B/GEN. (RET.) FRANCISCO V. GUDANI AND LT. COL. ALEXANDER F. BALUTAN PETITIONERS, VS. LT./GEN. GENEROSO S. SENGA AS CHIEF OF STAFF OF THE ARMED FORCES OF THE PHILIPPINES, COL. GI...

G.R. NO. 170165. August 15, 2006

Ponente: TINGA, J.

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TINGA, J.:

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A most dangerous general proposition is foisted on the Court — that soldiers who defy orders of their superior officers are exempt from the strictures of military law and discipline if such defiance is predicated on an act otherwise valid under civilian law. Obedience and deference to the military chain of command and the President as commander-in-chief are the cornerstones of a professional military in the firm cusp of civilian control. These values of obedience and deference expected of military officers are content-neutral, beyond the sway of the officer's own sense of what is prudent or rash, or more elementally, of right or wrong. A self-righteous military invites itself as the scoundrel's activist solution to the "ills" of participatory democracy.

Petitioners seek the annulment of a directive from President Gloria Macapagal-Arroyo[1] enjoining them and other military officers from testifying before Congress without the President's consent. Petitioners also pray for injunctive relief against a pending preliminary investigation against them, in preparation for possible court-martial proceedings, initiated within the military justice system in connection with petitioners' violation of the aforementioned directive.

The Court is cognizant that petitioners, in their defense, invoke weighty constitutional principles that center on fundamental freedoms enshrined in the Bill of Rights. Although these concerns will not be addressed to the satisfaction of petitioners, the Court recognizes these values as of paramount importance to our civil society, even if not determinative of the resolution of this petition. Had the relevant issue before us been the right of the Senate to compel the testimony of petitioners, the constitutional questions raised by them would have come to fore. Such a scenario could have very well been presented to the Court in such manner, without the petitioners having had to violate a direct order from their commanding officer. Instead, the Court has to resolve whether petitioners may be subjected to military discipline on account of their defiance of a direct order of the AFP Chief of Staff.

The solicited writs of certiorari and prohibition do not avail; the petition must be denied.

I.

The petitioners are high-ranking officers of the Armed Forces of the Philippines (AFP). Both petitioners, Brigadier General Francisco Gudani (Gen. Gudani) and Lieutenant Colonel Alexander Balutan (Col. Balutan), belonged to the Philippine Marines. At the time of the subject incidents, both Gen. Gudani and Col. Balutan were assigned to the Philippine Military Academy (PMA) in Baguio City, the former as the PMA Assistant Superintendent, and the latter as the Assistant Commandant of Cadets.[2]

On 22 September 2005, Senator Rodolfo Biazon (Sen. Biazon) invited several senior officers of the AFP to appear at a public hearing before the Senate Committee on National Defense and Security (Senate Committee) scheduled on 28 September 2005. The hearing was scheduled after topics concerning the conduct of the 2004 elections emerged in the public eye, particularly allegations of massive cheating and the surfacing of copies of an audio excerpt purportedly of a phone conversation between President Gloria Macapagal Arroyo and an official of the Commission on Elections (COMELEC) widely reputed as then COMELEC Commissioner Virgilio Garcillano. At the time of the 2004 elections, Gen. Gudani had been designated as commander, and Col. Balutan a member, of "Joint Task Force Ranao" by the AFP Southern Command. "Joint Task Force Ranao" was tasked with the maintenance of peace and order during the 2004 elections in the provinces of Lanao del Norte and Lanao del Sur.[3] `

Gen. Gudani, Col. Balutan, and AFP Chief of Staff Lieutenant General Generoso Senga (Gen. Senga) were among the several AFP officers who received a letter invitation from Sen. Biazon to attend the 28 September 2005 hearing. On 23 September 2005, Gen. Senga replied through a letter to Sen. Biazon that he would be unable to attend the hearing due to a previous commitment in Brunei, but he nonetheless "directed other officers from the AFP who were invited to attend the hearing."[4]

On 26 September 2005, the Office of the Chief of Staff of the AFP issued a Memorandum addressed to the Superintendent of the PMA Gen. Cristolito P. Baloing (Gen. Baloing). It was signed by Lt. Col. Hernando DCA Iriberri in behalf of Gen. Senga.[5] Noting that Gen. Gudani and Col. Balutan had been invited to attend the Senate Committee hearing on 28 September 2005, the Memorandum directed the two officers to attend the hearing.[6] Conformably, Gen. Gudani and Col. Balutan filed their respective requests for travel authority addressed to the PMA Superintendent.

On 27 September 2005, Gen. Senga wrote a letter to Sen. Biazon, requesting the postponement of the hearing scheduled for the following day, since the AFP Chief of Staff was himself unable to attend said hearing, and that some of the invited officers also could not attend as they were "attending to other urgent operational matters." By this time, both Gen. Gudani and Col. Balutan had already departed Baguio for Manila to attend the hearing.

Then on the evening of 27 September 2005, at around 10:10 p.m., a message was transmitted to the PMA Superintendent from the office of Gen. Senga, stating as follows:

> PER INSTRUCTION OF HER EXCELLENCY PGMA, NO AFP PERSONNEL SHALL APPEAR BEFORE ANY CONGRESSIONAL OR SENATE HEARING WITHOUT HER APPROVAL. INFORM BGEN FRANCISCO F GUDANI AFP AND LTC ALEXANDER BALUTAN PA (GSC) ACCORDINGLY.[7]

The following day, Gen. Senga sent another letter to Sen. Biazon, this time informing the senator that "no approval has been granted by the President to any AFP officer to appear" before the hearing scheduled on that day. Nonetheless, both Gen. Gudani and Col. Balutan were present as the hearing started, and they both testified as to the conduct of the 2004 elections.

The Office of the Solicitor General (OSG), representing the respondents before this Court, has offered additional information surrounding the testimony of Gen. Gudani and Col. Balutan. The OSG manifests that the couriers of the AFP Command Center had attempted to deliver the radio message to Gen. Gudani's residence in a subdivision in Parañaque City late in the night of 27 September 2005, but they were not permitted entry by the subdivision guards. The next day, 28 September 2005, shortly before the start of the hearing, a copy of Gen. Senga's letter to Sen. Biazon sent earlier that day was handed at the Senate by Commodore Amable B. Tolentino of the AFP Office for Legislative Affairs to Gen. Gudani, who replied that he already had a copy. Further, Gen. Senga called Commodore Tolentino on the latter's cell phone and asked to talk to Gen. Gudani, but Gen. Gudani refused. In

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response, Gen. Senga instructed Commodore Tolentino to inform Gen. Gudani that "it was an order," yet Gen. Gudani still refused to take Gen. Senga's call.[8]

A few hours after Gen. Gudani and Col. Balutan had concluded their testimony, the office of Gen. Senga issued a statement which noted that the two had appeared before the Senate Committee "in spite of the fact that a guidance has been given that a Presidential approval should be sought prior to such an appearance;" that such directive was "in keeping with the time[-]honored principle of the Chain of Command;" and that the two officers "disobeyed a legal order, in violation of A[rticles of] W[ar] 65 (Willfully Disobeying Superior Officer), hence they will be subjected to General Court Martial proceedings x x x" Both Gen. Gudani and Col. Balutan were likewise relieved of their assignments then.[9]

On the very day of the hearing, 28 September 2005, President Gloria-Macapagal-Arroyo issued Executive Order No. 464 (E.O. 464). The OSG notes that the E.O. "enjoined officials of the executive department including the military establishment from appearing in any legislative inquiry without her approval."[10] This Court subsequently ruled on the constitutionality of the said executive order in Senate v. Ermita.[11] The relevance of E.O. 464 and Senate to the present petition shall be discussed forthwith.

In the meantime, on 30 September 2005, petitioners were directed by General Senga, through Col. Henry A. Galarpe of the AFP Provost Marshal General, to appear before the Office of the Provost Marshal General (OPMG) on 3 October 2005 for investigation. During their appearance before Col. Galarpe, both petitioners invoked their right to remain silent.[12] The following day, Gen. Gudani was compulsorily retired from military service, having reached the age of 56.[13]

In an Investigation Report dated 6 October 2005, the OPMG recommended that petitioners be charged with violation of Article of War 65, on willfully disobeying a superior officer, in relation to Article of War 97, on conduct prejudicial to the good order and military discipline.[14] As recommended, the case was referred to a Pre-Trial Investigation Officer (PTIO) preparatory to trial by the General Court Martial (GCM).[15] Consequently, on 24 October 2005, petitioners were separately served with Orders respectively addressed to them and signed by respondent Col. Gilbert Jose C. Roa, the Pre-Trial Investigating Officer of the PTIO. The Orders directed petitioners to appear in person before Col. Roa at the Pre-Trial Investigation of the Charges for violation of Articles 65[16] and 97[17] of Commonwealth Act No. 408,[18] and to submit their counter-affidavits and affidavits of witnesses at the Office of the Judge Advocate General.[19] The Orders were accompanied by respective charge sheets against petitioners, accusing them of violating Articles of War 65 and 97.

It was from these premises that the present petition for certiorari and prohibition was filed, particularly seeking that (1) the order of President Arroyo coursed through Gen. Senga preventing petitioners from testifying before Congress without her prior approval be declared unconstitutional; (2) the charges stated in the charge sheets against petitioners be quashed; and (3) Gen. Senga, Col. Galarpe, Col. Roa, and their successors-in-interest or persons acting for and on their behalf or orders, be permanently enjoined from proceeding against petitioners, as a consequence of their having testified before the Senate on 28 September 2005.[20]

Petitioners characterize the directive from President Arroyo requiring her prior approval before any AFP personnel appear before Congress as a "gag order," which violates the principle of separation of powers in government as it interferes with the investigation of the Senate Committee conducted in aid of legislation. They also equate the "gag order" with culpable violation of the Constitution, particularly in relation to the public's constitutional right to information and transparency in matters of public concern. Plaintively, petitioners claim that "the Filipino people have every right to hear the [petitioners'] testimonies," and even if the "gag order" were unconstitutional, it still was tantamount to "the crime of obstruction of justice." Petitioners further argue that there

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was no law prohibiting them from testifying before the Senate, and in fact, they were appearing in obeisance to the authority of Congress to conduct inquiries in aid of legislation.

Finally, it is stressed in the petition that Gen. Gudani was no longer subject to military jurisdiction on account of his compulsory retirement on 4 October 2005. It is pointed out that Article 2, Title I of the Articles of War defines persons subject to military law as "all officers and soldiers in the active service" of the AFP.

II.

We first proceed to define the proper litigable issues. Notably, the guilt or innocence of petitioners in violating Articles 65 and 97 of the Articles of War is not an issue before this Court, especially considering that per records, petitioners have not yet been subjected to court martial proceedings. Owing to the absence of such proceedings, the correct inquiry should be limited to whether respondents could properly initiate such proceedings preparatory to a formal court-martial, such as the aforementioned preliminary investigation, on the basis of petitioners' acts surrounding their testimony before the Senate on 28 September 2005. Yet this Court, consistent with the principle that it is not a trier of facts at first instance,[21] is averse to making any authoritative findings of fact, for that function is first for the court-martial court to fulfill.

Thus, we limit ourselves to those facts that are not controverted before the Court, having been commonly alleged by petitioners and the OSG (for respondents). Petitioners were called by the Senate Committee to testify in its 28 September 2005 hearing. Petitioners attended such hearing and testified before the Committee, despite the fact that the day before, there was an order from Gen. Senga (which in turn was sourced "per instruction" from President Arroyo) prohibiting them from testifying without the prior approval of the President. Petitioners do not precisely admit before this Court that they had learned of such order prior to their testimony, although the OSG asserts that at the very least, Gen. Gudani already knew of such order before he testified.[22] Yet while this fact may be ultimately material in the court-martial proceedings, it is not determinative of this petition, which as stated earlier, does not proffer as an issue whether petitioners are guilty of violating the Articles of War.

What the Court has to consider though is whether the violation of the aforementioned order of Gen. Senga, which emanated from the President, could lead to any investigation for court-martial of petitioners. It has to be acknowledged as a general principle[23] that AFP personnel of whatever rank are liable under military law for violating a direct order of an officer superior in rank. Whether petitioners did violate such an order is not for the Court to decide, but it will be necessary to assume, for the purposes of this petition, that petitioners did so.

III.

Preliminarily, we must discuss the effect of E.O. 464 and the Court's ruling in Senate on the present petition. Notably, it is not alleged that petitioners were in any way called to task for violating E.O. 464, but instead, they were charged for violating the direct order of Gen. Senga not to appear before the Senate Committee, an order that stands independent of the executive order. Distinctions are called for, since Section 2(b) of E.O. 464 listed "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," as among those public officials required in Section 3 of E.O. 464 "to secure prior consent of the President prior to appearing before either House of Congress." The Court in Senate declared both Section 2(b) and Section 3 void,[24] and the impression may have been left following Senate that it settled as doctrine, that the President is prohibited from requiring military personnel from attending congressional hearings without having first secured prior presidential consent. That impression is wrong.

Senate turned on the nature of executive privilege, a presidential prerogative which is encumbered by significant limitations. Insofar as E.O. 464 compelled officials of the executive branch to seek prior presidential approval

before appearing before Congress, the notion of executive control also comes into consideration.[25] However, the ability of the President to require a military official to secure prior consent before appearing before Congress pertains to a wholly different and independent specie of presidential authority—the commander-in-chief powers of the President. By tradition and jurisprudence, the commander-in-chief powers of the President are not encumbered by the same degree of restriction as that which may attach to executive privilege or executive control.

During the deliberations in Senate, the Court was very well aware of the pendency of this petition as well as the issues raised herein. The decision in Senate was rendered with the comfort that the nullification of portions of E.O. 464 would bear no impact on the present petition since petitioners herein were not called to task for violating the executive order. Moreover, the Court was then cognizant that Senate and this case would ultimately hinge on disparate legal issues. Relevantly, Senate purposely did not touch upon or rule on the faculty of the President, under the aegis of the commander-in-chief powers[26] to require military officials from securing prior consent before appearing before Congress. The pertinent factors in considering that question are markedly outside of those which did become relevant in adjudicating the issues raised in Senate. It is in this petition that those factors come into play.

At this point, we wish to dispose of another peripheral issue before we strike at the heart of the matter. General Gudani argues that he can no longer fall within the jurisdiction of the court-martial, considering his retirement last 4 October 2005. He cites Article 2, Title I of Commonwealth Act No. 408, which defines persons subject to military law as, among others, "all officers and soldiers in the active service of the [AFP]," and points out that he is no longer in the active service.

This point was settled against Gen. Gudani's position in Abadilla v. Ramos,[27] where the Court declared that an officer whose name was dropped from the roll of officers cannot be considered to be outside the jurisdiction of military authorities when military justice proceedings were initiated against him before the termination of his service. Once jurisdiction has been acquired over the officer, it continues until his case is terminated. Thus, the Court held:

> The military authorities had jurisdiction over the person of Colonel Abadilla at the time of the alleged offenses. This jurisdiction having been vested in the military authorities, it is retained up to the end of the proceedings against Colonel Abadilla. Well-settled is the rule that jurisdiction once acquired is not lost upon the instance of the parties but continues until the case is terminated.[28]

Citing Colonel Winthrop's treatise on Military Law, the Court further stated:

> We have gone through the treatise of Colonel Winthrop and We find the following passage which goes against the contention of the petitioners, viz —
>
> - Offenders in general — Attaching of jurisdiction. It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly attached to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This principle has mostly been applied to cases where the offense was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him — as by arrest or the service of charges, — the military jurisdiction will fully attach and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused x x x [29]

Thus, military jurisdiction has fully attached to Gen. Gudani inasmuch as both the acts complained of and the initiation of the proceedings against him occurred before he compulsorily retired on 4 October 2005. We see no

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reason to unsettle the Abadilla doctrine. The OSG also points out that under Section 28 of Presidential Decree No. 1638, as amended, "[a]n officer or enlisted man carried in the retired list [of the Armed Forces of the Philippines] shall be subject to the Articles of War x x x"[30] To this citation, petitioners do not offer any response, and in fact have excluded the matter of Gen. Gudani's retirement as an issue in their subsequent memorandum.

IV.

We now turn to the central issues.

Petitioners wish to see annulled the "gag order" that required them to secure presidential consent prior to their appearance before the Senate, claiming that it violates the constitutional right to information and transparency in matters of public concern; or if not, is tantamount at least to the criminal acts of obstruction of justice and grave coercion. However, the proper perspective from which to consider this issue entails the examination of the basis and authority of the President to issue such an order in the first place to members of the AFP and the determination of whether such an order is subject to any limitations.

The vitality of the tenet that the President is the commander-in-chief of the Armed Forces is most crucial to the democratic way of life, to civilian supremacy over the military, and to the general stability of our representative system of government. The Constitution reposes final authority, control and supervision of the AFP to the President, a civilian who is not a member of the armed forces, and whose duties as commander-in-chief represent only a part of the organic duties imposed upon the office, the other functions being clearly civil in nature.[31] Civilian supremacy over the military also countermands the notion that the military may bypass civilian authorities, such as civil courts, on matters such as conducting warrantless searches and seizures.[32]

Pursuant to the maintenance of civilian supremacy over the military, the Constitution has allocated specific roles to the legislative and executive branches of government in relation to military affairs. Military appropriations, as with all other appropriations, are determined by Congress, as is the power to declare the existence of a state of war.[33] Congress is also empowered to revoke a proclamation of martial law or the suspension of the writ of habeas corpus.[34] The approval of the Commission on Appointments is also required before the President can promote military officers from the rank of colonel or naval captain.[35] Otherwise, on the particulars of civilian dominance and administration over the military, the Constitution is silent, except for the commander-in-chief clause which is fertile in meaning and implication as to whatever inherent martial authority the President may possess.[36]

The commander-in-chief provision in the Constitution is denominated as Section 18, Article VII, which begins with the simple declaration that "[t]he President shall be the Commander-in-Chief of all armed forces of the Philippines x x x"[37] Outside explicit constitutional limitations, such as those found in Section 5, Article XVI, the commander-in-chief clause vests on the President, as commander-in-chief, absolute authority over the persons and actions of the members of the armed forces. Such authority includes the ability of the President to restrict the travel, movement and speech of military officers, activities which may otherwise be sanctioned under civilian law.

Reference to Kapunan, Jr. v. De Villa[38] is useful in this regard. Lt. Col. Kapunan was ordered confined under "house arrest" by then Chief of Staff (later President) Gen. Fidel Ramos. Kapunan was also ordered, as a condition for his house arrest, that he may not issue any press statements or give any press conference during his period of detention. The Court unanimously upheld such restrictions, noting:

> [T]he Court is of the view that such is justified by the requirements of military discipline. It cannot be gainsaid that certain liberties of persons in the military service, including the freedom of speech, may be circumscribed by rules of military discipline. Thus, to a certain degree, individual rights may be curtailed, because the

> effectiveness of the military in fulfilling its duties under the law depends to a large extent on the maintenance of discipline within its ranks. Hence, lawful orders must be followed without question and rules must be faithfully complied with, irrespective of a soldier's personal views on the matter. It is from this viewpoint that the restrictions imposed on petitioner Kapunan, an officer in the AFP, have to be considered.[39]

Any good soldier, or indeed any ROTC cadet, can attest to the fact that the military way of life circumscribes several of the cherished freedoms of civilian life. It is part and parcel of the military package. Those who cannot abide by these limitations normally do not pursue a military career and instead find satisfaction in other fields; and in fact many of those discharged from the service are inspired in their later careers precisely by their rebellion against the regimentation of military life. Inability or unwillingness to cope with military discipline is not a stain on character, for the military mode is a highly idiosyncratic path which persons are not generally conscripted into, but volunteer themselves to be part of. But for those who do make the choice to be a soldier, significant concessions to personal freedoms are expected. After all, if need be, the men and women of the armed forces may be commanded upon to die for country, even against their personal inclinations.

It may be so that military culture is a remnant of a less democratic era, yet it has been fully integrated into the democratic system of governance. The constitutional role of the armed forces is as protector of the people and of the State.[40] Towards this end, the military must insist upon a respect for duty and a discipline without counterpart in civilian life.[41] The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.[42] In the end, it must be borne in mind that the armed forces has a distinct subculture with unique needs, a specialized society separate from civilian society. [43] In the elegant prose of the eminent British military historian, John Keegan:

> [Warriors who fight wars have] values and skills [which] are not those of politicians and diplomats. They are those of a world apart, a very ancient world, which exists in parallel with the everyday world but does not belong to it. Both worlds change over time, and the warrior world adopts in step to the civilian. It follows it, however, at a distance. The distance can never be closed, for the culture of the warrior can never be that of civilization itself.....[44]

Critical to military discipline is obeisance to the military chain of command. Willful disobedience of a superior officer is punishable by court-martial under Article 65 of the Articles of War.[45] "An individual soldier is not free to ignore the lawful orders or duties assigned by his immediate superiors. For there would be an end of all discipline if the seaman and marines on board a ship of war [or soldiers deployed in the field], on a distant service, were permitted to act upon their own opinion of their rights [or their opinion of the President"s intent], and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised."[46]

Further traditional restrictions on members of the armed forces are those imposed on free speech and mobility. Kapunan is ample precedent in justifying that a soldier may be restrained by a superior officer from speaking out on certain matters. As a general rule, the discretion of a military officer to restrain the speech of a soldier under his/her command will be accorded deference, with minimal regard if at all to the reason for such restraint. It is integral to military discipline that the soldier's speech be with the consent and approval of the military commander.

The necessity of upholding the ability to restrain speech becomes even more imperative if the soldier desires to speak freely on political matters. The Constitution requires that "[t]he armed forces shall be insulated from partisan politics," and that "[n]o member of the military shall engage directly or indirectly in any partisan political activity, except to vote."[47] Certainly, no constitutional provision or military indoctrination will eliminate a soldier's ability to form a personal political opinion, yet it is vital that such opinions be kept out of the public eye. For one, political belief is a potential source of discord among people, and a military torn by political strife is

incapable of fulfilling its constitutional function as protectors of the people and of the State. For another, it is ruinous to military discipline to foment an atmosphere that promotes an active dislike of or dissent against the President, the commander-in-chief of the armed forces. Soldiers are constitutionally obliged to obey a President they may dislike or distrust. This fundamental principle averts the country from going the way of banana republics.

Parenthetically, it must be said that the Court is well aware that our country's recent past is marked by regime changes wherein active military dissent from the chain of command formed a key, though not exclusive, element. The Court is not blind to history, yet it is a judge not of history but of the Constitution. The Constitution, and indeed our modern democratic order, frown in no uncertain terms on a politicized military, informed as they are on the trauma of absolute martial rule. Our history might imply that a political military is part of the natural order, but this view cannot be affirmed by the legal order. The evolutionary path of our young democracy necessitates a reorientation from this view, reliant as our socio-political culture has become on it. At the same time, evolution mandates a similar demand that our system of governance be more responsive to the needs and aspirations of the citizenry, so as to avoid an environment vulnerable to a military apparatus able at will to exert an undue influence in our polity.

Of possibly less gravitas, but of equal importance, is the principle that mobility of travel is another necessary restriction on members of the military. A soldier cannot leave his/her post without the consent of the commanding officer. The reasons are self-evident. The commanding officer has to be aware at all times of the location of the troops under command, so as to be able to appropriately respond to any exigencies. For the same reason, commanding officers have to be able to restrict the movement or travel of their soldiers, if in their judgment, their presence at place of call of duty is necessary. At times, this may lead to unsentimental, painful consequences, such as a soldier being denied permission to witness the birth of his first-born, or to attend the funeral of a parent. Yet again, military life calls for considerable personal sacrifices during the period of conscription, wherein the higher duty is not to self but to country.

Indeed, the military practice is to require a soldier to obtain permission from the commanding officer before he/she may leave his destination. A soldier who goes from the properly appointed place of duty or absents from his/her command, guard, quarters, station, or camp without proper leave is subject to punishment by court-martial.[48] It is even clear from the record that petitioners had actually requested for travel authority from the PMA in Baguio City to Manila, to attend the Senate Hearing.[49] Even petitioners are well aware that it was necessary for them to obtain permission from their superiors before they could travel to Manila to attend the Senate Hearing.

It is clear that the basic position of petitioners impinges on these fundamental principles we have discussed. They seek to be exempted from military justice for having traveled to the Senate to testify before the Senate Committee against the express orders of Gen. Senga, the AFP Chief of Staff. If petitioners' position is affirmed, a considerable exception would be carved from the unimpeachable right of military officers to restrict the speech and movement of their juniors. The ruinous consequences to the chain of command and military discipline simply cannot warrant the Court's imprimatur on petitioner's position.

V.

Still, it would be highly myopic on our part to resolve the issue solely on generalities surrounding military discipline. After all, petitioners seek to impress on us that their acts are justified as they were responding to an invitation from the Philippine Senate, a component of the legislative branch of government. At the same time, the order for them not to testify ultimately came from the President, the head of the executive branch of government

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and the commander-in-chief of the armed forces.

Thus, we have to consider the question: may the President prevent a member of the armed forces from testifying before a legislative inquiry? We hold that the President has constitutional authority to do so, by virtue of her power as commander-in-chief, and that as a consequence a military officer who defies such injunction is liable under military justice. At the same time, we also hold that any chamber of Congress which seeks the appearance before it of a military officer against the consent of the President has adequate remedies under law to compel such attendance. Any military official whom Congress summons to testify before it may be compelled to do so by the President. If the President is not so inclined, the President may be commanded by judicial order to compel the attendance of the military officer. Final judicial orders have the force of the law of the land which the President has the duty to faithfully execute.[50]

Explication of these principles is in order.

As earlier noted, we ruled in Senate that the President may not issue a blanket requirement of prior consent on executive officials summoned by the legislature to attend a congressional hearing. In doing so, the Court recognized the considerable limitations on executive privilege, and affirmed that the privilege must be formally invoked on specified grounds. However, the ability of the President to prevent military officers from testifying before Congress does not turn on executive privilege, but on the Chief Executive's power as commander-in-chief to control the actions and speech of members of the armed forces. The President's prerogatives as commander-in-chief are not hampered by the same limitations as in executive privilege.

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,[51] 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 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.[52]

At the same time, the refusal of the President to allow members of the military to appear before Congress is still subject to judicial relief. The Constitution itself recognizes as one of the legislature's functions is the conduct of inquiries in aid of legislation.[53] Inasmuch as it is ill-advised for Congress to interfere with the President's power as commander-in-chief, it is similarly detrimental for the President to unduly interfere with Congress's right to conduct legislative inquiries. The impasse did not come to pass in this petition, since petitioners testified anyway despite the presidential prohibition. Yet the Court is aware that with its pronouncement today that the President has the right to require prior consent from members of the armed forces, the clash may soon loom or actualize.

We believe and hold that our constitutional and legal order sanctions a modality by which members of the military may be compelled to attend legislative inquiries even if the President desires otherwise, a modality which does not offend the Chief Executive's prerogatives as commander-in-chief. The remedy lies with the courts.

The fact that the executive branch is an equal, coordinate branch of government to the legislative creates a wrinkle to any basic rule that persons summoned to testify before Congress must do so. There is considerable interplay between the legislative and executive branches, informed by due deference and respect as to their various constitutional functions. Reciprocal courtesy idealizes this relationship; hence, it is only as a last resort that one

branch seeks to compel the other to a particular mode of behavior. The judiciary, the third coordinate branch of government, does not enjoy a similar dynamic with either the legislative or executive branches. Whatever weakness inheres on judicial power due to its inability to originate national policies and legislation, such is balanced by the fact that it is the branch empowered by the Constitution to compel obeisance to its rulings by the other branches of government.

As evidenced by Arnault v. Nazareno[54] and Bengzon v. Senate Blue Ribbon Committee,[55] among others, the Court has not shirked from reviewing the exercise by Congress of its power of legislative inquiry.[56] Arnault recognized that the legislative power of inquiry and the process to enforce it, "is an essential and appropriate auxiliary to the legislative function."[57] On the other hand, Bengzon acknowledged that the power of both houses of Congress to conduct inquiries in aid of legislation is not "absolute or unlimited", and its exercise is circumscribed by Section 21, Article VI of the Constitution.[58] From these premises, the Court enjoined the Senate Blue Ribbon Committee from requiring the petitioners in Bengzon from testifying and producing evidence before the committee, holding that the inquiry in question did not involve any intended legislation.

Senate affirmed both the Arnault and Bengzon rulings. It elucidated on the constitutional scope and limitations on the constitutional power of congressional inquiry. Thus:

> As discussed in Arnault, the power of inquiry, "with process to enforce it," is grounded on the necessity of information in the legislative process. If the information possessed by executive officials on the operation of their offices is necessary for wise legislation on that subject, by parity of reasoning, Congress has the right to that information and the power to compel the disclosure thereof.
>
> As evidenced by the American experience during the so-called "McCarthy era", however, the right of Congress to conduct inquirites in aid of legislation is, in theory, no less susceptible to abuse than executive or judicial power. It may thus be subjected to judicial review pursuant to the Court's certiorari powers under Section 1, Article VIII of the Constitution.
>
> For one, as noted in Bengzon v. Senate Blue Ribbon Committee, the inquiry itself might not properly be in aid of legislation, and thus beyond the constitutional power of Congress. Such inquiry could not usurp judicial functions. Parenthetically, one possible way for Congress to avoid such result as occurred in Bengzon is to indicate in its invitations to the public officials concerned, or to any person for that matter, the possible needed statute which prompted the need for the inquiry. Given such statement in its invitations, along with the usual indication of the subject of inquiry and the questions relative to and in furtherance thereof, there would be less room for speculation on the part of the person invited on whether the inquiry is in aid of legislation.
>
> Section 21, Article VI likewise establishes critical safeguards that proscribe the legislative power of inquiry. The provision requires that the inquiry be done in accordance with the Senate or House's duly published rules of procedure, necessarily implying the constitutional infirmity of an inquiry conducted without duly published rules of procedure. Section 21 also mandates that the rights of persons appearing in or affected by such inquiries be respected, an imposition that obligates Congress to adhere to the guarantees in the Bill of Rights.
>
> These abuses are, of course, remediable before the courts, upon the proper suit filed by the persons affected, even if they belong to the executive branch. Nonetheless, there may be exceptional circumstances' wherein a clear pattern of abuse of the legislative power of inquiry might be established, resulting in palpable violations of the rights guaranteed to members of the executive department under the Bill of Rights. In such instances, depending on the particulars of each case, attempts by the Executive Branch to forestall these abuses may be accorded judicial sanction[59].

In Senate, the Court ruled that the President could not impose a blanket prohibition barring executive officials from testifying before Congress without the President's consent notwithstanding the invocation of executive

privilege to justify such prohibition. The Court did not rule that the power to conduct legislative inquiry ipso facto superseded the claim of executive privilege, acknowledging instead that the viability of executive privilege stood on a case to case basis. Should neither branch yield to the other branch's assertion, the constitutional recourse is to the courts, as the final arbiter if the dispute. It is only the courts that can compel, with conclusiveness, attendance or non-attendance in legislative inquiries.

Following these principles, it is clear that if the President or the Chief of Staff refuses to allow a member of the AFP to appear before Congress, the legislative body seeking such testimony may seek judicial relief to compel the attendance. Such judicial action should be directed at the heads of the executive branch or the armed forces, the persons who wield authority and control over the actions of the officers concerned. The legislative purpose of such testimony, as well as any defenses against the same — whether grounded on executive privilege, national security or similar concerns — would be accorded due judicial evaluation. All the constitutional considerations pertinent to either branch of government may be raised, assessed, and ultimately weighed against each other. And once the courts speak with finality, both branches of government have no option but to comply with the decision of the courts, whether the effect of the decision is to their liking or disfavor.

Courts are empowered, under the constitutional principle of judicial review, to arbitrate disputes between the legislative and executive branches of government on the proper constitutional parameters of power.[60] This is the fair and workable solution implicit in the constitutional allocation of powers among the three branches of government. The judicial filter helps assure that the particularities of each case would ultimately govern, rather than any overarching principle unduly inclined towards one branch of government at the expense of the other. The procedure may not move as expeditiously as some may desire, yet it ensures thorough deliberation of all relevant and cognizable issues before one branch is compelled to yield to the other. Moreover, judicial review does not preclude the legislative and executive branches from negotiating a mutually acceptable solution to the impasse. After all, the two branches, exercising as they do functions and responsibilities that are political in nature, are free to smooth over the thorns in their relationship with a salve of their own choosing.

And if emphasis be needed, if the courts so rule, the duty falls on the shoulders of the President, as commander-in-chief, to authorize the appearance of the military officers before Congress. Even if the President has earlier disagreed with the notion of officers appearing before the legislature to testify, the Chief Executive is nonetheless obliged to comply with the final orders of the courts.

Petitioners have presented several issues relating to the tenability or wisdom of the President's order on them and other military officers not to testify before Congress without the President's consent. Yet these issues ultimately detract from the main point — that they testified before the Senate despite an order from their commanding officer and their commander-in-chief for them not to do so,[61] in contravention of the traditions of military discipline which we

affirm today. The issues raised by petitioners could have very well been raised and properly adjudicated if the proper procedure was observed. Petitioners could have been appropriately allowed to testify before the Senate without having to countermand their Commander-in-chief and superior officer under the setup we have prescribed.

We consider the other issues raised by petitioners unnecessary to the resolution of this petition.

Petitioners may have been of the honest belief that they were defying a direct order of their Commander-in-Chief and Commanding General in obeisance to a paramount idea formed within their consciences, which could not be lightly ignored. Still, the Court, in turn, is guided by the superlative principle that is the Constitution, the embodiment of the national conscience. The Constitution simply does not permit the infraction which petitioners

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have allegedly committed, and moreover, provides for an orderly manner by which the same result could have been achieved without offending constitutional principles.

WHEREFORE, the petition is DENIED. No pronouncement as to costs.
SO ORDERED.
Panganiban, C.J., Puno, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Carpio Morales, Callejo, Sr., Chico-Nazario, Garcia and Velasco, Jr., JJ., concur.Corona, J., on leave.Azcuna, J., on official business.

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[1]Initially denominated as the lead respondent in this petition. However, in a Resolution dated 15 November 2005, the Court ordered the dismissal of the petition as against President Arroyo, owing to her immunity from suit during her incumbency as President. See rollo, p. 87. See also Estrada v. Desierto, G.R. Nos. 146710-15 & 146738, 2 March 2001, 353 SCRA 452, 516-522.

[2] Rollo, pp. 15-18.

[3] Id. at 18.

[4] Id. at 75.

[5] Id. at 76-77.

[6] Id.

[7]Id. at 81. Capitals not ours.

[8]Id. at 111-112.

[9] Id. at 83.

[10]Id. at 111.

[11] G.R. Nos. 169777, 169659, 169660, 169667, 169834, 171246, 20 April 2006.

[12] See rollo, pp. 52, 67.

[13] Pursuant to Presidential Decree No. 1638, Sec. 5(a) & 17 as amended, and Presidential Administrative Order No. 150 (4 January 1990).

[14] These articles of war are contained in Commonwealth Act No. 408, as amended.

[15] Rollo, p. 68.

[16] For "assaulting or willfully disobeying superior officer." See Article 65, Com. Act No. 408 (1938).

[17] A general article which punishes "all disorders and neglects to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service x x x See Com. Act No. 408 (1938), Art. 97,

[18] Commonly referred to as the Articles of War.

[19] Rollo, pp. 45, 59.

[20] Id. at 42.

[21] See e.g., Far East Bank and Trust Co. v. Court of Appeals, 326 Phil. 15, 18 (1996).

[22]Supra note 8.

[23] As affirmed by Com. Act No. 408, Art. 65 as amended. Supra note 14.

[24] The writer of this ponencia wrote a Separate Opinion to the Resolution dated 14 July 2005 (denying respondent's motion for reconsideration), wherein, concurring in the result, he elucidated on his position that Sections 2(b) and 3 of E.O. 464 are valid on its face as they are based on the President's constitutional power of executive control, but void as applied.

[25] See Constitution, Art. VII, Sec. 17, which reads, "Sec. 17. The President shall have control of all the executive departments, bureaus and offices. He shall ensure that the laws be faithfully executed." See also Senate v. Ermita, G.R. Nos. 169777, 169659, 169660, 169667, 169834, 171246, 14 July, 2005 Separate Opinion, J. Tinga.

[26] See Constitution, Art. VII, Sec. 18 , infra.

[27] No. L-79173, 7 December 1987, 156 SCRA 92.

[28] Id. at 102.

[29] Id. at 104-105. Emphasis supplied.

[30] See rollo, p. 148.

[31] See Carpio v. Executive Secretary, G.R. No. 96409, 14 February 1992, 206 SCRA 290, 302; citing The Constitution, A Commentary, by Fr. Joaquin Bernas, S.J., Vol. II, p. 212.

[32] See Alih v. Castro, No. L-69401, 23 June 1987, 151 SCRA 279, 286.

[33] See Constitution, Art. VI, Sections 24 & 23(1), respectively. Also worth noting, it was by a statute that courts-martial were vested jurisdiction to try acts punishable under the Articles of War. See Articles 12 to 15, Com. Act No. 408, as amended. See also Rep. Act No. 7055.

[34] See Constitution, Art. VII, Sec. 18.

[35] See Constitution, Art. VII, Sec. 16.

[36]Laurence Tribe notes in his opus, American Constitutional Law, that "[m]ore recently, it has become the practice to refer to the Commander in Chief Clause for whatever inherent martial authority the Executive may possess." L. Tribe, I American Constitutional Law, 3rd ed. (2000), at 658. A similar trend appears to have developed in this jurisdiction.

[37] See Constitution , Art. VII, Sec. 17.

[38] No. L-83177, 6 December 1988, 168 SCRA 264.

[39] Id. at 275. Emphasis supplied.

[40] Constitution, Art. II, Sec. 3.

[41] Schelsinger v. Councilman, 420 US 738, 757 (1975). "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." Burns v. Wilson, 346 U.S. 138, 140 (1952); citing Re: Grimley (United States v. Grimley) 137 U.S. 147, 34 L ed 636, 11 S Ct 52 (1890); Hiatt v. Brown, 339 U.S. 103, 94 L ed. 691, 70 S Ct 495 (1950).

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[42] Id.

[43] Parker v. Levy, 417 U.S. 733, 743 (1974).

[44]John Keegan, A History of Warfare, p. xvi (1993)

[45] See Article 65, Com. Act No. 408 (as amended)

[46] New v. Army, 50 M.J. 729, Amry Ct. Crim. App., 1999; citing United States v. Rockwood, 48 M.J. 501, Army Ct. Crim. App., 1998. Emphasis not ours.

[47] See Constitution, Art. XVI, Sec. 5(3).

[48] See Art. 63, Com. Act No. 408 (1938).

[49] See rollo, pp. 78, 79. In their petition, petitioners admit having requested for travel authority with their immediate superior, the PMA Superintendent. See id. at 22, 23.

[50] See Article 8, Civil Code, in connection with Section 17, Article VII, Constitution.

[51] Supra notes 34 & 36.

[52] Supra note 38.

[53] See Constitution, Art. VI, Sec. 21. See also Senate v. Ermita, supra note 11.

[54] 87 Phil. 29 (1950)

[55] G.R. No. 89914, 20 November 1991, 203 SCRA 767.

[56]"The "allocation of constitutional boundaries" is a task that this Court must perform under the Constitution.... The Court is thus of the considered view that it has jurisdiction over the present controversy for the purpose of determining the scope and extent of the power of the Senate Blue Ribbon Committee to conduct inquiries into private affairs in purported aid of legislation." Bengzon, Jr. v. Senate Blue Ribbon Committee, id., at 777.

[57] Arnault v. Nazareno, supra note 54, at 45.

[58]Bengzon v. Senate Blue Ribbon Committee, supra note 55, at 777.

[59] Senate v. Ermita, supra note 11.

[60] See e.g., Angara v. Electoral Commission, 63 Phil. 139, 156-157 (1936). Further, "[t]he role of the judiciary in mapping the metes and bounds of powers of the different branches of government was redefined in the 1987 Constitution which expanded the jurisdiction of this Court to include the determination of grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." Macalintal v. COMELEC, 453 Phil. 586, 740 (2003), J. Puno, Concurring and Dissenting Opinion.

[61] As stated earlier though, it is controverted whether petitioners were actually aware of the directive from the President before they testified before the Senate. See note 21. This factual matter, which will necessarily impact on the deliberate intent of the petitioners, is for the court-martial to decide.

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