is the repository of the people's will, Congress should be responsive to public opinion; and that one way of ascertaining public opinion is to conduct inquiries or investigations.[50]

For his part, Woodrow Wilson, the twenty-eighth President of the United States of America, has this to say on the importance of the congressional duty to inform:

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. *The informing function of Congress should be preferred even to its legislative function.*[51] (Emphasis supplied)

Salacup's explanation of the fourth reason is herein quoted in full because of its articulate expression on the impact of congressional inquiries and congressional stands on important issues as a result of the same:

> Finally, the congressional power of investigation has become very useful in moulding or crystallizing public opinion. Not infrequently, Congress is confronted with controversial issues, which it is not in a position to act upon immediately. Faced with such difficult situations, Congress has found its investigative power very useful. Investigations are resorted to, not to elicit information but to sound out public opinion. Congress invites interested parties, so that they may air their views on the question at hand. In so doing, Congress throws the responsibility to the public. Investigations are

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[49] *Id.*, at 8.

[50] *Id.*, at 9.

[51] Wilson, *supra* note 1.

> made to publicize an issue concerning some public policy, thereby influencing public opinion for or against the measure. The aim of Congress in this case is to be able to determine public reaction to a particular measure under consideration. With public opinion thus crystallized, Congress is enabled to take a definite stand. Public opinion, shaped and moulded by congressional inquiries, have placed heavy weights in congressional decisions.[52]

From another viewpoint, former Chief Justice Reynato Puno, in his concurring and dissenting opinion in *Macalintal v. Commission on Elections*,[53] identifies investigation as one among three other categories of congressional oversight, the other two being scrutiny and supervision.[54] Scrutiny, according to Chief Justice Puno,

> . . . implies a lesser intensity and continuity of attention to administrative operations. Its primary purpose is to determine economy and efficiency of the operation of government activities. In the exercise of legislative scrutiny, Congress may request *information and report* from the other branches of government. It can give recommendations or pass resolutions for consideration of the agency involved.
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> *Legislative scrutiny is based primarily on the power of appropriation of Congress.* Under the Constitution, the "power of the purse" belongs to Congress. The President may propose the budget, but still, Congress has the final say on appropriations. Consequently, administrative officials appear every year before the appropriation committees of Congress to report and submit a budget estimate and a program of administration for the succeeding fiscal year. During budget hearings, administrative officials defend their budget proposals.
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> . . .
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> *But legislative scrutiny does not end in budget hearings. Congress can ask the heads of departments to appear before and be heard by either House of Congress on any matter pertaining to their departments.*
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> *Likewise, Congress exercises its legislative scrutiny thru its power of confirmation.*
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[52] Salacup, *supra* note 31 at 44-45.

[53] G.R. No. 157013, July 10, 2003 (Puno, J., *concurring and dissenting*).

[54] *Id.*

> Through the power of confirmation, Congress shares in the appointing power of the executive. Theoretically, it is intended to lessen political considerations in the appointment of officials in sensitive positions in the government. It also provides Congress an opportunity to find out whether the nominee possesses the necessary qualifications, integrity and probity required of all public servants.[55]

As for legislative supervision, Puno describes this as the more comprehensive category of oversight. It is, as Puno opines, the "*most encompassing* form by which Congress exercises its oversight power." [56] According to Puno:

> "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 involved inquiry into *past executive branch* actions in order to influence future executive branch performance, *congressional supervision allows Congress to scrutinize the exercise of delegated law-making authority, and permits Congress to retain part of that delegated authority.*
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> *Congress exercises supervision over the executive agencies through its veto power. It typically utilizes veto provisions when granting the President or an executive agency the power to promulgate regulations with the force of law. These provisions require the President or an agency to present the proposed regulations to Congress, which retains a "right" to approve or disapprove any regulation before it takes effect.*[57]

As for investigation proper, Puno describes this as a more rigorous process that "involves a more intense digging of facts."[58] Puno also delves a bit into the history behind the power, commenting that

> . . . even in the absence of an express provision in the Constitution, congressional investigation has been held to be an essential and appropriate auxiliary to legislative function. In the United States, the lack of a constitutional provision specifically authorizing the conduct of legislative investigations did not deter its Congresses from holding investigation on suspected corruption,

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

> mismanagement, or inefficiencies of government officials. Exercised first in the failed St. Clair expedition in 1792, the power to conduct investigation has since been invoked in the Teapot Dome, Watergate, Iran-Contra, and Whitewater controversies. Subsequently, in a series of decisions, the Court recognized "the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive branch were unduly hampered."
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> In *Eastland v. United States Servicemen's Fund*, the U.S. Supreme Court ruled that the *scope* of the congressional power of inquiry "is *penetrating and far-reaching* as the potential power to enact and appropriate under the Constitution." It encompasses everything that concerns the administration of existing laws as well as proposed or possibly needed statutes. In the exercise of this power, congressional inquiries can reach all sources of information and in the absence of countervailing constitutional privilege or self-imposed restrictions upon its authority, Congress and its committees, have virtually, plenary power to compel information needed to discharge its legislative functions from executive agencies, private persons and organizations. Within certain constraints, the information so obtained may be made public… But while the congressional power of inquiry is broad, it is not unlimited. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of congress. Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body. But once its jurisdiction and authority, and the pertinence of the matter under inquiry to its area of authority are established, a committee's investigative purview is substantial and wide-ranging.[59]

It is to be gathered from the sentiments of the authors above that legislative investigations are, in essence, the proper actions of the elected overseers to safeguard the integrity of the government and the interests of the people in a republican state. An administration in good operating condition, and a body politic well versed of such conditions, are the *raisons d'être* of the legislative power of inquiry.

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[59] *Id.*

Origins

The origin of the current interpretation of the legislature's power of inquiry in Philippine jurisdiction presents itself as an irony: under the 1935 Constitution, it was "not directly or expressly provided for."[60] But, according to Rep. Joaquin Roces, "[i]t is a power clearly deduced from the primary power of Congress which is to legislate."[61] Tracing the history of the power, he notes:

> As early as 1792 the House of Representatives of the United States asserted its authority in this regard when it appointed a committee to investigate a military disaster and empowered it to call for such persons, papers and records as may be necessary to assist their inquiry. In the case of the Philippines, this power was recognized as early as 1930 in the case of *Lopez v. de los Reyes*. Continuous and unchallenged exercise of this legislative prerogative has made it an accepted and settled practice both here and in the United States.[62]

The doctrinal decision of the Supreme Court in *Arnault v. Nazareno*[63] also notes the necessary, implied, and inherent power of investigation of Congress as part of its lawmaking role. Justice Roman Ozaeta calls attention to this, *to wit*:

> Although there is no provision in the Constitution expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative functions advisedly and effectively, *such power is so far incidental to the legislative function as to be implied.* In other words, the power of inquiry – with process to enforce it – is an *essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which legislation is intended to affect or change*; and where the legislative body does not itself possess the requisite information – which is not infrequently true – recourse must be had to others who do possess it.[64] (Emphasis supplied)

In her graduate thesis, Salacup notes:

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[60] Roces, *supra* note 48 at 6.
[61] *Id.*
[62] Roces, *supra* note 48 at 7.
[63] G.R. No. 3820, July 18, 1950.
[64] *Id.* at 45.

> If we take a look at the Philippine Constitution, and even the American fundamental law for that matter, *nowhere in them could we find any mention made of the power of Congress to conduct inquiries*. No express provision of this authority appears in either of the two constitutions. But the power of inquiry exercised by Congress is implied from several provisions of the Constitution, expressly provided for. *Democratic governments rely heavily on implied powers, because the absence of express provisions should not, in any way, hamper the efficient functioning of government organs.*[65] (Emphasis supplied)

Salacup identifies these express constitutional provisions as the power to legislate, to punish members, to confirm appointments, and to impeach. Fundamentally, the power of legislative inquiry is based on the fundamental function of the legislature, which is to legislate. "The fact that the need for information is a *sine qua non* for effective legislation strongly supports the power of inquiry as implied from the power to legislate."[66] The power to punish members of Congress implies congressional inquiry; "[o]therwise, if resort to investigations is not made, a fair and just procedure can hardly be expected."[67] The power to confirm appointments implies the same, since "[i]t is but natural for Congress to determine beforehand, that the personnel whom the Chief Executive chooses are highly qualified, and are worthy to receive the salaries for which Congress has appropriated."[68] The power to impeach implies the power to investigate, for the same reason as the power to punish members of Congress does, because

> [i]n an impeachment proceeding, the two houses of Congress lay aside their legislative duties and sit as an impartial tribunal. In the performance of this function, it is no different from any ordinary court of justice. And just like a court, Congress in this case, makes use of investigations, to be able to arrive at a fair and just decision. A basic requirement of due process is the conduct of investigations before conviction can take place.[69]

Thus, despite an absence of express provision in a constitution, the investigative power of the legislature is authorized by implication as being a

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[65] Salacup, *supra* note 31 at 46.
[66] *Id.*, at 47.
[67] *Id.*, at 49.
[68] *Id.*, at 50.
[69] *Id.*, at 52.

necessary adjunct to its lawmaking function. This is to ensure that the legislature is able to craft informed, relevant, and responsive legislation for the benefit of the body politic and the republican state as a whole.

Scope and Limitations

As to the generally permissible extent of legislative inquiry, Salacup notes that

> [i]nasmuch as the investigative power is sustained by the legislative power, it necessarily follows that Congress can inquire into any matter which it has authority to legislate on. *Consequently, what Congress has no authority to legislate upon, it cannot likewise probe into*. And, since the legislative power is an extensive power, subject only to the limitations imposed by the Bill of Rights and those limitations springing from certain constitutional principles, *then it can be said that the investigative power is equally extensive*. In the Philippines, the Constitution grants plenary powers to the legislature. With the exception of the limitations found in the Bill of Rights, and those imposed by some basic constitutional principles, legislative power in the Philippines is full and complete. Likewise, the inquisitorial power of Congress is recognized as equally broad.[70] (Emphasis supplied)

Clearly, the scope of legislative inquiry is immense, but as an adjunct to general legislative power, it is limited in its operation by the Constitution. There are three general limitations to the exercise of legislative inquiry:

1. The inquiry must be in aid of legislation;
2. The inquiry must be in accordance with the duly published rules of procedure of the Senate or the House or the committee in question; and
3. The inquiry must respect the rights of persons appearing in or affected by the same.[71]

The first and the third are the most problematic. As to the first, Justice Vicente Mendoza opines that "legislative purpose" is "used more to state a result than to describe the process of determining the bounds of permissible and impermissible investigations and that reliance on it as a test has, on the

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[70] *Id.*, at 58.

[71] CONST., art. VI, § 21.

whole, left individual rights without adequate protection."[72] One of his four observations of the relevant American jurisprudence at the time was that any presumption that the investigation is in aid of legislation would be injurious to individual rights. He explains:

> To presume that the purpose is lawmaking where the purpose is different is to place an undue weight on one side of the scale. Against the presumption of legislative purpose, individual rights would indeed appear to be mere paperweights. Inevitably the balance must be struck in favor of the security of the state or other justifying national interest.
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> As Martin Shapiro pointed out, the whole technique of balancing individual freedoms against society's interests in government activities interfering with those freedoms will greatly benefit from the abandonment of the demand for, and presumption of, legislative purpose. By recognizing exposure as a normal purpose of investigations, while at the same time stressing its potential danger to individual rights, the Court can begin to act as a real balancer of interests, striking down those inquiries which needlessly destroy constitutional rights and upholding those in which exposure of some danger or misdeed is essential to society.[73]

Besides, the enforcement of such a test to ensure that each investigation is, in fact, in aid of legislation would be difficult, which is also one of Justice Mendoza's four observations:

> It is said that investigations can only be undertaken in aid of legislation. But how is the Court to prove otherwise if Congress declares that its purpose is legislation? And legislative investigation need not result in legislation. More often than not, therefore, the courts are driven to the extreme of taking the statement of legislative purpose at face value and considering it as conclusive upon themselves. The result is to leave constitutionally protected freedoms without protection.
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> Then, also, while the Court may try to enforce the legislative purpose doctrine by requiring Congress to state the aims and purposes of authorized investigations, there is nothing it can do if

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[72] Vicente Mendoza, *The Use of "Legislative Purpose" as a Limitation on the Congressional Power of Investigation*, 46 PHIL. L. J. 707, 708 (1971).

[73] *Id.*, at 720.

> Congress refuses to comply with its demand. On what ground can the Court strike down vague authorizing resolutions? On the principle of separation of powers?[74]

In the end, Justice Mendoza characterizes the presumption as illusory in that it "tends to lend a conclusory meaning when what is involved is a process of reaching judgment."[75] He suggests instead that

> [b]y regarding legislative investigations as any other legislative act (e.g., statute) and recognizing them for what they are, courts would be freed from the distorting illusion created by the demand for legislative purpose and would thus be able to measure the tension created by the tug and pull of the competing interest in public order and that in freedom of speech.[76]

Standing Philippine jurisprudence actually does away with the presumption in American jurisprudence. Instead, materiality pertains not to legislative purpose, but to the jurisdiction of the committee involved over the subject of the inquiry. Once committees acquire jurisdiction, the inquiries are presumed material not because they are for a legislative purpose, but because the inquiries are relevant to the area subsumed under the recognized authority of the committees. In *Arnault v. Nazareno*, it is explained that

> [o]nce 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 legislation. In other words, the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason*

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[74] *Id.*, at 719.
[75] *Id.*
[76] *Id.*, at 720.

> *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.*[77] (Emphasis supplied)

The third limitation mostly centers on the issue of privacy, but is also very much related to the first limitation. Lemuel Lopez remarks that, generally,

> [t]he express constitutional duty imposed by Congress to respect the rights of the witnesses appears at first impression to refer to the rights of witnesses not to be abused, insulted, harassed, or embarrassed, in short, the right to human dignity and the right not to be compelled to serve as a witness against himself which is of course is part of the right to privacy.[78]

Indeed, "[t]he power to investigate cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals."[79] He also notes the difficulties in applying this to the "gray" areas of privacy – the two main areas being the private affairs of public officers and the involvement in matters of public interest by private individuals.[80] However, more importantly, Lopez reminds us that the breadth of legislative inquiry poses a danger to constitutionally guaranteed rights if unchecked, relating back to the first limitation. He clarifies that

> [t]he scope of every legislative inquiry remains vast. Although based on the resolutions passed to empower a particular committee to conduct an investigation, like in the case of the Tambobong Estates Deal in the case of Arnault, there were attempts by Congress to limit its inquiry to a particular scope, i.e., questions directly related to the Tambobong Estate deal. *However, the present procedure of initiating a legislative inquiry, for instance in the Senate, may translate to a virtual total empowerment of Senate Committees to do anything to investigate on the matters described in the petition, information or as the Committee sees it. There is no need to define clear delineations or scope of a particular inquiry.* As a consequence, a whole range of inquiries may be initiated without even an enabling resolution from its mother House.

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[77] Arnault v. Nazareno, G.R. No. 3820, July 18, 1950.

[78] Lemuel Lopez, *The Right to Privacy in Inquiries in Aid of Legislation*, 78 PHIL. L. J. 162, 170 (2003).

[79] *Id.*, at 195.

[80] *Id.*, at 171-172.

> It seems that what Congress does is inquire now and justify through the resolutions or pending bills later. It engages in what the Watkins court describes as "*retroactive rationalization*." *The scope of inquiry may be left undefined and thus the witness is left to guess as to what he would answer* when he is asked of what "he knows" on say, "sale of the thirty-six corporations belonging to Benjamin 'Kokoy' Romualdez." Althought the witness is limited to a particular topic, i.e., "sale" *the topic could assume many different dimensions, may branch out as to expand to unforeseen bounds. Witnesses may not see the extent of the information Congress expects him to reveal.*[81] (Emphasis supplied)

Indeed, "having a clear guideline as to the scope of the inquiry is important"[82] because legislators need to know if their questions are pertinent, what information they may demand, and the legal consequences of the revelation.[83] However, as Lopez further elucidates, the pertinence of questions is still based on jurisdictional considerations because of the content of the resolution calling for the investigation.[84] The danger of vagueness is also apparent, because if the resolution does not specify what it is to investigate, then pertinence cannot be determined and the witness is again put at peril.[85]

The scope and limitations of legislative inquiry are designed to keep Congress from encroaching upon the functions and spheres of its coordinate branches. This is in keeping with the principle of limited government that is the foundation of republican states. Until now, however, the metes and bounds of the exercise of the power are still "gray." Legislative purpose remains a vague standard to keep congressional inquiry from overstepping constitutional delineations, and privacy rights, thus, are still bereft of any standard with which to ensure their protection from the demanding and exacting committees of Congress. Even after a long history of wielding the power, Congress still has a lot to improve on.

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[81] *Id.*, at 190-191.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

IV. BRIDGE: DANGERS AND LIMITATIONS OF THE CONCENTRATION OF INVESTIGATIVE POWER

It is submitted in this paper that the diffusion of investigative power is necessary to strike a proper balance among the segregated branches of government. This will allow all branches or instrumentalities to monitor the actions of each other and, more importantly, to compensate for the possible pitfalls and inaction of each other. Congress, along with the Ombudsman, the Commission on Elections, the Commission on Audit, and the Commission on Human Rights, has a broad and express mandate to exercise investigative power. However, the danger lies in the possibility that these instrumentalities may fail to properly exercise the same. Several scenarios can be imagined, such as when the Ombudsman declines to investigate or prosecute public officials, especially those of the administration under the President that appointed the Ombudsman; or, when Congress declines to investigate or impeach public officials despite knowledge of convincing evidence of their acts that constitute grounds for impeachment. The power may also be abused, as when both Congress and the Ombudsman inject a punitive or vindictive character to their investigations of political enemies in the Executive branch. For various political reasons, many instrumentalities may be hampered in their exercise of investigative power. Institutional deadlock may occur, and the truth and information needed by the government for effective governance, and demanded by the public for greater accountability, may never see the light of day.

It is also important to reiterate that to curtail the investigative efforts of one instrumentality is to definitely hamper the collective pursuit of truth and information by all branches and instrumentalities for the betterment of the republican state. The effort in question, which is that of the President, now necessitates reexamination for a justification of its inclusion in the collective pursuit of truth and information.

V. CRUX: PRESIDENTIAL POWER OF INVESTIGATION

Executive Power in General

The President, by constitutional mandate, is vested with the executive powers of government.[86] However, despite the Constitution's enumeration of these executive powers, executive power *per se* remains difficult to define. In *Marcos v. Manglapus*,[87] Justice Irene Cortés explains that this presents a problem when determining the extent of executive power. She elucidates this matter, *to wit*:

> As stated above, the Constitution provides that "[t]he executive power shall be vested in the President of the Philippines." *However, it does not define what is meant by "executive power" although in the same article it touches on the exercise of certain powers of the President, i.e.*, the power of control over all executive departments, bureaus and offices, the power to execute the laws, the appointing power, the powers under the commander-in-chief clause, the power to grant reprieves, commutations and pardons, the power to grant amnesty with the concurrence of Congress, the power to contract or guarantee foreign loans, the power to enter into treaties or international agreements, the power to submit the budget to Congress, and the power to address Congress. (Emphasis supplied)
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> The inevitable question then arises: by enumerating certain powers of the President, did the framers of the Constitution intend that the President shall exercise those specific powers and no other? Are these enumerated powers the breadth and scope of "executive power"? Petitioners advance the view that the President's powers are limited to those specifically enumerated in the 1987 Constitution. Thus, they assert: "The President has enumerated powers, and what is not enumerated is impliedly denied to her. *Inclusio unius est exclusio alterius*."[88]

However, in her dissertation[89] on the Philippine presidency published in 1966, Justice Cortés presents the answer that is the proper interpretation of the scope of executive power:

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[86] CONST., art. VII, § 1.

[87] G.R. No. 88211, Sept. 15, 1989.

[88] *Id.*

[89] IRENE CORTÉS, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER (1966).

American presidents have differed likewise in their understanding of presidential powers. Theodore Roosevelt and William Howard Taft later explained the opposite views they had on the subject. The former advanced the stewardship theory declaring that "*the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under the constitutional powers*…every executive officer in high position was a steward of the people bound actively and affirmatively to do all he could for the people…I decline to adopt the view that what was imperatively necessary for the Nation could not be done by the President *unless he could find some specific authorization to do it.*" In Taft's opinion "the president can exercise no power which cannot be reasonably and fairly traced to some specific grant of power *or justly implied or included with such express grant as necessary and proper to its exercise.* Such specific grant must be either in the Constitution or in an act of Congress passed in pursuance thereof. *There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.*"

On the other hand the Philippine government is unitary and highly centralized. There is no counterpart of the several states of the American union which have reserved powers under the United States Constitution. The Philippine constitution establishes the three departments of the government in this manner: "The legislative power shall be vested in a Congress of the Philippines which shall consist of a Senate and a House of Representatives." "The executive power shall be vested in a President of the Philippines." "The judicial powers shall be vested in one Supreme Court and in such inferior courts as may be provided by law." These provisions not only establish a separation of powers by actual division but also confer *plenary legislative, executive, and judicial powers.* For as the Supreme Court of the Philippines pointed out in *Ocampo v. Cabangis*, "a grant of legislative power means a grant of all the legislative power; and a grant of judicial power means a grant of all the judicial power which may be exercised under the government." If this is true of the legislative power which is exercised by two chambers with a combined membership of more than 120 and of the judicial power which is vested in a hierarchy of courts, *it can equally if not more appropriately apply to the executive power which is vested in one official—the president.* He personifies the executive branch. There is a unity in the executive branch absent from the two other branches of

> government. The president is not the chief of many executives. He is *the* executive.[90] (Emphasis supplied)

In other words, Article VII, Section 1 alone gives the President all powers express and implied for the exercise of executive functions, because of the "unitary and highly centralized" nature of Philippine government. As noted by Justice Cortés, no other person or entity in Philippine jurisdiction exercises executive power, unlike in the United States where the executive powers of the governors of the various states are still preserved.

It may be argued that executive power is limited to merely executing or enforcing the law. In response to this, Justice Cortés presents the following rebuttal:

> It would not be accurate, however, to state that "executive power" is the power to enforce the laws, for the President is head of state as well as head of government *and whatever powers inhere in such positions pertain to the office unless the Constitution itself withholds it.* Furthermore, the Constitution itself provides that the execution of the laws is only one of the other powers of the President. It also grants the President other powers that do not involve the execution of any provision of law, e.g., his power over the country's foreign relations.
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> On these premises, we hold the view that although the 1987 Constitution imposes limitations on the exercise of *specific* powers of the President, it maintains intact what is traditionally considered as within the scope of "executive power." Corollarily, the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. *In other words, executive power is more than the sum of specific powers so enumerated.* (Emphasis supplied)[91]

Indeed, a simple referral to the rules on statutory construction is helpful to this reexamination of the scope of presidential power. To quote Ruben Agpalo, the doctrine of necessary implication "states that what is implied in a statute is as much a part thereof as that which is expressed" and that "every statutory grant of power, right or privilege is deemed to include all incidental power, right or privilege."[92] Also, "[a]s a rule, where a general power

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[90] *Id.*, at 68-69.

[91] Marcos v. Manglapus, G.R. No. 88211, Sept. 15, 1989.

[92] RUBEN E. AGPALO, STATUTORY CONSTRUCTION 164 (2003 ED.).

is conferred or duty enjoined, every particular power necessary for the exercise of one or the performance of the other is also conferred."[93] However, "[t]he statutory grant of power does not include such incidental power which cannot be exercised without violating the Constitution, the statute conferring the power, or other laws on the same subject." Thus, by comparison, the constitutional grant of plenary executive power to the President confers upon him all necessary powers to aid him in the proper and efficient exercise of executive functions, including and especially the power of investigation.

Basis and Nature of Executive Power to Investigate

According to Agpalo, "[t]he President's investigatory power emanates from his power of supervision and control over all executive departments, bureaus, and offices; his power of supervision over local government units; and his power of appointment of presidential appointees, which are conferred upon him by the Constitution."[94] Of the three, the power of supervision and control over the Executive branch is the most relevant to investigation. As defined generally and specifically in *Kilusang Bayan sa Panglilingkod ng mga Magtitinda ng Bagong Pamilihang Bayan ng Muntinlupa, Inc. v. Dominguez*:

> Supervision and control include only the authority to: (a) act directly whenever a specific function is entrusted by law or regulation to a subordinate; (b) direct the performance of duty; restrain the commission of acts; (c) review, approve, reverse, or modify acts and decisions of subordinate officials or units; (d) *determine priorities in the execution of plans and programs*; and (e) *prescribe standards, guidelines, plans and programs.* Specifically, administrative supervision is limited to the authority of the department or its equivalent to: (1) *generally oversee the operations of such agencies and insure that they are managed effectively, efficiently and economically* but without interference with day-to-day activities; (2) *require the submission of reports and cause the conduct of management audit, performance evaluation and inspection to determine compliance with policies, standards and guidelines of the department*; (3) take such actions as may be necessary for the proper performance of official functions, including rectification of violations, abuses and other forms of mal-administration; (4) review

[93] *Id.*, at 169.
[94] *Id.*, at 37.

> and pass upon budget proposals of such agencies but may not increase or add to them.[95] (Emphasis supplied)

Corollary to the powers of supervision and control is the power to ensure the faithful execution of the laws. In fact, they are all written in the same provision in the Constitution.[96] According to Justice Antonio Carpio in his dissent from the majority in the *Biraogo* case, "to execute faithfully the law, the President must first know the facts that justify or require the execution of the law" because "[o]therwise, without knowing the facts, the President may be blindly or negligently, and not faithfully and intelligently, executing the law."[97] The importance of being informed of the truth and facts surrounding the offices of the Executive branch is crucial in the President's role as chief administrative officer of the government. In the case of *Evangelista v. Jarencio*,[98] the Supreme Court held:

> It has been essayed that *the life blood of the administrative process is the flow of fact, the gathering, the organization and analysis of evidence.* Investigations are useful for all administrative functions, not only for rule making, adjudication, and licensing, *but also for prosecuting, for supervising and directing, for determining general policy, for recommending, legislation, and for purposes no more specific than illuminating obscure areas to find out what if anything should be done.* An administrative agency may be authorized to make investigations, not only in proceedings of a legislative or judicial nature, but also in proceedings whose sole purpose is to obtain information upon which *future action* of a legislative or judicial nature may be taken and may require the attendance of witnesses in proceedings of a purely investigatory nature. *It may conduct general inquiries into evils calling for correction, and to report findings to appropriate bodies and make recommendations for actions.*[99] (Emphasis supplied)

From the three cases just quoted, it is evident that for a President to ensure the proper and efficient administration of the Executive branch with sound and responsive policies, as well as to ensure that mal-administration is avoided, if not eradicated, he or she needs at hand all the timely and relevant

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[95] G.R. No. 85439, Jan. 13, 1992.

[96] CONST., art. VII, § 17.

[97] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010 (Carpio, J., *dissenting*)..

[98] G.R. No. 29274, Nov. 27, 1975.

[99] *Id.*

information available. To do this, investigation is resorted to. In *Cariño v. Commission on Human Rights*,[100] it is defined in detail as follows:

> "*Investigate*," commonly understood, means to examine, explore, inquire or delve or probe into, research on, study. The dictionary definition of "investigate" is "to observe or study closely: inquire into systematically: "to search or inquire into: . . . to subject to an official probe . . . : to conduct an official inquiry." The purpose of investigation, of course, is to discover, to find out, to learn, obtain information. Nowhere included or intimated is the notion of settling, deciding or resolving a controversy involved in the facts inquired into by application of the law to the facts established by the inquiry.
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> The legal meaning of "investigate" is essentially the same: "(t)o follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry;" "to inquire; to make an investigation," "investigation" being in turn described as "(a)n administrative function, the exercise of which ordinarily does not require a hearing. 2 Am J2d Adm L Sec. 257; . . . an inquiry, judicial or otherwise, for the discovery and collection of facts concerning a certain matter or matters."[101]

Investigation as an inherent administrative function differs from investigation as a judicial one. The *Evangelista* case explains that an "administrative agency has the power of inquisition which is not dependent upon a case or controversy in order to get evidence, but can investigate merely on suspicion that the law is being violated or even just because it wants assurance that it is not."[102] This is in keeping with the President's mandate under the Faithful Execution Clause and his powers of supervision and control.

This, however, does not mean that this is exclusive to the President. Indeed, the Constitution also grants to the Ombudsman the power to investigate the branches of government, most especially the Executive. The Ombudsman is likewise not granted the exclusive power to investigate, for this

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[100] G.R. No. 96681, Dec. 2, 1991.

[101] *Id.*

[102] Evangelista v. Jarencio, G.R. No. 29274, Nov. 27, 1975.

would neuter the President's inherent power to ensure that the executive office is well in order. Justice Carpio elucidates thus:

> Purely fact-finding investigations to improve administrative procedures and efficiency, to institute administrative measures to prevent corruption, to provide the President with policy options, to recommend to Congress remedial legislation, and even to determine whether there is basis to file a formal administrative charge against a government official or employee, do not fall under the "primary jurisdiction" of the Ombudsman. These fact-finding investigations do not involve criminal or quasi-criminal cases cognizable by the Sandiganbayan.
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> If the Ombudsman has the power to take-over purely fact-finding investigations from the President or his subordinates, then the President will become inutile. The President will be wholly dependent on the Ombudsman, waiting for the Ombudsman to establish the facts before the President can act to execute faithfully the law. The Constitution does not vest such power in the Ombudsman. No statute grants the Ombudsman such power, and if there were, such law would be unconstitutional for usurping the power of the President to find facts necessary and proper to his faithful execution of the law.
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> Besides, if the Ombudsman has the exclusive power to conduct fact-finding investigations, then even the Judiciary and the Legislature cannot perform their fundamental functions without the action or approval of the Ombudsman. While the Constitution grants the Office of the Ombudsman the power to "[i]nvestigate on its own x x x any act or omission of any public official, employee, office or agency," such power is not exclusive. To hold that such investigatory power is exclusive to the Ombudsman is to make the Executive, Legislative and Judiciary wholly dependent on the Ombudsman for the performance of their Executive, Legislative and Judicial functions.[103] (Emphasis omitted)

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[103] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010 (Carpio, J., *dissenting*).

Issuance of Subpoena and Power of Contempt

The distinction between administrative investigations from judicial ones is important in this respect. Normally a subpoena *duces tecum* is restricted to judicial proceedings involving an actual case or controversy. The *Evangelista* case, however, shows that this restriction does not apply to administrative investigations:

> The seeming proviso in Section 580 of the Revised Administrative Code that the right to summon witnesses and the authority to require the production of documents under a subpoena *duces tecum* or otherwise shall be "subject in all respects to the same restrictions and qualifications as apply in judicial proceedings of a similar character" cannot be validly seized upon to require, in respondents' formulation, that, as in a subpoena under the Rules, a specific case must be pending before a court for hearing or trial and that the hearing or trial must be in connection with the court's judicial or adjudicatory functions before a non-judicial subpoena can be issued by an administrative agency like petitioner Agency. It must be emphasized, however, that an administrative subpoena differs *in essence* from a judicial subpoena. Clearly, what the Rules speaks of is a judicial subpoena, one procurable from and issuable by a competent court, and not an administrative subpoena. To an extent, therefore, the "restrictions and qualifications" referred to in Section 580 of the Revised Administrative Code could mean the restraints against infringement of constitutional rights or when the subpoena is unreasonable or oppressive and when the relevancy of the books, documents or things does not appear.
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> Rightly, administrative agencies may enforce subpoenas issued in the course of investigations, whether or not adjudication is involved, and whether or not probable cause is shown and even before the issuance of a complaint. It is not necessary, as in the case of a *warrant*, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose. The purpose of the subpoena is to discover evidence, not to prove a pending charge, but upon which to make one if the discovered evidence so justifies.[104]

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[104] *Id.*, at 105-106.

It has been opined, however, by former Court of Appeals Justice Jorge Coquia in his annotation to the *Evangelista* case,[105] that "[t]he usual methods of enforcement of administrative subpoenas is by means of application to a trial court of general jurisdiction for an order directing the witness to respond to the subpoena."[106] He further observed that the U.S. "Congress could not constitutionally grant to administrative agencies the power to punish for contempt, in case of refusal to obey subpoena."[107] Thus, "[i]f the court order is not obeyed, the witness is subject to contempt penalties"[108] by the court and not by the administrative agency. Justice Coquia states further:

> Aside from constitutional doubts, most state legislatures have evinced the belief that the advantages that may be gained, in the way of prompt and speedy enforcement, by granting contempt powers to administrative agencies, are exceeded by the hazards involved. *There appears a deep-seated reluctance to grant to non-judicial officers, bent on prosecuting their own cases, the power to imprison a witness who refuses to aid them in their task.* The fact that Congress consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance.[109]

Justice Coquia also takes note of the threefold test to determine the validity of an administrative subpoena: "(1) whether the inquiry is one the demanding agency is authorized by law to make; (2) whether the materials specified are relevant to an authorized inquiry;" and "(3) whether the disclosure sought is reasonable."[110] The second requirement is designed to guard against "fishing expeditions." Coquia explains thus:

> A court will not issue a subpoena duces tecum unless it is shown that the papers and books to be produced are pertinent, relevant, and material to the issues being tried. The application or petition must show these facts. Thus the writ will not be granted as a fishing expedition where the purpose is mere inquiry or to discover whether there is any evidence in them that will be useful to the applicant, or for the general inquisitorial examination.[111]

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[105] Jorge Coquia, *The Power of Administrative Agencies to Issue Subpoena*, 68 SCRA 119 (1975).

[106] *Id.*, at 122.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*, at 123.

[111] *Id.*, at 127.

Fundamentally, what Justice Coquia's annotation presents is a dilemma to the exercise of investigative power by the Executive branch in his role as chief administrative officer. Subpoenas *duces tecum* can be utilized even in the absence of a pending case, according to the *Evangelista* case. According to Coquia, however, there is a danger of allowing the enforcement of the same to be carried out by administrative agencies, let alone by the President. His reason is that subpoenas *duces tecum* are still technically judicial in nature, that is, they still require pending cases in order for the tests of relevancy and reasonability to be applied. Otherwise, without a pending case, the mere assertion that there is a lawful purpose would be enough to justify contempt for non-compliance. Also, since administrative agencies cannot exercise contempt powers without an explicit statutory grant, agencies will have to go to the Judiciary for enforcement, a cumbersome requirement considering that most investigations need to proceed immediately because of the precariousness of evidence and testimony to be procured. This is the same problem of the Truth Commission, which "may have subpoena powers but . . . has no power to cite people in contempt, much less order their arrest."[112]

Indeed, the danger of a "roving commission" designed to specifically search for anomalies to constitute bases for cases to be filed, with the additional judicial power to hold uncooperative persons in contempt, is apparent in Coquia's caveat.

Creation vs. Reorganization

One main allegation in the *Biraogo* case was that the President had no authority to create a public office, but merely to reorganize his office according to Book III Section 31of the Administrative Code of 1987.[113] The power to

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[112] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010.

[113] Exec. Order No. 292 (1987). "The President, subject to the policy in the Executive Office and in order to achieve simplicity, economy and efficiency, shall have continuing authority to reorganize the administrative structure of the Office of the President. For this purpose, he may take any of the following actions:

1) Restructure the internal organization of the Office of the President Proper, including the immediate Offices, the Presidential Special Assistants/Advisers System and the Common staff Support System, by abolishing, consolidating or merging units thereof or transferring functions from one unit to another;

create offices thus remains a legislative function. It is gleaned from Biraogo's memorandum that "[i]nsofar as it vests in the President the plenary power to reorganize the Office of the President to the extent of creating a public office, Section 31 is inconsistent with the principle of separation of powers enshrined in the Constitution and must be deemed repealed upon the effectivity thereof."[114] The Solicitor General, in his memorandum, countered

> . . . that there is nothing exclusively legislative about the creation by the President of a fact-finding body such as a truth commission. Pointing to numerous offices created by past presidents, it argues that the authority of the President to create public offices within the Office of the President Proper has long been recognized.[115]

In the end, the Court still upheld the President's "constitutionally-mandated duty," that is, "to create *ad hoc committees*."[116]

An *ad hoc* committee or commission, as it is called in the United States, is one of two broad types of presidential commissions, the other being the continuing presidential commission, according to Amy Zegart.[117] In her article, she states three core functions presidential commissions perform: (1) influencing public agenda proactively and reactively (agenda commissions), (2) providing information proactively and reactively (information commissions), and (3) to alter the constellation of political opposition on given issues (political constellation commissions).[118] The proactive form of the first is geared to "try to draw attention to and support for new presidential policy initiatives" while, reactively, "agenda commissions also target a mass audience, but they seek to respond to issues already in the public eye."[119] For the second, its proactive form enables information commissions to

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2) Transfer any function under the Office of the President to any other Department or Agency as well as transfer functions to the Office of the President from other Departments and Agencies; and

3) Transfer any agency under the Office of the President to any other department or agency as well as transfer agencies to the Office of the President from other departments or agencies."

[114] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010.

[115] *Id.*

[116] *Id.*

[117] Amy Zegart, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 PRES. STUD. Q. 366 (2004).

[118] *Id.*

[119] *Id.*

> . . . identify new policy problems looming on the horizon. They provide new facts or analysis about existing problems. They generate new thinking about policy options. They take a new look at government organization, examining how different organizational structures and processes can improve the effectiveness of government efforts, lower the costs, or both.[120]

Reactively, "information commissions most commonly assess what went wrong, investigating past policy failures and recommending lessons learned for the future."[121] As for political constellation commissions, their aim is "to foster consensus, compromise, and cooperation in a policy domain. This can be done either by putting stakeholders on the commission itself, or by delegating authority from those stakeholders to the commission."[122]

More importantly, from a perusal of Zegart's article, there is no fierce apprehension of the Executive in being able to create such commissions simply by executive order. It is acknowledged as a political fact despite the absence of any enabling provision in the United States Constitution. In fact, it is admitted that "other executive branch officials" have the same capacity of creation. The source of this authority and power to create presidential commissions apparently stems from congressional delegation to the same. In the Philippine jurisdiction, Agpalo identifies the congressional delegation of creating investigative bodies in Section 64(c) of the Revised Administrative Code, which empowers the President "[t]o order, when in his opinion the good of the public service so requires, an investigation of any action or the conduct of any person in the Government service, and in connection therewith to designate the official, committee, or person by whom such investigation shall be conducted."[123]

Also according to Agpalo, the currently subsisting 1987 Administrative Code has not repealed this provision, not even by implication, because it is in no way inconsistent with any provision of the current Administrative Code.[124] He also notes that the designating power is also preserved by virtue of Book III Section 20 of the latter code:

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[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] AGPALO, *supra* note 92 at 38.
[124] *Id.*

> Unless Congress provides otherwise, the President shall exercise such other powers and functions vested in the President, which are provided for under the laws and which are not specifically enumerated above, or which are not delegated by the President in accordance with law.

In fact, it was the same Section 64(c) of the Revised Administrative Code, which President Ferdinand Marcos invoked in creating the Presidential Agency on Reforms and Government Operations ("PARGO") in 1966, the agency involved in the *Evangelista* case.[125] The practice of Presidents in setting up *ad hoc* commissions has been with the Republic since the time it was still under the 1935 Constitution, and the Supreme Court noted the same by saying in *Biraogo* that

> [i]t should be stressed that the purpose of allowing *ad hoc* investigating bodies to exist is to allow an inquiry into matters which the President is entitled to know so that he can be properly advised and guided in the performance of his duties relative to the execution and enforcement of the laws of the land. And if history is to be revisited, this was also the objective of the investigative bodies created in the past like the PCAC, PCAPE, PARGO, the Feliciano Commission, the Melo Commission and the Zenarosa Commission. There being no changes in the government structure, the Court is not inclined to declare such executive power as non-existent just because the direction of the political winds have changed.[126]

Justice Carpio in his dissent in *Biraogo* also notes the usage of *ad hoc* commissions in the United States, particularly emphasizing the specificity of each that dispelled any abuse of equal treatment:

> This specific focus of fact-finding investigations is also true in the United States. Thus, the Roberts Commission focused on the Pearl Harbor attack, the Warren Commission focused on the assassination of President John F. Kennedy, and the 9/11 Commission focused on the 11 September 2001 terrorist attacks on the United States. These fact-finding commissions were created with specific focus to assist the U.S. President and Congress in crafting executive and legislative responses to specific acts or events of grave

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[125] Evangelista v. Jarencio, G.R. No. 29274, Nov. 27, 1975.

[126] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010.

> national importance. Clearly, fact-finding investigations by their very nature must have a specific focus.[127]

Moreover, a serious and blatant irony that the Court failed to note in *Biraogo* would be President Arroyo's Executive Order No. 12 promulgated on April 16, 2001 that *created* the PAGC. The first "whereas" clause[128] in its preamble specifically invoked the president's power of control and supervision over the executive departments, the same power which is the source of the presidential power of investigation. Justice Carpio articulates this irony in his dissent:

> Ironically, this Court, and even subordinates of the President in the Executive branch, routinely create all year round fact-finding bodies to investigate all kinds of complaints against officials and employees in the Judiciary or the Executive branch, as the case may be. The previous President created through executive issuances three purely fact-finding commissions similar to the Truth Commission. Yet the incumbent President, the only official mandated by the Constitution to execute faithfully the law, is now denied by this Court the power to create the purely fact-finding Truth Commission.[129] (Emphasis omitted)

He also adds that such practice of appointing or designating investigative panels is done routinely among all branches of government:

> The creation of *ad hoc* fact-finding bodies is a *routine occurrence* in the Executive and even in the Judicial branches of government. Whenever there is a complaint against a government official or employee, the Department Secretary, head of agency or head of a local government unit usually creates a fact-finding body whose members are incumbent officials in the same department, agency or local government unit. This is also true in the Judiciary, where this Court routinely appoints a fact-finding investigator, drawn from incumbent Judges or Justices (or even retired Judges or Justices who are appointed consultants in the Office of the Court Administrator),

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[127] *Id.*, (Carpio, J., *dissenting*).

[128] Exec. Order No. 12 (2001). "Whereas, Article VII, Section 17 of the Constitution provides that the President shall have control of all executive departments, bureaus, and offices;"

[129] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010 (Carpio, J., *dissenting*).

> to investigate complaints against incumbent officials or employees in the Judiciary.[130] (Emphasis supplied)

Moreover, Justice Carpio emphasizes that despite the obvious legislative character of creating these bodies, it is more of an adjunct of the separate and distinct powers of each branch, making it administrative in nature:

> *The creation of such* ad hoc *investigating bodies, as well as the appointment of* ad hoc *investigators, does not result in the creation of a public office. In creating* ad hoc *investigatory bodies or appointing* ad hoc *investigators, executive and judicial officials do not create public offices but merely exercise a power inherent in their primary constitutional or statutory functions, which may be to execute the law, to exercise disciplinary authority, or both.* These fact-finding bodies and investigators are not permanent bodies or functionaries, unlike public offices or their occupants. There is no separate compensation, other than *per diems* or allowances, for those designated as members of *ad hoc* investigating bodies or as *ad hoc* investigators.[131] (Emphasis supplied)

However, the Supreme Court declares in *Biraogo* that to create such an agency is not allowed, despite the total lack of mention of the implications of the PAGC's *creation* in the main decision, except for quoting the full text of Executive Order No. 1 therein. This still partakes of the legislative function, but it is no longer "solely and *exclusively* the exercise of *legislative* power" such as the "authority to *create* municipal corporations."[132]

By necessary implication, and by actual statutory delegation,[133] the President is empowered to designate or create (the terms no longer matter) *ad hoc* investigative commissions or committees to aid him in faithfully executing the laws and to enable the proper exercise of administrative control and supervision.

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[130] *Id.*

[131] *Id.*

[132] Pelaez v. Auditor General, G.R. No. 23825, Dec. 24, 1965.

[133] REVISED ADMINISTRATIVE CODE, § 64(c) (1917).

VI. JUXTAPOSITION AND COMPARISON OF CONGRESSIONAL AND PRESIDENTIAL INVESTIGATION

Integrating the relevant concepts, cases, and controversies, one sees the inevitable thrust of this paper's submission: the necessary inclusion of the powers of investigation, fact-finding, as well as the power to designate or create the person or body to conduct the same, as being within the scope of presidential power, especially vis-à-vis the coordinate power of Congress to do the same.

The President, like Congress, as a direct representative of the people, takes it upon himself to protect the interests of Philippine society. As such, he needs all the information available to help in his duty to ensure the clean and effective administration of government, as well as to inform his principal, the Filipino people, of the circumstances of his governance. The President, as both the head of government and the symbol of the state, also needs to rally and mold public opinion to better implement his policies and plans. The President's power of investigation is implied from the office's inherent and plenary power to execute the laws and to supervise and control the Executive branch, just as Congress, by implication from its inherent power to make laws, has the power to investigate to better effectuate the former. Also, the scope and limitations of congressional inquiry are similar to that of the President. The question of relevance as one of the requirements of a valid administrative subpoena has similar problems with that of the requirement of legislative purpose in congressional inquiries. The question of reasonability as to the disclosure sought by the administrative subpoena is reminiscent of issues on privacy and constitutional rights that legislative hearings elicit.

However, there does exist some doubt as to the effectiveness of the President's capability to investigate his own branch. Salacup notes that a bias exists when a President conducts his investigatory power:

> The Chief Executive cannot be expected to perform this duty of informing. As chief administrator, he is responsible for the conduct of the whole administrative set-up. This being the case, *he is reluctant to bring out in the open anything that would cause embarrassment. Reticence on his part is naturally expected, since he, as chief administrator, is held responsible for everything that goes on in his house. Anything that goes wrong in the administration is taken as a reflection of the kind of leadership that the incumbent chief possesses. Hence, he will be the least expected to air facts to the public.* But Congress, being a separate branch, with no stakes in

> the matter, is the body that can perform the function of exposure.[134] (Emphasis supplied)

Other problems of the Executive include the inherent lack of contempt powers, as this is essentially a judicial function that cannot be performed by administrative agencies without statutory grant, this being a well-known doctrine in administrative law. This is despite the fact that Congress has an inherent power to hold in contempt persons uncooperative or unresponsive to validly issued subpoenas. It should, however, also necessarily be an adjunct to investigative power, as a constant resort to the Judiciary to enforce subpoenas by requesting them to exercise their inherent contempt powers would unduly hamper an already overburdened hierarchy of courts. Congress does not have to go to court to enforce its subpoenas. Why should not the President be given the same equal protection and treatment?

VII. CONCLUSION

The author has shown, to the best of his ability, the truth behind the presidential power of investigation. It is neither unconstitutional for being a violation of the separation of powers, nor is it, as many believe, an unwelcome novelty in administrative control and supervision. It has been with republican governments since time immemorial. Indeed, in the proper hands, presidential investigation is a force to be reckoned with. It must never be used for petty, narrow, or selfish reasons nor must it be used as an instrument to further the selfish ambitions of glory-seeking executive officials.

The attainment of greater accountability and more effective and responsive governance is the purpose of this peculiar kind of investigation. This must be the end towards which the President must move and direct his time and energies as chief administrative officer of the government, to realize the implacable destiny of the Filipino people, and to attain the perfection of the country's collective will and personality. Justice Carpio reiterates in the final part of his dissent in *Biraogo* that "[n]either the Constitution nor any existing law prevents the incumbent President from redeeming his campaign pledge to the Filipino people."[135] T dangerous precedent, which diminishes inherent executive power, would definitely have grave implications on the dynamics

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[134] Salacup, *supra* note 31 at 40-41.

[135] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, Dec. 7, 2010 (Carpio, J., *dissenting*).

among the segregated branches of government in the years to come. Our so-far progressive understanding of the doctrine of separation of powers has come to a halt for now. To end this inquiry and reexamination, a final quote from Justice Carpio's dissent is in order:

> *This Court, in striking down EO 1 creating the Truth Commission, overrules the manifest will of the Filipino people to start the difficult task of putting an end to graft and corruption in government, denies the President his basic constitutional power to determine the facts in his faithful execution of the law, and suppresses whatever truth may come out in the purely fact-finding investigation of the Truth Commission.* This Court, in invoking the equal protection clause to strike down a purely fact-finding investigation, grants immunity to those who violate anti-corruption laws and other penal laws, renders meaningless the constitutional principle that public office is a public trust, and makes public officials unaccountable to the people at any time.
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> . . .
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> History will record the ruling today of the Court's majority as *a severe case of judicial overreach that made the incumbent President a diminished Executive in an affront to a co-equal branch of government*, crippled our already challenged justice system, and crushed the hopes of the long suffering Filipino people for an end to graft and corruption in government.[136] (Emphasis supplied)

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[136] *Id.*