

EN BANC

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

B/GEN. (RET.) FRANCISCO V. GUDANI AND LT. COL. ALEXANDER F. BALUTAN PETITIONERS, VS. LT./GEN. GENEROSO S. SENGAS AS CHIEF OF STAFF OF THE ARMED FORCES OF THE PHILIPPINES, COL. GILBERTO JOSE C. ROA AS THE PRE-TRIAL INVESTIGATING OFFICER, THE PROVOST MARSHALL GENERAL OF THE ARMED FORCES OF THE PHILIPPINES AND THE GENERAL COURT-MARTIAL, RESPONDENTS.

D E C I S I O N

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 Iriberry 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 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[r]ticles 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 coured 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 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