JURISPRUDENCE AS A RULES MUTABLE GAME*

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I. INTRODUCTION

Two decisions of the Philippine Supreme Court on Senate inquiries in aid of legislation[1] are the latest in a string of decisions that stretch Rodrigo Duterte's pristine winning record before the Supreme Court.[2] This record upholds every act by the former President, such as sanctioning the burial of Ferdinand Marcos, Sr. in a cemetery for heroes.[3] The Supreme Court removed its own Chief Justice,[4] watered down checks on the exercise of emergency powers,[5] defended Duterte's refusal to disclose the state of his health in violation of a constitutional directive,[6] and sanctioned the Philippines' withdrawal from the International Criminal Court ("ICC") on a technicality.[7]

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[1] Senate v. Medialdea, G.R. No. 257608, slip op., July 5, 2022; Ong v. Senate, G.R. No. 257401, slip op., Mar. 28, 2023.

[2] Dante Gatmaytan, *Duterte, judicial deference, and democratic decay in the Philippines*, 28 ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 553 (2018).

[3] Ocampo v. Enriquez, G.R. No. 225973, 835 SCRA 484, Nov. 8, 2016. *See also* Dante Gatmaytan, *Judicial Historical Revisionism in the Philippines: Judicial Review and the Rehabilitation of Ferdinand Marcos*, 16 U. PA. ASIAN L. REV. 339–381 (2020).

[4] Republic v. Sereno, G.R. No. 237428, 831 Phil. 27, May 11, 2018.

[5] The Court accomplished this by promulgating four decisions upholding the constitutionality of the imposition of martial law in Mindanao. *See* Lagman v. Medialdea, G.R. No. 231658, 829 SCRA 1, July 4, 2017; Padilla v. Congress of the Philippines, G.R. No. 231671, 832 SCRA 282, July 25, 2017; Lagman v. Pimentel, G.R. No. 235935, 825 Phil. 112, Feb. 6, 2018; and Lagman v. Medialdea, G.R. No. 243522, 847 Phil. 317, Feb. 19, 2019.

[6] De Leon v. Duterte, G.R. No. 252118 (Notice), May 8, 2020.

[7] Pangilinan v. Cayetano, G.R. No. 238875, 976 SCRA 509, Mar. 16, 2021. *See* Dante Gatmaytan, *How to Get Away with Mass Murder*, in EMERGENCIES AND EXECUTIONS: THE EROSION OF THE RULE OF LAW UNDER THE DUTERTE REGIME 107–132 (2023).

One study found that the probability of Duterte appointees voting in favor of his administration is significantly higher than that of justices voting for the administrations of his predecessors who appointed them.[8]

In the cases regarding Senate inquiries in aid of legislation, the Supreme Court went to outrageous lengths that defied both logic and precedent to secure every legal victory for Duterte. The effect of the Court's decisions is to create an image of a judicial system that disregards its own prior rulings and crafts new rules with every case. Philippine jurisprudence is now a rules mutable game akin to Calvinball.

The Supreme Court's Calvinball approach is the antithesis of *stare decisis*. The Court's decisions unsettle legal doctrines and strip case law of predictability and other benefits that flow from respect for precedent.[9]

It is true that jurisprudence is not cast in stone, but abandoning doctrine is the exception, not the rule, and can only be done when justified by strong and compelling reasons.[10] In contrast, the Court's approach dodges precedent at almost every opportunity.

II. STARE DECISIS

A. Origin and Definition

Stare decisis was adopted from American case law into the Philippine legal system. It is explicitly adopted under Article 8 of the Civil Code, which provides that "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines."[11]

The doctrine of *stare decisis et non quieta movere* means to adhere to precedents, and not to unsettle things which are established.[12]

"[*Stare decisis*] commands that, for the sake of certainty, a conclusion reached in one case should be applied to those that follow if the facts are

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[8] Björn Dressel, et al., *Justices and Political Loyalties: An Empirical Investigation of the Supreme Court of the Philippines, 1987–2020*, LAW & SOC. INQUIRY 1, 18 (2023).

[9] *See infra*, part II.

[10] [Hereinafter "*Kolin*"], Kolin Electronics Co., Inc. v. Kolin Phil. Intl, Inc., G.R. No. 228165, 896 Phil. 190, Feb. 9, 2021.

[11] [Hereinafter "*Aquino*"], Aquino v. Aquino, G.R. Nos. 208912 & 209018, 918-A Phil. 371, Dec. 7, 2021.

[12] Tala Realty Services Corp. v. Banco Filipino Sav. and Mortg. Bank, G.R. No. 143263, 421 SCRA 415, Jan. 29, 2004.

substantially the same, even though the parties may be different."[13] "[*Stare decisis* bars] any attempt to re-litigate the same issue where the same questions relating to the same event have been put forward by parties similarly situated as in a previous case litigated and decided by a competent court."[14] "When a court has laid down a principle of law applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases in which the facts are substantially the same."[15]

"The doctrine becomes operative only when judicial precedents are set by pronouncements made by the Supreme Court, to the exclusion of other courts. While decisions of lower courts are logically or legally sound, the doctrine of *stare decisis* only applies to decisions issued by the Court as to form part of the legal system."[16]

Faithful adherence to precedents is the enduring cornerstone in the administration of justice. "Otherwise, the legal structure would be in disarray if the Court maintains no compunction with respect to overturning precedents, and the legal framework will effectively be placed in the hands of a handful of appointed officers of the Court, instead of in the powers of the elected representatives of the people, where such power is constitutionally vested."[17]

B. Abandoning Precedent

The doctrine, however, is not cast in stone. If it can be shown that the circumstances in a particular case override the benefits derived by adopting the doctrine of *stare decisis*, the Court may set it aside. "Thus, the Court, especially with a new membership, is not obliged to blindly follow a particular decision that it determines, after re-examination, to call for rectification."[18]

Established doctrines may be abandoned when there are strong and compelling reasons "based on changes in law or public policy, evolving conditions, or the most pressing considerations of justice."[19] The Court has

[13] Borce v. PPI Holdings, Inc., G.R. No. 252718 (Notice), Dec. 2, 2020.

[14] Cu v. Small Bus. Guarantee and Fin. Corp., G.R. No. 218381, 993 SCRA 550, 562, July 14, 2021.

[15] Republic v. Sci. Park of the Phil., Inc., G.R. No. 248306, 990 SCRA 408, 428, June 28, 2021.

[16] Republic v. Spouses Yu, G.R. No. 188587, 96 Phil. 251, 264–65, Nov. 23, 2021.

[17] *Aquino*, 918-A Phil. 371, 563–64.

[18] Abaria v. NLRC, G.R. Nos. 154113, 187778, 187861 & 196156, 661 SCRA 686, 713, Dec. 7, 2011.

[19] *Kolin,* 896 Phil. 190, 267–68.

also added the evolution of judicial philosophy and the entry of new justices of the Court as grounds for abandoning precedent.[20]

The Court has the duty to abandon any doctrine or rule found to be in violation of the law. "[It] must not condone the perpetuation of an inaccurate interpretation of the law that relies solely on a mechanical application of *stare decisis*. [The Court] must not be shackled by precedents, more so when altering the same promotes judicious dispensation of justice."[21]

The United States Supreme Court explained, "*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision."[22]

There is an apparent tension between the ideas that precedent is mutable and that reliance on the durability of precedent is both reasonable and entitled to judicial respect. In other words, the flexibility of *stare decisis* suggests that it is actually unreasonable to rely on the durability of precedent. Given the reality that judicial decisions are subject to reconsideration, stakeholders might be expected to take their own measures to mitigate the costs of a potential overruling, just as actors must take precautions or purchase insurance to manage other types of risk.[23] Moreover, by publicly announcing that precedents are subject to reconsideration, the Court might be seen as avoiding any normative obligation to stakeholders who would be harmed by an overruling. Precedents are not promises, and when the Court chooses to overturn a prior decision, it does nothing more than exercise an option that it previously reserved.[24]

Of course, any decision of the Court is vulnerable to reconsideration and reversal. What we show here is that abandoning precedent must have a compelling basis and these recent decisions have no such basis.

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[20] ANGKLA: Ang Partido ng mga Pilipinong Marino, Inc. v. COMELEC, G.R. No. 246816, 953 SCRA 80, 248, Sept. 15, 2020.

[21] Acharon v. People, G.R. No. 224946, 913 Phil. 731, 811, Nov. 9, 2021.

[22] Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[23] Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L. J. 1459, 1460 (2013).

[24] *Id.* at 1460–1461.

III. CALVINBALL

Calvin, a six-year-old child from Bill Watterson's comic, Calvin and Hobbes, created Calvinball with the intention of making a game that could not be more disorganized.[25] The only permanent rule in the game of Calvinball is that you can never play the game with the same rule twice.[26] Any player may declare a new rule at any point in the game. Zones on the playing field are created "spontaneously and inconsistently by players."[27] The score does not need to be kept with any logical consistency.[28] Penalties may be in any form deemed fit. Any rule that is carried out during the course of the game may never be used again.[29]

The game is a "charmingly anarchic mash-up of obstacles, equipment and scoring," and one of the few constants of Calvinball is that the players modify the parameters of the game on the fly to maximize their momentary advantage.[30] The instant a player perceives that the existing rules put him at a disadvantage, the player can simply unilaterally alter the rules so that disadvantage is, by fiat, transformed into advantage.[31]

We liken this "charmingly anarchic mash-up of obstacles, equipment and scoring" to the Supreme Court's approach in resolving cases to favor Duterte. The Court, like the players in Calvinball, "unilaterally alters the rules" at any time it sees fit. However, although it is the Court that participates, the beneficiary is the President. The Court participates in Calvinball precisely because of the level of deference Courts exhibit in favor of the President. This is consistent with the view that courts in former colonies do not serve as checks on the President; rather, they implement executive policies.[32]

Calvinball is the perfect metaphor; case law is as unreliable as the rules of the game. Hence, the Court sacrifices its integrity, thereby eroding faith in the legal system.

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[25] Nicole Lapsatis, *In the Best Interests of No One: How New York's "Best Interest of the Child" Law Violates Parents' Fundamental Right to the Care, Custody, and Control of Their Children*, 86 ST. JOHN'S LAW REVIEW 673 (2012).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

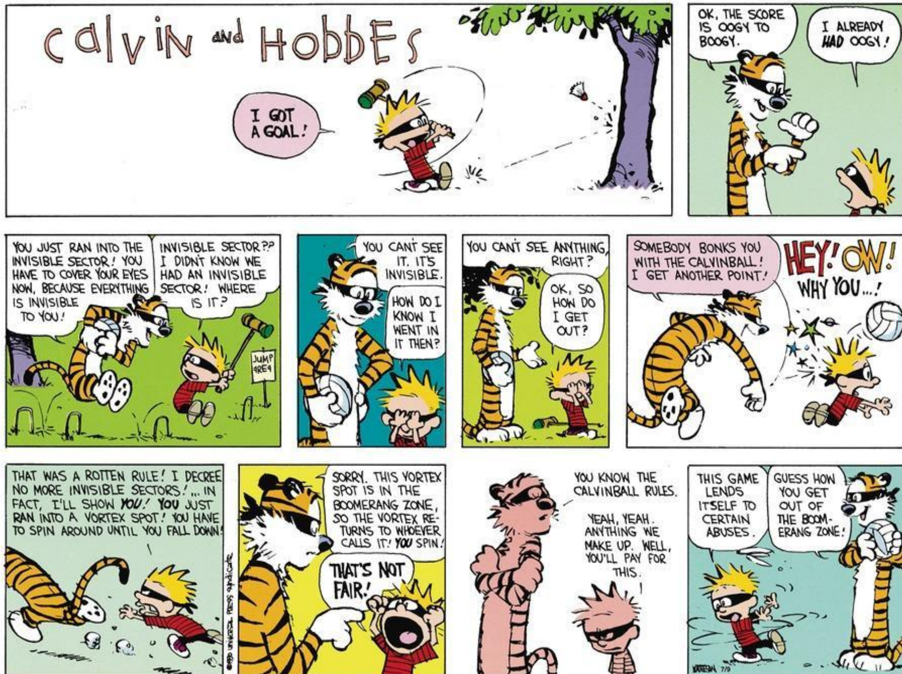
[30] Bob Tarantino, *Calvinball: Users' Rights, Public Choice Theory and Rules Mutable Games*, 35 WINDSOR Y.B. ACCESS JUST. 40, 57–8 (2018).

[31] *Id.*

[32] Dante Gatmaytan, *The Philippines' Authoritarian Constitution*, 95 PHIL. L. J. 529, 539 (2022).

A. Comics

A visual representation of the Supreme Court's approach is shown in this strip from Calvin and Hobbes:



CALVIN AND HOBBES © 1990 Watterson. Reprinted with permission of ANDREWS MCMEEL SYNDICATION. All rights reserved.

Comics[33] can provide a good source of creative possibilities for a variety of courses and contexts.[34] They are useful because they have a history of engagement with concepts of justice. Mainstream comics have "focused on crime, crime prevention, and punishment as part of their broader preoccupation with themes of power, abuse of power, and responsibility."[35] Marvel's Daredevil,[36] for example, can be used to demonstrate legal issues in

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[33] Many modern societies produce a form of visual and narrative that contains a series of printed pictures, usually though not always with text. Readers may call it sequential art, comics, comic book cartoon strips, or graphic novels. Wendy Siuyi Wong, *Globalizing Manga: From Japan to Hong Kong and Beyond*, 1 MECHADEMIA: SECOND ARC, EMERGING WORLDS OF ANIME AND MANGA, 23-45 (2006).

[34] Kelley J. Hall & Betsy Lucal, *Tapping into Parallel Universes: Using Superhero Comic Books in Sociology Courses*, 27 (1) TEACHING SOCIOLOGY 60, 65 (1999).

[35] Jane Hanley, *Noir Justice: Law, Crime and Morality in Diaz Canales and Guarnido's Blacksad: Somewhere within the Shadows and Arctic-nation*, 16 LAW TEXT CULTURE 379, 379 (2012).

[36] When not suited up as a superhero, Daredevil is Matt Murdock—a lawyer defending the helpless, and is acutely aware that the legal system sometimes fails to punish

criminal law and procedure, constitutional law, and professional responsibility.[37]

Using Calvinball as a metaphor for state acts is not new.

The Obama administration was accused of playing legal Calvinball by "making decisions based on individual cases, rather than consistent legal criteria,"[38] when it advanced that a citizen suspected of treason may be killed after a singular determination within the executive branch that the killing would not violate his due process rights.[39]

Notably, the Attorney General of the United States, Eric Holder, justified the Obama administration's handling of due process, or lack thereof, in cases of treason, by stating that "due process and "judicial process" are not one and the same, particularly when it comes to national security. He claimed that "[t]he Constitution guarantees due process, not judicial process."[40]

The United States Supreme Court has also been criticized for employing a Calvinball-style approach in deciding cases.

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wrongdoers. He delivers justice himself as Daredevil, a masked avenger who is not only interested injustice and truth but is upheld as the only one capable of actually obtaining it. Through the duality of his personas Matt can achieve a deliverance of retributive justice that often escapes the rigors of the law. *See* Cassandra Sharp, *"Riddle me this... ?" Would the World Need Superheroes if the law could actually deliver "justice"?*, 16 L. TEXT CULTURE 353, 361 (2012).

[37] Louis Michael Rosen, *The Lawyer as Superhero: How Marvel Comics' Daredevil Depicts the American Court System and Legal Practice*, 47 CAP. U. L. REV. 379, 381 (2019). Traditional conceptions of literacy as reading and writing verbal texts are insufficient. Instead, literacy pedagogy must give attention to the more complex communication environment and messages in more varied semiotic forms, especially the visual. *See* Carol L. Tilley, Robert G. Weiner, *Teaching and Learning with Comics*, THE ROUTLEDGE COMPANION TO COMICS 358, 364 (2016). By situating our thinking about comics, literacy, and education within a framework that views literacy as occurring in multiple modes, educators can use comics to greater effectiveness in our teaching at all levels by helping arm students with the critical-literacy skills they need to negotiate diverse systems of meaning making. *See* Dale Jacobs, *More than Words: Comics as a Means of Teaching Multiple Literacies*, 96 THE ENGLISH JOURNAL 19, 21 (2007). In comics, images provide contexts and subtexts for words, thereby problematizing textual messages. Words, conversely, shape how we perceive and interpret images. These combinations allow for communicative innovations such as using fragmented or abstract imagery, textual shifts in temporality, or pictures conveying emotions and mental processes that could not be easily understood through plain textual statements. *See* Luis Gomez Romero & Ian Dahlman, *Justice Framed: Law in Comics and Graphic Novels*, 16 L. TEXT CULTURE 3, 11 (2012).

[38] Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1272 (2011).

[39] *Id.*

[40] Charlie Savage, U.S. *Law May Allow Killings, Holder Says*, NEW YORK TIMES, Mar. 5, 2012, at A18.

One observation claims that Chief Justice Roberts of the United States Supreme Court is not the neutral umpire he claimed he would be, because he makes up different rules that favor Justices based on his ideological affinity with them. The Chief Justice was playing "Calvinball," altering the rules as he went along.[41] An analysis of how Chief Justice Roberts conducted telephonic cases showed that there was a disparity in how each Justice was treated. Conservative justices[42] notably received preferential treatment while liberal justices were disadvantaged.[43] Moreover, female justices were more frequently interrupted by the Chief Justice compared to their male counterparts, who were allowed more time to pursue their questions during the proceedings.[44] The result of such discriminatory treatment by the Chief Justice is a manipulation of the Supreme Court to promote the ideals of conservative justices while also hindering liberal justices.[45]

B. "Rules Mutable" Games

Rules mutable games involve a player who can change the rules during the course of the game to secure a win. The method for changing the rules is malleable—it may require bargaining or negotiation among the players. One player may physically coerce the other player(s), or there may be a need to resort to a "referee" empowered to promulgate and enforce the original and altered rules. In a rules mutable game, players engage with the game on two levels: (1) awareness of the rules (and playing in accordance with them in order to secure advantage); and (2) awareness that the rules themselves can be changed (and changing them in order to secure advantage). Anyone operating in the context of a rules mutable game must, as a point of strategy, work (either individually or collectively with similarly-situated players) to redefine the relevant rules "in order to obtain a more [favorable] payoff matrix."[46] Fundamentally, rules mutable games demonstrate that a rational actor is likely to think strategically to achieve a range of goals without regard to set rules.[47] Calvinball is an example of a "rule mutable" game.

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[41] Tonja Jacobi, Timothy R. Johnson, Eve M. Ringsmuth & Matthew Sag, *Oral Argument in the Time of COVID: The Chief Plays Calvinball*, 30 S. CAL. INTERDISC. L.J. 399, 402 (2021).

[42] *Id.* at 455.

[43] *Id.* at 402.

[44] *Id.* at 401.

[45] *Id.* at 402.

[46] Bob Tarantino, *Calvinball: Users' Rights, Public Choice Theory and Rules Mutable Games*, 35 WINDSOR Y.B. ACCESS JUST. 40, 58 (2018).

[47] Steven Rushing, *Plugging the Leak in Sec. 1498: Coercing the United States into Notifying Patent Owners of Government Use*, 45 VAND. J. TRANSNAT'L L. 879, 903 (2012).

IV. LAW AND JURISPRUDENCE

A. Law

The 1987 Constitution expressly recognizes the power of both houses of Congress to conduct inquiries in aid of legislation. Article VI, Section 21 provides:

> The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.[48]

"The power of both houses of Congress to conduct inquiries in aid of legislation is not [...] absolute or unlimited. […]. [T]he investigation must be 'in aid of legislation in accordance with its duly published rules of procedure' and 'the rights of persons appearing in or affected by such inquiries shall be respected.' […] It follows then that the rights of persons

[48] The 1935 Constitution did not contain a similar provision. In Arnault v. Nazareno, G.R. No. 3820, 87 Phil. 29, July 18, 1950, a case decided in 1950 under that Constitution, the Court already recognized that the power of inquiry is inherent in the power to legislate. *See* Senate v. Ermita, G.R. No. 169777, 488 SCRA 1, April 20, 2006. The power to conduct legislative inquiries was introduced in the text of the Constitution through Article VIII, Section 12 of the 1973 Constitution which provided:

SECTION 12.

> (1) There shall be a question hour at least once a month or as often as the Rules of the Batasang Pambansa may provide, which shall be included in its agenda, during which the Prime Minister, the Deputy Prime Minister or any Minister may be required to appear and answer questions and interpellations by Members of the Batasang Pambansa. Written questions shall be submitted to the Speaker at least three days before a scheduled question hour. Interpellations shall not be limited to the written questions, but may cover matters related thereto. The agenda shall specify the subjects of the question hour. When the security of the State so requires and the President so states in writing, the question hour shall be conducted in executive session.
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> (2) The Batasang Pambansa or any of its committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

under the Bill of Rights must be respected, including the right to due process and the right not to be compelled to testify against one's self."[49]

B. Landmark Cases

1. Arnault v. Nazareno

The signal case that embodied the Supreme Court's views on legislative inquiries is *Arnault v. Nazareno*[50]—a case that gave the Senate a very wide berth in conducting legislative investigations.

Arnault started in 1949, when the Government bought two estates (Buenavista and Tambobong) for PHP 5,000,000. Arnault was the attorney-in-fact who received the money for the seller, Ernest H. Burt (an American nonresident of the Philippines).

However, it was discovered that the seller, Burt, did not own the Buenavista and Tambobong properties; he only paid the down payments for them. Thus, Burt allegedly had no right to sell the properties to the government.

The Senate then investigated the Buenavista and Tambobong estates sale.

Arnault was obliged to be a witness, but he begged to be excused from answering the inquiry, which could be used against him, invoking his constitutional right against self-incrimination. Then, he refused to answer questions on the transactions (although he later testified that the transactions were legal and that he only acted in his functional capacity as Burt's representative). Claiming that citizens had a right to privacy in their dealings with other people, Arnault refused to explain what steps he took to have the money delivered to Burt. He also claimed that he forgot the name of the person representing Burt, to whom he delivered one of the checks, and he was uncooperative with other questions pertinent to the inquiry.

The Senate held Arnault in contempt, despite his claims that the questions were potentially self-incriminating, which Arnault believed gave him the right under the Constitution not to be compelled to be a witness against himself. As a result, Arnault was to be imprisoned until "he shall have purged

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[49] [Hereinafter "*Bengzon*"], Bengzon Jr. v. S. Blue Ribbon Comm., G.R. No. 89914, 203 SCRA 767, Nov. 20, 1991.

[50] [Hereinafter "*Arnault*"], G.R. No. L-3820, 87 Phil. 29, July 18, 1950.

the contempt"[51] by revealing the information they wanted. Nevertheless, the Committee submitted its report based on the discovered facts.

Eventually, the first session of Congress adjourned, but Arnault remained in contempt. Thus, he claimed that his detention had no legal basis, since the body that issued the resolution (to investigate) had already been dissolved by law.[52]

The Supreme Court first explained that "[a]lthough *there was no provision in the Constitution* expressly vesting either House of Congress with power to make investigations […], [the] power is incidental to the legislative function as to be implied. […] [T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. […] Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion is essential to obtain what is needed."[53]

The Court also said that "Congress of the Philippines has a wider range of legislative field than either the Congress of the United States or any state legislature."[54] It thus follows that "the field of inquiry into which the [Philippine Congress] may enter is also wider."[55] Thus, the Court stated:

> It would be difficult to define any limits by which the subject matter of its inquiry can be bounded. It is necessary for us to do so in this case. Suffice it to say, it must be coextensive with the range of the legislative power.[56]

Then, the Court addressed the arguments specifically raised by Arnault:

First, Arnault argued that Senate has no power to punish him for contempt for refusing to reveal the name of the person to whom he gave the money, "because such information is immaterial to, and will not serve, any intended or purported legislation and his refusal to answer the question has not embarrassed, obstructed, or impeded the legislative process."[57]

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[51] *Id.* at 43.
[52] *Id.* at 57.
[53] *Id.* at 45.
[54] *Id.* at 74.
[55] *Id.*
[56] *Id.* at 46.
[57] *Id.* at 47.

He then contended that "since the investigating committee has already rendered its report and has made all its recommendations as to what legislative measures should be taken pursuant to its findings, there is no necessity to force the petitioner to give the information desired other than that mentioned in its report […]"[58]

In response, the Court opined:

> Once an inquiry is admitted or established to be within the jurisdiction of a legislative body to make, […] 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 […] must be material or necessary to the exercise of a power in it vested by the Constitution , such as to legislate, or to expel a Member; and every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject of the inquiry or investigation.
>
> So a witness may not be coerced to answer a question that obviously has no relation to the subject of the inquiry. But from this it does not follow that every question that may be propounded to a witness must be material to any proposed or possible legislation. In other words, the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.[59]

The Court also laid down the parameters of its role in congressional investigations. Although it conceded that the Senate's ruling on the materiality of the information sought from the witness is presumed to be correct, if the questions are *not pertinent to the matter under the* inquiry, a witness rightfully may refuse to answer. Further, the Court added:

> W]here the alleged immateriality of the information sought by the legislative body from a witness is relied upon to contest its jurisdiction, the Court is duty bound to pass upon the contention. The fact that the legislative body has jurisdiction or the power to

[58] *Id.*
[59] *Arnault* at 48. Excerpt separated into two paragraphs for clarity.

> make the inquiry would not preclude judicial intervention to correct a clear abuse of discretion in the exercise of that power.[60]

The Court then found that the question Arnault refused to answer, which led to his detention, was pertinent to the matter under inquiry. "The contention is not that the question was impertinent to the subject of the inquiry but that it has no relation or materiality to any proposed legislation." The Court then reiterated that it was "not necessary for the legislative body to show that every question propounded to a witness is material to any proposed or possible legislation; what is required is that it be pertinent to the matter under inquiry."[61]

> The Court cannot determine, any more that it can direct Congress, what legislation to approve or not to approve; that would be an invasion of the legislative prerogative. The Court, therefore, may not say that the information sought from the witness which is material to the subject of the legislative inquiry is immaterial to any proposed or possible legislation.[62]

Second. Arnault argued that the Senate lacked authority to commit him for contempt for a term beyond its period of legislative session (which ended on May 18, 1950).[63]

The Court held that:

> [T]he Senate of the Philippines is a continuing body whose members are elected for a term of six years and so divided that the seats of only one-third become vacant every two years, two-thirds always continuing into the next Congress save as vacancies may occur thru (sic) death or resignation.
>
> Members of the House of Representatives are all elected for a term of four years; so that the term of every Congress is four years. The Second Congress of the Philippines was constituted on December 30, 1949, and was to expire on December 30, 1953. The resolution of the Senate committing the petitioner was adopted during the first session of the Second Congress, which began on the fourth Monday of January and ended on May 18, 1950.[64]

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[60] *Id.* at 49.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 61–62.

The Court explained that "[h]ad the resolution of commitment been adopted by the House of Representatives, it could be enforced until the final adjournment of the last session of the Second Congress in 1953. […] But the resolution of commitment was adopted by the Senate, which is a continuing body and which does not cease to exist upon the periodical dissolution of the Congress or of the House of Representatives. There is no limit as to time to the Senate's power to punish for contempt in cases where that power may constitutionally be exerted as in the present case."[65]

In a direct response to Arnault's arguments, the Court maintained the petitioner's role in the situation.

> [The] investigation has not been completed because of [Arnault's refusal] as a witness to answer certain questions pertinent to the subject of the inquiry. The Senate has empowered the committee to continue the investigation during the recess. By refusing to answer the questions, the witness has obstructed the performance by the Senate of its legislative function, and the Senate has the power to remove the obstruction by compelling the witness to answer the questions through restraint of his liberty until he shall have answered them. That power subsists as long as the Senate, which is a continuing body, persists in performing the particular legislative function involved. If the power to punish for contempt terminates upon the adjournment of the session, the Senate would have to resume the investigation at the next and succeeding sessions and repeat the contempt proceedings against the witness until the investigation is completed […]."[66]

Third. Arnault invoked the privilege against self-incrimination. "He contend[ed] that he would incriminate himself if he should reveal the name of the person to whom he gave the [] [money] because if that person be a public official then [Arnault] might be accused of bribery, and if that person be a private individual the latter might accuse him of oral defamation."[67]

The Court ruled against Arnault, saying:

> As against the witness' inconsistent and unjustified claim to a constitutional right, is his clear duty as a citizen to give frank,

[65] *Id.* at 62.

[66] *Arnault* at 63. He argued that the power may be "abusively and oppressively exerted by the Senate which might keep the witness in prison for life." The Court held that "we must assume that the Senate will not be disposed to exert the power beyond its proper bounds." If this limitations are disregarded, "the portals of this Court are always open to those whose rights might thus be transgressed."

[67] *Id.* at 63–64.

> sincere, and truthful testimony before a competent authority. The state has the right to exact fulfillment of a citizen's obligation, consistent of course with his right under the Constitution. The witness in this case has been vociferous and militant in claiming constitutional rights and privileges but patently recreant to his duties and obligations to the Government which protects those rights under the law. When a specific right and a specific obligation conflict with each other, and one is doubtful or uncertain while the other is clear and imperative, the former must give way to the latter.[68]

Arnault recognized that the legislative power of inquiry and the process to enforce it "is an essential and appropriate auxiliary to the legislative function."[69] Since *Arnault*, the Supreme Court has been constricting the powers of Congress in conducting legislative inquiries.

i. After *Arnault*

In *Bengzon,* the Court acknowledged that the power of both houses of Congress to conduct inquiries in aid of legislation is not absolute or unlimited, and it is circumscribed by Section 21, Article VI of the Constitution.[70] Thus, the Court enjoined the Senate Blue Ribbon Committee from requiring the petitioners to testify and produce evidence before the committee, holding that the inquiry in question did not involve any intended legislation.[71]

In *Gudani v. Senga*,[72] the Court created a military exception for the Commander-in-Chief, allowing her to prevent military officers from testifying before congressional investigations.[73]

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[68] *Id.* at 66.
[69] *Id.* at 45.
[70] *Bengzon,* 203 SCRA 767, 777.
[71] *Bengzon,* 203 SCRA 767, 781.
[72] G.R. No. 170165, 498 SCRA 671, Aug. 15, 2006.
[73] *Id.* at 701–702. There, the Court held:

> Our ruling that the President could, as a general rule, require military officers to seek presidential approval before appearing before Congress is based foremost on the notion that a contrary rule unduly diminishes the prerogatives of the President as commander-in-chief. Congress holds significant control over the armed forces in matters such as budget appropriations and the approval of higher-rank promotions, yet it is on the President that the Constitution vests the title as commander-in-chief and all the prerogatives and functions appertaining to the position. Again, the exigencies of military discipline and the chain of command mandate that the President's ability to control

In *Balag v. Senate of the Philippines,*[74] the Court placed a cap on the length of time for detention. "Under *Arnault,* [] a witness or resource speaker cited in contempt by the Senate "may be detained indefinitely due to its characteristic as a continuing body. The [] witness may be detained for a day, a month, a year, or even for a lifetime depending on the desire of the perpetual Senate[,]"[75] putting the rights of persons appearing before or affected by the legislative inquiry in jeopardy."[76] It further added, "While there is a presumption of regularity that the Senate will not gravely abuse its power of contempt, there is still a […] possibility of indefinite imprisonment of witnesses as long as there is no specific period of detention, which is certainly not contemplated and envisioned by the Constitution.[77]

The Court struck a balance between the interest of the Senate and the rights of persons cited in contempt during legislative inquiries, stating: "These interests [are] the exercise by an individual of his basic freedoms on the one hand, and the government's promotion of fundamental public interest or policy objectives on the other."[78] It further held that "the period of imprisonment under the inherent power of contempt by the Senate during inquiries in aid of legislation should only last until the termination of the legislative inquiry under which the said power is invoked."[79]

But the most radical departure from *Arnault* is *Neri v. Senate Committee on Accountability of Public Officers and Investigations*.[80]

2. Neri v. Senate Committee on Accountability of Public Officers and Investigation

In *Neri,* the Supreme Court micromanaged the Senate by filtering questions that the Senate may ask in their inquiries. The facts of the case were

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> the individual members of the armed forces be accorded the utmost respect. Where a military officer is torn between obeying the President and obeying the Senate, the Court will without hesitation affirm that the officer has to choose the President. After all, the Constitution prescribes that it is the President, and not the Senate, who is the commander-in-chief of the armed forces.

[74] [Hereinafter "*Balag*"], G.R. No. 234608, slip op., July 3, 2018.
[75] *Id.* at 14.
[76] *Id.*
[77] *Balag* at 15.
[78] *Id.*
[79] *Id.* at 16.
[80] [Hereinafter "*Neri Decision*"], G.R. No. 180643, 549 SCRA 77, Mar. 25, 2008 and [Hereinafter "*Neri Resolution*"], 564 SCRA 152, Sept 4, 2008.

as follows: On April 21, 2007, the Department of Transportation and Communications entered into a contract with Zhing Xing Telecommunications Equipment (ZTE) for the supply of equipment and services for the National Broadband Network (NBN) Project [amounting to USD 329,481,290 (approximately PHP 16,000,000)]. The project was to be financed by the People's Republic of China."[81]

"[Senate] Committees initiated the investigation by sending invitations to certain personalities and cabinet officials involved in the NBN Project."[82]

"In the September 18, 2007 hearing, businessman Jose de Venecia III testified that several high executive officials and power brokers were using their influence to push the approval of the NBN Project by the National Economic and Development Authority (NEDA). It appeared that the Project was initially approved as a Build-Operate-Transfer (BOT) project but, on March 29, 2007, the NEDA acquiesced to convert it into a government-to-government project, to be financed through a loan from the Chinese Government."[83]

"On September 26, 2007, petitioner [Neri, the former Director General of NEDA] testified before respondent Committees for eleven [] hours. He disclosed that then Commission on Elections (COMELEC) Chairman Benjamin Abalos offered him PHP 200,000,000 in exchange for his approval of the NBN Project. He further narrated that he informed President Arroyo about the bribery attempt and that she instructed him not to accept the bribe. However, when probed further on what they discussed about the NBN Project, petitioner refused to answer, invoking 'executive privilege.' In particular, he refused to answer the questions on:

(a) Whether or not President Arroyo followed up the NBN Project,

(b) Whether or not she directed him to prioritize it, and

(c) Whether or not she directed him to approve."[84]

He also refused to attend subsequent hearings and was cited in contempt by the Senate, which also ordered his arrest.

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[81] *Neri Decision*, 549 SCRA 77, 103.
[82] *Id.* at 105.
[83] *Neri Decision*, 549 SCRA 77, 105.
[84] *Id.*

The Supreme Court held that the three questions were covered by executive privilege, and the Senate committees committed grave abuse of discretion in issuing the contempt order against Neri. The Order citing Neri in contempt and directing his arrest and detention were nullified.[85]

The respondent Senate committees filed a motion for reconsideration. The Court affirmed its ruling but also held that the committees failed to show that the communications elicited by the three questions were critical to the exercise of their functions.[86]

In that case, the Court addressed the Senate's need for information in relation to its legislative functions. The Court held that "[t]he burden to show this is on the respondent Committees, since they seek to intrude into the sphere of competence of the President in order to gather information which, according to said respondents, would 'aid' them in crafting legislation."[87]

This is a departure from *Arnault*, which held that "it is not necessary for the legislative body to show that every question propounded to a witness is material to any proposed or possible legislation; what is required is that it be pertinent to the matter under inquiry."[88]

The Court justified its departure from *Arnault* by saying that "[] [t]he bare standard of 'pertinency' set in *Arnault* cannot be lightly applied to the instant case, which unlike *Arnault,* involves a conflict between two [] separate, co-equal[,] and coordinate Branches (sic) of the Government."[89] The Court added that:

> The failure of the counsel for respondent Committees to pinpoint the specific need for the information sought or how the withholding of the information sought will hinder the accomplishment of their legislative purpose is very evident in the above oral exchanges. Due to the failure of the respondent Committees to successfully discharge this burden, the presumption in favor of confidentiality of presidential communication stands. The implication of the said presumption, like any other, is to dispense with the burden of proof as to whether the disclosure will

[85] *Id.* at 139.
[86] *Neri Resolution*, 564 SCRA 152, 212.
[87] *Id.*
[88] *Arnault*, 87 Phil. 29, 50.
[89] *Neri Resolution*, 564 SCRA 152, 213.

> significantly impair the President's performance of her function. Needless to state this is assumed, by virtue of the presumption.[90]

According to the Court, "[t]he general thrust and the tenor of the three [] questions is to trace the alleged bribery to the Office of the President. While it may be a worthy endeavor to investigate the potential culpability of high government officials, including the President, in a given government transaction, it is simply not a task for the Senate to perform. The role of the Legislature is to make laws, not to determine anyone's guilt of a crime or wrongdoing."[91]

C. The New Cases

1. Senate of the Philippines v. Medialdea

"In its 2020 Annual Audit Report, the Commission on Audit (COA) noted a deficiency of PHP 67,323,186,570.57 in public funds intended for the government's COVID-19 response. This spurred an investigation by the Senate Blue Ribbon Committee on the budget utilization of the Department of Health (DOH).[92] When President Duterte initially complained of the alleged browbeating of executive officials appearing as resource persons, the inquiry had already been ongoing for several hearings.[93] Thus, President Duterte, through Executive Secretary Medialdea, authorized the issuance of a

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[90] *Id.* at 216.

[91] *Id.* at 218–220. The Court added:

> …The determination of who is/are liable for a crime or illegal activity, the investigation of the role played by each official, the determination of who should be haled to court for prosecution and the task of coming up with conclusions and finding of facts regarding anomalies, especially the determination of criminal guilt, are not functions of the Senate. Congress is neither a law enforcement nor a trial agency. Moreover, it bears stressing that no inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress, *i.e.,* legislation. Investigations conducted solely to gather incriminatory evidence and "punish" those investigated are indefensible. There is no Congressional power to expose for the sake of exposure.

[92] S. v. Medialdea, [Hereinafter "*S. v. Medialdea*"], G.R. No. 257608, slip op., July 5, 2022, 2. According to the commission, the fund transfer was not documented, resulting in a delay in the distribution of critical medical supplies for pandemic response. The commission's report prompted the Senate to dig deeper, and it then uncovered evidence of financial misuse, particularly for supplies from Pharmally Pharmaceutical, a business formed just months before securing billions of pesos in supply contracts. The Pharmally scandal became the most prominent allegation of corruption against the Duterte administration. *See* Julio C. Teehankee, *The Philippines in 2021: Twilight of the Duterte Presidency*, 62 ASIAN SURVEY 126, 129 (2022).

[93] *Id.* at 4.

Memorandum dated October 4, 2021, prohibiting all Executive Department officials and employees from appearing and attending the inquiry.[94]

Students of Philippine law are familiar with a similar effort by a President to prevent her subordinates from attending congressional investigations, as seen in *Senate of the Philippines v. Ermita*.[95]

Ermita determined the constitutionality of President Macapagal-Arroyo's Executive Order No. 464 (hereinafter "Order"), titled, "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation Under the Constitution, and For Other Purposes."[96]

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[94] *Id.*

[95] [Hereinafter "*Ermita*"], G.R. No. 169777, 488 SCRA 1, Apr. 20, 2006.

[96] *Id.* at 24. The salient provisions of the Order are as follows:

> SECTION 1. Appearance by Heads of Departments Before Congress. — In accordance with Article VI, Section 22 of the Constitution and to implement the Constitutional provisions on the separation of powers between co-equal branches of the government, all heads of departments of the Executive Branch of the government shall secure the consent of the President prior to appearing before either House of Congress.
>
> When the security of the State or the public interest so requires and the President so states in writing, the appearance shall only be conducted in executive session.
>
> SECTION. 2. Nature, Scope and Coverage of Executive Privilege. —
>
> (a) Nature and Scope. — The rule of confidentiality based on executive privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution (Almonte vs. Vasquez, G.R. No. 95367, 23 May 1995). Further, Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees provides that Public Officials and Employees shall not use or divulge confidential or classified information officially known to them by reason of their office and not made available to the public to prejudice the public interest.
>
> Executive privilege covers all confidential or classified information between the President and the public officers covered by this executive order, including:
>
> i. Conversations and correspondence between the President and the public official covered by this

In particular, the pertinent provisions sought to be nullified in *Ermita* were Sections 2 and 3, with the latter described by the Court as:

executive order (Almonte vs. Vasquez G.R. No. 95367, 23 May 1995; Chavez v. Public Estates Authority, G.R. No. 133250, 9 July 2002);
ii. Military, diplomatic and other national security matters which in the interest of national security should not be divulged (Almonte vs. Vasquez, G.R. No. 95367, 23 May 1995; Chavez v. Presidential Commission on Good Government, G.R. No. 130716, 9 December 1998).
iii. Information between inter-government agencies prior to the conclusion of treaties and executive agreements (Chavez v. Presidential Commission on Good Government, G.R. No. 130716, 9 December 1998);
iv. Discussion in close-door Cabinet meetings (Chavez v. Presidential Commission on Good Government, G.R. No. 130716, 9 December 1998);
v. Matters affecting national security and public order (Chavez v. Public Estates Authority, G.R. No. 133250, 9 July 2002).
(b) Who are covered. — The following are covered by this executive order:
i. Senior officials of executive departments who in the judgment of the department heads are covered by the executive privilege;
ii. Generals and flag officers of the Armed Forces of the Philippines and such other officers who in the judgment of the Chief of Staff are covered by the executive privilege;
iii. Philippine National Police (PNP) officers with rank of chief superintendent or higher and such other officers who in the judgment of the Chief of the PNP are covered by the executive privilege;
iv. Senior national security officials who in the judgment of the National Security Adviser are covered by the executive privilege; and
v. Such other officers as may be determined by the President.

SECTION 3. Appearance of Other Public Officials Before Congress. — All public officials enumerated in Section 2 (b) hereof shall secure prior consent of the President prior to appearing before either House of Congress to ensure the observance of the principle of separation of powers, adherence to the rule on executive privilege and respect for the rights of public officials appearing in inquiries in aid of legislation.

> Section 3 of [the Order] require[d] all the public officials enumerated in Section 2(b) to secure the consent of the President prior to appearing before either house of Congress. The enumeration covered all senior officials of Executive Departments, all officers of the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP), and all senior national security officials *who, in the judgment of the heads of offices designated in the same section* (i.e. department heads, Chief of Staff of the AFP, Chief of the PNP, and the National Security Adviser), are *'covered by the executive privilege.'*"[97]

The Court further clarified that the enumeration in Section 2(b) covers "other officers *as may be determined by the President.*"[98] With Section 2's title (Nature, Scope and Coverage of Executive Privilege) as context, the Court noted that presidential determination "under this provision is intended to be based on a similar finding of coverage under executive privilege."[99]

The Court also observed that Section 2(b) "virtually states that executive privilege actually covers persons. Such is a misuse of the doctrine. Executive privilege […] is properly invoked in relation to specific categories of information and not to categories of persons."[100]

However, the Court clarified the coverage of executive privilege in relation to Section 2(a), which concerns the nature, scope and coverage of executive privilege, stating that "persons being 'covered by the executive privilege' may be read as an abbreviated way of saying that the person is <u>in possession of information</u> which is, in the judgment of the head of office concerned, privileged as defined in Section 2(a)."[101] It further elucidates that rationale of its ruling:

> The Court […] proceed[ed] on the assumption that this is the intention of the challenged order. Upon a determination by the designated head of office or by the President that an official is "covered by the executive privilege," such official is subjected to the requirement that he first secure the consent of the President prior to appearing before Congress. This requirement effectively bars the appearance of the official concerned unless the same is

[97] *Ermita,* 488 SCRA 1, 58. (Emphasis in the original; underscoring supplied.)
[98] *Id.* at 60.
[99] *Id.*
[100] *Id.*
[101] *Id.*

> permitted by the President. *The proviso allowing the President to give its consent means nothing more than that the President may reverse a prohibition which already exists by virtue of Executive Order No. 464*."[102]
>
> Thus, underlying this requirement of prior consent is the determination by a head of office, *authorized by the President under Executive Order No. 464*, or by the President herself, that such official is in possession of information that is covered by executive privilege. This determination then becomes the basis for the official's refusal to appear in the legislative investigation."[103]
>
> [W]henever an official invokes Executive Order No. 464 to justify their failure to be present, the invocation must be construed as a declaration to Congress that the President, or a head of office authorized by the President, has determined that the requested information is privileged, and that the President has not reversed such determination. Such declaration, however, even without mentioning the term "executive privilege," amounts to an implied claim that the information is being withheld by the executive branch, by authority of the President, on the basis of executive privilege.[104]

The Court in *Ermita* then cites the Executive Secretary's September 28, 2005 letter to Senate President Drilon to illustrate the implied nature of the claim of privilege authorized by the assailed Order:

> In connection with the inquiry to be conducted by the Committee of the Whole regarding the Northrail Project of the North Luzon Railways Corporation on 29 September 2005 at 10:00 a.m., *please be informed that officials of the Executive Department invited to appear at the meeting will not be able to attend the same without the consent of the President, pursuant to Executive Order No. 464 (s. 2005)*, entitled "Ensuring Observance Of The Principle Of Separation Of Powers, Adherence To The Rule On Executive Privilege And Respect For The Rights Of Public Officials Appearing In Legislative Inquiries In Aid Of Legislation Under The Constitution, And For Other Purposes." *Said officials have not secured the required consent from the President.*[105]

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[102] *Ermita,* 488 SCRA 1, 60. Emphasis in the original.
[103] *Id.* (Emphasis in the original.)
[104] *Id.* at 61.
[105] *Id.* (Emphasis in the original and supplied.)

Notably, the letter did not explicitly invoke executive privilege or claim that the subject of the inquiry fell under the recognized grounds of executive privilege. Moreover, the letter did not provide that since President Arroyo had not given her consent under the Order, their absences were justified.[106]

As the Court determined, Executive Secretary Ermita's letter operates under the assumption that the invited officials are covered by the assailed Order.[107] The Court further clarifies:

> [H]owever, to be covered by the order means that a determination has been made, by the designated head of office or the President, that the invited official possesses information that is covered by executive privilege. Thus, although it is not stated in the letter that such determination has been made, the same must be deemed implied. Respecting the statement that the invited officials have not secured the consent of the President, it only means that the President has not reversed the standing prohibition against their appearance before Congress.[108]
>
> Inevitably, Executive Secretary Ermita's letter leads to the conclusion that the executive branch, either through the President or the heads of offices authorized under Executive Order No. 464, has made a determination that the information required by the Senate is privileged, and that, at the time of writing, there has been no contrary pronouncement from the President. In fine, an implied claim of privilege has been made by the executive. [109]

The Court looked further and assessed the claim of privilege authorized by the Order to determine whether it is valid. The Court found:

> While the validity of claims of privilege must be assessed on a [case-to-case] basis, examining the ground invoked therefor and the particular circumstances surrounding it, there is, in an implied claim of privilege, a defect that renders it invalid *per se*. By its very nature, and as demonstrated by the letter of respondent Executive Secretary, the implied claim authorized by Section 3 of [the Order] is *not accompanied* by any specific allegation of the basis thereof (e.g., whether the information demanded involves military or diplomatic secrets, closed-door Cabinet meetings, etc.). While Section 2(a)

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[106] *Id.*
[107] *Ermita,* 488 SCRA 1, 61.
[108] *Ermita,* 488 SCRA 1, 62.
[109] *Id.*

> enumerates the types of information that are covered by the privilege under the challenged order, Congress is left to speculate as to which among them is being referred to by the executive. The enumeration is not even intended to be comprehensive, but a mere statement of what is included in the phrase "confidential or classified information between the President and the public officers covered by this executive order.[110]
>
> Certainly, Congress has the right to know why the executive considers the requested information privileged. It does not suffice to merely declare that the President, or an authorized head of office, has determined that it is so, and that the President has not overturned that determination. Such a declaration leaves Congress in the dark on how the requested information could be classified as privileged. That the message is couched in terms that, on first impression, do not seem like a claim of privilege only makes it more pernicious. It threatens to make Congress doubly blind to the question of why the executive branch is not providing it with the information that it has requested.
>
> A claim of privilege, being a claim of exemption from an obligation to disclose information, must be clearly asserted. […] Absent then a statement of the specific basis of a claim of executive privilege, there is no way of determining whether it falls under one of the traditional privileges, or whether, given the circumstances in which it is made, it should be respected.[111]

Ermita then emphasizes that "[d]ue respect for a co-equal branch of government, moreover, demands no less than a claim of privilege clearly stating the grounds therefor."[112] The Court added:

> The claim of privilege under Section 3 of [the Order] in relation to Section 2(b) is thus invalid *per se*. It is not asserted, [but] merely implied. Instead of providing precise and certain reasons for the claim, it merely invokes [the Order], coupled with an announcement that the President has not given her consent. It is woefully insufficient for Congress to determine whether the withholding of information is justified under the circumstances of each case. It *severely* frustrates the power of inquiry of Congress.[113]

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[110] *Id.* at 63. (Emphasis in the original.)
[111] *Ermita,* 488 SCRA 1, 64.
[112] *Id.* at 66.
[113] *Id.* at 67. (Emphasis in the original and supplied.)

The Court invalidated Sections 3 and 2(b) of Executive Order No. 464.

Back to *Senate of the Philippines v. Medialdea*. Following *Ermita*, Duterte's order prohibiting all officials and employees of the Executive Department from appearing or attending the inquiry should have been struck down as unconstitutional.[114]

However, instead of applying *Ermita*,[115] the Court instead held that "[] the *Memorandum* [was] founded on a jurisdictional challenge—whether the subject inquiry of the Senate Blue Ribbon Committee properly falls within its jurisdiction or within the jurisdiction of the Joint Congressional Oversight Committee created under the *Bayanihan* Acts."[116]

Respectfully, one cannot find any challenge to the jurisdiction of the Senate Blue Ribbon Committee in the *Memorandum*.[117] The *Memorandum* provided:

> The Senate Blue Ribbon Committee hearings on the 2020 Audit Report of the Commission on Audit have been going on for nearly two months now. The Executive has been showing due respect to such Committee, through the faithful attendance and participation of its officials and employees in the aforesaid hearings. However, the point has been reached where the participation of the Executive is already greatly affecting its ability to fulfill its core mandates in the Constitution and laws, most of all[,] the protection of our people's right to health in this time of pandemic.
>
> Moreover, given the manner that the inquiry has been conducted, and clear indications that the hearings are meant to go on indefinitely, it has become evident that the said hearings are conducted not in aid of legislation, but to identify persons to hold accountable for alleged irregularities already punishable under existing laws. In so doing, the Senate Blue Ribbon Committee has stepped into the mandates of other branches of government, and has deprived itself of the only basis to compel attendance to its hearings.
>
> Thus, on the premise that the principle of separation of powers requires mutual respect among the different branches of government, and in view of Article II, Section 15 of the 1987

114 *S. v. Medialdea.*

115 *Ermita*.

116 *S. v. Medialdea,* G.R. No. 257608, 16.

117 *S. v. Medialdea.*

> Constitution on the protection and promotion by the State of the right to health of the people, the President has DIRECTED all officials and employees of the Executive Department to no longer appear before or attend the abovementioned Senate Blue Ribbon Committee hearings, effective immediately. Instead, they shall focus all their time and effort on the implementation of measures to address the current State of Calamity on account of COVID-19, and in carrying out their other functions.
>
> All officials and employees of the Executive Department are reminded to perform their functions in accordance with the Constitution and laws, and observe utmost responsibility, integrity and efficiency. This Administration shall continue and shall not hesitate to investigate and file charges against corrupt officials and employees in the proper forum.[118]

The Memorandum was relying on jurisprudence[119] that limits the Senate's inquiry power when it is wielded to determine who is guilty of the commission of a crime or illegal activity. The President's objection was directed at what he perceived as a Senate witch-hunt "to identify persons to hold accountable for alleged irregularities already punishable under existing laws."[120]

Moreover, the first time the Court mentions the issue on jurisdiction was completely out of the blue, *viz*:

> The petition does not mention that the Senate or any of its Committee had ruled on the jurisdictional challenge raised in the *Memorandum*. We therefore infer that this jurisdictional challenge has prudently remained unresolved.[121]

There is simply nothing that lays a foundation for the supposed "jurisdictional challenge."

The Court held that Section 3 of the Senate Rules of Procedure Governing Inquiries in Aid of Legislation proscribes a premature resort to a special civil action for *certiorari*. It concluded:

> The petition is easily differentiated from *Senate v. Ermita*. The present case presents a direct jurisdictional challenge to the subject

[118] *Id.* at 13. (Emphasis omitted.)

[119] Calida v. Trillanes IV, G.R. No. 240873 (Resolution), September 3, 2019, *citing Neri*, 549 SCRA 77 March. 25, 2008.

[120] *S. v. Medialdea,* G.R. No. 257608, 13.

[121] *Id.* at 8. (Emphasis in the original.)

> inquiry and its characterization. The President asserts—the inquiry falls within the jurisdiction of the Joint Congressional Oversight Committee created under the *Bayanihan* Acts, hence, beyond the power of legislative inquiry of the Senate and its Committees. The Senate has yet to resolve this claim and the arising challenge in the manner set forth in the *Rules of Procedure Governing Inquiries in Aid of Legislation*. On the other hand, *Ermita* involved a challenge on the ground of executive privilege and a blanket prohibition that did not reject any subject inquiry as one in aid of legislation.[122]

In this case, the Supreme Court itself created a legal argument in favor of upholding the President's Executive Order—one which the President did not make.

Assuming the Office of the President did make such an argument, it would have made more sense for the Court to infer, that the jurisdictional challenge was resolved by the Senate in its favor. Why else would it pursue the case?

It is also doubtful that a statute (Republic Act No. 11469 and Republic Act No. 11494) can prevent the Senate from performing its investigative functions under the Constitution. The *Bayanihan* laws do create oversight committees but do not constrict the power of the Senate to conduct legislative inquiries:

> SECTION 5. Reports to Congress and Creation of an Oversight Committee. — The President, during Monday of every week, shall submit a weekly report to Congress of all acts performed pursuant to this Act during the immediately preceding week. The report shall likewise include the amount and corresponding utilization of the funds used, augmented, reprogrammed, reallocated and realigned pursuant to this Act.
>
> For this purpose, the Congress shall establish a Joint Congressional Oversight Committee composed of four (4) members of each house to be appointed by the Senate President and the House Speaker, respectively. This Committee shall determine whether such acts, orders, rules and regulations are within the restrictions provided herein.[123]
>
> SECTION 14. Reportorial Requirement and Creation of an Oversight Committee. — The President, every first Monday of the month, shall submit a monthly report to Congress and to the

[122] *Id.* at 18–19. (Emphasis omitted.)
[123] Rep. Act No. 11469 (2020). Bayanihan to Heal as One Act.

> Commission on Audit (COA) of all acts performed pursuant to this Act during the immediately preceding month including a report on the targets and actual accomplishments of government programs, strategies, plans, and efforts relative to the COVID-19 pandemic as well as relevant and more granulated health-related data, and such other information which Congress and COA may require. The terms and conditions of any loan entered into by the government to finance the programs and projects to implement this law shall likewise be included in the Report. The Report shall also contain detailed BESF tables for COVID-19, similar to the BESF tables submitted to Congress by the Development Budget Coordination Committee.
>
> For this purpose, the Congress shall establish a Joint Congressional Oversight Committee composed of four (4) members of each House to be appointed by the Senate President and the House Speaker, respectively. This Committee shall determine whether such acts, orders, rules and regulations are within the restrictions provided herein.[124]

2. Ong v. Senate of the Philippines

The Senate continued its losing streak in *Ong v. Senate of the Philippines*,[125] "which involved two consolidated petitions for *certiorari* and prohibition which ultimately plead for a clearer definition and delineation of the scope and extent of the Senate's power of inquiry in aid of legislation."[126]

The Senate Blue Ribbon Committee ("Committee") hearings uncovered that Pharmally Pharmaceutical Corporation ("Pharmally"), a sister company of the controversial Taiwan-based Pharmally International Holdings, cornered PHP 8.68 billion in pandemic deals between 2020 and 2021, despite it being a small, newly created firm that lacked the funds, track record, and credibility to handle big-ticket government procurement.[127] Chinese citizen and businessman Michael Yang Hong Ming (Yang), a friend and former economic adviser of the President, had links to Pharmally through a network of companies that thrived during Duterte's term.[128] Pharmally

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[124] Rep. Act No. 11469 (2020). Bayanihan to Heal as One Act.

[125] [Hereinafter "*Ong*"], G.R. No. 257401, slip op., Mar. 28, 2023, 2.

[126] *Id.*

[127] Pia Ranada. *Biggest pandemic supplier has links to ex-Duterte adviser Michael Yang,* Rappler, Aug. 28, 2021, *available at* https://www.rappler.com/newsbreak/investigative/biggest-pandemic-supplier-has-links-to-ex-duterte-adviser-michael-yang/. According to its General Information Sheet from the Securities and Exchange Commission (SEC), the firm was only created in 2019.

[128] *Id.*

officials pointed to Yang as their financier and guarantor, although he denied this.[129] Yang's role was central to a series of allegedly overpriced COVID-19 supply contracts worth nearly USD 175,000,000 awarded by Duterte's government to Pharmally.[130]

On August 2021, the Committee issued a subpoena to Linconn Uy Ong (Ong), a member of the Board of Directors and the Supply Chain Manager of Pharmally, to attend its September 7, 2021 hearing, which he failed to do. Accordingly, the Committee cited him in contempt and ordered his arrest and detention.[131] Regardless, Ong was able to attend the September 10, 2021 hearing, which was "conducted relative to the Commission on Audit (COA) Consolidated Annual Audit Report for Fiscal Year 2020 relating to the expenditures of the Department of Health (DOH) on the 'fight against [COVID-19]'."[132] However, the Committee issued another Contempt Order, together with his arrest, against him for "testifying falsely and evasively."[133] Thus, Ong filed the first Petition for *Certiorari* and Prohibition with Very Urgent Prayers for *Status Quo Ante* Order/Temporary Restraining Order and Writ of Preliminary Injunction."[134]

Yang, who was also a member of the Philippine Full Win Group of Companies, Inc., filed the second Petition seeking the nullification of the Arrest Orders dated September 7 and 10, 2021. Additionally, Yang also "[sought] the nullification of the Lookout Bulletin issued by the Bureau of Immigration in accordance with the Committee's [request] dated September 13, 2021. Further, he prayed that the Committee be ordered to desist from compelling him to disclose information involving his properties and business interests […]."[135]

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[129] Organized Crime and Corruption Reporting Project, *Philippine President Duterte's Former Economic Adviser was a "Drug Lord," Says Affidavit in New ICC Case* (2021), Nov. 10, 2021, *available at* https://www.occrp.org/en/investigations/philippine-president-dutertes-former-economic-adviser-was-a-drug-lord-says-affidavit-in-new-icc-case. Among the officials embroiled in the scandal are longtime Duterte aide-turned-senator Bong Go and former Department of Budget and Management (DBM) Undersecretary Lloyd Christopher Lao, a volunteer election lawyer for the President who eventually headed the DBM's Procurement Service ("PS-DBM"). Lao had signed off on the Duterte government contracts with Pharmally.

[130] Ranada, *supra* note at 128.

[131] *Ong*, G.R. No. 257401, 5.

[132] *Id.* at 3.

[133] *Id.*

[134] *Id.* at 1.

[135] *Id.* at 3.

The Court held that the Committee [thereby the Senate] *"failed to accord petitioners their rights* in the exercise of its contempt power in the conduct of its proceedings."[136] The Court further clarified that:

> These rights refer to […] those enshrined under the Bill of Rights, more particularly to the right to due process and the right against unreasonable seizures under Sections 1 and 2, Article III of the 1987 Constitution. […] The violation and disregard of the petitioners' rights were brought about by the Senate's exercise of its power of contempt *punishing* the act of *"testifying falsely or evasively"* under the Senate rules.[137]

After reproducing transcripts of the hearings, affording the petitioners an opportunity to be heard,[138] it simply disagreed with the senators' opinions.

According to the Court:

> [T]hat Ong may have shown hesitancy in giving direct answers as regards the documents pertaining to the supply of Personal Protective Equipment (PPEs) does not conclusively establish that he was evasive. The totality of his responses evinces that he was mindful of his right against self-incrimination. Again, he manifested his willingness to cooperate in the investigation by committing to produce and submit documents required by the Committee."[139]

The Court also sided with Yang, stating that contempt envisages a *refusal or unwillingness to testify* on one's part:

> [T]he fact that Yang made inconsistent or incomplete answers did not conclusively establish that he was evasive within the context of contempt. While Yang initially tried to avoid giving any leading information as regards his connection with Pharmally, he was able to subsequently aver during the proceedings that he introduced the suppliers of facemasks and PPEs to Ong.[140]

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[136] *Id.* at 24.

[137] *Id.* at 24–25. (Emphasis in the original.)

[138] The essence of due process in administrative proceedings is an opportunity to explain one's side or an opportunity to seek reconsideration of the action or ruling complained of. *See* Emin v. De Leon, G.R. No. 139794, February 27, 2002.

[139] *Ong*, G.R. No. 257401, 35.

[140] *Id.* at 41.

In the Court's view, "[] the Committee immediately surmised on the incredulity of his testimony, thus citing him in contempt and ordering his arrest on the ground that he gave inconsistent or incomplete answers."[141]

In *Ong,* the Supreme Court was not reviewing the Senate's interpretation of a law; it disagreed with the senators' appreciation of the witnesses' testimonies without the benefit of being present during the hearings. In other words, the senators found that the witnesses were giving inconsistent and incomplete answers. The Supreme Court disagreed and concluded that the witnesses were denied due process.

Jurisprudence is clear that inquiries in aid of legislation are not criminal proceedings and resource persons requested to appear are not to be treated as suspects. Both *Bengzon* and *Standard Chartered Bank v. Senate Committee on Banks, Financial Institutions and Currencies*[142] explain that the Constitution protects the rights of those who are invited to attend inquiries in aid of legislation.[143]

Bengzon says:

> One of the basic rights guaranteed by the Constitution to an individual is the right against self-incrimination. This right construed as the right to remain completely silent may be availed of by the accused in a criminal case; but it may be invoked by other witnesses only as questions are asked of them.[144]

Standard Chartered, for its part, explains:

> The right of the accused against self-incrimination is extended to respondents in administrative investigations that partake of the nature of or are analogous to criminal proceedings.[145]

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[141] *Id.*

[142] [Hereinafter "*Standard Chartered*"], G.R. No. 167173, 541 SCRA 456, Dec. 27, 2007.

[143] Article VI, Section 21 of the Constitution provides:

> SECTION 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.

[144] *Bengzon,* 203 SCRA 767, 785.

[145] *Standard Chartered,* 541 SCRA 456, 460.

In these cases, the Supreme Court is not saying that the resource persons are defendants in criminal proceedings but that the rights of persons appearing in or affected by such inquiries shall be respected. Thus, resource persons must be afforded procedural due process.

The essence of procedural due process is embodied in the basic requirement of notice and an opportunity to be heard, or as applied in administrative proceedings, an opportunity to explain one's side or an opportunity to seek reconsideration of the action or ruling complained of.[146] As the Court expounded in *Villarete v. Commission on Audit*:

> It entails giving a party a chance to seek reconsideration of an action or ruling complained of. In line with this, the failure to notify a party of a decision involving them, especially one where they stand to lose their life, liberty, or property, robs a litigant the chance to avail of the reliefs granted to them by law. Such is a violation of due process.[147]

However, in *Ong,* the Court departs from *Bengzon* and *Standard Chartered,* stating that the Senate's power to cite a witness in contempt as criminal in nature, *to wit*:

> …a legislative contempt is essentially criminal or punitive in nature. Notably, the contumacious act of testifying falsely or evasively finds criminal definition under Article 183 of the Revised Penal Code (RPC) penalizing false testimony and perjury. In the case, the Committee's treatment of petitioners' supposed contumacious acts as criminal in nature is even bolstered when it ordered their arrest and, worse, the subsequent transfer of Ong to the Pasay City Jail. Indeed, the power to punish crimes is punitive in nature as it involves a proceeding brought by the State before the courts to punish offenders.[148]

Thus, the Supreme Court established a higher standard for due process for witnesses charged with "giving false or evasive testimony,"[149] *viz*:

> …witnesses who are charged by Congress with "giving false or evasive testimony" must be accorded stricter due process requirements, such as the opportunity to explain one's side before being penalized, consistent with the due

[146] Caguimbal v. CSC, G.R. No. 250170 (Notice), Feb.3, 2020.

[147] Villarete v. COA, G.R. No. 243818, 922 Phil. 743, 753, Apr. 26, 2022. (Citations omitted.)

[148] *Ong*, G.R. No. 257401, 42.

[149] *Id.* at 43.

> process safeguards used in criminal proceedings. Considering the broad definition of "giving false or evasive testimony," the witness must, at the very least, be given a chance to explain why his or her testimony is not false or evasive.[150]

The standard of due process was elevated to one "consistent with the due process safeguards used in criminal proceedings."[151]

Using the standard of due process in criminal proceedings is clearly inappropriate in congressional investigations, because there is a difference between punishment for contempt and punishment for a crime.[152] "The power to punish for contempt is coercive in nature, [whereas] the power to punish crimes is punitive. The first is a vindication by the House of its own privileges[;] [t]he second is a proceeding brought by the State […] to punish offenders. The two are distinct, the one from the other."[153] Persons invited to appear before a legislative inquiry do so as resource persons and not as accused in a criminal proceeding.[154]

Ong conflates the coercive nature of contempt and the punitive nature of a criminal prosecution. This suggests that witnesses testifying before a congressional inquiry may invoke all the due process guarantees "throughout all stages of a criminal prosecution—from the inception of custodial investigation until rendition of judgment."[155] This would open up a world of requirements that are part of due process for criminal proceedings beyond those already recognized in case law,[156] such as the presumption of innocence of the accused,[157] and the right to counsel.[158] This will also raise various questions, such as whether an order of arrest issued by either House of Congress is subject to the same standards for warrants of arrest issued by judges.[159]

Furthermore, how one determines whether witnesses were given a "chance to explain" their testimony is extremely subjective. The senators

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[150] *Id.*

[151] *Id.*

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

[153] *Id.* at 180.

[154] Calida v. Trillanes IV, G.R. No. 240873, slip op., 6, Sep. 3, 2019.

[155] Labay v. Sandiganbayan, G.R. Nos. 235937-40, slip op., 8, July 23, 2018.

[156] These are the rights to privacy and the right against self-incrimination. *See* Sabio v. Gordon, G.R. Nos. 174340, 174318 & 174177, 504 SCRA 704, Oct.17, 2006.

[157] *See* Gov't of H.K. Special Adm. Region v. Olalia, Jr., G.R. No. 153675, 521 SCRA 470, Apr. 19, 2007.

[158] *See* Inacay v. People, G.R. No. 223506, 810 SCRA 610, Nov. 28, 2016.

[159] *See* Abdula v. Guiani, G.R. No. 118821, 326 SCRA 1, Feb. 18, 2000.

interrogated the witnesses as shown by reams of testimony. It concluded that the witnesses were inconsistent and gave incomplete answers. The Supreme Court read the *same* testimony and concluded that the witnesses were not given a chance to explain their testimony.

The Order that cited petitioners Ong and Yang in contempt of the Senate Blue Ribbon Committee, and directing their arrest, were nullified for having been issued with grave abuse of discretion.

V. ANALYSIS

The Supreme Court's jurisprudence on congressional investigations has skewed the balance in favor of the President, veering sharply away from the tenor of *Arnault*. Notably, *Neri* limited the Senate's power to ask questions when the case involves a conflict between two separate, co-equal and coordinate branches of government. It abandoned *Arnault*'s holding that 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.

Balag, on the other hand, set a cap on the length of detentions that the Senate may impose.

Senate of the Philippines v. Medialdea was an open and shut case. A blanket prohibition preventing executive officials from attending a Senate inquiry is unconstitutional under *Ermita*. But the Supreme Court salvaged the President's directive by citing an argument that the President himself did not advance.

In *Ong*, the Supreme Court expanded the definition of due process to save the President's friends from detention. In the end, the Supreme Court disagreed with the Senate in the appreciation of the witnesses' testimonies and it overruled the senators—the senators who thought the witnesses were testifying falsely or evasively. The Supreme Court did not agree. The senators had been too quick to judge and, therefore, the witnesses were deprived of due process.

The common denominator in both cases is the unwritten rule that the President must always win.

It is true that rules change and case law, as discussed above, can change for a number of reasons. But these changes have to be based on more

than a whim or loyalty to the appointing power. If the only discernible basis for the change in rules is bias for the President, then faith in the legal system can shake faith in the rule of law.

Stare decisis lends legitimacy to judicial institutions by contributing to the "actual and perceived integrity of the judicial process."[160] Mills adds:

> By applying the same legal rule to a plaintiff who sues in the precedent case and to a plaintiff who brings a subsequent suit, a court "treat[s] similarly situated individuals in the same way." Doing so increases the perception that the court applies the law evenly and consistently to all, thereby promoting the rule of law. Similarly, the doctrine facilitates consistent and stable results over time, even as the membership of a court changes, which allows the public to perceive that the court's analysis is not swayed by the "vagaries of the political process," increasing a court's perceived legitimacy.[161]

The doctrine promotes "the rule of law," stabilizes the culture, and contains the norm of temporal equality.[162]As another scholar points out:

> Keeping legal rules in place until they're lawfully changed also goes a long way toward maintaining the rule of law. But in any legal system worthy of the name, the rules of change have to have a certain amount of exclusivity or closure. They cannot be generally agnostic as to other methods of changing the law, at least not without casting everything else in the system into doubt. We can imagine a legal system with rules that permit no changes, but a legal system that has no rules of change looks more like Calvinball.[163]

This is why technically, Calvinball is not a game, since anything can count as a move within the activity as players make up new and more complicated "rules" as the game goes along.[164] What Calvinball does teach is that although disregarding rules in one case may help one player achieve a

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[160] Alexander Lazaro Mills, *Reliance by Whom? The False Promise of Societal Reliance on Stare Decisis Analysis*, 92 N.Y.U. LAW. REV. 2094, 2099 (2017).

[161] *Id.* In the Philippines, however, the Supreme Court acknowledges that a change in the membership of the Court is one reason why precedent can be abandoned. *See* Abaria v. NLRC, G.R. No. 154113, 661 SCRA 686, December 7, 2011; and ANGKLA: Ang Partido ng mga Pilipinong Marino, Inc. v. COMELEC, G.R. No. 246816, 953 SCRA 80, Sept. 15, 2020.

[162] James G. Wilson, *Taking Stare Decisis Seriously*, 10 J. JURIS 327, 348 (2011). *See also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987).

[163] Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817, 843 (2015).

[164] Robert L. Simon, *Internalism and Sport,* in ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF SPORT, 23–34 (2015).

victory in that game, such victory is achieved at the expense of all participants in later games, and ultimately at the expense of the game itself.[165]

Calvinball jurisprudence is harmful. It may help one player (the President) achieve a victory—but this is attained at the expense of our faith in the legal system.

VI. CONCLUSION

"This game lends itself to certain abuses."
—Calvin[166]

The Supreme Court's latest cases on congressional inquiries sustained President Duterte's winning streak. These victories required changes in the rules that once again shook the public's confidence in the Court's ability to play the role of a neutral arbiter.

There is nothing amusing about case law that evokes a child's game marked by inconsistency in the application of rules. An approach to jurisprudence that alters rules to favor the President undermines checks and balances and diminishes the stature of the Supreme Court as it takes on the role as the President's sheriff—a branch of government dedicated to enforcing executive edicts.

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[165] Bret Rappaport & Joni Green, *Calvinball Cannot be Played on this Court: The Sanctity of Auction Procedures in Bankruptcy*, 11 JBKRLP 189, 190 (2002).

[166] Calvin and Hobbes by Bill Watterson for August 26, 1990.