CONCLUSIONS AND RECOMMENDATIONS

The Joint Committee conducted fourteen (14) public hearings on the inquiry in-aid-of legislation arising from the 8 June 2005 Privilege Speech of the Minority Leader, Rep. Francis Escudero entitled the "Tale of Two Tapes." Of thirty-six (36) invited witnesses and/or resource persons, only eighteen (18) were able to testify and/or provide their inputs[1]. Witness Samuel Ong, subpoenaed twice, never appeared in the hearings.

Atty. Ong sent his lawyer to the public hearings to inform the Joint Committee that fear for his own safety prevented Ong from personally appearing before the Members. Ong had also, through his lawyer, offered a copy of what has been billed the "mother of all tapes" and the videotape allegedly showing T/Sgt. Vidal Doble admitting that he is the person responsible for the wiretapping. Doble denied this in his testimony, admitting only that he was paid by Atty. Ong the handsome sum of two million pesos (Php 2M) to say on video that he was the source of the wiretap. The Joint Committee declined to accept the materials because without Ong's personal appearance and testimony, these have no probative value. Ong went into hiding and has never reappeared since.

The other important witness, former COMELEC Commissioner Atty. Virgilio Garcillano, completely ignored the Joint Committee during the first six months of the hearings. He even flaunted his disdain by consenting to be interviewed while in hiding by a national newspaper. In that interview, he denied it was his voice in the tapes. Nothing stopped him from appearing before the Joint Committee and unequivocally deny it was his voice in the tapes or that the alleged taped conversations had taken place at all. Instead, Garcillano also went into hiding. It was rumored he fled the country. The government of Singapore issued a *note verbale* that a certain Virgilio Garcillano had transited through Singapore from Manila on to a Singapore airlines flight to London. Whether he was in the country throughout the period he eluded the Joint Committee's summons or left for abroad for that purpose is irrelevant. What is critical is that flight is a sign of guilt.

The Joint Committee cited Garcillano for contempt and the House of Representatives issued a warrant for his arrest on 3 August 2005. In late November 2005, Garcillano suddenly reappeared and granted an interview with ABS-CBN and to a national newspaper. On 7 December 2005, he voluntarily appeared before the Joint Committee to testify on the issues raised in connection with the so-called Garci tapes. He, however, steadfastly refused to throw any light on the matter citing *sub judice* and his right against self-incrimination. His petition with the Supreme Court to stop the Joint Committee from coming out with a report on the tapes is yet unresolved. He unwaveringly refused to give responsive answers to the questions propounded by the Members of the Joint Committee, except on the issue of whether he had left the country. He produced two clean passports for that purpose, a current one and the one previous.

Despite Garcillano's obstinate silence on key issues, and the absence of Ong, the public hearings generated enough information for the Joint Committee to make what it feels are relevant recommendations, particularly on corrective legislation and policy initiatives that Congress might undertake in the short term.

The Joint hearings probed several issues. Foremost among these were the issues concerning violations of Republic Act 4200 or the Anti-Wiretapping Law, the conduct of the 2004 elections and the alleged rigging of the election returns to favor President Gloria Macapagal Arroyo, along with the seeming lack of concern from police and intelligences agencies over the possible wiretapping of the President, who might have been responsible, as well as the alleged involvement of the opposition with regard to the publication of the so-called Garci Tapes.

Based on testimonies of witnesses and documents submitted, the Joint Committee recommends the following:

1. The Committee on Public Order and Safety, in coordination with the Committees on Justice and National Defense and Security, shall undertake a comprehensive study and review of Republic Act No. 4200 or the Anti-Wiretapping Law and recommend the appropriate amendments thereto or the enactment of a new law, particularly with regard to further enhancing legal protection for the confidentiality of private communications while making allowances for communication that jeopardize the national interest, increasing the severity of penalties in both situations;

2. The Committees on National Defense and Security and Public Order and Safety should exercise its oversight powers on how government handles intelligence information, as well as review the capabilities of intelligence agencies to conduct surveillance and communications intercept operations to fight crime, while increasing accountability for the misuse of these capabilities. Congress, through appropriate legislation, should promote professionalism in the Armed Forces of the Philippines and other national security agencies and exercise its confirmation powers more judiciously in the matter of appointments and promotions in these departments.

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[1] Justice Pangalangan and Fr. Bernas were not able to attend the hearing due to prior appointments but nevertheless, sent their written position papers.

3. Enact the "Cyber-crime Prevention Act" to deter illegal access and/or interception of communications systems and networks. Tighten its safeguards and ensure that these will promote privacy rights, including criminalizing both the disclosure and the publication of illegal wiretapped material.

4. The Committee on Suffrage on Electoral Reforms shall undertake a comprehensive study and review of the Election Laws, and recommend the appropriate amendments thereto which shall address gaps in the electoral process that enable the perpetration of electoral fraud and encourage improper conduct by election officials and candidates. Strongly advocate for and pursue legislation on the automation of Philippine elections.

5. The appropriate committees should continue investigating the possibility that former COMELEC Commissioner Virgilio Garcillano fled the country while eluding Congress and may have committed forgery to perjure himself before the Joint Committee when he denied leaving the country. Recommend the prosecution of persons or entities that may have assisted in his flight abroad if such is shown. To be sure, the Bureau of Immigration has certified per its records[2] that the last time Garcillano left the country was in 1993. Nonetheless, a review is called for of the rules and regulations of the Department of Foreign Affairs, Bureau of Immigration, Air Transportation Office, Aviation Security Group and other air or sea transportation agencies covering the arrival and departure of public or private aircraft and seacraft to identify system shortcomings and procedural loopholes that might permit unrecorded foreign arrivals and departures;

6. Recommend to the Inspector General of the Armed Forces of the Philippines to take appropriate action against TSgt Doble for his violation of the AFP Articles of War and Code of Ethics.

7. The House of Representatives to severely reprimanded the AFP-ISAFP and the NBI for their cavalier attitude to the so called Garci Tapes and the possibility that the President was the victim of the wiretap operation resulting in a breach of national security;

8. The House of Representatives to cite Atty. Samuel Ong for contempt and cause the issuance of a warrant for his arrest. Admonish the law enforcement agencies to exert all efforts to discover his whereabouts and present him to Congress.

9. The appropriate committee to study whether there is a need for a special law penalizing public officials for deliberately making false statements even in circumstances that do not amount to perjury.

10. The House of Representatives to continue to seek the answers to other issues arising from the hearings, and in particular, subpoena phone records to establish the likelihood or unlikelihood that the alleged wiretapped conversations could have taken place.

I. Republic Act No. 4200 or the Anti-Wiretapping Law.

The existence of the so-called Garci Tapes highlighted two important concerns, to wit: the opposing interests of an individual's right to privacy and the right of the public to know matters of direct and intense public interest, such as election fraud.

RA 4200 was enacted for the precise purpose of protecting without any exception whatsoever the privacy of communication. The 1935 Constitution, the prevailing Charter at the time RA 4200 was passed in 1965 provided that:

> *"The privacy of communication and correspondence shall be inviolable except under lawful order of the court or when public safety and order require otherwise." (Article III, Section 5 of the Bill of Rights)*

This same right was again enshrined in the 1973 Constitution specifically in Article IV, Sections 4(1) and (2) which state that:

> *"The privacy of communication and correspondence shall be inviolable except under lawful order of the court or when public safety and order require otherwise."*
>
> *"Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding."*

[2] See Annexes B25 and F20

These same provisions are likewise guaranteed in the present 1987 Constitution, Article III, Section 3(1) and 2).

Accordingly, any illegally wiretapped recording of a conversation in violation of RA 4200 "shall not be admissible in evidence in any judicial, quasi-judicial, legislative or administrative hearing or investigation" (Section 4, RA 4200). This ban is all encompassing and must include "any proceeding" as provided for in the Constitution. Consequently, the ban extends to congressional investigations and possibly even impeachments.

The foregoing prohibition is lifted or does not apply in only two instances, namely: (1) when all parties have authorized the recording (Section 1 of RA 4200); and (2) when the wiretapping is authorized by a written order of a competent Regional Trial Court upon written application and examination under oath or affirmation "in cases involving crimes of treason, espionage, provoking war and disloyalty in case of war, piracy, mutiny in the high seas, rebellion, sedition, conspiracy to commit sedition, inciting to sedition, kidnapping as defined by the Revised Penal Code,[3] and violations of Commonwealth Act No. 616,[4] punishing espionage and other offenses against national security" (Sec. 3 of RA 4200). In short there is only one legal basis for publishing or otherwise using a wiretapped conversation, and that is if it was authorized by a court order.

What is protected is the privacy of communication irrespective as to whether the parties are private persons or public officials. However, if the conversation or spoken word is uttered in a public manner, the protection does not apply. This legislative intent is clear in Senate deliberations on the law.[5]

In *Navarro v. Court of Appeals* (GR No. 121087, August 26 1999) the Supreme Court had the occasion to distinguish between private and public communications, describing the latter as the kind conducted in a manner that the parties to the conversation know and will allow it to be overheard. The public character as opposed to the privacy of communications has nothing to do with the contents of the same.

This brings us to the issue of how R.A. 4200, could be enforced without requiring the subject of an illegal wiretap to come out publicly by filing a complaint, thereby linking the embarrassing contents of an illegal wiretap with himself or herself. It was repeatedly stressed by legal experts that the President's failure to come forward and formally complain against the illegal wiretap and order the prosecution of the same—indeed her refusal to seek a judicial injunction against its playing, not to mention mass reproduction and sale—meant that the law was not broken because no one had come forward as a victim of the crime.

Yet violation of RA 4200 is a public crime, the offended party should be the State or the People of the Philippines. Thus the law should be enforceable even without a particular complainant and even against those who so much as claim to be uttering illegal wiretap recordings without need of having to authenticate the same. This is debatable, probably intensely so, but law might be amended to allow for another distinction to be legally recognized between the public and private character of conversations, so as to allow the evidentiary admission of wiretapped conversations; and that is if it would serve a critically important public interest such as the prosecution of impeachable or national security offenses. Whether we should allow the admission of even illegally wiretapped conversations on these limited grounds turns on how Congress weighs the competing interests of privacy on the one hand and the need to deter the use of new technology to further political crimes like election fraud. In short, are public officials entitled to the privacy of their conversations involving solicitations to crime?

As the law now stands, mere possession let alone manufacture, not to mention publicity of illegally wiretapped material is criminal. And yet the rapid and extensive proliferation of the so-called Garci tapes, in willful disregard of the patent illegality of the same, in addition to their being publicly played by a Joint Committee of Congress, has, in our view, eroded the authority and credibility of the law. Either the severe and all-encompassing character of RA 4200 is reaffirmed by new legislation or relaxed to accommodate the politically charged character of illegal wiretaps, such as that of the so-called Garci tapes.

The belated appearance of Garcillano and his unwavering refusal to give responsive answers to any questions relating to the so-called Garci tapes showed how wrong the Committee, the opposition, the public and the press were to have put so much importance on Garcillano's testimony**.**

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3 Article 267, Title Nine, Chapter One, Section One of the Revised Penal Code

4 CA No. 616 – An Act to Punish Espionage and Other Offenses Against the National Security

5 See House of Representatives Archives, p. 626, Congressional Record Vol. III, No. 33 (RA 4200 [SB9] Infopack 5 CRP)

Where the constitutional mandate of the Committees to conduct the inquiry comes into conflict with public interest and privacy issues that may be invoked under the law, the Committees were guided by the opinions of the country's legal experts as follows:

> *"The right to privacy protected by the Constitution under RA 4200 must be balanced against the right of the people to information under the Constitution."*
>
> *"… nothing is more vital to the democratic polity than the issue of who was elected president in the last elections and whether or not the democratic processes have been distorted. Now that the president has authenticated the tape and admitted that hers is the voice on the tape, it is imperative that the people should get to know what their President had told a member of the independent constitutional commission and what the latter had replied."*[6]
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> *"The contents of the alleged wiretapped materials are not merely of private concern; they are matters of public interest." … "Privacy concerns must give way when balanced against the interest in disseminating information of paramount public importance."*[7]

The Joint Committee does not adopt as definitive any or all of the legal opinions offered. At least one of them appears to be based on a misreading of the celebrated case of *New York Times Co. v. United States [The Pentagon Papers Case]* which qualified its decision to allow publication of so-called national security documents in the interest of the public's right to information and freedom of expression by adding, through Justices Douglas and Black, that "[t]here is, moreover, no statute barring the publication by the press of the material which the *Times* and *Post* seek to use." While Justices Stewart and White, stressed that "[I]n the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked instead to perform a function that the Constitution gave to the Executive, not the Judiciary."

But in the Philippines, there is such a statute barring the public disclosure of certain information; to wit, Republic Act 4200. So that the situation would be akin to that in *Snepp v. United States*, where the Court held that the failure of a CIA agent—who had signed a confidentiality agreement with the CIA yet failed to get CIA permission for the publication of his memoirs—even if the government conceded that they divulged no confidential information—created a constructive trust over the proceeds of the publication in favor of the government. If that was so with regard to a general law like contracts, what more a specific enactment such as R.A. 4200.

In any case, the Joint Committee ultimately voted to play the tapes on the insistence of the majority of its members for tactical political reasons. And it did so with the repeated caveat that the Joint Committee was not treating them as authentic, or that their content was true or admissible as evidence for any purpose. It was listening to the tapes merely as part of the narrative of the witnesses who presented the same or as "reference materials." It must be noted that the Joint Committee made no disclaimer to the witnesses about their criminal liability for introducing the tapes or admitting to handling them so that they testified at their peril. Yet, curiously, the government has shown no interest in prosecuting these clear violations of law.

The so called Garci tapes were played in open session. But to what effect this has on the authority of the law has yet to be determined. Fr. Bernas had suggested that it would be more prudent for the tapes to be played in executive session to minimize the legal fallout. Did the playing of the tapes in public by the law-making branch of government effectively create an exception to the blanket prohibition in R.A. 4200 to the use of the products of illegal wiretaps? Do we have here an implicit congressional repeal? Might it be said that the production and playing of the Garci tapes in Congress and by Congress decriminalized the same, so that it can now be authenticated by the admission of those who conducted the wiretap without peril of prosecution? Can the contents of the tapes as captured in the House of Representatives transcripts of stenographic notes be now received in evidence for purposes of congressional proceedings, such as impeachments, or a prosecution for election fraud? Is there a need to reenact the anti-wiretapping law because of what transpired in the joint hearings? Perhaps these questions will get definitive answers when a comprehensive review of the law is finally undertaken in more sober circumstances**.** But to be consistent, the Congress that played admittedly illegal wiretaps should proceed to legislate a legal exception for itself.

The hearings also showed the deficiencies of RA 4200 as a potentially powerful legal tool in the prevention, detection and prosecution of serious crimes.[8] Enacted on 19 June 1965 and never amended

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[6] Excerpts from submission of Dean Pacifico Agabin; For whole text, see Annex D2

[7] Excerpts from submission of Fr. Joaquin Bernas, SJ, see Annex D3

[8] Recommendations herein from the Committee on Public Order and Security

since, the concerns raised during the discussions show that the law needs to be updated to accommodate unanticipated improvements in communications technology, as well as unprecedented political situations, particularly on the following provisions and salient concerns:

1. In Section 1 of RA 4200, the modes of communication that can be open to legitimate wiretapping appear to be limited by the prevailing technology at the time of its enactment – *"…to tap any wire or cable, or by using any other device or arrangement, to secretly overhear, intercept or record such communication or spoken word by using a device commonly known as a dictaphone or dictagraph or dectaphone or walkie-talkie or tape recorder,…"*[9] It could be construed as having failed fatally to anticipate novel technologies and services such as digital or wireless communication. In the strict construction required of penal laws, this shortcoming could favor the accused and prove fatal to a criminal prosecution based even on authorized wiretaps.

   Novel and unanticipated wiretapping technology at the time of the law's enactment might be deemed excluded from the penal law's strictly circumscribed coverage. Still, we are satisfied that, in the present case of the so-called "Garci tapes," the phrases "*any other device or arrangement, to secretly overhear intercept or record"* adequately covers even the new technology by which the Garci tapes may have been made. We can conclude, therefore, that the recording of the same is fully covered by the existing language of the law. Nonetheless, a clearer language covering to both existing and future possible technologies *via an amendment or new law may be called for*; (italics supplied)

2. Section 3 of the same law only specifies a limited range of crimes for which legitimate wiretapping can be sought, to wit,*"… crimes of treason, espionage, provoking war and disloyalty in case of war, piracy, mutiny in the high seas, rebellion, conspiracy, …"*[10] This covers mostly national security offenses. The emergence of organized crime groups that are able to exploit modern digital telecommunications has put law enforcement at a distinct and severe disadvantage. For example, it is virtually impossible to conduct a drug buy-bust operation with cellular phones able to alert the suspects to pull out of a "deal" before police agents can swoop in. The new and eminently portable communications technology has greatly enhanced the ease and impunity with which other serious crimes can be committed.

   An amended law should now include drug trafficking, bank robbery, kidnap-for-ransom, human trafficking, white slavery, child pornography, illegal recruitment, including acts constituting impeachable offenses as some of the crimes which could be covered by a court order authorizing wiretapping.

3. The NBI has denied possessing even the capability to conduct interception and other wiretapping activities. While the ISAFP has admitted that it can tap landlines or land based cable/wire phones, it has likewise denied any capability to wiretap cellular telephones. Both the major telecommunications companies, Globe and Smart, have also denied possessing equipment capable of conducting electronic intercepts or of having allowed at any time in the past the use of their equipment by law enforcement agencies authorized to conduct the same for the prevention or detection of crimes, such as kidnapping.

   It would be frightening to believe the ISAFP's and the NBI's firm assertions of technical impotence in the field of modern surveillance. It would put the country on the watchlist of countries abetting, deliberately or by neglect, organized crime such as drug trafficking and terrorism.

   The Joint Committee believes that the following needs to be done: 1) Congress should make sufficient budgetary allocations to enable law enforcement and national security agencies to conduct modern surveillance and, equally imperative 2) strictly control and monitor the possession, acquisition and use of modern surveillance instruments by these agencies, severely punishing their unauthorized acquisition and use, extending to their publication. It was the sense of Congress in a recent and related piece of legislation, to wit, RA 9160, as amended, The Anti-Money Laundering Law, that one of the most effective ways of protecting the confidentiality of records and communications is to explicitly and severely penalize their disclosure and publication. RA 9160 therefore included the media within the scope of the prohibition and made it liable for the publication of confidential information, with the aim of discouraging the extortion and blackmail of public officials and private persons by media practitioners.[11]

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[9] First paragraph, Section 1, RA 4200

[10] First paragraph, Section 3, RA 4200

[11] See RA 9160, as amended, Section 9(c), Reporting of Covered Transactions

4. R.A. 4200 does not explicitly mandate the cooperation and assistance of telecommunications service providers or other similar private entities equipped with up-to-date equipment and facilities through which electronic surveillance might be conducted.

   Several countries such as the United States, Canada, the United Kingdom, and Puerto Rico, have enacted laws giving legal authority to law enforcement agencies to conduct surveillance and intercept communications, and for that purpose obligating telecommunication carriers to assist in this endeavor, subject to judicial authorization. This is called the "Communications Assistance for Law Enforcement Act" or the CALEA.

   A provision responsive to this issue is included in several proposed bills under deliberation in plenary. The Joint Committee believes and recommends, however, that this specific matter should be further studied. The Committee on Public Order and Security and the Committee on Justice should undertake a comprehensive study and determine whether we need similar legislation in this area.

II. National Security[12]

The Joint Committee was not able to establish that the ISAFP or the NBI were responsible for the Garci tapes which involved cellular phone conversations. Both denied the technical capability to do it. But the Joint Committee uncovered that at least one such equipment — GSM Cellular Phone Interceptors and Transmitters capable of intercepting digital cellular phones — existed in the NBI. On 7 July 2005 Rep. Jesus Crispin Remulla submitted documents showing the acquisition of such equipment in Y2000/2001, thus showing that, at one time, the NBI had it. NBI Director General Wycoco denied the NBI's capability to wiretap "at the moment," though he later qualified his statement by saying that such equipment as the NBI had was, as he put it, a "lemon.[13]"

But, according to the affidavit of NBI Regional Director Carlos Saunar, these particular wiretapping equipment were handed over to Atty. Samuel Ong on 4 July 2001 and on 30 July 2001 or immediately thereafter upon the verbal instructions of Wycoco. Atty. Saunar stated in his affidavit that at the time of turnover to Atty. Ong, the equipment did work. Ong's refusal to appear in person denies Saunar's testimony the corroboration it needs.

The Joint Committee had received information that some of our law enforcement and other intelligence agencies such as the former Presidential Anti-Organized Crime Task Force (PAOCTF) or its spin-off, the current Presidential Anti-Crime and Emergency Response (PACER) do have the capability to intercept communications on digital cellular phones, which are being used for anti-kidnapping and anti-terrorists operations.[14] But it is unable to say with any confidence if the information is true. It may just be a useful fiction intended as a deterrent to the use of cellular phones in crimes.

The Joint Committee is fairly certain that, whatever the condition of the wiretap recordings—original or altered—it was former COMELEC Commissioner Virgilio Garcillano who was the subject of the wiretap and not the other parties he was allegedly conversing with. Only Ong's direct testimony on the manner in which the wiretap was conducted could have established the truth. The closest that the Joint Committee might have come to the truth was by consulting the phone records of the alleged parties to the alleged wiretapped conversations, contemporaneous with the time the same are alleged to have taken place. A legal opinion submitted by Dean Agabin stated that the phone companies could submit these phone records without violating the privacy of the persons involved.[15] But time had run out on the Joint Committee. As Congress prepared to reconvene, the action shifted to the 2005 impeachment proceedings.

Regardless of who was the intended victim of the interception, the Joint Committee is very much concerned that the President of the Philippines and other high officials of the government can be victimized by wiretaps. Such activities can compromise national security, not least by exposing these officials to blackmail and extortion that would, most likely, affect the performance of their duties and subvert their fidelity to the public trust.

There is compelling reason to conduct a review of not only the capabilities of law enforcement agencies to conduct effective surveillance and intercept operations, but also the manner in which classified

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12 Recommendations herein from the Committee on National Defense and Security

13 Refer to pertinent excerpts of Wycoco's testimony above or to the 7 July 2005 TSN

14 See Doble's testimony above

15 See Annex D10

information or intelligence materials are handled and treated. Specifically, the following should be given importance:

1. An audit of existing technological capabilities of law enforcement and national security agencies for wiretapping and other forms of electronic surveillance;

2. The review of how the above handle intelligence material. That the wiretapped material in question, if authentic, may have been leaked, sold and otherwise illegally disclosed, for whatever purpose, underscores the careless, cavalier, not to say criminal fashion in which intelligence material is handled by the military. This is eloquently exemplified by General Quevedo's testimony that although he had heard about the CDs, these did not appear important to them (ISAFP) and were even surprised when the CDs were presented to the media.[16] At the time of his testimony on 13 July 2005, he had not bothered to listen to the CDs.

   Similarly, the NBI averred utter indifference toward what could well be a wiretap of presidential conversations and refused to budge or even consider investigating the provenance of the so called Garci Tapes even after they blossomed into a full-blown political crisis marked by bitter political divisions, as well as shameless dodging of the issues on one hand, and grandstanding on the other.

   Both agencies are hereby reprimanded for their cavalier attitude toward a development that, unchecked, swelled into a national crisis. Even if the so-called Garci tapes had not been authenticated, the fact that it sounded like the President's voice in the wiretapped conversations and the apparent breach in security should have been a cause for grave alarm.

3. In relation to this, there is, too, the case of T/Sgt. Doble, who according to his testimony, was approached by Ong to "own up" to the wiretapping in exchange for two million pesos. This happened in the Imperial Hotel on Timog Avenue, which is highly identified with the entertainment industry. He was, however, contradicted, by his lover, Marietta Santos, who testified that it was, in fact, Doble who sold the tapes to Ong for the said amount in that hotel. Regardless of who was telling the truth, Doble should be held accountable for his actions in this issue. As an officer in the Philippine Air Force, and as an agent of ISAFP, his participation in this drama raises questions about his integrity and conduct. Doble must be held liable for violations of the Articles of War, as amended, specifically Articles 63, 67, 84, 95, and 97 and the AFP Code of Ethics, Sections 1.2 and 2.8 of Article III and Sections 3.1, 4.1.2, 4.1.3 and 4.4.8 of Article V.[17]

4. The Committee on National Defense and Security shall exercise its oversight powers and conduct further investigation into the management of intelligence information. In the matter of the subject tapes, their authenticity should be firmly established or definitively disproved to the extent possible, and their real provenance established, so that if the intelligence agencies are shown to have been involved, the officials concerned should be held accountable.

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16 13 July TSN, pp. 97-98, EHM/XXVIII-1-2

17 Commonwealth Act No. 408, as amended – Articles of War

Article 63. Disrespect toward the President, Vice-President, the Congress of the Philippines or the Secretary of National Defense. – Any Officer who uses contemptuous or disrespectful words against the President, Vice-President, the Congress of the Philippines or the Secretary of National Defense shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

Article 67. – Mutiny or Sedition. – any person subject to military law who attempts to create or who begins, excites, causes or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

Article 84. Military Property – Willful or negligent loss, damage or wrongful disposition. – Any person subject to military law who willingly or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military belonging to the Philippines shall make good the loss or damage and suffer such punishment as a court-martial may direct.

Article 95. Frauds against the Government affecting matters and equipment. - Any person subject to military le who, x x x

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence, stores, money, or other property of the Commonwealth of the Philippines furnished or intended for the military service thereof; or

x x x

Article 97. General article. – Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military disciple and all conduct of a nature to bring discredit upon the military service shall be taken cognizance of by a general or summary court-martial according to the nature and degree of the offense and punished at the discretion of such court.

5. Congress should endeavor to promote and preserve professionalism in the AFP and other national security agencies. Legislation should institutionalize these reforms. Congress, particularly the pertinent committees, should exercise oversight powers more firmly, demand higher standards, and conduct a sharper scrutiny of the appointment and promotion of officers in the AFP and other agencies involved in national security.

III. Technology[18]

Recent years have seen the rapid emergence of new technologies enabling swifter and more effective communications processes and systems. With more than thirty (30) million subscribers, digital cellular phones have become the preferred means of communications because of its ease, versatility, and portability.

While the Joint Committee agrees that unauthorized wiretapping is flatly and universally prohibited by RA 4200, it also recognizes that wiretapping, properly authorized, can be a powerful tool for the detection and prevention of crimes that have been thriving as never before thanks to the technological advances in communications.

The alleged wiretapping of a COMELEC Official and a President, or any other persons for that matter, poses serious concerns about the use of the increasingly sophisticated technology of cellular phone communications. The Committee on Information Communications Technology which has been deliberating on cyber-crime issues has recently approved the proposed "Cyber-Crime Prevention Act of 2005" which aims to promote the development, application and exploitation of information and communications technology. The proposed law at the same time seeks to protect the integrity of wire and wireless computer and communication systems against all manner of abuse, misuse and illegal access. Penalties and sanctions are provided for illegal access and illegal interception of communications systems and networks.

The Committee on Information Communications Technology shall undertake further studies on how the proposed anti-cyber-crime law can complement other legislative proposals intended to rationalize authorized communications interception such as the CALEA. The committee must consider further the deterrent value of increasing the severity of penalties imposed for violations.

IV. The Electoral Process[19]

Nothing strikes harder and deadlier at the life of democracy than the subversion of that singular process by which democracy realizes itself: to wit, the conduct of honest elections. Any serious doubt about the integrity of the electoral process calls into equally severe question the legitimacy of the government that claims to govern by virtue of that electoral process, destabilizes the country, and generates a civil discord impervious to peaceful resolution.

Philippine elections, particularly for the highest office in the land, the Presidency, suffer under the most profound disrepute. It has become conventional wisdom that a presidential challenger must win by an overwhelming majority of the votes to overcome the assumption of a certain amount of institutional fraud favoring the incumbent. In this context, it is virtually impossible to gain a credible mandate in a close election, so that the "winning" party must spend an inordinate amount of time, energy and resources defending his or her "victory" which remains ever in doubt and subject to challenge.

While Philippine elections are often doubted, the Joint Committee hearing was never able to determine how exactly allegedly corrupt COMELEC officials committed fraud in the last election at the alleged behest of the President. The controversy over the alleged wiretap was so tightly and vehemently focused on the tapes' possible provenance, which was never established—and on their contents, which were arguably inadmissible in evidence—that the question was never asked let alone answered whether any fraud actually took place that might be linked to the alleged illegally wiretapped conversations. It was just assumed that the conversations, if true, surely resulted in the commission of election fraud.

The low credibility of Philippine elections is in part the result of corrupt election officials and in part systemic. Thus significant electoral reforms must be institutionalized in the shortest possible time to improve and simplify the process, as well as restore the faith of the voters and political participants in

[18] Recommendations herein from the Committee on Information Communications Technology

[19] Recommendations herein from the Committee on Suffrage and Electoral Reforms

our electoral process. The Committee on Suffrage and Electoral Reforms must *press harder for major reforms* of the current electoral system in the following areas:

1. A thorough analysis of the current electoral system and its present legal framework [20] to determine specific areas where the issues raised during the hearings can be addressed. In particular, Article XXII, Sections 261[21] and 264[22] of the Omnibus Election Code should be revisited to provide stiffer penalties for government officials and officials and employees of the COMELEC who are found guilty of election offenses such as tampering or conniving to tamper with election results.

2. A study should be conducted on how to treat contact between candidates and officers of the COMELEC during election periods. Much of the controversy over the tapes converged on the alleged conversations of the President with a COMELEC Commissioner during the vote counting period. Section 261 does not contain any provision on this subject. Although Section 3 of RA 3019 – Anti Graft and Corrupt Practices Act – criminalizes certain acts, there is no specific provision covering the conduct of candidates and election officials during election periods. Neither does Republic Act 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees, contain a provision covering this situation. A determination should be made on whether or not to criminalize such contact as candidates have the right to protect their votes. We are not certain that a flat-out prohibition would promote clean elections, for that would leave candidates at the mercy of election officials whom they suspect or worse know to be committing election fraud against them.

3. Much of the controversy about election fraud can be attributed to the outdated Philippine election process and system, although West European elections, which have not been questioned in living memory, are conducted in pretty much the same antiquated manual fashion. There have been repeated reform proposals for the automation of elections at every stage, from voter registration to vote count and final tabulation. But the same doubts bedevil these proposals, which are suspected of merely accelerating election fraud by electronic means. At any rate, the existing law on automation, Republic Act no. 8436, has been criticized for being too specific on the equipment without regard to rapidly improving technologies and lower costs. In the process of reviewing RA 8436 and crafting the policies to effect the desired reforms, the following concerns should be taken into consideration:

    a. Accessibility – voters need equipment and systems, whether automated or manual, that are user friendly;

    b. Accuracy – the process by which to count votes and determine the winner must be swift, precise and credible;

    c. Security – ballots or votes cast must be secure, particularly on the transmission of results as this is where fraud almost always takes place;

    d. Accountability – the accuracy of results which underpins the accountability of election officials;

    e. Auditability – the vote count and the vote results must be traceable, backward and forward, so that the integrity of the process can be shown at every stage.

    f. Transparency – the electorate and the citizens in general have to be able to fully observe the electoral process, which is important in providing them with enough information so as to foster the credibility of the system.

    g. Technology neutral – no specific technology should be favored by the law which should adopt the most general language possible on the technology of automation.

    h. Integrity – The electorate during the elections and the public as a whole, the rest of the time, must come to trust in the integrity of the process and accept the results.

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20 Batas Pambansa Blg. 881 (Omnibus Election Code); Republic Act No. 7166 (Synchronized Elections Law); Republic Act No. 6646 (The Electoral Reforms Law of 1987); Republic Act No. 9189 (Overseas Absentee Voting Act of 2003); Republic Act No. 8189 (Voter's Registration Act of 1996); Republic Act No. 7941 (Party-List System Act); Republic Act No. 9006 (Fair Election Act); Republic Act No. 8436 (Automated Election Law)

21 Prohibited Acts (election offenses) in BP Blg. 881

22 Penalties in BP Blg. 881

4. Through legislation and other initiatives, Congress must institutionalize voter education. By this we mean, not personal electoral choices, regarding which it is impertinent to make any suggestion, but with respect to the electoral process itself so that the public are neither misled about the actual integrity of our elections nor become unduly suspicious regarding the same so that they can be misled into questioning and protesting the legitimacy of duly elected governments.

V. Legislative-Executive Cooperation; The Missing Witnesses

The inquiry in aid-of-legislation required the testimonies of former COMELEC Commissioner Garcillano and former NBI Director Samuel Ong as the most crucial resource persons that could shed light into the controversy.

The abovementioned witnesses, who were invited through formal letters and afterwards subpoenaed by the Joint Committee, and even issued a warrant of arrest as in the case of Garcillano, were believed to be the only ones who could address the issues of authenticity and the tapes' criminal or compromising content. But they refused to appear despite the repeated service of summons and what the police alleged were sincerely diligent efforts to find them. The Joint Committee sought the assistance of the Department of Foreign Affairs to verify the flight to foreign parts of COMELEC Commissioner Garcillano.

The ensuing exchange between the Joint Committee and the concerned DFA office and other concerned agencies evinced only a flaccid response from the latter. It was felt that the reluctance of the DFA amounted to deliberate obstruction of justice.

This problem would bedevil the inquiry from start to finish. The cooperation of agencies of the executive branch is essential to effective congressional inquiries; otherwise Congress will be performing functions that pertain only to the executive.

Throughout the hearings, however, no witness from the administration made a single contribution to arriving at the truth. No sincere cooperation was ever extended by the administration to the congressional inquiry, rather, the administration showed an utter disregard, if not disrespect, towards the inquiry-in-aid of legislation conducted by the Lower House. Though some members of the administration appeared in the hearings, nothing substantial was presented to arrive at the truth. Testimonies of witnesses of the administration were expected to shed light in this highly publicized scandal but their evasive answers merely raised more issues and muddled others.

Likewise, the lack of cooperation not to say outright stonewalling of the military was evident when the ISAFP consistently failed to produce the AFP officers invited to testify. Of fourteen invited military men, only three attended and yet provided no substantial information, worse yet expressing a complete lack of concern over the possibility of their Commander-in-Chief being victimized by wiretapping. And on at least one hearing (25 January 2006), military officers refused to attend invoking Executive Order 464. The Joint Committee noted no objections to this invocation which would trigger a full blown and still raging controversy after it was made in the Senate.

With respect to the whereabouts of Garcillano, it was fortunate that information was provided by a very highly placed official of the diplomatic community to then Chairman Gilbert Remulla, stating that a certain Garcillano arrived in Singapore at 10:00 p.m. on 14 July 2005 and departed thence to London. A letter dated 8 September 2005 from Secretary Raul Gonzalez of the Department of Justice to Rep. Remulla contained a *note verbale* from the Singapore Foreign Ministry to the Singapore Philippine Embassy confirming that a certain Garcillano "transited in Singapore on 14 July 2005 onboard a Learjet 35 with registration number RP-C 1426. Mr. Garcillano departed Singapore on 15 July onboard Singapore Airlines Flight SQ 320."[23]

That said, Garcillano did produce both his current and previous passports, and showed them to be clear of any marks indicating foreign travel. The DFA certified that it had issued the passports though the Committee had requested the Bangko Sentral ng Pilipinas (BSP), which is the sole authorized manufacturer of blank passports to shed light on the authenticity of the same.

The Committee has also requested the DOJ to seek more information from the Singapore Foreign Ministry on the details in the *note verbale*, specifically requesting at least a certified true copy of Garcillano's disembarkation card and a copy of airport security videos if available. It did not surprise us that the DOJ requested us to direct our inquiries to the DFA[24] after the DFA in August 2005, told us that

[23] See Annex B27
[24] See Annex B35

it had been required to refer all matters pertaining to Garcillano to the DOJ[25] This was classic buck-passing and verged on obstruction of justice.

Nonetheless, the Joint committee was grateful for small mercies. After all, the DFA did present the *note verbale* which is based on information provided by the Singapore Checkpoints Authority. In an interview reported in a national daily on 16 December 2005, Secretary Gonzalez described Singapore's diplomatic note as *"an impeccable document….indubitable"* and that Garcillano could be held for perjury. As DFA spokesperson Gilberto Asuque puts it, the *note verbale* is "*the primary means of communications between two sovereign nations,*" and that *"both countries appreciate the integrity of a note verbale. We have to stand by its integrity because we ourselves issue notes verbale*."

VI. Conflicting Testimonies

Testimony of Sec. Bunye Being Inconsistent with his Public Pronouncement

During his testimony, Sec. Bunye, under oath, said that he "was not sure whether or not the voice in the CDs was that of the President."[26] This is totally different from what he said during his June 6 press conference; to wit that the President was illegally wiretapped, the conversation was spliced, and that it was the President's voice.

The kindest construction of the Press Secretary's equivocation is that he was confused if not panicky. But the Joint Committee does not subscribe to the view that his opinion on this score, though it oscillated wildly, binds the President and constitutes a legal admission on her part under the doctrine of alter ego. The doctrine is limited to official acts of a cabinet official, excluding suppositions about a matter beyond his competence and personal knowledge.

But Bunye contradicted himself in the matter of playing the tapes before the Malacañang press corps. In his 21 June testimony he said that he did not initiate the playing of the tapes; that *"…the members of the Malacañang press corps were very insistent that they at least hear the …the tapes prior to my sending them to the National Bureau of Investigation*;" that he played the tapes *"(A)t the insistence of the Malacañang Press Corps,*…"[27] (italics supplied)

But on 22 June, upon the direct questioning of Rep. Emilio Macias II, who said that some reporters denied having insisted Bunye play the tapes for them but rather that Bunye offered to play the tapes, Bunye admitted that he was the one who initiated the playing of the tapes for the Press Corps.[28]

This matter of whether Bunye initiated the tape-playing or at the prompting of the reporters is a trivial one. The media can confuse any but the most hardened public official. What cannot be dismissed and indeed verges on the contemptible is Bunye's insistence that the two CDs he presented to the Palace press corps—one of them apparently doctored to discredit the other—came into his possession anonymously by an incredibly circuitous route. This is so unbelievable that only another person, former Sen. Francisco Tatad, similarly hard put to explain how his tapes came into his possession, would offer the same preposterous explanation. The tapes/CDs in their possession were purportedly delivered in unmarked envelopes to their respective residences by persons whose faces no one in their homes could recall or, for that matter, even noticed. Tatad would add that he later submitted (improperly not to say illegally) the tapes for authentication to a lawyer who, by a baffling coincidence, would turn out to be the counsel of Atty. Samuel Ong who would publicly declare that it was he who procured the illegal tapes in the first place. This circuitry of circumstances beggars belief.

But Bunye is an incumbent public official, and Tatad merely a former one. As spokesperson of the President, he presumably speaks only the truth in her name and nothing else to cover up ignorance or wrongdoing.

The Constitution provides that: "*Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives*." [29] (italics supplied)

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25 See Annex B26

26 22 June 2005 TSN, p. 132, GCC/XXXIII-2; p. p. 59, TMR/XV-3; p. 70, , DTMD/XVIII-3p. 93, MTGA/XXV-3; p. 99, APM/XXVII-1; and 21 June 2005, p. 98-99, LCLV/XXVIII-2-3; p. 100, APM/XXIX-1

27 21 June 2005 TSN, p. 103/CAB/XXX-1

28 22 June 2005 TSN, pp. 129-130, ESB/XXXII-3-4

29 Section 1, Article 11 of the 1987 Constitution

Even a Press Secretary may not use his office to conceal the truth or mislead the public. The Joint Committee recommends that the appropriate Committee be tasked to consider a special law to prohibit and penalize public officials for deliberately misleading statements even in cases that do not constitute perjury.

VII. The Opposition as Destabilizers; The Tale of the Tapes

The brunt of Minority Floor Leader, Rep. Francis Escudero's privilege speech was that the government was unfairly blaming the opposition in the House for the illegal wiretaps, their disclosure and the resulting political instability.

The opposition repeatedly denied that it had or could have had anything to do with the so-called Garci tapes and the resulting instability. Nothing said in the joint hearings belied its claim of innocence, not to say inutility, particularly when the government itself denied referring to the opposition in the House.[30]

It cannot be denied that former Senator Tatad belongs to the opposition. Mr. Tatad admitted that he gave Atty. Paguia the two audiocassette tapes from which Paguia's 32-minute CDs were copied. Mr. Tatad has also stated his view that the Arroyo government is illegitimate.

It is therefore difficult to escape the conclusion that this so-called wiretap tapes, whether genuine in whole or in part, or completely fabricated, could have just materialized out of thin air and fallen fortuitously on the laps of the persons who brought them to public attention. Indeed, there is compelling reason to believe that, if not their production, then certainly their acquisition and subsequent publication were actively sought and were components of a plan involving several persons and considerable financial resources, with the aim of embarrassing the President into leaving office or, failing that, toppling the government by the political mass action generated by the scandal. Who were the persons involved, the Joint Committee cannot say; almost everyone who passionately invoked the tapes as authentic was even more vehement in denying any knowledge that could prove its authenticity or having had anything to do with the tapes.

While it is unfair if not impossible to require proof of a negative—to wit, that the alleged conversations in the so-called Garci tapes did *not* take place—on the contrary, the President confessed and apologized that conversations, not necessarily the same, took place between herself and a COMELEC official—Malacañang was clearly at an utter loss to explain the tapes and, on at least one occasion, attempted a cover up.

This was when the Press Secretary's claimed that of the two CDs he purportedly received from an anonymous source, one was original and the other tampered with. This only raised more issues and answered none. How did he know which was which? He later said he had relied on the labels of the CDs, one saying it was fake and the other genuine. But why would anyone send out a pair of contrasting tapes, one self-admittedly a fake and the other claiming to be a true reproduction? And why would Bunye rely on the labels? Was he adopting the labels as true? He appeared to have done so, claiming that one tape contained the President's voice. But he later disowned his own statement.[31]

In sum, on the one hand, a conspiracy clearly existed to topple the President by embarrassing her with the so-called Garci tapes; on the other hand, the administration could not and would not confront the tapes, contributed nothing towards arriving at the truth about them but on the contrary attempted a cover-up.

But whatever the reasons for the appearance of these tapes and CDs, it is necessary to look at the larger picture of the quality of the democratic exercise in the Philippines. It is heartening to note that the public, despite its profound skepticism regarding public officials and official action, preferred to tune in to official and established venues such as a Congressional inquiry to arrive at the truth, and thereby stayed off the streets into which reckless political elements sought to take the controversy. But it cannot be gainsaid that the spirit of faction has attained a degree of virulence with which the present political system can barely cope.

Much has been said about the tapes. Arguments and counter arguments were put forward, particularly on its admissibility as evidence in this or that forum. Yet RA 4200 is clear: the tapes and their contents are inadmissible for any purpose in any forum whatsoever. Nevertheless, the tapes are there, they were

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[30] See Bunye and Wycoco testimonies: 22 June 2005 TSN, p. 98, LCLV/XXVI-4, P. 124, TJAS/XXXI-1; 23 June 2005 TSN, p. 23, NAB/VI-4; p. 24, MTGA/VII-1
Ibid, p. 34, CAB/X-1

[31] 22 June 2005 TSN; , p. 125, TJAS/XXXI-2

massively reproduced, and they were played in a formal congressional hearing before the nation—with what legal effect on the law itself remains to be seen.

The question of authenticity can only be answered when the person or entity responsible for the alleged wiretaps admits to the act and identifies the tapes or the conversations in them as those that were intercepted, or when the persons who engaged in the conversations admit to them, as the President may have done in her public apology on 27 June 2005.

The repeal of R.A. 4200 will retroactively decriminalize the illegal wiretaps, if such they were rather than wholesale fabrications, and may produce the key testimony on this score. At this point, the Joint Committee does not anticipate that any individual or entity will admit to it. What remains to be done is the authentication of the tapes by a credible body, local or foreign, which could at least inform Congress as to what the latest forensic science can confidently say about them.

Finally, the Joint Committee urges the immediate adoption of this report and that the appropriate Committees of the House of Representatives and appropriate agencies and entities be provided with copy thereof and undertake immediate action on the recommendations.

Respectfully submitted:

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