Republic of the Philippines
Supreme Court
Manila

EN BANC

ROMULO L. NERI, Petitioner, - versus - **SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS, SENATE COMMITTEE ON TRADE AND COMMERCE, AND SENATE COMMITTEE ON NATIONAL DEFENSE AND SECURITY**, Respondents.	**G.R. No. 180643** **Present:** PUNO, *C.J.*, QUISUMBING, YNARES-SANTIAGO, CARPIO, AUSTRIA-MARTINEZ, CORONA, CARPIO MORALES, AZCUNA, TINGA, CHICO-NAZARIO, VELASCO, JR., NACHURA, REYES, LEONARDO-DE CASTRO, and BRION, *JJ.* **Promulgated:** March 25, 2008

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DECISION

LEONARDO-DE CASTRO*, J.*:

At bar is a petition for *certiorari* under Rule 65 of the Rules of Court assailing the show cause **Letter**[1] dated November 22, 2007 and contempt**Order**[2] dated January 30, 2008 concurrently issued by respondent

Senate Committees on Accountability of Public Officers and Investigations,[3] Trade and Commerce,[4] and National Defense and Security[5] against petitioner Romulo L. Neri, former Director General of the National Economic and Development Authority (NEDA).

The facts, as culled from the pleadings, are as follows:

On April 21, 2007, the Department of Transportation and Communication (DOTC) entered into a contract with Zhong Xing Telecommunications Equipment (ZTE) for the supply of equipment and services for the National Broadband Network (NBN) Project in the amount of U.S. $ 329,481,290 (approximately ₱16 Billion Pesos). The Project was to be financed by the People's Republic of China.

In connection with this NBN Project, various Resolutions were introduced in the Senate, as follows:

> **(1) P.S. Res. No. 127**, introduced by Senator Aquilino Q. Pimentel, Jr., entitled RESOLUTION DIRECTING THE BLUE RIBBON COMMITTEE AND THE COMMITTEE ON TRADE AND INDUSTRY TO INVESTIGATE, IN AID OF LEGISLATION, THE CIRCUMSTANCES LEADING TO THE APPROVAL OF THE BROADBAND CONTRACT WITH ZTE AND THE ROLE PLAYED BY THE OFFICIALS CONCERNED IN GETTING IT CONSUMMATED AND TO MAKE RECOMMENDATIONS TO HALE TO THE COURTS OF LAW THE PERSONS RESPONSIBLE FOR ANY ANOMALY IN CONNECTION THEREWITH AND TO PLUG THE LOOPHOLES, IF ANY IN THE BOT LAW AND OTHER PERTINENT LEGISLATIONS.
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> **(2) P.S. Res. No. 144**, introduced by Senator Mar Roxas, entitled Á RESOLUTION URGING PRESIDENT GLORIA MACAPAGAL ARROYO TO DIRECT THE CANCELLATION OF THE ZTE CONTRACT
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> **(3) P.S. Res. No. 129**, introduced by Senator Panfilo M. Lacson, entitled RESOLUTION DIRECTING THE COMMITTEE ON NATIONAL DEFENSE AND SECURITY TO CONDUCT AN INQUIRY IN AID OF LEGISLATION INTO THE NATIONAL SECURITY IMPLICATIONS OF AWARDING THE NATIONAL BROADBAND NETWORK CONTRACT TO THE CHINESE FIRM

ZHONG XING TELECOMMUNICATIONS EQUIPMENT COMPANY LIMITED (ZTE CORPORATION) WITH THE END IN VIEW OF PROVIDING REMEDIAL LEGISLATION THAT WILL PROTECT OUR NATIONAL SOVEREIGNTY, SECURITY AND TERRITORIAL INTEGRITY.

(4) P.S. Res. No. 136, introduced by Senator Miriam Defensor Santiago, entitled RESOLUTION DIRECTING THE PROPER SENATE COMMITTEE TO CONDUCT AN INQUIRY, IN AID OF LEGISLATION, ON THE LEGAL AND ECONOMIC JUSTIFICATION OF THE NATIONAL BROADBAND NETWORK (NBN) PROJECT OF THE NATIONAL GOVERNMENT.

At the same time, the investigation was claimed to be relevant to the consideration of three (3) pending bills in the Senate, to wit:

1. **Senate Bill No. 1793**, introduced by Senator Mar Roxas, entitled AN ACT SUBJECTING TREATIES, INTERNATIONAL OR EXECUTIVE AGREEMENTS INVOLVING FUNDING IN THE PROCUREMENT OF INFRASTRUCTURE PROJECTS, GOODS, AND CONSULTING SERVICES TO BE INCLUDED IN THE SCOPE AND APPLICATION OF PHILIPPINE PROCUREMENT LAWS, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 9184, OTHERWISE KNOWN AS THE GOVERNMENT PROCUREMENT REFORM ACT, AND FOR OTHER PURPOSES;

2. **Senate Bill No. 1794**, introduced by Senator Mar Roxas, entitled AN ACT IMPOSING SAFEGUARDS IN CONTRACTING LOANS CLASSIFIED AS OFFICIAL DEVELOPMENT ASSISTANCE, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 8182, AS AMENDED BY REPUBLIC ACT NO. 8555, OTHERWISE KNOWN AS THE OFFICIAL DEVELOPMENT ASSISTANCE ACT OF 1996, AND FOR OTHER PURPOSES; and

3. **Senate Bill No. 1317**, introduced by Senator Miriam Defensor Santiago, entitled AN ACT MANDATING CONCURRENCE TO INTERNATIONAL AGREEMENTS AND EXECUTIVE AGREEMENTS.

Respondent Committees initiated the investigation by sending invitations to certain personalities and cabinet officials involved in the NBN Project. Petitioner was among those invited. He was summoned to appear and testify on September 18, 20, and 26 and October

25, 2007. However, he attended only the September 26 hearing, claiming he was "out of town" during the other dates.

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

On September 26, 2007, petitioner testified before respondent Committees for eleven (11) hours. He disclosed that then Commission on Elections (COMELEC) Chairman Benjamin Abalos offered him ₱200 Million in exchange for his approval of the NBN Project. He further narrated that he informed President Arroyo about the bribery attempt and that she instructed him not to accept the bribe. However, when probed further on what they discussed about the NBN Project, petitioner refused to answer, invoking "executive privilege". In particular, he refused to answer the questions on **(a)** whether or not President Arroyo followed up the NBN Project,[6] **(b)** whether or not she directed him to prioritize it,[7] and **(c)** whether or not she directed him to approve.[8]

Unrelenting, respondent Committees issued a *Subpoena Ad Testificandum* to petitioner, requiring him to appear and testify on November 20, 2007.

However, in the Letter dated November 15, 2007, Executive Secretary Eduardo R. Ermita requested respondent Committees to dispense with petitioner's testimony on the ground of executive privilege. The pertinent portion of the letter reads:

> With reference to the *subpoena ad testificandum* issued to Secretary Romulo Neri to appear and testify again on 20 November 2007 before the Joint Committees you chair, it will be recalled that Sec. Neri had already testified and exhaustively discussed the ZTE / NBN project,

including his conversation with the President thereon last 26 September 2007.

Asked to elaborate further on his conversation with the President, Sec. Neri asked for time to consult with his superiors in line with the ruling of the Supreme Court in *Senate v. Ermita*, 488 SCRA 1 (2006).

Specifically, Sec. Neri sought guidance on the possible invocation of executive privilege on the following questions, to wit:

a) Whether the President followed up the (NBN) project?
b) Were you dictated to prioritize the ZTE?
c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?

Following the ruling in *Senate v. Ermita*, the foregoing questions fall under conversations and correspondence between the President and public officials which are considered executive privilege (*Almonte v. Vasquez*, G.R. 95637, 23 May 1995; *Chavez v. PEA*, G.R. 133250, July 9, 2002). Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision making process. The expectation of a President to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

In light of the above considerations, this Office is constrained to invoke the settled doctrine of executive privilege as refined in *Senate v. Ermita*, and has advised Secretary Neri accordingly.

Considering that Sec. Neri has been lengthily interrogated on the subject in an unprecedented 11-hour hearing, wherein he has answered all questions propounded to him except the foregoing questions involving

> executive privilege, we therefore request that his testimony on 20 November 2007 on the ZTE / NBN project be dispensed with.

On November 20, 2007, petitioner did not appear before respondent Committees. Thus, on November 22, 2007, the latter issued the show cause **Letter** requiring him to explain why he should not be cited in contempt. The Letter reads:

> Since you have failed to appear in the said hearing, the Committees on Accountability of Public Officers and Investigations (Blue Ribbon), Trade and Commerce and National Defense and Security require you to show cause why you should not be cited in contempt under Section 6, Article 6 of the Rules of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon).
>
> The Senate expects your explanation on or before 2 December 2007.

On November 29, 2007, petitioner replied to respondent Committees, manifesting that it was not his intention to ignore the Senate hearing and that he thought the only remaining questions were those he claimed to be covered by executive privilege, thus:

> It was not my intention to snub the last Senate hearing. In fact, I have cooperated with the task of the Senate in its inquiry in aid of legislation as shown by my almost 11 hours stay during the hearing on 26 September 2007. During said hearing, I answered all the questions that were asked of me, save for those which I thought was covered by executive privilege, and which was confirmed by the Executive Secretary in his Letter 15 November 2007. In good faith, after that exhaustive testimony, I thought that what remained were only the three questions, where the Executive Secretary claimed executive privilege. Hence, his request that my presence be dispensed with.
>
> Be that as it may, should there be new matters that were not yet taken up during the 26 September 2007 hearing, may I be furnished in advance as to what else I need to clarify, so that as a resource person, I may adequately prepare myself.

In addition, petitioner submitted a letter prepared by his counsel, Atty. Antonio R. Bautista, stating, among others that: **(1)** his (petitioner) non-appearance wasupon the order of the President; and **(2)** his conversation with

President Arroyo dealt with delicate and sensitive national security and diplomatic matters relating to the impact of the bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines. The letter ended with a reiteration of petitioner's request that he "be furnished in advance" as to what else he needs to clarify so that he may adequately prepare for the hearing.

In the interim, on December 7, 2007, petitioner filed with this Court the present petition for *certiorari* assailing the show cause **Letter** dated November 22, 2007.

Respondent Committees found petitioner's explanations unsatisfactory. Without responding to his request for advance notice of the matters that he should still clarify, they issued the **Order** dated January 30, 2008, citing him in contempt of respondent Committees and ordering his arrest and detention at the Office of the Senate Sergeant-At-Arms until such time that he would appear and give his testimony. The said Order states:

ORDER

> For failure to appear and testify in the Committee's hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007; and Tuesday, November 20, 2007, despite personal notice and Subpoenas Ad Testificandum sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007), herein attached) **ROMULO L. NERI is hereby cited in contempt of this (sic) Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.**
>
> The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make a return hereof within twenty four (24) hours from its enforcement.
>
> **SO ORDERED.**

On the same date, petitioner moved for the reconsideration of the above Order.[9] He insisted that he has not shown "any contemptible conduct worthy of contempt and arrest." He emphasized his willingness to

testify on new matters, however, respondent Committees did not respond to his request for advance notice of questions. He also mentioned the petition for *certiorari* he filed on December 7, 2007. According to him, this should restrain respondent Committees from enforcing the show cause **Letter** "through the issuance of declaration of contempt" and arrest.

In view of respondent Committees' issuance of the contempt **Order**, petitioner filed on February 1, 2008 a *Supplemental Petition for Certiorari (With Urgent Application for TRO/Preliminary Injunction),* seeking to restrain the implementation of the said contempt **Order**.

On February 5, 2008, the Court issued a *Status Quo Ante Order* **(a)** enjoining respondent Committees from implementing their *contempt Order*, **(b)**requiring the parties to observe the *status quo* prevailing prior to the issuance of the assailed order, and **(c)** requiring respondent Committees to file their comment.

Petitioner contends that respondent Committees' show cause **Letter** and contempt **Order** were issued with grave abuse of discretion amounting to lack or excess of jurisdiction. He stresses that his conversations with President Arroyo are "**candid discussions meant to explore options in making policy decisions**." According to him, these discussions "**dwelt on the impact of the bribery scandal involving high government officials on the country's diplomatic relations and economic and military affairs and the possible loss of confidence of foreign investors and lenders in the Philippines**." He also emphasizes that his claim of executive privilege is upon the order of the President and within the parameters laid down in *Senate v. Ermita*[10] and *United States v. Reynolds.*[11] Lastly, he argues that he is precluded from disclosing communications made to him in official confidence under Section 7[12] of Republic Act No. 6713, otherwise known as *Code of Conduct and Ethical Standards for Public Officials and Employees*, and Section 24[13] (e) of Rule 130 of the Rules of Court.

Respondent Committees assert the contrary. They argue that **(1)** petitioner's testimony is material and pertinent in the investigation conducted *in aid of legislation*; **(2)** there is no valid justification for petitioner to claim executive privilege; **(3)** there is no abuse of their authority to order petitioner's arrest; and **(4)**petitioner has not come to court with clean hands.

In the oral argument held last March 4, 2008, the following issues were ventilated:

1. What communications between the President and petitioner Neri are covered by the principle of 'executive privilege'?

1.a Did Executive Secretary Ermita correctly invoke the principle of executive privilege, by order of the President, to cover **(i)** conversations of the President in the exercise of her executive and policy decision-making and **(ii)** information, which might impair our diplomatic as well as economic relations with the People's Republic of China?

1.b. Did petitioner Neri correctly invoke executive privilege to avoid testifying on his conversations with the President on the NBN contract on his assertions that the said conversations**"dealt with delicate and sensitive national security and diplomatic matters relating to the impact of bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines"** x x x within the principles laid down in *Senate v. Ermita* (488 SCRA 1 [2006])?

1.c Will the claim of executive privilege in this case violate the following provisions of the Constitution:

Sec. 28, Art. II (Full public disclosure of all transactions involving public interest)

Sec. 7, Art. III (The right of the people to information on matters of public concern)

Sec. 1, Art. XI (Public office is a public trust)

Sec. 17, Art. VII (The President shall ensure that the laws be faithfully executed)

and the due process clause and the principle of separation of powers?

2. What is the proper procedure to be followed in invoking executive privilege?

3. Did the Senate Committees gravely abuse their discretion in ordering the arrest of petitioner for non-compliance with the subpoena?

After the oral argument, the parties were directed to manifest to the Court within twenty-four (24) hours if they are amenable to the Court's proposal of allowing petitioner to immediately resume his testimony before the Senate Committees to answer the other questions of the Senators without prejudice to the decision on the merits of this pending petition. It was understood that petitioner may invoke executive privilege in the course of the Senate Committees proceedings, and if the respondent Committees disagree thereto, the unanswered questions will be the subject of a supplemental pleading to be resolved along with the three (3) questions subject of the present petition.[14] At the same time, respondent Committees were directed to submit several pertinent documents.[15]

The Senate did not agree with the proposal for the reasons stated in the Manifestation dated March 5, 2008. As to the required documents, the Senate and respondent Committees manifested that they would not be able to submit the latter's "Minutes of all meetings" and the "Minute Book" because it has never been the "historical and traditional legislative practice to keep them."[16] They instead submitted the Transcript of Stenographic Notes of respondent Committees' joint public hearings.

On March 17, 2008, the Office of the Solicitor General (OSG) filed a *Motion for Leave to Intervene and to Admit Attached Memorandum,* founded on the following arguments:

(1) The communications between petitioner and the President are covered by the principle of "executive privilege."

(2) Petitioner was not summoned by respondent Senate Committees in accordance with the law-making body's power to conduct inquiries in aid of legislation as laid down in Section 21, Article VI of the Constitution and *Senate v. Ermita.*

(3) Respondent Senate Committees gravely abused its discretion for alleged non-compliance with the *Subpoena* dated November 13, 2007.

The Court granted the OSG's motion the next day, March 18, 2008.

As the foregoing facts unfold, related events transpired.

On March 6, 2008, President Arroyo issued Memorandum Circular No. 151, revoking Executive Order No. 464 and Memorandum Circular No. 108. She advised executive officials and employees to follow and abide by the Constitution, existing laws and jurisprudence, including, among others, the case of *Senate v. Ermita*[17] when they are invited to legislative inquiries *in aid of legislation*.

At the core of this controversy are the two (2) crucial queries, to wit:

First, are the communications elicited by the subject three (3) questions covered by executive privilege?

And ***second,*** did respondent Committees commit grave abuse of discretion in issuing the contempt **Order?**

We grant the petition.

At the outset, a glimpse at the landmark case of *Senate v. Ermita*[18] becomes imperative. *Senate* draws in bold strokes the distinction between the **legislative**and **oversight** powers of the Congress, as embodied under Sections 21 and 22, respectively, of Article VI of the Constitution, to wit:

> **SECTION 21.** The Senate or the House of Representatives or any of its respective committees may conduct inquiries **in aid of legislation** in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

> **SECTION 22.** The heads of department may upon their own initiative, with the consent of the President, or upon the request of either House, or as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the state or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.

Senate cautions that while the above provisions are closely related and complementary to each other, they should not be considered as pertaining to the same power of Congress. Section 21 relates to the power to conduct inquiries *in aid of legislation*. Its aim is to elicit information that may be used for legislation. On the other hand, Section 22 pertains to the power to conduct a question hour, the objective of which is to obtain information in pursuit of Congress' oversight function.[19] Simply stated, while both powers allow Congress or any of its committees to conduct inquiry, their **objectives** are different.

This distinction gives birth to another distinction with regard to the use of compulsory process. Unlike in Section 21, Congress **cannot** compel the appearance of executive officials under Section 22. The Court's pronouncement in *Senate v. Ermita*[20] is clear:

> When Congress merely seeks to be informed on how department heads are implementing the statutes which it has issued, its right to such information is not as imperative as that of the President to whom, as Chief Executive, such department heads must give a report of their performance as a matter of duty. In such instances, Section 22, in keeping with the separation of powers, states that Congress may only *request* their appearance. Nonetheless, when the inquiry in which Congress requires their appearance is 'in aid of legislation' under Section 21, the appearance is *mandatory* for the same reasons stated in *Arnault.*
>
> **In fine, the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in**

pursuit of legislation. This is consistent with the intent discerned from the deliberations of the Constitutional Commission

> Ultimately, the power of Congress to compel the appearance of executive officials under section 21 and the lack of it under Section 22 find their basis in the principle of separation of powers. While the executive branch is a co-equal branch of the legislature, it cannot frustrate the power of Congress to legislate by refusing to comply with its demands for information. (Emphasis supplied.)

The availability of the power of judicial review to resolve the issues raised in this case has also been settled in *Senate v. Ermita,* when it held:

> As evidenced by the American experience during the so-called "McCarthy era," however, the right of Congress to conduct inquiries 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.

Hence, this decision.

I
The Communications Elicited by the Three (3) Questions are Covered by Executive Privilege

We start with the basic premises where the parties have conceded.

The power of Congress to conduct inquiries *in aid of legislation* is broad. This is based on the proposition that a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.[21] Inevitably, adjunct thereto is the compulsory process to enforce it. But, the power, broad as it is, has limitations. To be valid, it is imperative that it is done in accordance with the Senate or House duly published rules of procedure and that the rights of the persons appearing in or affected by such inquiries be respected.

The power extends even to executive officials and the only way for them to be exempted is through a valid claim of executive privilege.[22] This directs us to the consideration of the question **-- is there a recognized claim of executive privilege despite the revocation of E.O. 464?**

A- ***There is a Recognized Claim of Executive Privilege Despite the Revocation of E.O. 464***

At this juncture, it must be stressed that the revocation of E.O. 464 does not in any way diminish our concept of executive privilege. This is because this concept has Constitutional underpinnings. Unlike the United States which has further accorded the concept with statutory status by enacting the *Freedom of Information Act*[23] and the *Federal Advisory Committee Act*,[24] the Philippines has retained its constitutional origination, occasionally interpreted only by this Court in various cases. The most recent of these is the case of *Senate v. Ermita* where this Court declared unconstitutional substantial portions of E.O. 464. In this regard, it is worthy to note that Executive Ermita's Letter dated November 15, 2007 limits its bases for the claim of executive privilege to *Senate v. Ermita, Almonte v. Vasquez*,[25] and *Chavez v. PEA*.[26] There was never a mention of E.O. 464.

While these cases, especially *Senate v. Ermita*,[27] have comprehensively discussed the concept of executive privilege, we deem it imperative to explore it once more in view of the clamor for this Court to clearly define the communications covered by executive privilege.

The *Nixon* and *post-Watergate cases* established the broad contours of the **presidential communications privilege**.[28] In *United States v. Nixon*,[29] theU.S. Court recognized a great public interest in

preserving **"the confidentiality of conversations that take place in the President's performance of his official duties."** It thus considered presidential communications as "**presumptively privileged**." Apparently, the presumption is founded on the "**President's generalized interest in confidentiality**." The privilege is said to be necessary to guarantee the candor of presidential advisors and to provide "**the President and those who assist him… with freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."**

In *In Re: Sealed Case,*[30] the U.S. Court of Appeals delved deeper. It ruled that there are two (2) kinds of executive privilege; one is the **presidential communications privilege** and, the other is the **deliberative process privilege**. The former pertains to **"communications, documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential."** The latter includes **'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."**

Accordingly, they are characterized by marked distinctions. **Presidential communications privilege** applies to **decision-making of the President** while, the **deliberative process privilege**, to **decision-making of executive officials**. The **first** is rooted in the constitutional principle of separation of power and the President's unique constitutional role; the **second** on common law privilege. Unlike the **deliberative process privilege**, the **presidential communications privilege** applies **to documents in their entirety, and covers final and post-decisional**

materials as well as pre-deliberative ones[31] As a consequence, congressional or judicial negation of the **presidential communications privilege** is always subject to greater scrutiny than denial of the **deliberative process privilege**.

Turning on who are the officials covered by the **presidential communications privilege**, *In Re: Sealed Case* confines the privilege only to White House Staff that has "operational proximity" to direct presidential decision-making. Thus, the privilege is meant to encompass only those functions that form the core of presidential authority, involving what the court characterized as "quintessential and non-delegable Presidential power," such as commander-in-chief power, appointment and removal power, the power to grant pardons and reprieves, the sole-authority to receive ambassadors and other public officers, the power to negotiate treaties, etc.[32]

The situation in *Judicial Watch, Inc. v. Department of Justice*[33] tested the *In Re: Sealed Case* principles. There, while the presidential decision involved is the exercise of the President's pardon power, a non-delegable, core-presidential function, the Deputy Attorney General and the Pardon Attorney were deemed to be too remote from the President and his senior White House advisors to be protected. The Court conceded that functionally those officials were performing a task directly related to the President's pardon power, but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from the *In Re: Sealed Case's* functional test. The majority concluded that, the lesser protections of the deliberative process privilege would suffice. That privilege was, however, found insufficient to justify the confidentiality of the 4,341 withheld documents.

But more specific classifications of communications covered by executive privilege are made in older cases. Courts ruled early that the Executive has a right to withhold documents that might reveal **military or state secrets,**[34] **identity of government informers in some circumstances,**[35] and **information related to pending investigations**.[36] An area where the privilege is highly revered is in **foreign relations**. In *United States v. Curtiss-Wright Export Corp.*[37] the U.S. Court, citing President George Washington, pronounced:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

Majority of the above jurisprudence have found their way in our jurisdiction. In *Chavez v. PCGG*[38], this Court held that there is a "governmental privilege against public disclosure with respect to state secrets regarding military, diplomatic and other security matters." In *Chavez v. PEA*,[39] there is also a recognition of the confidentiality of Presidential conversations, correspondences, and discussions in closed-door Cabinet meetings. In *Senate v. Ermita*, the concept of**presidential communications privilege** is fully discussed.

As may be gleaned from the above discussion, the claim of executive privilege is highly recognized in cases where the subject of inquiry relates to

a power textually committed by the Constitution to the President, such as the area of military and foreign relations. Under our Constitution, the President is the repository of the commander-in-chief,[40] appointing,[41] pardoning,[42] and diplomatic[43] powers. Consistent with the doctrine of separation of powers, the information relating to these powers may enjoy greater confidentiality than others.

The above cases, especially, *Nixon*, *In Re Sealed Case* and *Judicial Watch*, somehow provide the elements of **presidential communications privilege**, to wit:

1) The protected communication must relate to a "quintessential and non-delegable presidential power."

2) The communication must be authored or "solicited and received" by a close advisor of the President or the President himself. The judicial test is that an advisor must be in "operational proximity" with the President.

3) The **presidential communications privilege** remains a qualified privilege that may be overcome by a showing of adequate need, such that the information sought "likely contains important evidence" and by the unavailability of the information elsewhere by an appropriate investigating authority.[44]

In the case at bar, Executive Secretary Ermita premised his claim of executive privilege on the ground that the communications elicited by the three (3) questions "fall under conversation and correspondence between the President and public officials" necessary in "her executive and policy decision-making process" and, that "the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China." Simply put, the bases are**presidential communications privilege** and executive privilege on matters relating to **diplomacy or foreign relations**.

Using the above elements, we are convinced that, indeed, the communications elicited by the three (3) questions are covered by the **presidential communications privilege**. ***First***, the communications relate to a "quintessential and non-delegable power" of the President, i.e. the power to enter into an executive agreement with other countries. This authority of the President to enter into *executive agreements* without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence.[45] ***Second,*** the communications are "received" by a close advisor of the President. Under the "operational proximity" test, petitioner can be considered a close advisor, being a member of President Arroyo's cabinet. *And* ***third***, there is no adequate showing of a compelling need that would justify the limitation of the privilege and of the **unavailability** of the information elsewhere by an appropriate investigating authority.

The third element deserves a lengthy discussion.

United States v. Nixon held that a claim of executive privilege is subject to **balancing against other interest.** In other words, confidentiality in executive privilege is **not absolutely** protected by the Constitution. The U.S. Court held:

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.

The foregoing is consistent with the earlier case of *Nixon v. Sirica,*[46] where it was held that **presidential communications** are presumptively privileged and that the presumption can be overcome only by mere showing of public need by the branch seeking access to conversations. The courts are enjoined to resolve the competing interests of the political branches of the government "in the manner that preserves the essential functions of each Branch."[47] Here, the record is bereft of any categorical explanation from respondent Committees to show a compelling or citical

need for the answers to the three (3) questions in the enactment of a law. Instead, the questions veer more towards the exercise of the legislative oversight function under Section 22 of Article VI rather than Section 21 of the same Article. *Senate v. Ermita* ruled that the **"the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation."** It is conceded that it is difficult to draw the line between an inquiry *in aid of legislation* and an inquiry in the exercise of oversight function of Congress. In this regard, much will depend on the content of the questions and the manner the inquiry is conducted.

Respondent Committees argue that a claim of executive privilege does not guard against a possible disclosure of a crime or wrongdoing. We see no dispute on this. It is settled in *United States v. Nixon*[48] that "demonstrated, specific need for evidence in **pending criminal trial**" outweighs the President's "generalized interest in confidentiality." However, the present case's distinction with the *Nixon* case is very evident. In *Nixon*, there is a pending criminal proceeding where the information is requested and it is the demands of due process of law and the fair administration of criminal justice that the information be disclosed. This is the reason why the U.S. Court was quick to "**limit the scope of its decision.**" It stressed that it is **"not concerned here with the balance between the President's generalized interest in confidentiality x x x and congressional demands for information."** Unlike in *Nixon*, the information here is elicited, not in a criminal proceeding, but in a legislative inquiry. In this regard, *Senate v. Ermita* stressed that the validity of the claim of executive privilege depends not only on the ground invoked but, also, on the **procedural setting** or the **context** in which the claim is made. Furthermore, in *Nixon*, the President did not interpose any claim of need to protect military, diplomatic or sensitive national security secrets. In the present case, Executive

Secretary Ermita categorically claims executive privilege on the grounds of **presidential communications privilege** in relation to her executive and policy decision-making process and diplomatic secrets.

The respondent Committees should cautiously tread into the investigation of matters which may present a conflict of interest that may provide a ground to inhibit the Senators participating in the inquiry if later on an impeachment proceeding is initiated on the same subject matter of the present Senate inquiry. Pertinently, in*Senate Select Committee on Presidential Campaign Activities v. Nixon*,[49] it was held that since an impeachment proceeding had been initiated by a House Committee, the Senate Select Committee's immediate oversight need for five presidential tapes should give way to the House Judiciary Committee which has the constitutional authority to inquire into presidential impeachment. The Court expounded on this issue in this wise:

> It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing. The Congress learned this as to its own privileges in *Gravel v. United States*, as did the judicial branch, in a sense, in *Clark v. United States*, and the executive branch itself in *Nixon v. Sirica*. **But under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned,** not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, **on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.**
>
> In its initial briefs here, the Committee argued that it has shown exactly this. It contended that resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it 'would aid in a determination whether legislative involvement in political campaigns is

necessary' and 'could help engender the public support needed for basic reforms in our electoral system.' Moreover, Congress has, according to the Committee, power to oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view. The Committee says that with respect to Watergate-related matters, this power has been delegated to it by the Senate, and that to exercise its power responsibly, it must have access to the subpoenaed tapes.

We turn first to the latter contention. In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution. Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source. x x x **We have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee's subpoena.**

The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress' legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. **While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events**; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in*Nixon v. Sirica*, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. **We see no comparable need in the legislative process, at least not in the circumstances of this case.** Indeed, whatever force there might once have been in the Committee's argument that the subpoenaed materials are necessary to its legislative judgments has been substantially undermined by subsequent events. (Emphasis supplied)

Respondent Committees further contend that the grant of petitioner's claim of executive privilege violates the constitutional provisions on the right of the people to information on matters of public concern.[50] We might have agreed with such contention if petitioner did not appear before them at all. But petitioner made himself available to them during the September 26 hearing, where he was questioned for eleven (11) hours. Not only that, he expressly manifested his willingness to answer more questions from the Senators, with the exception only of those covered by his claim of executive privilege.

The right to public information, like any other right, is subject to limitation. Section 7 of Article III provides:

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, **subject to such limitations as may be provided by law**.

The provision itself expressly provides the limitation, i.e. **as may be provided by law**. Some of these laws are Section 7 of Republic Act (R.A.) No. 6713,[51] Article 229[52] of the Revised Penal Code, Section 3 (k)[53] of R.A. No. 3019, and Section 24(e)[54] of Rule 130 of the Rules of Court. These are in addition to what our body of jurisprudence classifies as confidential[55] and what our Constitution considers as belonging to the larger concept of executive privilege. Clearly, there is a recognized public interest in the confidentiality of certain information. We find the information subject of this case belonging to such kind.

More than anything else, though, the right of Congress or any of its Committees to obtain information *in aid of legislation* cannot be equated with the people's right to public information. The former cannot claim that every legislative inquiry is an exercise of the people's right to information. The distinction between such rights is laid down in *Senate v. Ermita:*

> There are, it bears noting, clear distinctions between the right of Congress to information which underlies the power of inquiry and the right of people to information on matters of public concern. For one, the demand of a citizen for the production of documents pursuant to his right to information does not have the same obligatory force as a *subpoena duces tecum* issued by Congress. Neither does the right to information grant a citizen the power to exact testimony from government officials. These powers belong only to Congress, not to an individual citizen.
>
> **Thus, while Congress is composed of representatives elected by the people, it does not follow, except in a highly qualified sense, that in every exercise of its power of inquiry, the people are exercising their right to information.**

The members of respondent Committees should not invoke as justification in their exercise of power a right properly belonging to the people in general. This is because when they discharge their power, they do so as public officials and members of Congress. Be that as it may, the right to information must be balanced with and should give way, in appropriate cases, to constitutional precepts particularly those pertaining to delicate interplay of executive-legislative powers and privileges which is the subject of careful review by numerous decided cases.

B- The Claim of Executive Privilege is Properly Invoked

We now proceed to the issue -- ***whether the claim is properly invoked by the President.*** Jurisprudence teaches that for the claim to be properly invoked, there must be a formal claim of privilege, lodged by the head of the department which has control over the matter."[56] A formal and proper claim of executive privilege requires a "precise and certain reason" for preserving their confidentiality.[57]

The Letter dated November 17, 2007 of Executive Secretary Ermita satisfies the requirement. It serves as the formal claim of privilege. There, he expressly states that "**this Office is constrained to invoke the settled doctrine of executive privilege as refined in *Senate v. Ermita*, and has advised Secretary Neri accordingly**." Obviously, he is referring to the

Office of the President. That is more than enough compliance. In *Senate v. Ermita*, a less categorical letter was even adjudged to be sufficient.

With regard to the existence of "precise and certain reason," we find the grounds relied upon by Executive Secretary Ermita specific enough so as not "to leave respondent Committees in the dark on how the requested information could be classified as privileged." The case of *Senate v. Ermita* only requires that an allegation be made "whether the information demanded involves military or diplomatic secrets, closed-door Cabinet meetings, etc." The particular ground must only be specified. The enumeration is not even intended to be comprehensive."[58] The following statement of grounds satisfies the requirement:

> The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic ofChina. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

At any rate, as held further in *Senate v. Ermita,*[59] the Congress must not require the executive to state the reasons for the claim with such particularity as to compel disclosure of the information which the privilege is meant to protect. This is a matter of respect to a coordinate and co-equal department.

II
Respondent Committees Committed Grave Abuse of Discretion in Issuing the Contempt Order

Grave abuse of discretion means "such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, in other words where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and it must be so patent and gross as

to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."[60]

It must be reiterated that when respondent Committees issued the show cause **Letter** dated November 22, 2007, petitioner replied immediately, manifesting that it was not his intention to ignore the Senate hearing and that he thought the only remaining questions were the three (3) questions he claimed to be covered by executive privilege. In addition thereto, he submitted Atty. Bautista's letter, stating that his non-appearance was upon the order of the President and specifying the reasons why his conversations with President Arroyo are covered by executive privilege. **Both correspondences include an expression of his willingness to testify again, provided he "be furnished in advance" copies of the questions.** Without responding to his request for advance list of questions, respondent Committees issued the**Order** dated January 30, 2008, citing him in contempt of respondent Committees and ordering his arrest and detention at the Office of the Senate Sergeant-At-Arms until such time that he would appear and give his testimony. Thereupon, petitioner filed a motion for reconsideration, informing respondent Committees that he had filed the present petition for *certiorari*.

Respondent Committees committed grave abuse of discretion in issuing the contempt **Order** in view of five (5) reasons.

First, there being a legitimate claim of executive privilege, the issuance of the contempt Order suffers from constitutional infirmity.

Second, respondent Committees did not comply with the requirement laid down in *Senate v. Ermita* that the invitations should contain the "possible needed statute which prompted the need for the inquiry," along with "the usual indication of the subject of inquiry and the **questions** relative to and in furtherance thereof." Compliance with this requirement is imperative, both under Sections 21 and 22 of Article VI of the Constitution. This must be so to ensure that the rights of both persons **appearing in or affected** by such inquiry are respected as

mandated by said Section 21 and by virtue of the express language of Section 22. Unfortunately, despite petitioner's repeated demands, respondent Committees did not send him an advance list of questions.

Third, a reading of the transcript of respondent Committees' January 30, 2008 proceeding reveals that only a minority of the members of the Senate Blue Ribbon Committee was present during the deliberation.[61] Section 18 of the *Rules of Procedure Governing Inquiries in Aid of Legislation* provides that:

> "The Committee, **by a vote of majority** of all its members, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer proper questions by the Committee or any of its members."

Clearly, the needed vote is a **majority** of all the members of the Committee. Apparently, members who did not actually participate in the deliberation were made to sign the contempt Order. Thus, there is a cloud of doubt as to the validity of the contempt Order dated January 30, 2008. We quote the pertinent portion of the transcript, thus:

> **THE CHAIRMAN (SEN. CAYETANO, A). For clarification. x x x The Chair will call either a caucus or will ask the Committee on Rules if there is a problem. Meaning, if we do not have the sufficient numbers. But if we have a sufficient number, we will just hold a caucus to be able to implement that right away because…Again, our Rules provide that any one held in contempt and ordered arrested, need the concurrence of a majority of all members of the said committee and we have three committees conducting this.**
>
> So thank you very much to the members…
>
> **SEN. PIMENTEL. Mr. Chairman.**
>
> **THE CHAIRMAN (SEN. CAYETANO,A). May I recognize the Minority Leader and give him the floor, Senator Pimentel.**

SEN. PIMENTEL. Mr. Chairman, there is no problem, I think, with consulting the other committees. But I am of the opinion that the Blue Ribbon Committee is the lead committee, and therefore, it should have preference in enforcing its own decisions. Meaning to say, it is not something that is subject to consultation with other committees. I am not sure that is the right interpretation. I think that once we decide here, we enforce what we decide, because otherwise, before we know it, our determination is watered down by delay and, you know, the so-called "consultation" that inevitably will have to take place if we follow the premise that has been explained.

So my suggestion, Mr. Chairman, is the Blue Ribbon Committee should not forget it's the lead committee here, and therefore, the will of the lead committee prevails over all the other, you, know reservations that other committees might have who are only secondary or even tertiary committees, Mr. Chairman.

THE CHAIRMAN (SEN. CAYETANO, A.) Thank you very much to the Minority Leader. And I agree with the wisdom of his statements. I was merely mentioning that under Section 6 of the Rules of the Committee and under Section 6, "The Committee by a vote of a majority of all its members may punish for contempt any witness before it who disobeys any order of the Committee."

So the Blue Ribbon Committee is more than willing to take that responsibility. **But we only have six members here today, I am the seventh as chair and so we have not met that number.** So I am merely stating that, sir, that when we will prepare the documentation, if a majority of all members sign and I am following the Sabio v. Gordon rule wherein I do believe, if I am not mistaken, Chairman Gordon prepared the documentation and then either in caucus or in session asked the other members to sign. And once the signatures are obtained, solely for the purpose that Secretary Neri or Mr. Lozada will not be able to legally question our subpoena as being insufficient in accordance with law.

SEN. PIMENTEL. Mr. Chairman, the caution that the chair is suggesting is very well-taken. But I'd like to advert to the fact that the quorum of the committee is only two as far as I remember. Any two-member senators attending a Senate committee hearing provide that quorum, and therefore there is more than a quorum demanded by our Rules as far as we are concerned now, and acting as Blue Ribbon Committee, as Senator Enrile pointed out. In any event, the signatures that will follow by the additional members will only tend to strengthen the determination of this Committee to put its foot forward – put down on what is happening in this country, Mr. Chairman, because it really looks terrible if the primary Committee of the Senate, which is the Blue Ribbon

> Committee, cannot even sanction people who openly defy, you know, the summons of this Committee. I know that the Chair is going through an agonizing moment here. I know that. But nonetheless, I think we have to uphold, you know, the institution that we are representing because the alternative will be a disaster for all of us, Mr. Chairman. So having said that, I'd like to reiterate my point.
>
> **THE CHAIRMAN (SEN. CAYETANO, A.)** First of all, I agree 100 percent with the intentions of the Minority Leader. **But let me very respectfully disagree with the legal requirements. Because, yes, we can have a hearing if we are only two but both under Section 18 of the Rules of the Senate and under Section 6 of the Rules of the Blue Ribbon Committee, there is a need for a majority of all members if it is a case of contempt and arrest.** So, I am simply trying to avoid the court rebuking the Committee, which will instead of strengthening will weaken us. But I do agree, Mr. Minority Leader, that we should push for this and show the executive branch that the well-decided – the issue has been decided upon the Sabio versus Gordon case. And it's very clear that we are all allowed to call witnesses. And if they refure or they disobey not only can we cite them in contempt and have them arrested. x x x [62]

Fourth, we find merit in the argument of the OSG that respondent Committees likewise violated Section 21 of Article VI of the Constitution, requiring that the inquiry be in accordance with the "**duly published rules of procedure**." We quote the OSG's explanation:

> The phrase 'duly published rules of procedure' requires the Senate of every Congress to publish its rules of procedure governing inquiries in aid of legislation because every Senate is distinct from the one before it or after it. Since Senatorial elections are held every three (3) years for one-half of the Senate's membership, the composition of the Senate also changes by the end of each term. Each Senate may thus enact a different set of rules as it may deem fit. **Not having published its *Rules of Procedure*, the subject hearings in aid of legislation conducted by the 14th Senate, are therefore, procedurally infirm**.

And fifth, respondent Committees' issuance of the contempt Order is arbitrary and precipitate. It must be pointed out that respondent Committees did not **first**pass upon the claim of executive privilege and inform petitioner

of their ruling. Instead, they curtly dismissed his explanation as "unsatisfactory" and simultaneously issued the Order citing him in contempt and ordering his immediate arrest and detention.

A fact worth highlighting is that **petitioner is not an unwilling witness**. He manifested several times his readiness to testify before respondent Committees. He refused to answer the three (3) questions because he was ordered by the President to claim executive privilege. It behooves respondent Committees to first rule on the claim of executive privilege and inform petitioner of their finding thereon, instead of peremptorily dismissing his explanation as "unsatisfactory." Undoubtedly, respondent Committees' actions constitute grave abuse of discretion for being arbitrary and for denying petitioner due process of law. The same quality afflicted their conduct when they **(a)** disregarded petitioner's motion for reconsideration alleging that he had filed the present petition before this Court and **(b)**ignored petitioner's repeated request for an advance list of questions, if there be any aside from the three (3) questions as to which he claimed to be covered by executive privilege.

Even the courts are repeatedly advised to exercise the power of contempt judiciously and sparingly with utmost self-restraint with the end in view of utilizing the same for correction and preservation of the dignity of the court, not for retaliation or vindication.[63] Respondent Committees should have exercised the same restraint, after all petitioner is not even an ordinary witness. He holds a high position in a co-equal branch of government.

In this regard, it is important to mention that many incidents of judicial review could have been avoided if powers are discharged with circumspection and deference. Concomitant with the doctrine of separation

of powers is the mandate to observe respect to a co-equal branch of the government.

One last word.

The Court was accused of attempting to abandon its constitutional duty when it required the parties to consider a proposal that would lead to a possible compromise. The accusation is far from the truth. The Court did so, only to test a tool that other jurisdictions find to be effective in settling similar cases, to avoid a piecemeal consideration of the questions for review and to avert a constitutional crisis between the executive and legislative branches of government.

In *United States v. American Tel. & Tel Co.*,[64] the court refrained from deciding the case because of its desire to avoid a resolution that might disturb the balance of power between the two branches and inaccurately reflect their true needs. Instead, it remanded the record to the District Court for further proceedings during which the parties are required to negotiate a settlement. In the subsequent case of *United States v. American Tel. &Tel Co.*,[65] it was held that "much of this spirit of compromise is reflected in the generality of language found in the Constitution." It proceeded to state:

> Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

It thereafter concluded that: **"The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government. It is the long-term staying power of government that is enhanced by the mutual accommodation required by the separation of powers."**

In rendering this decision, the Court emphasizes once more that the basic principles of constitutional law cannot be subordinated to the needs of a particular situation. As magistrates, our mandate is to rule objectively and dispassionately, always mindful of Mr. Justice Holmes' warning on the dangers inherent in cases of this nature, thus:

> "some accident of immediate and overwhelming interest…appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."[66]

In this present crusade to "search for truth," we should turn to the fundamental constitutional principles which underlie our tripartite system of government, where the Legislature enacts the law, the Judiciary interprets it and the Executive implements it. They are considered separate, co-equal, coordinate and supreme within their respective spheres but, imbued with a system of checks and balances to prevent unwarranted exercise of power. The Court's mandate is to preserve these constitutional principles at all times to keep the political branches of government within constitutional bounds in the exercise of their respective powers and prerogatives, even if it be in the search for truth. This is the only way we can preserve the stability of our democratic institutions and uphold the Rule of Law.

WHEREFORE, the petition is hereby **GRANTED**. The subject Order dated January 30, 2008, citing petitioner Romulo L. Neri in contempt of the Senate Committees and directing his arrest and detention, is hereby nullified.

SO ORDERED.

TERESITA J. LEONARDO DE CASTRO
Associate Justice

WE CONCUR:

REYNATO S. PUNO
Chief Justice

LEONARDO A. QUISUMBING
Associate Justice

CONSUELO YNARES-SANTIAGO
Associate Justice

ANTONIO T. CARPIO
Associate Justice

MA. ALICIA AUSTRIA-MARTINEZ
Associate Justice

RENATO C. CORONA
Associate Justice

CONCHITA CARPIO MORALES
Associate Justice

ADOLFO S. AZCUNA
Associate Justice

DANTE O. TINGA
Associate Justice

MINITA V. CHICO-NAZARIO
Associate Justice

PRESBITERO J. VELASCO, JR.
Associate Justice

ANTONIO EDUARDO B. NACHURA
Associate Justice

RUBEN T. REYES
Associate Justice

ARTURO D. BRION
Associate Justice

C E R T I F I C A T I O N

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

REYNATO S. PUNO
Chief Justice

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[1] *Rollo*, pp. 12-14.

[2] *Rollo*, pp. 85-86. Through the *Supplemental Petition for Certiorari (With Urgent Application for Temporary Restraining Order/Preliminary Injunction).*

[3] Chaired by Hon. Senator Alan Peter S. Cayetano.

[4] Chaired by Hon. Senator Manuel A. Roxas II.

[5] Chaired by Hon. Senator Rodolfo G. Biazon.

[6] Transcript of the September 26, 2007 Hearing of the respondent Committees, pp.91-92.

[7] *Id*., pp. 114-115.

[8] *Id.*, pp. 276-277.

[9] See Letter dated January 30, 2008.

[10] 488 SCRA 1 (2006).

[11] 345 U.S. 1 (1953).

[12] **Section 7. Prohibited Acts and Transactions.** – In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute

prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful: x x x

(c) Disclosure and/or misuse of confidential information. -

Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:

(1) To further their private interests, or give undue advantage to anyone; or

(2) To prejudice the public interest.

[13] **SEC. 24. Disqualification by reason of privileged communication**. – The following persons cannot testify as to matters learned in confidence in the following cases. **(e)** A public officer cannot be examined during his term of office or afterwards, as to communications made to him in official confidence, when the court finds that the public interest would suffer by disclosure.

[14] TSN of the Oral Argument, March 4, 2008, p. 455.

[15] **(1)** Minutes of all meetings of the three (3) committees held in January and February, 2008; **(2)** Notice for joint meeting of three (3) committees held on 30 January 2008 duly received by the members of the committees; **(3)**Minute Books of the three (3) committees; **(4)** Composition of the three (3) committees; and **(5)** Other documents required of them in the course of the oral argument.

[16] See Manifestation, *rollo*, pp.170-174.

[17] *Supra*..

[18] *Supra*.

[19] *Ibid.*

[20] *Ibid.*

[21] *Arnault v. Nazareno*, 87 Phil 32 (1950)

[22] *Senate v. Ermita*, p. 58.

[23] 5 U.S. C. § 552

[24] 51 U.S. C. app.

[25] 433 Phil. 506 (2002).

[26] G.R. No. 130716, December 9, 1998, (360 SCRA 132).

[27] *Supra*.

[28] CRS Report for Congress, Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments at p. 2.

[29] 418 U.S. 683.

[30] *In Re: Sealed Case No*. 96-3124, June 17, 1997.

[31] *Id.*

[32] CRS Report for Congress, Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments at pp. 18-19.

[33] 365 F.3d 1108, 361 U.S.App.D.C. 183, 64 Fed. R. Evid. Serv. 141.

[34] See *United States v. Reynolds*, 345 U.S. 1, 6-8 (1953); *Chicago v. Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111; *Totten v. United States*, 92 U.S. 105, 106-107 (1875).

[35] *Roviaro v. United States*, 353 U.S. 53, 59-61.

[36] See *Friedman v. Bache Halsey Stuart Shields, Inc.* 738 F. 2d 1336,1341-43 (D.C. Cir. 1984).

[37] 14 F. Supp. 230, 299 U.S. 304 (1936).

[38] 360 Phil. 133 (1998).

[39] *Supra*.

[40] Section 18, Article VII.

[41] Section 16, Article VII.

[42] Section 19, Article VII.

[43] Section 20 and 21, Article VII.

[44] CRS Report for Congress, Presidential Claims of Executive Privilege: History, Law Practice and Recent Developments, *supra*..

[45] Bernas, S.J., The 1987 Constitution of the Republic of the Philippines, A Commentary, 2003 Ed. p. 903.

[46] 159 U.S. App. DC. 58, 487 F. 2d 700 (D.C. Cir. 1973).

[47] *U.S. v. Nixon*, 418 U.S. 683 (1974)

[48] *Supra*.

[49] 498 F. 2d 725 (D.C. Cir.1974).

[50] Citing Section 7, Article 3 of the Constitution.

[51] Section 7. Prohibited Acts and Transactions. – In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful: x x x

> **(c) Disclosure and/or misuse of confidential information. - Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:**
>
> **(1) To further their private interests, or give undue advantage to anyone; or**
>
> **(2) To prejudice the public interest**.

[52] **Article 229. Revelation of secrets by an officer. –** Any public officer who shall reveal any secret known to him by reason of his official capacity, or shall wrongfully deliver papers or copies of papers of which he may have charge and which should not be published, shall suffer the penalties of *prision correccional* in its medium and maximum periods, perpetual special disqualification and a fine not exceeding 2,000 pesos if the revelation of such secrets or the delivery of such papers shall have caused serious damage to the public interest; otherwise, the penalties of *prision correccional* in its minimum period, temporary special disqualification and a fine not exceeding 500 pesos shall be imposed.

[53] **Section 3. Corrupt practices of public officers.** – In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

> **(k)** Divulging valuable information of a confidential character, acquired by his office or by him on account of his official position to unauthorized persons, or releasing such information in advance of its authorized release date.

[54] **Sec. 24. Disqualification by reason of privileged communications.** – The following persons cannot testify as to matters learned in confidence in the following case: x x x

> **(a)** A public officer cannot be examined during his term of office or afterwards, as to communications made to him in official confidence, when the court finds that the public interest would suffer by the disclosure.

[55] In *Chavez v. Public Estates Authority*, *supra.*, the Supreme Court recognized matters which the Court has long considered as confidential such as "information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law enforcement agencies before the prosecution of the accused." It also stated that "presidential conversations, correspondences, or discussions during close-door cabinet meetings which, like internal deliberations of the Supreme Court or other collegiate courts, or executive sessions of either House of Congress, are recognized as confidential. Such information cannot be pried-open by a co-equal branch of government.

[56] *United States v. Reynolds*, *supra.*.

[57] *Unites States v. Article of Drug*, 43 F.R.D. at 190.

[58] *Senate v. Ermita, supra.*, p. 63.

[59] *Id*., citing *U.S. v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727, 32 A.L. R. 2d 382 (1953).

[60] *Freedom from Debt Coalition v. Energy Regulatory Commission*, G.R. No. 161113. June 15, 2004.

[61] Trancript of the January 30, 2008 proceedings, p. 29.

[62] Trancript of the January 30, 2008 Proceeding of the respondent Senate Committees, pp. 26-31.

[63] *Rodriguez v. Judge Bonifacio*, A.M. No. RTJ-99-1510, November 6, 2000, 344 SCRA 519.

[64] 179 U.S. App. Supp. D.C. 198, 551 F 2d. 384 (1976).

[65] 567 F 2d 121 (1977).

[66] *Northern Securities Co. v. United States*, 193 U.S. 197, 48 L. Ed. 679, 24 S Ct. 436 (1904).

EN BANC

G.R. No. 180643 – ROMULO L. NERI v. SENATE COMMITTEE ON ACCOUNTABILITY AND PUBLIC OFFICERS AND INVESTIGATIONS, SENATE COMMITTEE ON TRADE AND COMMERCE, AND SENATE COMMITTEE ON NATIONAL DEFENSE AND SECURITY.

Promulgated:

March 25, 2008

x - x

CONCURRING OPINION

CHICO-NAZARIO, *J*.:

I express my concurrence in the majority opinion as written by my colleague Justice Teresita J. Leonardo-De Castro. In addition to the ratiocination already presented therein, I still wish to stress particular points which convinced me that the Petition for *Certiorari* of petitioner Romulo L. Neri should be granted.

Once again, this Court finds itself in the same position it held just two years ago in the landmark case of *Senate of the Philippines v. Ermita*,[1] standing judge over a dispute between the Executive and Legislative branches of the Government.

Even the antecedent facts giving rise to the present Petition seem familiar. They involve the conflict between, on one hand, the right of the Senate to compel the appearance and testimony of executive officials in hearings in aid of legislation; and, on the other, the right of the President and

the executive officials she so authorizes to invoke executive privilege to protect and keep certain information confidential.

In *Ermita*, cabinet members and military officials declined to appear before the Senate for hearings held in aid of legislation, invoking Executive Order No. 464 issued by President on "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and for other Purposes," which basically made it mandatory for them to obtain the President's permission prior to attending said hearings. Without the President's permission, they will not go.

In the Petition at bar, petitioner Neri, by virtue of his position as the former Director General of the National Economic Development Authority, testified on 26 September 2007 in an 11-hour hearing conducted by the respondent Senate Committees on the alleged anomalies in the award of the National Broadband Network (NBN) Project to Zhing Xing Telecommunications Equipment (ZTE). During said hearing, he already invoked executive privilege when he refused to answer three specific questions propounded to him:

a) Whether the President followed up the (NBN) project?

b) Were you dictated to prioritize the ZTE?

c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?

He failed to return and face further inquiry before the respondent Senate Committees in the hearing set for 20 November 2007. Executive Secretary

Eduardo A. Ermitaand Atty. Antonio R. Bautista, as petitioner Neri's counsel, sent separate letters to the respondent Senate Committees consistently asserting that petitioner Neri's non-appearance at the hearing was upon the President's order; and his conversations with the President on the NBN Project, the apparent subject of further inquiry by the respondent Senate Committees, were covered by executive privilege since they involved national security and diplomatic matters. Respondent Senate Committees found unsatisfactory petitioner Neri's explanation for his non-attendance at the hearing, thus, in an Order dated 30 January 2008, cited him for contempt and directed his arrest and detention in the Office of the Senate Sergeant-At-Arms "until such time that he will appear and give his testimony."

Faced with either disobeying the President's order or being arrested by the Senate, petitioner Neri sought relief from this Court by filing a Petition for *Certiorari*and a Supplemental Petition for *Certiorari*, under Rule 65 of the Rules of Court, alleging grave abuse of discretion on the part of the respondent Senate Committees for first issuing a show cause Order, dated 22 November 2007, against petitioner Neri for his failure to attend the 20 November 2007 hearing; and subsequently issuing the contempt and arrest Order, dated 30 January 2008 against petitioner Neri after finding his explanation unsatisfactory.

This Court shall not shirk from its duty, impressed upon it by no less than the Constitution, to exercise its judicial power "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[2] It was clearly intended by the framers of the Constitution that the judiciary be the final arbiter on the question of whether or not a branch of government or any of its officials has acted without jurisdiction or

in excess of jurisdiction or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction.[3] And when the Judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments, but only asserts the solemn and sacred obligation entrusted to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which the instrument secures and guarantees to them.[4]

By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. Mere abuse of discretion is not enough. It must be grave abuse of discretion as when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[5]

Considering the factual background of the Petition at bar, respondent Senate Committees did commit grave abuse of discretion in issuing the assailed Orders for having done so without basis, with undue haste, and in violation of due process.

Our republican system of Government is composed of three independent and co-equal branches, the Executive, Legislative, and Judiciary. One of the fundamental tenets underlying our constitutional system is the principle of separation of powers, pursuant to which the powers of government are mainly divided into three classes, each of which is assigned to a given branch of the service. The main characteristic of said principle is not, however, this allocation of powers among said branches of the service, but the fact that: 1) each department is independent of the others and supreme within its own sphere; and 2) the powers vested in one department cannot be given or delegated, either by the same or by Act of Congress, to any other department.[6]

The fundamental power of the Senate, as one of the Houses of the Legislative Branch, is to make laws, and within this sphere, it is supreme. Hence, this Court had long before upheld the power of inquiry of the Legislature in aid of legislation. In *Arnault v. Nazareno*,[7] this Court pronounced:

> Although there is no provision in the Constitution expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative functions advisedly and effectively, such power is so far incidental to the legislative function as to be implied. In other words, the power of inquiry with process to enforce it-is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information which is not infrequently true-recourse must be had to others who do possess it. Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion is essential to obtain what is needed. (McGrain vs. Daugherty, 273 U. S., 135; 71 L. ed., 580; 50 A. L. R., 1.) The fact that the Constitution expressly gives to Congress the power to punish its Members for disorderly behaviour, does not by necessary implication exclude the power to punish for contempt any other person. (Anderson vs. Dunn, 6 Wheaton, 204; 5 L. ed., 242.)[8]

In the same case, the Court also qualified the extent of the Legislature's power of inquiry:

> But no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire. (Kilbournvs. Thompson, 26 L. ed., 377.)
>
> Since, as we have noted, the Congress of the Philippines has a wider range of legislative field than either the Congress of the United States or a State Legislature, we think it is correct to say that the field of inquiry into which it may enter is also wider. It would be difficult to define any limits by which the subject matter of its inquiry can be bounded. It is not necessary for us to do so in this case. Suffice it to say that it must be coextensive with the range of the legislative power.[9]

In the Petition at bar, the Senate relies on its power of inquiry as embodied in Article VI, Section 21 of the Constitution, which reads:

> Section 21. The Senate or House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

In citing petitioner Neri in contempt and ordering his arrest, however, the respondent Senate Committees had overstepped the boundaries of its appointed sphere, for it persists to acquire information that is covered by executive privilege and beyond its jurisdiction to inquire.

Simply put, executive privilege is "the power of the Government to withhold information from the public, the courts, and the **Congress**." It is also defined as "the right of the President and high-level executive branch officers to withhold information from **Congress**, the courts, and ultimately the public."[10] It must be stressed that executive privilege is a right vested in the President which she may validly exercise within her sphere of executive power. The President can validly invoke executive privilege to keep information from the public and even from co-equal branches of the Government, *i.e.*, the Legislature and the Judiciary.

In *Chavez v. Public Estates Authority*,[11] this Court recognized that:

> The right to information, however, does not extend to matters recognized as privileged information under the separation of powers. The right does not also apply to information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law enforcement agencies before the prosecution of the accused, which courts have long recognized as confidential. The right may also be subject to other limitations that Congress may impose by law.
>
> There is no claim by PEA that the information demanded by petitioner is privileged information rooted in the separation of powers. The information does not cover Presidential conversations,

correspondences, or discussions during closed-door Cabinet meetings which, like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential. **This kind of information cannot be pried open by a co-equal branch of government.** A frank exchange of exploratory ideas and assessments, free from the glare of publicity and pressure by interested parties, is essential to protect the independence of decision-making of those tasked to exercise Presidential, Legislative and Judicial power. This is not the situation in the instant case. (Emphasis ours.)

A more extensive explanation for the rationale behind the executive privilege can be found in *United States v. Nixon*,[12] to wit:

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. **A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.** These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

x x x x

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.' It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. x x x (Emphasis ours.)

It is clear from the foregoing that executive privilege is not meant to personally protect the President, but is inherent in her position to serve, ultimately, the public interest. It is not an evil thing that must be thwarted at every turn. Just as acts of the Legislature enjoy the presumption of validity, so must also the acts of the President. Just all other public officers are afforded the presumption of regularity in the exercise of their official functions, then what more the President, the highest Executive official of the land. Hence, when the President claims that certain information is covered by executive privilege, then rightfully, said information must be presumptively privileged.[13]

Respondent Senate Committees cite the statement made by this Court in *Ermita* that "the extraordinary character of the exemptions indicates that the presumption inclines heavily *against* executive secrecy and in favor of disclosure."[14] However, said declaration must be taken in the context of *Ermita* where EO No. 464 placed under the protection of executive privilege virtually **all** conversations, correspondences, and information of **all** executive and military officials, unless otherwise ordered by the President. *Ermita* firmly established that public disclosure is still the general rule while executive privilege is the exemption therefrom. But when the President does invoke executive privilege as regards certain information, the same must be deemed presumptively privileged.

Necessarily, it is the President who can make the initial determination of what information is covered by the executive privilege because only she and the executive officials involved are privy to the information. Although the President and/or her authorized executive official are obliged to clearly state the grounds for invoking executive privilege, they are not required to state the reasons for the claim with such particularity as to compel the disclosure of the information which the privilege is meant to protect.[15] The

President, through petitioner Neri, claims that the conversation between the two of them as regards the NBN Project is privileged for it involves matters that may affect diplomatic and economic relations of the country with China. These are valid grounds rendered even more credible in light of the fact that the NBN Project is funded by a loan extended by the Chinese Government to our Government and awarded to ZTE, a Chinese firm. The respondent Senate Committees' demand for a deeper or more substantial justification for the claim of executive privilege could well lead to the revelation of the very same details or information meant to be protected by the privilege, hence, rendering the same useless. Furthermore, since the information the respondent Senate Committees seek is presumptively privileged, the burden is upon them to overcome the same by contrary evidence.

Also in support of my position that the respondent Senate Committees acted beyond their legislative jurisdiction is their continued avowal of "search for the truth." While the search for the truth is truly a noble aspiration, respondent Senate Committees must bear in mind that their inquiry and investigative powers should remain focused on the primary purpose of legislation.

Respondent Senate Committees present three pending Senate bills for which the investigative hearings are being held:

a. Senate Bill No. 1793, introduced by Senator Mar Roxas, entitled "An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes."

b. Senate Bill No. 1794, introduced by Senator Mar Roxas, entitled "An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes."

c. Senate Bill No. 1317, introduced by Senator Miriam Defensor Santiago, entitled "An Act Mandating Concurrence to International Agreements and Executive Agreements."

Consistent with the requirement laid down in *Ermita*, petitioner Neri attended the 26 September 2007 investigative hearing on the afore-mentioned Senate bills, even though he was obviously ill that day, answered all the other questions of the Senators regarding the NBN Project including the attempted bribery upon him, except the three questions for which he invoked executive privilege by order of the President. Respondent Senate Committees failed to establish that petitioner Neri's answers to these three questions are indispensable, or that they are not available from any other source, or that the absence thereof frustrates the power of the Senate to legislate.

Respondent Senate Committees lightly brushed aside petitioner Neri's claim of executive privilege with a general statement that such is an unsatisfactory reason for not attending the 20 November 2007 hearing. It likewise precipitately issued the contempt and arrest Order against petitioner Neri for missing only one hearing, the 20 November 2007, despite the explanation given by petitioner Neri, through Executive Secretary Ermita and counsel Atty. Bautista, for his non-appearance at said hearing, and the expression by petitioner Neri of his willingness to return before respondent Senate Committees if he would be furnished with the other questions they would still ask him. Petitioner Neri's request for

advance copy of the questions was not unreasonable considering that in *Ermita*, this Court required:

> It follows, therefore, that when an official is being summoned by Congress on a matter which, in his own judgment, might be covered by executive privilege, he must be afforded**reasonable time** to inform the President or the Executive Secretary of the possible need for invoking the privilege. This is necessary in order to provide the President or Executive Secretary with fair opportunity to consider whether the matter indeed calls for a claim of executive privilege. **If, after the lapse of that reasonable time, neither the President nor the Executive Secretary invokes the privilege, Congress is no longer bound to respect the failure of the official to appear before Congress and may then opt to avail of the necessary legal means to compel his appearance**.[16] (Emphasis ours.)

Yet the respondent Senate Committees unexplainably failed to comply therewith.

Another point militating against the issuance of the contempt and arrest Order is its issuance even without quorum and the required number of votes in the respondent Senate Committees. During oral arguments, Senator Francis N. Pangilinan asserted that whatever infirmities at the committee level were cured by the 2/3 votes of the entire Senate favoring the issuance of the contempt and arrest Order against petitioner Neri, since the committee is a mere agent of the entire chamber.[17] In their Memorandum, respondent Senate Committees no longer addressed said issue contending that petitioner Neri never assailed the procedure by which the contempt and arrest Order was issued. While this Court may not rule on an issue not raised in the Petition, it may take note of the apparent lack of clear and established rules for the issuance by the Senate of a contempt and arrest Order against a recalcitrant witness in hearings conducted in aid of legislation. Senators may very well be familiar with the practice or tradition of voting in such cases, but not necessarily the witness against whom the contempt and arrest Order may be issued and who shall suffer the loss of his

liberty. Procedural due process requires that said witness be informed of the rules governing his appearance and testimony before the Senate Committees, including the possible issuance of a contempt and arrest Order against him, because only then can he be aware of any deviation from the established procedure and of any recourse available to him.

Finally, much has been said about this Court not allowing the executive privilege to be used to conceal a criminal act. While there are numerous suspicions and allegations of crimes committed by public officers in the NBN Project, these remain such until the determination by the appropriate authorities. Respondent Senate Committees are definitely without jurisdiction to determine that a crime was committed by the public officers involved in the NBN Project, for such authority is vested by the Constitution in the Ombudsman. Again, it must be emphasized, that the Senate's power of inquiry shall be used to obtain information in aid of legislation, and not to gather evidence of a crime, which is evidently a prosecutorial, not a legislative, function.

In view of the foregoing, and in the exercise of this Court's power of judicial review, I vote to **GRANT** the Petition and **DECLARE** the Order dated 30 January 2008 of the respondent Senate Committees null and void for having been issued in grave abuse of discretion amounting to lack or excess of jurisdiction.

MINITA V. CHICO-NAZARIO
Associate Justice

[1] G.R. No. 169777, 20 April 2006, 488 SCRA 1.

[2] Article VIII, Section 1.

[3] *Tañada v. Angara*, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 48.

[4] *In re: Wenceslao Laureta*, G.R. No. 68635, 12 March 1987, 148 SCRA 382, 419, citing *Angara v. Electoral Commission*, 63 Phil. 139, 158 (1936).

[5] Id.

[6] See the Concurring Opinion of J. Concepcion in *Guevara v. Inocentes*, 123 Phil. 200, 217-218 (1966).

[7] 87 Phil. 29 (1950).

[8] Id. at 45.

[9] Id. at 45-46.

[10] *Senate of the Philippines v. Ermita*, supra note 1 at 45, citing B. SCHWARTZ, *EXECUTIVE PRIVILEGE AND CONGRESSIONAL INVESTIGATORY POWER*, 47 Cal. L. Rev. 3, and M. ROZELL, *Executive Privilege and the Modern Presidents: In Nixon's Shadow* (83 Minn. L. Rev. 1069).

[11] 433 Phil. 506, 534 (2002).

[12] 418 US 1039, 1063-1068 (1974).

[13] Id.

[14] *Senate of the Philippines v. Ermita*, supra note 1 at 51.

[15] Id. at 66.

[16] Id. at 69.

[17] TSN, 4 March 2008, pp. 706-709.

G.R. No. 180643 (*Romulo L. Neri, petitioner, v. Senate Committee on Accountability of Public Officers and Investigations, Senate Committee on Trade and Commerce, and Senate Committee on National Defense and Security, respondents*.)

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SEPARATE OPINION

REYES, R.T., *J*.:

I AM one of two Justices who only concurred in the result of the majority decision penned by esteemed colleague, Justice Teresita Leonardo-De Castro. I again effectively do so now in the resolution of the motion for reconsideration through this separate opinion. It has become necessary for

me to clarify for the record my position on the issues of executive privilege and the contempt and arrest powers of the Senate.

As expected, given the highly-politicized complexion of the case, the Court ruling received a mixed reaction of praise and flak. My kind of concurrence and that of Justice Leonardo A. Quisumbing did not escape criticism. An article[1] erroneously described Our vote as "unclear," casting doubt on the final verdict of the *Neri*petition. Another item[2] wrongly branded us as mere "straddlers," sitting on both sides of the fence and coming up with a decision only at the last minute.

A sad commentary of the times is when a Justice takes a stand which flatters the political opposition, it is hailed as courageous; when the stand benefits the administration, it is hounded as cowardly. But judicial

independence is neither here nor there. For me, it is judicial action that is right and reasonable, taken without fear or favor, unmindful of incidental consequences.

I thus take exceptions to the unfounded criticisms.

For one, a concurrence in the result is not unprecedented. Several justices in this Court's long history had voted in a similar fashion. Then Chief Justice Ramon Aquino voted in the same manner in the 1985 case of *Reformina v. Tomol, Jr.*,[3] a case tackling the proper interest rate in an action for damages for injury to persons and loss of property.

In the 2001 landmark case of *Estrada v. Desierto*,[4] involving the twin issues of the resignation of deposed President Joseph Estrada and the legitimacy of the assumption of President Gloria Macapagal-Arroyo as his successor, Justices Kapunan, Pardo, Buena, Ynares-Santiago and Sandoval-Gutierrez concurred in the result of the decision penned by Chief Justice Reynato S. Puno.[5] In 2006, Chief Justice Panganiban voted similarly in *Republic v. Hong*,[6] a case revisiting the mandatory requirement of a "credible witness" in a naturalization proceeding under Commonwealth Act 473.

For another, there should be no point of confusion. A concurrence in the result is a favorable vote for the decision crafted by the *ponente*. It simply means that I agreed in the outcome or disposition of the case, but not necessarily on all the grounds given in the *ponencia*. I concurred with the weightier reasons stated in the majority decision to grant the petition for *certiorari* and to quash the Senate arrest and contempt order against petitioner, Secretary Neri. However, I did not share some of the reasoning of the *ponente*.

If an unqualified vote of concurrence is allowed on a majority decision or dissenting opinion, there is no reason why a vote in the result should be treated differently, much less proscribed.

Now, on the merits of respondents' motion for reconsideration which merely restates their arguments against the petition focusing on executive privilege invoked on three (3) questions.[7] For the guidance of the Bench, the Bar and the Academe, I opt to correlate my position with those of the other Justices, with due respect to them. To be sure, Our decision and resolution in this case will continue to be the subject of legal scrutiny, public debate and academic discussion.

I

The proper basis of executive privilege in the Neri petition is only presidential communication privilege; executive privilege based on diplomacy and foreign relations is not valid for lack of specificity.

Ang tamang batayan ng pribilehiyo ng Pangulo sa petisyon ni Neri ay ang pampangulong pribilehiyo sa komunikasyon; ang pampangulong pribilehiyo sa diplomasya at ugnayang panlabas ay di angkop dahil sa kawalan ng pagtitiyak.

The majority decision sustained executive privilege on two grounds: (a) under the presidential communication privilege; and (2) executive privilege on matters relating to diplomacy or foreign relations.[8]

I agree with the *ponente* that the three questions are covered by the presidential communication privilege. But I disagree that they are covered by executive privilege on matters affecting diplomacy or foreign relations.

Ako'y sumasang-ayon sa ponente na ang tatlong katanungan ay saklaw ng pampangulong pribilehiyo sa komunikasyon. Subalit hindi ako sang-ayon na ang mga ito ay sakop ng pampangulong pribilehiyo sa diplomasya o ugnayang panlabas.

The distinction between presidential **communication** privilege and executive privilege based on **diplomacy and foreign relations** is important because they are two different categories of executive privilege recognized by jurisprudence.[9] The first pertains to those communications between the President and her close advisors relating to official or state matters; the second are those matters that have a direct bearing on the conduct of our external affairs with other nations, in this case the Republic of China.

The two categories of executive privilege have different rationale. Presidential communication privilege is grounded on the paramount need for candor between the President and her close advisors. It gives the President and those assisting her sufficient freedom to interact without fear of undue public scrutiny. On the other hand, executive privilege on matters concerning our diplomatic or foreign relations is akin to state secret privilege which, when divulged, will unduly impair our external relations with other countries.[10]

The distinction is vital because of the need for **specificity** in claiming the privilege. *Senate of the Philippines v. Ermita*[11] mandates that a claim of privilege must specify the grounds relied upon by the claimant.[12] The degree of specificity required obviously depends on the nature of the information to be disclosed.[13]

As to presidential **communication** privilege, the requirement of specificity is not difficult to meet. This kind of privilege easily passes the test. As long as the subject matter pertains to a communication between the President and her close advisor concerning official or state matters, the requirement is complied with.

There is no dispute that petitioner Neri is a close advisor of the President, being then the Chairman of the National Economic and Development Authority. The transaction involved the NBN-ZTE broadband deal, a government contract which is an official or state matter. Hence, the conversation between the President and petitioner Neri is covered by the presidential communication privilege.

Of course, there is a presumption that every communication between the President and her close advisor pertains to an official or state matter. The burden is on the party seeking disclosure to prove that the communication is not in an official capacity.

The fact of conversation is the trigger of the presidential communication privilege. There is no need to give specifics or particulars of the contents of the conversation because that will obviously divulge the very matter which the privilege is meant to protect. It will be an illusory privilege if a more stringent standard is required.[14]

In contrast, a relatively higher standard of specificity is required for a claim of executive privilege based on **diplomacy or foreign relations**. As in state secrets, this type of executive privilege is content based.[15] This means that the claim is dependent on the very content of the information sought to be disclosed. To adequately assess the validity of the claim, there is a need for the court, usually in closed session, to become privy to the information. This will enable the court to sufficiently assess whether or not the information claimed to be privileged will actually impair our diplomatic or foreign relations with other countries. It is the content of the information and its effect that trigger the privilege. To be sure, a generalized claim of privilege will not pass the more stringent test of specificity.

In the case at bar, the letter[16] of Secretary Eduardo Ermita to the Senate dated November 15, 2007 asserting executive privilege contained a mere general allegation that the conversation between the President and petitioner Neri "might" impair our diplomatic relations with the Republic of China. There is no explanation how the contents of the conversation will actually impair our diplomatic relations. Absent sufficient explanation or specifics, We cannot assess the validity of the claim of executive privilege.

Obviously, bare assertion without more will not pass the more stringent test of specificity. It is in this context that I agree with the dissenting justices[17] that the claim of privilege based on diplomacy or foreign relations must be struck down as devoid of basis.

It may be noted that Justice Tinga is not also persuaded by the claim of executive privilege based on diplomacy or foreign relations. He said:

> Petitioner Neri also cites diplomatic and state secrets as basis for the claim of executive privilege, alluding for example to the alleged adverse impact of disclosure on national security and on our diplomatic relations with China. The argument hews closely to the state secrets privilege. *The problem for petitioner Neri though is that unless he informs this Court the contents of his questioned conversations with the President, the Court would have no basis to accept his claim that diplomatic and state secrets would indeed be compromised by divulging the same in a public Senate hearing*.
>
> Indeed, if the claim of executive privilege is predicated on the particular content of the information, such as the state secrets privilege, which the claimant refuses to divulge, there is no way to assess the validity of the claim unless the court judging the case becomes privy to such information. If the claimant fails or refuses to divulge such information, *I submit that the courts may not pronounce such information as privileged on content-based grounds, such as the state secrets privilege. Otherwise, there simply would be no way to dispute such claim of executive privilege. All the claimant would need to do is to invoke the state secrets privilege even if no state secret is at all involved, and the court would then have no way of ascertaining whether the claim has been validly raised, absent judicial disclosure of such information*.[18]

There is qualified presumption of presidential communication privilege.

Mayroong kwalipikadong pagpapalagay sa pampangulong pribilehiyo sa komunikasyon.

American jurisprudence[19] bestows a **qualified** presumption in favor of presidential communication privilege. This means that the initial point is

against disclosure of the contents of the communication between the President and her close advisors. The burden of proof is on the agency or body seeking disclosure to show compelling reasons to overcome the presumption.

Respondent Senate Committees, however, insist that there should be no presumption in favor of presidential communication privilege. It banks on this Court's statement in *Senate of the Philippines v. Ermita*[20] that "*the extraordinary character of the exemption (executive privilege) indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure*."[21] It is argued that the dicta in *Ermita* is contrary and even antithetical[22] to the qualified presumption under American jurisprudence. Respondents likewise cite several provisions of the 1987 Philippine Constitution favoring public disclosure over secrecy[23] in its attempt to reverse the presumption.

I cannot agree with respondents. The Court's statement in *Ermita* must be read in its proper context. It is merely a general statement in favor of public disclosure and against government secrecy. To be sure, transparency of government actions is a laudable virtue of a republican system of government such as ours. After all, a public office is a public trust. A well informed citizenry is essential in a democratic and republican government.

But not all privileges or those that prevent disclosure of government actions are objectionable. Executive privilege is not an evil that should be thwarted and waylaid at every turn. Common sense and public policy require a certain degree of secrecy of some essential government actions. Presidential communication privilege is one of them. The President and her

close advisor should be given enough leeway to candidly discuss official and state matters without fear of undue public scrutiny. The President cannot effectively govern in a fishbowl where her every action is dissected and scrutinized. Even the Senate itself enjoys the same privilege in the discharge of its constitutional functions. Internal workings of the Senate Committees, which include deliberations between the Senators and their staffs in crafting a bill, are generally beyond judicial scrutiny.

The Court's dicta in *Senate of the Philippines v. Ermita* should not be unduly emasculated as basis for a general argument in favor of full disclosure of all governmental actions, much less as foundation for a presumption against presidential communication privilege. To my mind, it was not the intention of this Court to reverse the qualified presumption of presidential communication under American jurisprudence. Quite the contrary, the Court in *Ermita*, by citing the case of *Almonte v. Vasquez*, adopted the qualified presumption of presidential communication privilege. *Almonte* quoted several American cases which favored the qualified presumption of presidential communication privilege.[24] As discussed by Chief Justice Reynato Puno in his dissenting opinion:

> A hard look at *Senate v. Ermita* ought to yield the conclusion that it bestowed a qualified presumption in favor of the presidential communications privilege. As shown in the previous discussion, *U.S. v. Nixon*, as well as the other related Nixon cases *Sirica* and *Senate Select Committee on Presidential Campaign Activities, et al. v. Nixon* in the D.C. Court of Appeals, as well as subsequent cases, all recognize that there is a presumptive privilege in favor of presidential communications. The *Almonte* case quoted *U.S. v. Nixon* and recognized a presumption in favor of confidentiality of presidential communications.
>
> The statement in *Senate v. Ermita* that the "extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure" must therefore be read to mean that there is a general disfavor of government privileges as held in *In Re Subpoena for Nixon*, especially considering the bias of the 1987 Philippine Constitution towards full public disclosure and transparency in government.

> In fine, *Senate v. Ermita* recognized the presidential communications privilege in *U.S. v. Nixon* and the qualified presumptive status that the U.S. High Court gave that privilege. Thus, respondent Senate Committees' argument that the burden is on petitioner to overcome a presumption against executive privilege cannot be sustained.[25]

At any rate, it is now settled that there is a qualified presumption in favor of presidential communication privilege. The majority decision[26] expressly recognized the presumption. Even Justices Ynares-Santiago[27] and Carpio,[28] in their separate dissenting opinions, agree that the presumption exists. Justice Carpio Morales[29] presented a different formulation of the privilege, but she nevertheless acknowledges the presumption. In other words, the three questions directed to petitioner are presumptively privileged because they pertain to the contents of his conversation with the President. ***Sa madaling salita, ang tatlong tanong sa petisyoner ay ipinapalagay na may angking pribilehiyo dahil ito'y tungkol sa usapan nila ng Pangulo***.

Presidential communication privilege is not absolute; it is rebuttable.

Ang pampangulong pribilehiyo sa komunikasyon ay hindi ganap; ito'y maaaring salungatin.

The fact that presidential communication is privileged is not the end of the matter. It is merely the starting point of the inquiry. In *Senate of the Philippines v. Ermita*, this Court stated:

> *That a type of information is recognized as privileged does not, however, necessarily mean that it would be considered privileged in all instances.* For in determining the validity of a claim of privilege, the question that must be asked is not only whether the requested information falls within one of the traditional privileges, but also whether that privilege should be honored in a given procedural setting.[30]

All Justices[31] agree that the presumption in favor of presidential communication privilege is *rebuttable*. The agency or body seeking disclosure must present **compelling** reasons to overcome the presumption. Justice Nachura stated the delicate balancing test in this manner:

> Because the foundation of the privilege is the protection of the public interest, any demand for disclosure of information or materials over which the privilege has been invoked must, likewise, be anchored on the public interest. Accordingly, judicial recognition of the validity of the claimed privilege depends upon "a weighing of the public interest protected by the privilege against the public interest that would be served by disclosure in a particular case." While a "demonstrated specific need" for material may prevail over a generalized assertion of privilege, whoever seeks the disclosure must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender.[32]

The Senate power of investigation in aid of legislation is different from its oversight function.

Ang kapangyarihan ng Senado na magsiyasat kaakibat ng tungkulin sa paggawa ng batas ay kaiba sa gawain nito ng pagsubaybay.

The context or procedural setting in which executive privilege is claimed is vital in the courts' assessment of the privilege. Since executive privilege has constitutional underpinnings, the degree of proof required to overcome the presumption must likewise have constitutional support. Here, the context or setting of the executive privilege is a joint Senate Committee[33] ***investigation in aid of legislation***.

There is a statement in the majority decision that respondent Senate Committees were exercising their oversight function,[34] instead of their legislative powers[35] in asking the three questions to Secretary Neri.[36] The characterization of the Senate power as one in the exercise of its oversight, instead of legislative, function has severe repercussions because of this Court's dicta in *Ermita* that the Senate's oversight function "*may be facilitated by compulsory process only to the extent that it is performed in*

pursuit of legislation." In exercising its oversight function, the Senate may only **request** the appearance of a public official. In contrast, it may **compel** appearance when it is exercising its power of investigation in aid of legislation.

On this score, I part way with the majority decision. To be sure, it is difficult to draw a line between the oversight function and the legislative function of the Senate. Nonetheless, there is sufficient evidence on record

that the Senate Committees were actually exercising their legislative power rather than their oversight function in conducting the NBN-ZTE investigation. Various resolutions,[37] privilege speeches[38] and bills[39] were filed in the Senate in connection with the NBN-ZTE contract. Petitioner's counsel, Atty. Antonio Bautista, even concedes that the investigation conducted by the Senate Committees were in aid of legislation.[40]

While there is a perception in some quarters that respondents' investigation is being carried too far or for some other motives, We cannot but accord respondents the benefit of the doubt.

The principle of separation of powers requires that We give due respect to the Senate assertion that it was exercising its legislative power in conducting the NBN-ZTE investigation. It is not for this Court to challenge, much less second guess, the purpose of the NBN-ZTE investigation or the motives of the Senators in probing the NBN-ZTE deal. We must presume a legislative purpose from the investigation because of the various pending bills filed in the Senate. At any rate, it is settled that the improper motives of some Senators, if any, will not vitiate the Senate's investigation as long as the presumed legislative purpose is being served by the work of the Senate Committees.[41]

Rebutting the presumption:* e*xecutive privilege is honored in civil, but not in criminal proceedings.

Ang pribilehiyo ay iginagalang sa kasong sibil, ngunit hindi sa kasong kriminal.

Given that a claim of presidential communication privilege was invoked by Secretary Neri in a Senate investigation in aid of legislation, it is necessary to examine how a similar claim of executive privilege fared in other contexts, particularly in criminal and civil proceedings, in order to gain insight on the evidence needed to rebut the qualified presumption.

There is a consensus among the Justices of this Court that a claim of executive privilege cannot succeed in a criminal proceeding. The reason is simple. The right of the accused to due process of law requires nothing less than full disclosure. When vital information that may exculpate the accused from a crime is withheld from the courts, the wheels of justice will be

stymied and the constitutional right of the accused to due process of law becomes illusory. It is the crucial need for the information covered by the privilege and the dire consequences of nondisclosure on the discharge of an essential judicial function which trumps executive privilege.

The leading case on executive privilege in a **criminal** proceeding is *U.S. v. Nixon*.[42] It involved a *sub poena duces tecum* to then United States President Richard Nixon and his staff to produce tape recordings and documents in connection with the Watergate scandal. Ruling that executive privilege cannot prevail in a criminal proceeding, the Supreme Court of the United States stated:

> The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of criminal prosecution.
>
> On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal case.[43]

I hasten to point out, however, that in this case, there is yet no criminal proceeding, hence, the vital ruling on *Nixon* does not square with Neri.

Again, in contrast, executive privilege is generally honored in a civil proceeding. The need for information in a civil case is not as significant or

does not have the same stakes as in a criminal trial. Unlike the accused in a criminal trial, the defendant in a civil case will not lose his life or liberty when information covered by executive privilege is left undisclosed to the courts. Moreover, there is the exacting duty of the courts to prove the guilt of the accused beyond reasonable doubt. But mere preponderance of evidence is required in a civil case to deliver a verdict for either party. That burden may be hurdled even without a full disclosure of information covered by the executive privilege.

The leading case on executive privilege in a civil proceeding is *Cheney v. US District Court of the District of Columbia*.[44] It involved discovery orders against Vice President Cheney and other federal officials and members of the National Energy Policy Development Group. Differentiating the earlier case of *Nixon*, the Supreme Court of the United States in *Cheney* held that the claim of executive privilege will be honored in a civil proceeding because it does not share the same "constitutional dimension" as in a criminal trial, thus:

> The Court of Appeals dismissed these separation of powers concerns. Relying on *United States v. Nixon*, it held that even though respondents' discovery requests are overbroad and "go well beyond FACA's requirements," the Vice- and his former colleagues on the NEPDG "shall bear the burden" of invoking privilege with narrow specificity and objecting to the discovery requests with "detailed precision." In its view, this result was required by *Nixon's* rejection of an "absolute, unqualified presidential privilege of immunity from judicial process under all circumstances." x x x
>
> The analysis, however, overlooks fundamental differences in the two cases. *Nixon* involves the proper balance between the Executive's interest in the confidentiality of its communication and the "constitutional need for production of relevant evidence in a criminal proceeding." The Court's decision was explicit that it was "not … concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation … We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."

> *The distinction Nixon drew between criminal and civil proceedings is not just a matter of formalism*. x x x In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, not only must the Executive Branch first assert privilege to resist disclosure, but privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be "expansively construed, for they are in derogation of the search for truth." *The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in Nixon. As Nixon recognized, the right to the production of relevant evidence in civil proceedings does not have the same "constitutional dimensions."*[45]

Nixon and *Cheney* present a stark contrast in the court's assessment of executive privilege in two different procedural settings. While the privilege was honored in a civil proceeding, it was held unavailing in a criminal trial. It is arguable that in both cases, there is a **compelling need** for the information covered by the privilege. After all, the courts may be unable to deliver a fair verdict without access to the information covered by the privilege.

I submit that **the distinction lies on the effect of non-disclosure on the efficient discharge of the court's judicial function**. The court may not adjudge the guilt of the accused beyond reasonable doubt in a criminal trial without the information covered by the privilege. The information may, in fact, exculpate the accused from the crime. In contrast, the court may render judgment in a civil case even absent the information covered by the privilege. The required burden of proof may still be hurdled even without access to the information.

In short, if the body or agency seeking disclosure may efficiently discharge its constitutional duty even without access to the information, the privilege will be honored. If, on the other hand, the privilege substantially impairs the performance of that body or agency's constitutional duty, the information covered by the privilege will be disclosed to enable that agency to comply with its constitutional duty.

There are two significant tests for rebutting the qualified presumption of presidential communication privilege.

May dalawang makahulugang panukat sa pagsalungat ng kwalipikadong pagpapalagay sa pampangulong pribilehiyo sa komunikasyon.

The majority decision ruled that the qualified presumption of presidential communication privilege may be overturned only by a showing of **public need** by the branch seeking access to conversation.[46]

Chief Justice Puno opines that the test must center on the efficient discharge of the constitutional functions of the President vis-à-vis the Senate. Using the "function impairment test," the Court weighs how the disclosure of the withheld information would impair the President's ability to perform her constitutional duties more than nondisclosure would impair the other branch's ability to perform its constitutional functions.[47] The test entails an initial assessment of the strength of the qualified presumption which shall then be weighed against the adverse effects of non-disclosure on the constitutional function of the agency seeking the information.

Justice Carpio Morales agrees that the proper test must focus on the effect of non-disclosure on the discharge of the Senate's constitutional duty of enacting laws, thus:

> Thus, a government agency that seeks to overcome a claim of the presidential communications privilege must be able to demonstrate that access to records of presidential conversations, or to testimony pertaining thereto, is **vital** to the responsible performance of that agency's official functions.[48]

In his separate concurring opinion, Justice Tinga highlights that the "claim of executive privilege should be *tested against the function of the legislative inquiry*, which is to acquire insight and information for the

purpose of legislation. He simplifies the issue in this manner: *would the divulgence of the sought-after information impede or prevent the Senate from enacting legislation*?[49]

Justice Nachura tersely puts it that to hurdle the presumption the Senate must show "how and why the desired information "is *demonstrably critical* to the responsible fulfillment of the Committees' functions."[50]

Justice Consuelo Ynares-Santiago, on the other hand, asserts that the proper test should not only be confined to the consequences of disclosure or non-disclosure on the constitutional functions of the President and the Senate, but must involve a holistic assessment of "public interest." She notes that "grave implications on public accountability and government transparency" are factors that must be taken into account in resolving a claim of executive privilege.[51]

The seemingly different tests submitted by the concurring and dissenting justices are but motions of the same type of balancing act which this Court must undertake in resolving the issue of executive privilege. The "public interest" test propounded by Justice Ynares-Santiago emphasizes the general basis in resolving the issue, which is **public interest**. The "balancing test" espoused by the majority justices and Justice Carpio Morales, and the "function impairment test" of Chief Justice Puno, on the other hand, underscore the main factor in resolving the conflict, which is to assess the **consequence of non-disclosure** on the effective discharge of the constitutional function of the branch or agency seeking the information.

The "balancing test" and the "function impairment test" approximate the test applied by the Supreme Court of the United States in *Nixon* and *Cheney*. An analysis of *Nixon* and *Cheney* reveals that the test must be anchored on two points. **One**, the compelling need for the information covered by the privilege by the body or agency seeking disclosure. **Two**, the effect of non-disclosure on the efficient discharge of the constitutional function of the body or agency seeking the information.

Both requisites must concur although the two may overlap. If there is a compelling need for the information, it is more likely that the agency seeking disclosure cannot effectively discharge its constitutional function without the required information. Disclosure is precisely sought by that agency in order for it to effectively discharge its constitutional duty. But it may also be true that there is a compelling need for the information but the agency or body seeking disclosure may still effectively discharge its constitutional duty even without the information. The presence of alternatives or adequate substitutes for the information may render disclosure of the information unnecessary.

The starting point is against disclosure of the contents of the communication between the President and her close advisors because of the qualified presumption of presidential communication privilege. The burden is on the party seeking disclosure to prove a **compelling** need for the information. But mere compelling need is insufficient. The branch or agency seeking the information must **also** show that it cannot effectively discharge its constitutional function without access to the information covered by the privilege.

The degree of impairment of the constitutional function of the agency seeking disclosure must be **significant** or **substantial** as to render it unable

to efficiently discharge its constitutional duty. In *Nixon*, the harm occasioned by non-disclosure was held to "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." In contrast, the harm in a civil proceeding was held to be only minor or insignificant, which rendered disclosure unnecessary.

Application of the twin tests – paglalapat ng kambal na panukat

Applying the same dual tests, the qualified presumption of the presidential communication privilege may be rebutted only upon showing by the Senate of a**compelling need** for the contents of the conversation between the President and Secretary Neri. The Senate must also prove that **it cannot effectively discharge its legislative function** without the information covered by the privilege.

The presidential communication privilege was invoked in a joint Senate investigation in aid of legislation. The main purpose of the NBN-ZTE investigation is to aid the Senators in crafting pertinent legislation. The constitutional duty involved in this case is the lawmaking function of the Senate.

Using the function impairment test, Chief Justice Puno concludes that the Senate had adequately shown a compelling need for the contents of the conversation between the President and Secretary Neri. The Chief Justice points out that there is no effective substitute for the information because it provides the **factual** basis "in crafting specific legislation pertaining to procurement and concurring in executive agreements."[52]

Justice Carpio Morales also observes that the Senate had adequately presented a compelling need for the information because it is "apparently unavailable anywhere else."[53] Justice Carpio Morales holds "it would be unreasonable to expect respondent Committees to merely hypothesize on the alternative responses and come up with legislation on that basis."[54]

I take a different view. To my mind, the Senate failed to present a case of compelling need for the information covered by the privilege. It must be borne in mind that Secretary Neri is only **one** of the many witnesses in the NBN-ZTE investigation. In fact, he had already testified lengthily for eleven (11) hours. Numerous resource persons and witnesses have testified before and after him. The list includes Rodolfo "Jun" Lozada, Jr., Jose De Venecia IV, Chairman Benjamin Abalos, technical consultants Leo San Miguel and Dante Madriaga. To date, the Senate Committees had conducted a total of twelve hearings on the NBN-ZTE investigation.

Given the sheer abundance of information, both consistent and conflicting, I find that the Senate Committees have more than enough inputs and insights which would enable its members to craft proper legislation in connection with its investigation on the NBN-ZTE deal. I do not see how the contents of the conversation between Secretary Neri and the President, which is presumptively privileged, could possibly add more light to the law-making capability of the Senate. At the most, the conversation will only bolster what had been stated by some witnesses during the Senate investigation.

I do not share the opinion that the entire talk between the President and Secretary Neri is essential because it provides the <u>factual</u> backdrop in crafting amendments to the procurement laws. The testimony of numerous witnesses and resource persons is already sufficient to provide a glimpse, if not a fair picture, of the whole NBN-ZTE contract. The Senators may even

assume, rightly or wrongly, based on the numerous testimonies, that there was an anomaly on the NBN ZTE contract and craft the necessary remedial legislation.

Unlike in a criminal trial, this is not a case where a precise reconstruction of past events is essential to the efficient discharge of a constitutional duty. The Senate is not a court or a prosecutorial agency where a meticulous or painstaking recollection of events is essential to determine the precise culpability of an accused. The Senate may still enact laws even without access to the contents of the conversation between the President and Secretary Neri. As correctly noted by Justice Nachura, "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events" and that "it is not uncommon for some legislative measures to be fashioned on the strength of certain assumptions that may have no solid factual precedents."[55]

Even granting that the Senate had presented a case of compelling need for the information covered by the executive privilege, the Senate nonetheless failed to prove the second element of "substantial impairment" of its constitutional lawmaking function. It is hard to imagine how an affirmative or negative answer to the three questions posed to petitioner Neri would hinder the Senate from crafting a law amending the Build Operate and Transfer (BOT) Law or the Official Development and Assistance (ODA) Act. The Senate may also cobble a law subjecting executive agreements to Senate concurrence even without access to the conversation between the President and Secretary Neri.

In fine, the qualified presumption in favor of presidential communication privilege was not successfully rebutted. First, the Senate

failed to prove a compelling need for the information covered by the privilege. Second, the constitutional function of the Senate to enact laws will not be substantially impaired if the information covered by the privilege is left undisclosed. For these twin reasons, I concur with the *ponente*'s decision honoring presidential communication privilege in the NBN-ZTE Senate investigation.

Gamit ang panukat ng* "balancing test" *at* "function impairment test," *matibay ang aking pasiya na hindi matagumpay na nasalungat ang kwalipikadong pagpapalagay* (qualified presumption) *sa pampangulong pribilehiyo sa komunikasyon.

Executive privilege and crime –
pampangulong pribilehiyo at krimen

The Senate also asserts that executive privilege cannot be used to conceal a crime. It is claimed that the conversation between the President and Secretary Neri pertained to an attempted bribery by then COMELEC chairman Benjamin Abalos to Secretary Neri. The alleged crime committed by Chairman Abalos will be shielded and concealed if the content of the conversation between the President and Secretary Neri is left undisclosed. It is also claimed that the President herself and his husband may have been complicit in the commission of a crime in approving the NBN-ZTE contract.

That executive privilege cannot be invoked to conceal a crime is well-settled. All Justices of this Court agree on that basic postulate. The privilege covers only the official acts of the President. It is not within the sworn duty of the President to hide or conceal a crime.[56] Hence, the privilege is unavailing to cover up an offense.

But We cannot lightly assume a criminal conduct. In the same manner that We give due respect to the Senate when it asserts that it is conducting an investigation in aid of legislation, so too must We accord the same level of courtesy to the President when she asserts her presidential communication privilege.

It must be stressed that the Senate is conducting the NBN-ZTE investigation **only in aid of legislation**. Its main goal is to gain insights on how to better craft pertinent laws. Its investigation is not, ought not to be, a fishing expedition to incriminate the President or for other purpose.

The Senate is not a prosecutorial agency. That duty belongs to the Ombudsman and the Department of Justice. Or the House of Representatives if impeachment is desired. That the concerned Senators or other sectors do not trust these institutions is altogether another matter. But the Court should not be pressured or faulted if it declines to deviate from the more specific norm ordained by the Constitution and the rule of law.

Much has been said about the need to ferret out the truth in the reported anomaly on the aborted NBN-ZTE broadband deal. But can the truth be fairly ascertained in a Senate investigation where there is no rule of evidence? Where even double hearsay testimony is allowed and chronicled by media? Where highly partisan politics come into play? May not the true facts be unveiled through other resource persons, including a namesake (Ruben Caesar Reyes)?

II

On the contempt and arrest order –
ang order ng pagsuway at pag-aresto

On the second issue, the majority decision invalidated the arrest and contempt order against petitioner Neri on five (5) counts, namely: (a) valid invocation of executive privilege; (b) lack of publication of the Senate Rules

of Procedure; (c) failure to furnish petitioner Neri with advance list of questions and proposed statutes which prompted its investigation; (d) lack of majority vote to cite for contempt; and (e) arbitrary and precipitate issuance of the contempt order. The first and the last are interrelated.

I concur with the majority decision but on a **single** ground: valid invocation of executive privilege.

A. Because of valid invocation of executive privilege, the Senate order of contempt and arrest is baseless, hence, invalid.

Dahil sa pasiya ng nakakarami sa Hukuman na balido ang imbokasyon ni Neri ng pampangulong pribilehiyo, ang* order *ng Senado sa kanyang pagsuway at pag-aresto ay walang batayan kaya hindi balido.

The Senate declared petitioner Neri in contempt because he refused to divulge the full contents of his conversation with the President. It is his refusal to answer the three questions covered by the presidential communication privilege which led to the issuance of the contempt and later the arrest order against him.

I note that the Senate order of contempt against Secretary Neri stated as its basis his failure to appear in four slated hearings, namely: September 18, 2007,September 20, 2007, October 25, 2007 and November 20, 2007.[57] But Secretary Neri attended the Senate hearing on **September 26, 2007** where he was grilled for more than eleven (11) hours. The October 25, 2007 hearing was moved to November 20, 2007 when the Senate issued a *subpoena ad testificandum* to Secretary Neri to further testify on the NBN-ZTE deal.

Before the slated November 20 hearing, Secretary Ermita wrote to the Senate requesting it to dispense with the testimony of Secretary Neri on the

ground of executive privilege. The Senate did not act on the request of Secretary Ermita. Secretary Neri did not attend the November 20, 2007 hearing.

The Senate erroneously cited Secretary Neri for contempt for failing to appear on the September 18 and 20, 2007 hearings. His failure to attend the two hearings is already a **non-issue** because he did attend and testified in the September 26, 2007 hearing. If the Senate wanted to cite him for contempt for his absence during the two previous hearings, it could have done so on September 26, 2007, when he testified in the Senate. The Senate cannot use his absence in the September 18 and 20 hearings as basis for citing Secretary Neri in contempt.

The main reason for the contempt and arrest order against Secretary Neri is his failure to divulge his conversation with the President. As earlier discussed, We ruled that Secretary Neri correctly invoked presidential communication privilege. Since he **cannot** be compelled by the Senate to divulge part of his conversation with the President which included the three questions subject of the petition for *certiorari*, the contempt and arrest order against him must be declared **invalid** as it is baseless. Petitioner, however, **may** still be compelled by the Senate to testify on **other matters** not covered by the presidential communication privilege.

B. The Senate does not need to republish its Rules of Procedure Governing Inquiries in Aid of Legislation.

Hindi kailangan na muling ipalathala ng Senado ang Tuntunin sa Prosidyur sa Pagsisiyasat Tulong sa Paggawa ng Batas.

Justice Leonardo-De Castro sustained the position of the Office of the Solicitor General that non-publication of the Senate Rules of Procedure is fatal to the contempt and arrest order against Secretary Neri, thus:

> We find merit in the argument of the OSG that respondent Committees likewise violated Section 21 of Article VI of the Constitution, requiring that the inquiry be in accordance with the "**duly published rules of procedure**." We quote the OSG's explanation:
>
> > "The phrase 'duly published rules of procedure' requires the Senate of every Congress to publish its rules of procedure governing inquiries in aid of legislation because every Senate is distinct from the one before it or after it. Since Senatorial elections are held every three (3) years for one-half of the Senate's membership, the composition of the Senate also changes by the end of each term. Each Senate may thus enact a different set of rules as it may deem fit. **Not having published its *Rules of Procedure,* the subject hearings in aid of legislation conducted by the 14th Senate, are therefore, procedurally infirm**."[58]

Justice Carpio agreed with Justice Leonardo-De Castro. In his separate opinion, Justice Carpio held that the Senate is **not** a continuing body under the 1987 Constitution because only half of its members continue to the next Congress, hence, it does not have a **quorum** to do business, thus:

> The Constitution requires that the Legislature publish its rules of procedure on the conduct of legislative inquiries in aid of legislation. There is no dispute that the last publication of the*Rules of Procedure of the Senate Governing the Inquiries in Aid of Legislation* was on 1 December 2006 in the *Philippine Star* and *Philippine Daily Inquirer* during the 13th Congress. There is also no dispute that the *Rules of Procedure* have not been published in newspapers of general circulation during the current 14th Congress. However, the *Rules of Procedure* have been published continuously in the website of the Senate since at least the 13th Congress. In addition, the Senate makes the *Rules of Procedure* available to the public in pamphlet form.
>
> In *Arnault v. Nazareno*, decided under the 1935 Constitution, this Court ruled that "the Senate of the Philippines is a continuing body whose members are elected for a term of six years and so divided that the seats of only one-third become vacant every two years, **two-thirds always continuing into the next Congress** save as vacancies may occur thru death or resignation." To act as a legislative body, the Senate must have a

quorum, which is a majority of its membership. Since the Senate under the 1935 Constitution always had two-thirds of its membership filled up except for vacancies arising from death or resignation, the Senate always maintained a quorum to act as a legislative body. Thus, the Senate under the 1935 Constitution continued to act as a legislative body even after the expiry of the term of one-third of its members. This is the rationale in holding that the Senate under the 1935 Constitution was a continuing legislative body.

The present Senate under the 1987 Constitution is no longer a continuing legislative body. The present Senate has twenty-four members, twelve of whom are elected every three years for a term of six years each. Thus, the term of twelve Senators expires every three years, leaving **less than a majority of Senators to continue into the next Congress**. The 1987 Constitution, like the 1935 Constitution, requires a majority of Senators to "constitute a quorum to do business." Applying the same reasoning in *Arnault v. Nazareno*, the Senate under the 1987 Constitution is not a continuing body because less than majority of the Senators continue into the next Congress. The consequence is that the *Rules of Procedure* must be republished by the Senate after every expiry of the term of twelve Senators.

The publication of the *Rules of Procedure* in the website of the Senate, or in pamphlet form available at the Senate, is not sufficient under the *Tañada v. Tuvera* ruling which requires publication either in the Official Gazette or in a newspaper of general circulation. The *Rules of Procedure* even provide that the rules "shall take effect seven (7) days after publication in two (2) newspapers of general circulation," precluding any other form of publication. Publication in accordance with *Tañada* is mandatory to comply with the due process requirement because the*Rules of Procedure* put a person's liberty at risk. A person who violates the *Rules of Procedure* could be arrested and detained by the Senate.

Due process requires that "fair notice" be given to citizens before rules that put their liberty at risk take effect. The failure of the Senate to publish its *Rules of Procedure* as required in Section 22, Article VI of the Constitution renders the *Rules of Procedure* void. Thus, the Senate cannot enforce its *Rules of Procedure*.[59]

Chief Justice Puno, on the other hand, points out that the Senate has been considered a continuing body by custom, tradition and practice. The Chief Justice cautions on the far-reaching implication of the Senate Rules of Procedure being declared invalid and unenforceable. He says:

The Senate Rules of Procedure Governing Inquiries in Aid of Legislation is assailed as invalid allegedly for failure to be re-published. It is contended that the said rules should be re-published as the Senate is not a continuing body, its membership changing every three years. The assumption is that there is a new Senate after every such election and it

> should not be bound by the rules of the old. We need not grapple with this contentious issue which has far-reaching consequences to the Senate. The precedents and practice of the Senate should instead guide the Court in resolving the issue. For one, the Senators have traditionally considered the Senate as a continuing body despite the change of a part of its membership after an election. It is for this reason that the Senate does not cease its labor during the period of such election. Its various Committees continue their work as its officials and employees. For another, the Rules of the Senate is silent on the matter of re-publication. Section 135, Rule L of the Rules of the Senate provides that, "if there is no Rule applicable to a specific case, the precedents of the Legislative Department of the Philippines shall be resorted to x x x." It appears that by tradition, custom and practice, the Senate does not re-publish its rules especially when the same has not undergone any material change. In other words, existing rules which have already undergone publication should be deemed adopted and continued by the Senate regardless of the election of some new members. Their re-publication is thus an unnecessary ritual. We are dealing with internal rules of a co-equal branch of government and unless they clearly violate the Constitution, prudence dictates we should be wary of striking them down. The consequences of striking down the rules involved in the case at bar may spawn serious and unintended problems for the Senate.[60]

True it is that, as the Constitution mandates, the Senate may only conduct an investigation in aid of legislation pursuant to its duly **published** rules of procedure. Without publication, the Senate Rules of Procedure Governing Inquiries in Aid of Legislation is ineffective. Thus, unless and until said publication is done, the Senate cannot enforce its own rules of procedure, including its power to cite a witness in contempt under Section 18.

But the Court can take judicial notice that the Senate Rules of Procedure Governing Inquiries in Aid of Legislation was published on August 20 and 21, 1992 in the *Philippine Daily Inquirer* and *Philippine Star* during the 9th Congress.

The Senate again published its said rules on December 1, 2006 in the *Philippine Star* and *Philippine Daily Inquirer* during the 13th Congress. That the Senate published its rules of procedure twice more than complied with the Constitutional requirement.

I submit that the Senate remains a continuing body under the 1987 Constitution. That the Senate is a continuing body is premised on the staggered terms of its members, the idea being to ensure stability of governmental policies. This is evident from the deliberations of the framers of the Constitution, thus:

> "MR RODRIGO. x x x
>
> I would like to state that in the United States Federal Congress, the term of the members of the Lower House is only two years. We have been used to a term of four years here but I think three years is long enough. But they will be allowed to run for reelection any number of times. In this way, we remedy the too frequent elections every two years. ***We will have elections every three years under the scheme and we will have a continuing Senate. Every election, 12 of 24 Senators will be elected, so that 12 Senators will remain in the Senate. In other words, we will have a continuing Senate***.[61]
>
> x x x x
>
> MR DAVIDE. This is just a paragraph of that section that will follow what has earlier been approved. It reads: "OF THE SENATORS ELECTED IN THE ELECTION IN 1992, THE FIRST TWELVE OBTAINING THE HIGHEST NUMBER OF VOTES SHALL SERVE FOR SIX YEARS AND THE REMAINING TWELVE FOR THREE YEARS."
>
> This is to start the ***staggering of the Senate to conform to the idea of a continuing Senate***.
>
> THE PRESIDING OFFICER (Mr. Rodrigo). What does the Committee say?
>
> MR SUAREZ. The Committee accepts the Davide proposal, Mr. Presiding Officer.[62]

The Senate does not cease to be a continuing body merely because only half of its members continue to the next Congress. To my mind, even a lesser number of Senators continuing into the next Congress will still make the Senate a continuing body. The Senate must be viewed as a collective body. It is an institution quite apart from the Senators composing it. The

Senate as an institution cannot be equated to its present occupants. It is indivisible. It is not the sum total of all sitting Senators at any given time. Senators come and go but the very institution of the Senate remains. It is this indivisible institution which should be viewed as continuing.

The argument that the Senate is not a continuing body because it lacks **quorum** to do business after every midterm or presidential elections is flawed. It does not take into account that the term of office of a Senator is fixed by the Constitution. There is no vacancy in the office of outgoing Senators during midterm or presidential elections. Article VI, Section 4 of the 1987 Constitution provides:

> The term of office of the Senators shall *be six years and shall commence, unless otherwise provided by law, at noon on the thirtieth day of June next following their election*.

The term of a Senator starts at noon of June 30 next following their election and shall end before noon of June 30 six years after. The constitutional provision aims to prevent a vacuum in the office of an outgoing Senator during elections, which is fixed under the Constitution unless changed by law on the second Monday of May,[63] until June 30 when the Senators-elect assume their office. There is no vacuum created because at the time an outgoing Senator's term ends, the term of a Senator-elect begins.

The same principle holds true for the office of the President. A president-elect does not assume office until noon of June 30 next following a presidential election. An outgoing President does not cease to perform the duties and responsibilities of a President merely because the people had chosen his/her new successor. Until her term expires, an outgoing President

has the constitutional duty to discharge the powers and functions of a President unless restricted[64] by the Constitution.

In fine, the Senate is a continuing body as it continues to have a full or at least majority membership[65] even during elections until the assumption of office of the Senators-elect. The Senate as an institution does not cease to have a quorum to do business even during elections. It is to be noted that the Senate is not in session during an election until the opening of a new Congress for practical reasons. This does not mean, however, that outgoing Senators cease to perform their duties as Senators of the Republic during such elections. When the President proclaims martial law or suspends the writ of habeas corpus, for example, the Congress including the outgoing Senators are required to convene if not in session within 24 hours in accordance with its rules without need of call.[66]

The Constitutional provision requiring publication of Senate rules is contained in Section 21, Article VI of the 1987 Constitution, which reads:

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

The above provision only requires a "***duly published***" rule of procedure for inquiries in aid of legislation. It is silent on republication. There is nothing in the constitutional provision that commands that every new Congress must publish its rules of procedure. Implicitly, republication is necessary only when there is an amendment or revision to the rules. This is required under the due process clause of the Constitution.

The Senate in the 13th Congress caused the publication of the Rules of Procedure Governing Inquiries in Aid of Legislation. The present Senate (14th Congress) adopted the same rules of procedure in the NBN-ZTE investigation. It does not need to republish said rules of procedure because

it is not shown that a substantial amendment or revision was made since its last publication that would affect the rights of persons appearing before it.

On a more practical note, there is little to be gained in requiring a new Congress to cause the republication of the rules of procedure which has not been amended or revised. The exercise is simply a waste of government funds. Worse, it unduly burdens and hinders the Senate from discharging its constitutional duties. Publication takes time and during the interregnum, it cannot be gainsaid that the Senate is barred or restricted from conducting an investigation in aid of legislation.

I agree with the Chief Justice that this Court must be wary of the far-reaching consequences of a case law invalidating the Senate rules of procedure for lack of republication. Our ruling in this petition will not only affect the NBN-ZTE investigation, but all other Senate investigations conducted under the 10th, 11th, 12th, and the present 14th Congress, for which no republication of the rules has been done. These investigations have been

the basis of several bills and laws passed in the Senate and the House of Representatives. Putting a doubt on the authority, effectivity and validity of these proceedings is imprudent and unwise. This Court should really be cautious in making a jurisprudential ruling that will unduly strangle the internal workings of a co-equal branch and needlessly burden the discharge of its constitutional duty.

C. The Senate failed to furnish petitioner with a list of possible questions and needed statutes prompting the inquiry. But the lapse was sufficiently cured.

Nagkulang ang Senado na bigyan ang petisyuner ng listahan ng mga itatanong sa kanya at mga panukalang batas na nagtulak sa pagsisiyasat. Subalit ang kakulangan ay nalunasan ng sapat.

In *Senate v. Ermita*,[67] the Court issued a guideline to the Senate to furnish a witness, prior to its investigation, an advance list of proposed questions and possible needed statutes which prompted the need for the inquiry. The requirement of prior notice will dispel doubts and speculations on the real nature and purpose of its investigation. Records show the Senate failed to comply with that guideline. It did not furnish petitioner Neri an advance list of the required questions and bills which prompted the NBN-ZTE investigation. Thus, the Senate committed a procedural error.

The majority decision held that the procedural error invalidated the contempt and arrest order against petitioner Neri, thus:

> x x x Respondent Committees did not comply with the requirement laid down in *Senate v. Ermita* that the invitations should contain the "possible needed statute which prompted the need for the inquiry," along with "the usual indication of the subject of inquiry and the **questions** relative to and in furtherance thereof." Compliance with this requirement is imperative, both under Sections 21 and 22 of Article VI of the Constitution. This must be so to ensure that the rights of both

> persons **appearing in or affected** by such inquiry are respected as mandated by said Section 21 and by virtue of the express language of Section 22. Unfortunately, despite petitioner's repeated demands, respondent Committees did not send him an advance list of questions.[68]

Nevertheless, I disagree with the majority on this point. I do not think that such procedural lapse *per se* has a substantial effect on the resolution of the validity of the Senate contempt and arrest order. The defect is relatively **minor** when viewed in light of the serious issues raised in the NBN-ZTE investigation. More importantly, the procedural lapse was sufficiently **cured** when petitioner was apprised of the context of the investigation and the pending bills in connection with the NBN-ZTE inquiry when he appeared before the respondent Senate committees.

If this were a case of a witness suffering undue prejudice or substantial injury because of unfair questioning during a Senate investigation, I would not hesitate to strike down a contempt and arrest order against a recalcitrant witness. But this is not the situation here. Petitioner neither suffered any undue prejudice nor substantial injury. He was not ambushed by the Senators with a barrage of questions regarding a contract in which he had little or no prior knowledge. Quite the contrary, petitioner **knew or ought to know** that the Senators will query him on his participation and knowledge of the NBN-ZTE deal. This was clear from the **letter** of the Senate to petitioner requesting his presence and attendance during its investigation.

At any rate, this case should serve as an eye-opener to the Senate to faithfully comply with Our directive in *Ermita*. To prevent future claims of unfair surprise and questioning, the Senate, in its future investigations, ought to furnish a witness an advance list of questions and the pending bills which prompted its investigation.

D. There was a majority vote under Section 18 of the pertinent Senate Rules of Procedure.

Nagkaroon ng boto ng nakararami ayon sa Seksiyon 18 ng nauukol na Tuntunin ng Senado.

Section 18 of the Senate Rules Governing Inquiries in Aid of Legislation provides:

> Sec. 18. *Contempt*. – The Committee, **by a vote of a majority of all its members**, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members, or testifying, testifies falsely or evasively. A contempt of the Committee shall be deemed a contempt of the Senate. Such witness may be ordered by the Committee to be detained in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself of that contempt.

The majority decision held that the required majority vote under Section 18 of the said Senate Rules of Procedure was not met. In her *ponencia*, Justice Leonardo-De Castro notes that members of the Senate Committees who were ***absent*** during the Senate investigations were made to sign the contempt order. The*ponente* cites the transcript of records during the Senate investigation where Senator Aquilino Pimentel raised the issue to Senator Alan Peter Cayetano during interpellation, thus:

> **THE CHAIRMAN (SEN. CAYETANO, A).** May I recognize the Minority Leader and give him the floor, Senator Pimentel.
>
> **SEN. PIMENTEL.** Mr. Chairman, there is no problem, I think, with consulting the other committees. But I am of the opinion that the Blue Ribbon Committee is the lead committee, and therefore, it should have preference in enforcing its own decisions. Meaning to say, it is not something that is subject to consultation with other committees. I am not

sure that is the right interpretation. I think that once we decide here, we enforce what we decide, because otherwise, before we know it, our determination is watered down by delay and, you know, the so-called "consultation" that inevitably will have to take place if we follow the premise that has been explained.

So my suggestion, Mr. Chairman, is the Blue Ribbon Committee should not forget it's the lead committee here, and therefore, the will of the lead committee prevails over all the other, you, know reservations that other committees might have who are only secondary or even tertiary committees, Mr. Chairman.

THE CHAIRMAN (SEN. CAYETANO, A.). Thank you very much to the Minority Leader. And I agree with the wisdom of his statements. I was merely mentioning that under Section 6 of the Rules of the Committee and under Section 6, "The Committee by a vote of a majority of all its members may punish for contempt any witness before it who disobeys any order of the Committee."

So the Blue Ribbon Committee is more than willing to take that responsibility. **But we only have six members here today, I am the seventh as chair and so we have not met that number.** So I am merely stating that, sir, that when we will prepare the documentation, if a majority of all members sign and I am following the *Sabio v. Gordon* rule wherein I do believe, if I am not mistaken, Chairman Gordon prepared the documentation and then either in caucus or in session asked the other members to sign. And once the signatures are obtained, solely for the purpose that Secretary Neri or Mr. Lozada will not be able to legally question our subpoena as being insufficient in accordance with law.[69]

Justice Arturo Brion particularly agrees with the *ponente*. In his separate concurring opinion, Justice Brion cites the admission of Senators Francis Pangilinan and Rodolfo Biazon during the Oral Argument that the required majority vote under Section 18 was not complied with, thus:

That the Senate committees engaged in shortcuts in ordering the arrest of Neri is evident from the record of the arrest order. *The interpellations by Justices Tinga and Velasco of Senators Rodolfo G.*

> *Biazon (Chair of the Committee on National Defense and Security) and Francis N. Pangilinan (Senate Majority Leader) yielded the information that none of the participating Committees (National Defense and Security, Blue Ribbon, and Trade and Commerce) registered enough votes to approve the citation of contempt and the arrest order*. An examination of the Order dated 30 January 2008 shows that only Senators Alan Peter Cayetano, Aquino III, Legarda, Honasan and Lacson (of 17 regular members) signed for the Blue Ribbon Committee; only Senators Roxas, Pia Cayetano, Escudero and Madrigal for the Trade and Commerce Committee (that has 9 regular members); and only Senators Biazon, and Pimentel signed for the National Defense and Security Committee (that has 19 regular members). *Senate President Manny Villar, Senator Aquilino Pimentel as Minority Floor Leader, Senator Francis Pangilinan as Majority Floor Leader, and Senator Jinggoy Ejercito Estrada as Pro Tempore, all signed as ex-officio members of the Senate standing committees but their votes, according to Senator Biazon's testimony, do not count in the approval of committee action*.[70]

Chief Justice Puno has a different view. Citing the Certification[71] issued by the Senate's Deputy Secretary for Legislation, the Chief Justice concludes that the required majority vote was sufficiently met. The Chief Justice adds that even if the votes of the *ex officio* members of the Senate Committee were counted, the majority requirement for each of the respondent Senate Committees was still satisfied.[72]

I share the view of the Chief Justice on this point.

The divergence of opinion between the majority decision and Chief Justice Puno pertains to the voting procedure of the Senate. It involves two issues: (a) whether or not the vote to cite a witness for contempt under Section 18 of the Senate Rules requires actual physical presence during the Senate investigation; and (b) whether or not the votes of the *ex officio* members of respondent Senate Committees should be counted under Section 18 of the Senate Rules.

The twin issues involve an interpretation of the internal rules of the Senate. It is settled that the internal rules of a co-equal branch are within its sole and exclusive discretion. Section 16, Article VI of the 1987 Constitution provides:

> Each House may determine the Rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds of all its members, suspend or expel a member. A penalty of suspension, when imposed, shall not exceed sixty days.

In *Avelino v. Cuenco*,[73] this Court by a vote of 6-4 refused to assume jurisdiction over a petition questioning the election of Senator Cuenco as Senate President for lack of quorum. The case cropped up when then Senate President Avelino walked out of the Senate halls followed by nine other Senators, leaving only twelve senators in the session hall. The remaining twelve Senators declared the position of the Senate President vacant and unanimously designated Senator Cuenco as the Acting Senate President. Senator Avelino questioned the election, among others, for lack of quorum. Refusing to assume jurisdiction, this Court held:

> The Court will not sally into the legitimate domain of the Senate on the plea that our refusal to intercede might lead into a crisis, even a revolution. No state of things has been proved that might change the temper of the Filipino people as a (*sic*) peaceful and law-abiding citizens. And we should not allow ourselves to be stampeded into a rash action inconsistent with the claim that should characterize judicial deliberations.[74]

The same principle should apply here. We must not lightly intrude into the internal rules of a co-equal branch. The doctrine of separation of powers demands no less than a prudent refusal to interfere with the internal affairs of the Senate. The issues of lack of quorum and the inclusion of the votes of the *ex officio* members are beyond this Court's judicial review.

Apart from jurisprudence, common sense also requires that We should accord the same privilege and respect to a co-equal branch. If this Court allows Justices who are physically absent from its sessions to cast their vote

on a petition, there is no reason to treat the Senators differently. It is also common knowledge that even members of the House of Representatives cast their vote on a bill without taking part in its deliberations and sessions. Certainly, **what is sauce for the goose is sauce for the gander**. If it is allowed in the House of Representatives, it should be allowed in the Senate. ***Kung ito'y pinapayagan sa Mababang Kapulungan, dapat payagan din sa Mataas na Kapulungan***.

Avelino v. Cuenco was decided under the 1935 Constitution. Judicial power has been expanded under the present 1987 Constitution.[75] Even if We resolve the twin issues under Our expanded jurisdiction, Section 18 of the Senate Rules is sufficiently complied with. The section is silent on proper voting procedure in the Senate. It merely provides that the Senate may cite a witness in contempt by "*majority vote of all its members*." Clearly, as long as the majority vote is garnered, irrespective of the mode on how it is done, whether by mere signing of the contempt order or otherwise, the requirement is met. Here, it is clear that a majority of the members of the respective Senate Committees voted to cite petitioner Neri in contempt.

The required majority vote under Section 18 was sufficiently met if We include the votes of the *ex officio* members of the respective Senate Committees. Section 18 does not distinguish between the votes of permanent and *ex officio* members. Interpreting the Section, the votes of the *ex officio* members of the respective Committees should be counted in determining the quorum and the required majority votes. *Ubi lex non distinguit nec nos distinguire debemus*. When the law does not distinguish,

we must not distinguish. ***Kapag ang batas ay di nagtatangi, di tayo dapat magtangi***.

Conclusion

Summing up, I affirm my stand to grant the petition for *certiorari*. The Senate cannot compel petitioner Neri to answer the three questions subject of the petition for *certiorari* or to divulge the contents of his pertinent conversation with the President on the ground of presidential **communication** privilege.

I also affirm my position to quash the Senate contempt and arrest order against petitioner on the ground of **valid** invocation of presidential communication privilege, **although** (a) it is **unnecessary** to re-publish Senate Rules of Procedure Governing Inquiries in Aid of Legislation, (b) the Senate failure to furnish petitioner with a list of questions was **cured**, and (c) there was a **majority** vote.

Sa kabuuan, pinagtitibay ko ang aking paninindigan upang payagan ang petisyon para sa certiorari. Hindi mapipilit ng Senado si petisyuner Neri na sagutin ang tatlong tanong sa petisyon o ibunyag ang laman ng kaugnay na usapan nila ng Pangulo, dahil sa pampangulong pribilehiyo sa komunikasyon.

Pinaninindigan ko rin ang aking posisyon upang pawalang-saysay ang order ng Senado sa pagsuway at pag-aresto sa petisyuner, dahil sa tamang imbokasyon ng nasabing pribilehiyo, <u>bagama't</u> (a) <u>hindi na kailangan</u> ang muling paglalathala ng mga Tuntunin sa Prosidyur ng Senado sa Pagsisiyasat Tulong sa Paggawa ng Batas, (b) <u>nalunasan</u> ang pagkukulang ng Senado na bigyan ang petisyuner ng listahan ng mga tanong, at (c) nagkaroon ng <u>nakararaming</u> boto.

Accordingly, I vote to deny respondents' motion for reconsideration.

RUBEN T. REYES
Associate Justice

[1] "More critics slam SC on Neri Decision," http://www.abs-cbnglobal.com/ItoangPinoy/News/ PhilippineNews/tabid/140/ArticleID/1296/TargetModuleID/516/Default .aspx; accessed May 15, 2008.
[2] "Inside story: SC justices had pre-determined votes on Neri case," NewsBreak written by Marites Datunguilan Vitug, April 2, 2008, http://newsbreak.com.ph/index.php?option=com_content&task= view&id=4329&Itemid=88889384 accessed April 22, 2008.
[3] G.R. No. L-59096, October 11, 1985, 139 SCRA 260, 267.
[4] G.R. Nos. 146710-15, March 2, 2001, 353 SCRA 452, 531.
[5] J. Kapunan, J. Ynares-Santiago, and J. Sandoval-Gutierrez reserved the right to file separate opinions.
[6] G.R. No. 168877, March 24, 2006, 485 SCRA 405, 423.
[7] The three questions are:
a) Whether the President followed up the (NBN) project?
b) Were you dictated to prioritize the ZTE?
c) Whether the President told you to go ahead and approve the project after being told about the alleged bribe?
[8] Majority decision penned by J. Leonardo-De Castro, pp. 19, 21.
[9] *Senate of the Philippines v. Ermita*, G.R. No. 169777, April 20, 2006, 488 SCRA 1; *Chavez v. Philippine Commission on Good Government*, G.R. No. 130716, December 9, 1998, 299 SCRA 744; *Almonte v. Vasquez*, G.R. No. 95367, May 23, 1995, 244 SCRA 286.
[10] Concurring opinion of J. Tinga, p. 10.
[11] Supra.
[12] In *Senate of the Philippines v. Ermita*, this Court stated:

> Absent then a statement of the specific basis of a claim of executive privilege, there is no way of determining whether it falls under one of the traditional privileges, or whether, given the circumstances in which it is made, it should be respected. These, in substance, were the same criteria in assessing the claim of privilege asserted against the Ombudsman in *Almonte v. Vasquez* and, more in point, against a committee of the Senate in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.

[13] In her separate concurring opinion, J. Carpio Morales notes that the two claims of privilege must be assessed separately because they are grounded on different public interest consideration, thus:

> The two claims must be *assessed separately*, they being grounded on different public interest considerations. Underlying the presidential communications privilege is the public interest in enhancing the quality of presidential decision-making. As the Court held in the same case of *Senate v. Ermita*, "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The diplomatic secrets privilege, on the other hand, has a different objective – to preserve our diplomatic relations with other countries. (pp. 8-9)

[14] In *Senate of the Philippines v. Ermita*, the Supreme Court stated:

> Congress must not require the executive to state the reasons for the claim with such particularity as to compel disclosure of the information which the privilege is meant to protect.

[15] Separate concurring opinion of J. Tinga, p. 9; dissenting opinion of C.J. Puno, pp. 41-42, 63.
[16] The pertinent portion of the Letter of Executive Secretary Ermita to Senator Cayetano reads:

The context in which executive privilege is being invoked is that the information sought to be disclosed *might impair* our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the x x x, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

[17] Dissenting opinions of C.J. Puno, pp. 69-70, J. Carpio, p. 24, J. Carpio Morales, p. 21.

[18] Separate Concurring Opinion of Justice Tinga, pp. 9-10.

[19] *US v. Nixon*, 418 US 613 (1974); *Nixon v. Sirica*, 487 F. 2d 700.

[20] Supra note 9.

[21] *Senate of the Philippines v. Ermita*, id. at 52.

[22] Motion for reconsideration, p. 15.

[23] Id. at 14-20.

[24] In her dissenting opinion, J. Ynares-Santiago stated:

Indeed, presidential conversations and correspondences have been recognized as presumptively privileged under case law. (*Almonte v. Vasquez*, 314 Phil. 150 [1995]). (pp. 2-3)

[25] Dissenting opinion of C.J. Puno, pp. 75-77.

[26] Majority decision, pp. 15, 18 & 19.

[27] Dissenting opinion, pp. 2-3.

[28] Dissenting and concurring opinion, p. 15.

[29] J. Carpio Morales stated in her dissenting opinion:

Parenthetically, the presumption in favor of confidentiality only takes effect after the Executive has first established that the information being sought is covered by a recognized privilege. The burden is initially with the Executive to provide precise and certain reasons for upholding his claim of privilege, in keeping with the more general presumption in favor of transparency. Once it is able to show that the information being sought is covered by a recognized privilege, the burden shifts to the party seeking information, who may still overcome the privilege by a strong showing of need. (p. 25)

[30] *Senate of the Philippines v. Ermita*, id. at 47.

[31] Majority decision, p. 20; concurring opinions of J. Nachura, p. 11, J. Tinga, p. 11, J. Brion, p. 8; dissenting opinions of C.J. Puno, p. 58, J. Carpio Morales, p. 9, J. Carpio, p. 12, J. Ynares-Santiago, p. 1.

[32] Concurring opinion of J. Nachura, pp. 2-3.

[33] The NBN-ZTE investigation is a joint committee investigation by the Committee on Accountability of Public Officers and Investigations (Blue Ribbon), Committee on Trade and Commerce and Committee on National Defense and Security.

[34] CONSTITUTION (1987), Art. VI, Sec. 22 provides:

The heads of department may upon their own initiative, with the consent of the President, or upon the request of either House, or as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the state or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.

[35] Id., Sec. 21 provides:

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

[36] The majority decision stated:

The foregoing is consistent with the earlier case of *Nixon v. Sirica*, where it was held that presidential communications are presumptively privileged and that the presumption can be overcome only by mere showing of public need by the branch seeking access to conversations. The courts are enjoined to resolve the competing interests of the political branches of the government "in the manner that preserves the essential functions of each Branch."[36] Here, the record is bereft of any categorical explanation from respondent Committees to show a compelling or critical need for the answers to the three (3) questions in

the enactment of a law. ***Instead, the questions veer more towards the exercise of the legislative oversight function under Section 22 of Article VI rather than Section 21 of the same Article. Senate v. Ermita ruled that the "the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation***."

[37] The following are the resolutions passed in the Senate in connection with the NBN-ZTE investigation:

1. P.S. Res. (Philippine Senate Resolution) No. 127, introduced by Senator Aquilino Q. Pimentel, Jr., entitled:

> Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting It Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations.

2. P.S. Res. No. 129, introduced by Senator Panfilo M. Lacson, entitled:

> Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity.

3. P.S. Res. No. 136, introduced by Senator Miriam Defensor Santiago, entitled:

> Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government.

4. P.S. Res. No. 144, introduced by Senator Manuel Roxas III, entitled:

> Resolution Urging Gloria Macapagal-Arroyo to Direct the Cancellation of the ZTE Contract.

[38] The following are the Privilege Speeches delivered in connection with the NBN ZTE investigation:

1. Privilege Speech of Senator Panfilo M. Lacson, delivered on September 11, 2007, entitled "Legacy of Corruption."

2. Privilege Speech of Senator Miriam Defensor Santiago, delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement."

[39] The following are the pending bills filed in connection with the NBN-ZTE investigation:

1. Senate Bill No. 1793, introduced by Senator Manuel Roxas III, entitled:

> An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes.

2. Senate Bill No. 1794, introduced by Senator Manuel Roxas III, entitled:

> An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes.

3. Senate Bill No. 1317, introduced by Senator Miriam Defensor Santiago, entitled:

> An Act Mandating Concurrence to International Agreements and Executive Agreements.

[40] TSN, March 4, 2008, p. 82.

[41] *Watkins v. United States,* 354 US 178, 1 L. Ed 1273 (1957).

[42] 418 US 613 (1974).

[43] *U.S. v. Nixon,* id.

[44] 542 US 367, 124 S. Ct. 2576 (2004).

[45] *Cheney v. US District Court of the District of Columbia,* id.

[46] Majority decision, p. 20.

[47] Dissenting opinion of C.J. Puno, p. 59.
[48] Separate dissenting opinion of J. Carpio Morales, p. 25.
[49] Concurring opinion of J. Tinga, p. 11.
[50] Concurring opinion of J. Nachura, pp. 10-11.
[51] Separate dissenting opinion of J. Ynares-Santiago, p. 3.
[52] Dissenting opinion of C.J. Puno, pp. 96-98.
[53] Dissenting opinion of J. Carpio Morales, p. 29.
[54] Id. at 27.
[55] Concurring opinion of J. Nachura, p. 10.
[56] Concurring opinion of J. Carpio, p. 14.
[57] Annex "A." Supplemental opinion.
[58] Majority decision, p. 30.
[59] Concurring opinion of J. Carpio, pp. 28-31.
[60] Dissenting opinion of C.J. Puno, pp. 110-111.
[61] Constitutional Commission Record, July 24, 1986, p. 208.
[62] Constitutional Commission Record, October 3, 1986, p. 434.
[63] CONSTITUTION (1987), Art. VI, Sec. 8.
[64] Id., Secs. 14 and 15 provides:

> Section 14. Appointments extended by an Acting President shall remain effective, unless revoked by the elected President, within ninety days from his assumption or reassumption of office.
>
> Section 15. Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.

[65] The Office of a Senator may be vacant for causes such as death or permanent disability.
[66] CONSTITUTION (1987), Art. VII, Sec. 18 provides:

> The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.
>
> *The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call.*

[67] In *Senate of the Philippines v. Ermita*, this Court stated:

> One possible way for Congress to avoid such a 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 statements in its invitations, along with the usual indication of the subject of the 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.

[68] Majority decision, pp. 27-28.
[69] Majority decision, pp. 28-30.
[70] Concurring opinion of J. Brion, pp. 5-6.
[71] 1. **Committee on Accountability of Public Officers and Investigations (17 members excluding 3 *ex-officio* members)**:

Chairperson: Cayetano, Alan Peter - signed
Vice-Chairperson:
Members: Cayetano, Pia - signed

Defensor Santiago, Miriam
Enrile, Juan Ponce
Escudero, Francis - signed
Gordon, Richard
Honasan II, Gregorio Gringo - signed
Zubiri, Juan Miguel
Arroyo, Joker
Revilla, Jr., Ramon
Lapid, Manuel
Aquino III, Benigno - signed
Biazon, Rodolfo - signed
Lacson, Panfilo - signed
Legarda, Loren - signed
Madrigal, M.A. - signed
Trillanes IV, Antonio

Ex-Officio Members:

Ejercito Estrada, Jinggoy - signed
Pangilinan, Francis - signed
Pimentel, Jr., Aquilino - signed

2. **Committee on National Defense and Security (19 members excluding 2 *ex-officio* members)**:

Chairperson: Biazon, Rodolfo - signed
Vice-Chairperson:
Members: Angara, Edgardo
Zubiri, Juan Miguel
Cayetano, Alan Peter - signed
Enrile, Juan Ponce
Gordon, Richard
Cayetano, Pia - signed
Revilla, Jr., Ramon
Honasan II, Gregorio Gringo - signed
Escudero, Francis - signed
Lapid, Manuel
Defensor Santiago, Miriam
Arroyo, Joker
Aquino III, Benigno - signed
Lacson, Panfilo - signed
Legarda, Loren - signed
Madrigal, M.A. - signed
Pimentel, Jr. Aquilino - signed
Trillanes IV, Antonio

Ex-Officio Members:

Ejercito Estrada, Jinggoy - signed
Pangilinan, Francis – signed

3. **Committee on Trade and Commerce (9 members excluding 3 *ex-officio* members)**:

Chairperson: Roxas, MAR - signed
Vice-Chairperson:
Members: Cayetano, Pia - signed
Lapid, Manuel
Revilla, Jr., Ramon
Escudero, Francis - signed
Enrile, Juan Ponce
Gordon, Richard
Biazon, Rodolfo - signed
Madrigal, M.A.- signed

Ex-Officio Members:

Ejercito Estrada, Jinggoy -signed

Pangilinan, Francis - signed
Pimentel, Jr., Aquilino - signed

[72] Dissenting opinion of C.J. Puno, p. 119.

[73] 83 Phil. 17 (1949).

[74] *Avelino v. Cuenco,* id. at 22.

[75] CONSTITUTION (1987), Art. VIII, Sec. 1 provides:

> Judicial review includes the duty of the Courts of Justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

G.R. No. 180643 – ROMULO L. NERI, in his capacity as Chairman of the Commission on Higher Education (CHED) and as former Director General of the National Economic and Development Authority (NEDA) v. SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS & INVESTIGATIONS (BLUE RIBBON), SENATE COMMITTEE ON TRADE & COMMERCE, and SENATE COMMITTEE ON NATIONAL DEFENSE & SECURITY.

Promulgated:

March 25, 2008

x - x

DISSENTING OPINION

PUNO, *C.J.*:

The giant question on the scope and use of executive privilege has cast a long shadow on the ongoing Senate inquiry regarding the alleged and attempted bribery of high government officials in the consummation of the National Broadband Network (NBN) Contract of the Philippine government. With the expanse and opaqueness of the constitutional doctrine of executive privilege, we need to open a window to enable enough light to

enter and illuminate the shadow it has cast on the case at bar. The task is not easy, as the nature of executive privilege is not static, but dynamic. Nonetheless, if there is a North Star in this quest, it is that the end all of executive privilege is to promote public interest and no other.

First, let us unfurl the facts of the case.

On April 21, 2007, the Department of Transportation and Communications (DOTC), through Secretary Leandro Mendoza, and Zhing Xing Telecommunications Equipment (ZTE), through its Vice President Yu Yong, executed in Boao, China, a "Contract for the Supply of Equipment and Services for the National Broadband Network Project" ("NBN-ZTE Contract") worth US$ 329,481,290.00 or approximately PhP 16 billion.[1] ZTE is a corporation owned by the Government of the People's Republic of China.[2] The NBN-ZTE Contract was to be financed through a loan that would be extended by the People's Republic of China. President Gloria Macapagal-Arroyo allegedly witnessed the signing of the contract.[3]

The NBN-ZTE Contract became the subject of investigations by the Joint Committees of the Senate, consisting of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon), Committee on Trade and Commerce and Committee on National Defense and Security after the filing of the following resolutions and delivery of the following privilege speeches:

1. **P.S. Res. (Philippine Senate Resolution) No. 127**, introduced by **Senator Aquilino Q. Pimentel, Jr.,** entitled:

Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting It Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations.[4]

2. **P.S. Res. No. 129**, introduced by **Senator Panfilo M. Lacson**, entitled:

Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity.[5]

3. **P.S. Res. No. 136**, introduced by **Senator Miriam Defensor Santiago**, entitled:

Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government.[6]

4. **P.S. Res. No. 144**, introduced by **Senator Manuel Roxas III**, entitled:

Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract.[7]

5. **Privilege Speech of Senator Panfilo M. Lacson**, delivered on September 11, 2007, entitled “Legacy of Corruption.”[8]

6. **Privilege Speech of Senator Miriam Defensor Santiago,** delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement."[9]

There are also **three (3) pending bills** in the Senate related to the

investigations, namely:

1. **Senate Bill No. 1793**, introduced by **Senator Manuel Roxas III**, entitled:

> An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes.[10]

2. **Senate Bill No. 1794**, introduced by **Senator Manuel Roxas III**, entitled:

> An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes.[11]

3. **Senate Bill No. 1317**, introduced by **Senator Miriam Defensor Santiago**, entitled:

> An Act Mandating Concurrence to International Agreements and Executive Agreements.[12]

The hearings **in aid of legislation** started in September 2007[13] and have yet to be concluded.

On September 26, 2007, petitioner Romulo L. Neri, upon invitation by the respondent Senate Committees, attended the hearing and testified for eleven (11) hours.[14] Petitioner was the Director General of the National Economic and Development Authority (NEDA) during the negotiation and signing of the NBN-ZTE Contract.[15] He testified that President

Macapagal-Arroyo had initially given instructions that there would be no loan and no guarantee for the NBN Project, and that it was to be undertaken on an unsolicited Build-Operate-Transfer (BOT) arrangement, so that the government would not expend funds for the project.[16] Eventually, however, the NBN Project was awarded to ZTE with a government-to-government loan.[17]

In the course of his testimony, petitioner declared that then Commission on Elections Chairperson Benjamin Abalos, the alleged broker of the NBN-ZTE Contract, offered him PhP 200 million in relation to the NBN-ZTE Contract.[18] He further stated that he informed President Macapagal-Arroyo of the bribe attempt by Chairperson Abalos, and that the President told him not to accept the bribe.[19] When Senator Francis N. Pangilinan asked petitioner whether the President had followed up on the NBN Contract, he refused to answer. He invoked executive privilege which covers conversations between the President and a public official.[20]Senator Loren B. Legarda asked petitioner if there was any government official higher than he who had dictated that the ZTE be prioritized over Amsterdam Holdings, Inc. (AHI), another company applying to undertake the NBN Project on a BOT arrangement.[21] Petitioner again invoked executive privilege, as he claimed that the question may involve a conversation between him and the President.[22] Senator Pia S. Cayetano also asked petitioner whether the President told him what to do with the project - after he had told her of the PhP 200 million attempted bribe and she told him not to accept it – but petitioner again invoked executive privilege.[23] At this juncture, Senator Rodolfo G. Biazon, Chairperson of the Committee on National Defense and Security, sought clarification from petitioner on his

source of authority for invoking executive privilege. Petitioner replied that he had been instructed by Executive Secretary Eduardo R. Ermita to invoke executive privilege on behalf of the President, and that a written order to that effect would be submitted to the respondent Senate Committees.[24]

Several Senators urged petitioner to inform the respondent Senate Committees of the basis for his invocation of executive privilege as well as the nature and circumstances of his communications with the President -- whether there were military secrets or diplomatic and national security matters involved. Petitioner did not accede and instead cited the coverage of executive privilege under Section 2(a) of Executive Order 464,[25] which includes "all confidential or classified information between the President and public officers covered by the Executive Order, such as conversations, correspondence between the President and public official." As respondent Senate Committees needed to know the basis for petitioner's invocation of executive privilege in order to decide whether to accept it or not, the petitioner was invited to an executive session to discuss the matter.[26] During the executive session, however, petitioner felt ill and was allowed to go home with the undertaking that he would return.[27]

On November 13, 2007, a subpoena *ad testificandum* was issued to petitioner, requiring him to appear before the Committee on Accountability of Public Officers and Investigations (Blue Ribbon).[28] The subpoena was signed by Senator Alan Peter S. Cayetano, Chairperson of the Senate Blue Ribbon Committee; Senator Manual A. Roxas III, Chairperson of the Committee on Trade and Commerce; and Senator Rodolfo G. Biazon, Chairperson of the Committee on National Defense and Security; and it was approved and signed by Senate President Manuel B. Villar.

On November 15, 2007, Executive Secretary Eduardo Ermita wrote to respondent Senate Blue Ribbon Committee Chairperson Alan Peter Cayetano. He communicated the **request** of the Office of the President to

dispense with the petitioner's testimony on November 20, 2007, "(c)onsidering that Sec. Neri has been lengthily interrogated on the subject in an unprecedented 11-hour hearing, wherein he answered all questions propounded to him **except** the foregoing questions involving executive privilege." The three (3) questions for which executive privilege was invoked "by Order of the President" were the following:

"a) Whether the President followed up the (NBN) project?

b) Were you dictated to prioritize the ZTE?

c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?"[29]

The letter of Executive Secretary Ermita offered the following justification for the invocation of executive privilege on these three questions, *viz*:

> "Following the ruling in **Senate v. Ermita**, the foregoing questions fall under conversations and correspondence between the President and public officials which are considered executive privilege (Almonte v. Vasquez, G.R. 95367, 23 May 1995; Chavez v. PEA, G.R. 133250, July 9, 2002). Maintaining the **confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision-making process.** The expectation of a President [as] to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.

> **The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China.** Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.
>
> In light of the above considerations, this Office is constrained to invoke the settled doctrine of executive privilege as refined in Senate v. Ermita, and has advised Secretary Neri accordingly." (*emphasis supplied*)[30]

Petitioner did not appear before the respondent Senate Committees on November 20, 2007. Consequently, on November 22, 2007, the committees wrote to petitioner requiring him to show cause why he should not be cited for contempt **for failing to attend the hearing on November 20, 2007,** pursuant to Section 6, Article 6 of the Rules of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon). The letter was signed by the Chairpersons of the Senate Blue Ribbon Committee, the Committee on Trade and Commerce and the Committee on National Defense and Security and was approved and signed by the Senate President.[31]

On November 29, 2007, petitioner wrote to Senator Alan Peter Cayetano as Chairperson of the Committee on Accountability of Public Officers and Investigations. Petitioner stated that after his exhaustive testimony, he "thought that what remained were only the three questions, where the Executive Secretary claimed executive privilege"; hence, in his November 15, 2007 letter to Senator Alan Peter Cayetano, Executive Secretary Ermita requested that petitioner's presence be dispensed with in

the November 20, 2007 hearing. Petitioner then requested that if there were matters not taken up in the September 26, 2007 hearing that would be taken up in the future, he be informed in advance, so he could adequately prepare for the hearing.[32]

Attached to petitioner's letter was the letter of his lawyer, Atty. Antonio Bautista, explaining that petitioner's "non-appearance last 20 November 2007 was upon the order of the President invoking executive privilege, as embodied in Sec. Eduardo R. Ermita's letter dated 18 (sic) November 2007", and that "Secretary Neri honestly believes that he has exhaustively and thoroughly answered all questions asked of him on the ZTE/NBN contract except those relating to his conversations with the President."[33] Atty. Bautista's letter further stated that petitioner's **"conversations with the President dealt with delicate and sensitive national security and diplomatic matters relating to the impact of the bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines.** Secretary Neri believes, upon our advice, that, given the sensitive and confidential nature of his discussions with the President, he can, within the principles laid down in Senate v. Ermita…and U.S. v. Reynolds…justifiably decline to disclose these matters on the claim of executive privilege."[34] Atty. Bautista also requested that he be notified in advance if there were new matters for petitioner to testify on, so that the latter could prepare for the hearing.[35]

On December 6, 2007, petitioner filed the Petition at bar. He contends that he properly invoked executive privilege to justify his non-appearance at

theNovember 20, 2007 hearing and prays that the Show Cause Order dated November 22, 2007 be declared null and void.

On January 30, 2008, an Order citing petitioner for contempt was issued by respondent Senate Committees, which reads, *viz*:

COMMITTEES ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS (BLUE RIBBON), TRADE & COMMERCE, AND NATIONAL DEFENSE AND SECURITY

IN RE: P.S. Res. Nos. 127, 129, 136 & 144; and Privilege Speeches of Senators Lacson and Santiago (all on the ZTE-NBN Project)

x----------x

ORDER

For failure to appear and testify in the Committees' hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007, despite personal notice and a Subpoena Ad Testificandum sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007, herein attached) **ROMULO L. NERI** is hereby cited in contempt of this (sic) Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.

The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make a return hereof within twenty four (24) hours from its enforcement.

SO ORDERED.

Issued this 30th day of January, 2008 at the City of Pasay.

(Signed)	(Signed)
ALAN PETER S. CAYETANO	**MAR ROXAS**
Chairman	Chairman

Committee on Accountability of Public Officers & Investigations (Blue Ribbon)

Committee on Trade and Commerce

(Signed)
RODOLFO G. BIAZON
Chairman
Committee on National Defense & Security

(Signed)
PIA S. CAYETANO** **MIRIAM DEFENSOR SANTIAGO***

(Signed)
JUAN PONCE ENRILE** **FRANCIS G. ESCUDERO****

(Signed)
RICHARD J. GORDON** **GREGORIO B. HONASAN***

JUAN MIGUEL F. ZUBIRI* **JOKER P. ARROYO***

RAMON B. REVILLA, JR.** **MANUEL M. LAPID****

(Signed) (Signed)
BENIGNO C. AQUINO III* **PANFILO M. LACSON***

(Signed) (Signed)
LOREN B. LEGARDA* **M. A. MADRIGAL****

ANTONIO F. TRILLANES* **EDGARDO J. ANGARA*****

(Signed)
AQUILINO Q. PIMENTEL, JR.***

Approved:

(Signed)
MANNY VILLAR
Senate President

* Member, Committees on Accountability of Public Officers & Investigations (Blue Ribbon) and National Defense & Security
** Member, Committees on Accountability of Public Officers & Investigations (Blue Ribbon), Trade & Commerce and National Defense & Security
*** Member, Committee on National Defense & Security

Ex Officio

(Signed)
AQUILINO Q. PIMENTEL, JR.
Minority Leader

(Signed)
FRANCIS "Kiko" N. PANGILINAN
Majority Leader

(Signed)
JINGGOY EJERCITO ESTRADA
President Pro Temporare[36]

On January 30, 2008, petitioner wrote to Senate President Manuel Villar, Senator Alan Peter S. Cayetano, Chairperson of the Committee on Accountability of Public Officers & Investigations (Blue Ribbon); Senator Manuel Roxas, Chairperson of the Committee on Trade & Commerce; and Senator Rodolfo G. Biazon, Chairperson of the Committee on National Defense and Security, seeking reconsideration of the Order of arrest. He explained that as stated in his November 29, 2007 letter, he had not intended to snub the November 20, 2007 hearing and had in fact cooperated with the Senate in its almost eleven hours of hearing on September 26, 2007. He further explained that he thought in good faith that the only remaining questions were the three for which he had invoked executive privilege. He

also reiterated that in his November 29, 2007 letter, he requested to be furnished questions in advance if there were new matters to be taken up to allow him to prepare for the hearing, but that he had not been furnished these questions.[37]

On February 5, 2008, petitioner filed a Supplemental Petition for Certiorari, praying that the Court issue a Temporary Restraining Order or Writ of Preliminary Injunction enjoining respondent Senate Committees from enforcing the Order for his arrest, and that the Order of arrest be annulled. Petitioner contends that his non-appearance in the November 20, 2007 hearing was justified by the invocation of executive privilege, as explained by Executive Secretary Ermita in his November 15, 2007 letter to respondent Senate Blue Ribbon Committee Chairperson Alan Peter Cayetano and by his (petitioner's) letter dated November 29, 2007 to Senator Alan Peter Cayetano as Chairperson of the Committee on Accountability of Public Officers and Investigations.[38] On February 5, 2008, the Court issued a Status Quo Ante Order and scheduled the case for Oral Argument on March 4, 2008.

Respondent Senate Committees filed their comment, arguing that: (1) there is no valid justification for petitioner to claim executive privilege;[39] (2) his testimony is material and pertinent to the Senate inquiry in aid of legislation;[40] (3) the respondent Senate Committees did not abuse their authority in issuing the Order of arrest of petitioner;[41] and (4) petitioner did not come to Court with clean hands.[42]

On March 4, 2008, the Oral Argument was held. Thereafter, the Court ordered the parties to submit their memoranda. Both parties submitted their Memoranda on March 17, 2008. On the same day, the Office of the

Solicitor General filed a Motion for Leave to Intervene and to Admit Attached Memorandum.

In the Oral Argument held on March 4, 2008, the Court delineated the following **issues to be resolved**, *viz*:

1. What communications between the President and petitioner Neri are covered by the principle of executive privilege?[43]

2. What is the proper procedure to be followed in invoking executive privilege?

3. Did the Senate Committees gravely abuse their discretion in ordering the arrest of petitioner for noncompliance with the subpoena?

A holistic view of the doctrine of executive privilege will serve as a hermeneutic scalpel to excise the fat of information that does not fall within the ambit of the privilege and to preserve only the confidentiality of the lean meat of information it protects in the particular setting of the case at bar.

I. General Policy Considerations on Disclosure and Secrecy in a Democracy: United States and Philippine Constitutions

The doctrine of executive privilege is tension between disclosure and secrecy in a democracy. Its doctrinal recognition in the Philippines finds its origin in theU.S. political and legal system and literature. At the outset, it is worth noting that the provisions of the U.S. Constitution say little about government secrecy or public access.[44] In contrast, the 1987 Philippine Constitution is replete with provisions on government transparency,

accountability and disclosure of information. This is a reaction to our years under martial rule when the workings of government were veiled in secrecy.

The 1987 Constitution provides for the right to information in Article III, Sec. 7, *viz*:

> The **right of the people to information** on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law. (*emphasis supplied*)

Symmetrical to this right, the 1987 Constitution enshrines the policy of the State on information and disclosure in its opening Declaration of Principles and Policies in Article II, *viz*:

> Sec. 24. The State recognizes the **vital** role of communication and **information in nation-building**. (*emphasis supplied*).
>
> Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a **policy of full public disclosure of all its transactions involving public interest**. (*emphasis supplied*)

A complementary provision is Section 1 of Article XI on the Accountability of Public Officers, which states, *viz*:

> Sec.1. 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. (*emphasis supplied*)

A more specific provision on availability of information is found in Section 21 of Article XI, National Economy and Patrimony, which states, *viz*:

> Sec. 21. Foreign loans may be incurred in accordance with law and the regulation of the monetary authority. **Information on foreign laws obtained or guaranteed by the Government shall be made available to the public**. (*emphasis supplied*)

In the concluding articles of the 1987 Constitution, information is again given importance in Article XVI, General Provisions, which states, *viz*:

> Sec. 10. The State shall provide the policy environment for the full development of Filipino capability and the **emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country,** in accordance with a policy that respects the freedom of speech and of the press. (*emphasis supplied*)

A government's democratic legitimacy rests on the people's information on government plans and progress on its initiatives, revenue and spending, among others, for that will allow the people to vote, speak, and organize around political causes meaningfully.[45] As Thomas Jefferson said, "if a nation expects to be ignorant and free in a state of civilization, it expects what never was and will never be."[46]

II. Our Government Operates under the Principle of Separation of Powers

The 1987 Constitution separates governmental power among the legislative, executive and judicial branches to avert tyranny by "safeguard(ding) against the encroachment or aggrandizement of one branch at the expense of the other."[47] However, the principle of separation of powers recognized that a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation

capable of governing itself effectively"; hence, the separation of powers between the branches is not absolute.[48]

Our Constitution contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, and autonomy but reciprocity.[49] Well said, the boundaries established by the Constitution delineating the powers of the three branches must be fashioned "according to common sense and the . . . necessities of governmental co-ordination."[50] This constitutional design requires an internal balancing mechanism by which government powers cannot be abused.[51] We married all these ideas when we decided the 1936 case **Angara v. Electoral Commission,**[52] *viz*:

> Each department of the government has exclusive cognizance of the matters within its jurisdiction, and is **supreme within its own sphere.** But it does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely restrained and independent of each other. **The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government**.[53] (*emphasis supplied*)

A. A Look at the Power of Legislative Investigation and Contempt of Witness

Patterned after the U.S. Constitution, the Philippine Constitution structures the government in a manner whereby its three separate branches -- executive, legislative and judicial -- are able to provide a system of checks and balances. The responsibility to govern is vested in the executive, but the legislature has a long-established power to inquire into administrative

conduct and the exercise of administrative discretion under the acts of the legislature, and to ascertain compliance with legislative intent.[54]

This power of congressional oversight embraces all activities undertaken by Congress to enhance its understanding of and influence over implementation of legislation it has enacted. Oversight may be undertaken through review or investigation of executive branch action.[55] One device of the legislature to review, influence and direct administration by the executive is legislation and the corollary power of investigation.[56] The standard justification for an investigation is the presumed need for new or remedial legislation; hence, investigations ought to be made in aid of legislation.[57]

The legislative power of investigation was recognized under the 1935 Constitution, although it did not explicitly provide for it. This power had its maiden appearance in the 1973 Constitution[58] and was carried into the 1987 Constitution in Article VI, Section 21, *viz*:

> Sec. 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

Included in the legislative power of investigation is the power of contempt or process to enforce. Although the power of contempt is not explicitly mentioned in the provision, this power has long been recognized. In the 1950 landmark case **Arnault v. Nazareno,**[59] the Court held, *viz*:

> Although there is no provision in the Constitution, expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may

> exercise its legislative functions advisedly and effectively, such power is so far incidental to the legislative function as to be implied. In other words, **the power of inquiry -with process to enforce it- is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information -which is not infrequently true- recourse must be had to others who do possess it.** Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so **some means of compulsion is essential to obtain what is needed.** (McGrain vs. Daugherty, 273 U.S. 135; 71 L.ed, 580; 50 A.L.R., 1) **The fact that the Constitution expressly gives to Congress the power to punish its Members for disorderly behaviour, does not by necessary implication exclude the power to punish for contempt any other person.** (Anderson vs. Dunn, 6Wheaton, 204; 5 L. ed., 242)[60] *(emphasis supplied)*

There are **two requirements** for the valid exercise of the legislative power of investigation and contempt of witness for contumacy: **first, the existence of a legislative purpose,** *i.e.*, the inquiry must be in aid of legislation, and **second, the pertinency of the question propounded**.

First, the legislative purpose. In the 1957 case **Watkins v. United States**,[61] the U.S. Supreme Court held that the **power to investigate encompasses everything** that concerns the administration of existing laws, as well as proposed or possibly needed statutes.[62] It further held that the **improper motives of members** of congressional investigating committees **will not vitiate** an investigation instituted by a House of Congress, if that assembly's legislative purpose is being served by the work

of the committee.[63] Two years later, the U.S. High Court held in **Barenblatt v. United States**[64] that the **power is not unlimited**, as Congress may only investigate those areas in which it may potentially legislate or appropriate. It cannot inquire into matters that are within the **exclusive** province of one of the other branches of government. The U.S. High Court ruled that the **judiciary has no authority to intervene on the basis of motives** that spurred the exercise of that power, even if it was exercised purely for the purpose of exposure, so long as Congress acts in pursuance of its constitutional power of investigation.

In the seminal case of **Arnault,** this Court held that the subject inquiry had a legislative purpose. In that case, the Senate passed Resolution No. 8, creating a special committee to investigate the Buenavista and the Tambobong Estates Deal in which the government was allegedly defrauded of PhP 5 million. Jean Arnault was among the witnesses examined by the committee. Arnault refused to answer a question, which he claimed was "self-incriminatory," prompting the Senate to cite him for contempt. He was committed to the custody of the Sergeant-at-Arms and imprisoned. He sought redress before this Court on a petition for *habeas corpus*, contending that the Senate had no power to punish him for contempt; the information sought to be obtained by the Senate was not pertinent to the investigation and would not serve any intended legislation, and the answer required of him was incriminatory.

The Court upheld the jurisdiction of the Senate to investigate the Buenavista and Tambobong Estates Deal through the Special Committee it created under Senate Resolution No. 8. The Resolution read in relevant part, *viz*:

> RESOLUTION CREATING A SPECIAL COMMITTEE TO INVESTIGATE THE BUENAVISTA AND THE TAMBOBONG ESTATES DEAL.
>
> xxx xxx xxx
>
> RESOLVED, That a Special Committee, be, as it hereby is, created, composed of five members to be appointed by the President of the Senate to investigate the Buenavista and Tambobong Estates deal. **It shall be the duty of the said Committee to determine whether the said purchase was honest, valid, and proper and whether the price involved in the deal was fair and just, the parties responsible therefor, and any other facts the Committee may deem proper in the premises**…(*emphasis supplied*)

The subject matter to be investigated was clearly stated in the Resolution, and the Court "entertain(ed) no doubt as to the Senate's authority to do so and as to the validity of Resolution No. 8"[65] for the following reasons, *viz*:

> …The transaction involved a questionable and allegedly **unnecessary and irregular expenditure of no less than ₱5,000,000 of public funds**, of which **Congress is the constitutional guardian**. It also **involved government agencies created by Congress and officers whose positions it is within the power of Congress to regulate or even abolish**. As a result of the yet uncompleted investigation, the **investigating committee has recommended and the Senate has approved three bills** (1) prohibiting the Secretary of Justice or any other department head from discharging functions and exercising powers other than those attached to his own office, without previous congressional authorization; (2) prohibiting brothers and near relatives of any President of the Philippines from intervening directly or indirectly and in whatever capacity in transactions in which the Government is a party, more particularly where the decision lies in the hands of executive or administrative officers who are appointees of the President; and (3) providing that purchases of the Rural Progress Administration of big landed estates at a price

> of ₱100,000.00 or more, and loans guaranteed by the Government involving ₱100,000.00 or more, shall not become effective without previous congressional confirmation.[66] (*emphasis supplied*)

There is, thus, legislative purpose when the **subject matter of the inquiry is one over which the legislature can legislate,** such as the appropriation of public funds; and the creation, regulation and abolition of government agencies and positions. It is **presumed that the facts are sought by inquiry, because the "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change**."[67] (*emphasis supplied*) The Court noted that the investigation gave rise to several bills recommended by the Special Committee and approved by the Senate.

In sum, under the first requirement for validity of a legislative investigation and contempt of witness therein, the dual requirements of authority are that the power exercised by the committee must be both within the authority delegated to it and within the competence of Congress to confer upon the committee.[68]

Second, the pertinency of the question propounded. The test of pertinency is whether a question itself is in the ultimate area of investigation; a question is pertinent also if it is "a usual and necessary stone in the arch of a bridge over which an investigation must go."[69] In determining pertinency, the court looks to the history of the inquiry as disclosed by the record.[70] **Arnault** states the **rule on pertinency**, *viz*:

> Once an inquiry is admitted or established to be within the jurisdiction of a legislative body to make, we think the **investigating committee has the power to require a**

> **witness to answer any question pertinent to that inquiry**, subject of course to his constitutional right against self-incrimination. The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and **every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject matter of the inquiry or investigation.** So a witness may not be coerced to answer a question that obviously has no relation to the subject of the inquiry. But from this **it does not follow that every question that may be propounded to a witness be material to any proposed or possible legislation**. In other words, **the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.**[71] *(emphasis supplied)*

The Court found that the question propounded to Arnault was not immaterial to the investigation or self-incriminatory; thus, the petition for *habeas corpus* was dismissed.

B. A Look at Executive privilege

1. Definition and judicial use of the term

"**Executive privilege**" has been **defined** as the right of the President and high-level executive branch officials to withhold information from Congress, the courts, and the public.[72] Executive privilege is a direct descendant of the constitutionally designed separation of powers among the legislative, executive and judicial branches of government.

The U.S. Constitution (and the Philippine Constitution) **does not directly mention** "executive privilege," but commentators theorized that the privilege of confidentiality is **constitutionally based**, as it relates to the President's effective discharge of executive powers.[73] The Founders of the American nation acknowledged an **implied** constitutional prerogative of Presidential secrecy, a power they believed was at times necessary and proper.

The term "executive privilege" is but half a century old, having **first appeared** in the 1958 case **Kaiser Aluminum & Chemical Co. v. United States,**[74] in which Justice Reed, sitting on the U.S. Court of Claims, wrote: "The power must lie in the courts to determine **Executive Privilege** in litigation.... (T)he privilege for intra-departmental advice would very rarely have the importance of diplomacy or security".[75] (*emphasis supplied*)

The **U.S. Supreme Court's recognition of executive privilege is even more recent**, having entered the annals of the High Court only in the 1974 landmark case **U.S. v. Nixon**.[76]

But as aforestated, executive privilege has been practised since the founding of the American nation. To better grasp the issue presented in the case at bar, we revisit the history of executive privilege in the U.S. political and legal landscape, to which we trace the concept of executive privilege in our jurisdiction. Next, an exposition of the scope, kinds and context for invocation of executive privilege will also be undertaken to delineate the parameters of the executive privilege at issue in the case at bar.

2. History and use

As the first U.S. President, **George Washington** established time-honored principles that have since molded the doctrine of executive

privilege. He was well aware of the crucial role he played in setting precedents, as evinced by a letter he wrote on May 5, 1789 to James Madison, *viz*: "As the first of every thing *in our situation* will serve to establish a precedent, it is devoutly wished on my part that these precedents may be fixed on true principles."[77]

Though not yet then denominated "executive privilege," President Washington in 1792 originally claimed authority to withhold information from the Congressional committee investigation of a military expedition headed by General Arthur St. Clair against native Americans. The committee requested papers and records from the executive to assist it in its investigation.[78] After conferring with his cabinet, President Washington decided that **disclosure was in the public interest** but, as Secretary of State Jefferson explained, the President was inclined to **withhold papers that would injure the public**.

In 1794, in response this time to a Senate request, Washington allowed the Senate to examine some parts of, but withheld certain information in relation to correspondence between the French government and the American minister thereto, and between the minister and Secretary of State Randolph, because the**information could prove damaging to the public interest.** The Senate did not challenge his action.[79]

Thus, **Washington established a historical precedent for executive privilege that is firmly rooted in two theories: first, a separation of powers theory that certain presidential communications should be free from compulsion by other branches; and second, a structural argument that secrecy is important to the President's constitutional duties in**

conducting state and foreign affairs.[80] Washington established that he had the **right to withhold information if disclosure would injure the public, but he had no right to withhold embarrassing or politically damaging information.**[81]

President **Thomas Jefferson** came next. He also staunchly defended executive secrecy. In the **1807** case **U.S. v. Burr**,[82] Jefferson was ordered by the court to comply with a subpoena *duces tecum* for a letter concerning Vice President Aaron Burr who was on trial for treason arising from a secessionist conspiracy. The court reasoned that what was involved was a capital case involving important rights; that producing the letter advanced the cause of justice, which Jefferson as Chief Executive had a duty to seek; that the letter contained no state secrets; and that even if state secrets were involved, *in camera* review would be undertaken. Thus, as early as 1807, the **Burr case established the doctrine that the President's authority to withhold information is not absolute,** the President is amenable to compulsory process, **and the interests in secrecy must be weighed against the interests in disclosure.**[83]

Despite the **Burr case**, **the mid-nineteenth century U.S. Presidents exercised the power of secrecy without much hesitation**. The trend **grew among chief executives,** following President Washington's lead, **to withhold information** either because a particular request would have **given another branch the authority to exercise a constitutional power reserved solely to the President or because the request would interfere with the President's own exercise of such a power.**[84] **In the early life of the nation, the legislature generally accepted the secrecy privilege,** as the

Framers of the Constitution attempted to put into practice the principles they had created.[85]

The **trend continued among U.S. Presidents of the early to the mid-twentieth century**. Despite Congress' aggressive attempts to assert its own constitutional investigative and oversight prerogatives, the **twentieth century Presidents protected their own prerogatives with almost no interference from the judiciary, often forcing a quick congressional retreat**.[86]

The **latter half of the twentieth century** gave birth to the term "executive privilege" under President **Dwight Eisenhower**. At this time, the **judiciary's efforts to define and delimit the privilege** were more aggressive, and there were less of the **absolute assertions of the privilege that were typical of previous Presidents.**

The administration of President Richard Nixon produced the **most significant developments in executive privilege**. Although his administration initially professed an "open" presidency in which information would flow freely from the executive to Congress to the public, **executive privilege during this period was invoked not for the protection of national security interests, foreign policy decision-making or military secrets as in the past, but rather to keep under wraps politically damaging and personally embarrassing information.**[87] President Nixon's resignation was precipitated by the landmark case on executive privilege, **U.S. v. Nixon.**[88] In view of its importance to the case at bar, its depth discussion will be made in the subsequent sections.

Executive privilege was asserted commonly during the Ford, Carter, Reagan and Bush Administrations, but its use had only a marginal impact on constitutional law.[89] The administration of William or Bill Clinton again catapulted executive privilege to the limelight. As noted by a commentator, "President Clinton's frequent, unprincipled use of the executive privilege for self-protection rather than the protection of constitutional prerogatives of the presidency or governmental process ultimately weakened a power historically viewed with reverence and deference by the judicial and legislative branch."[90] The **latest trend has become for Presidents to assert executive privilege, retreat the claim and agree to disclose information under political pressure.**[91]

The history of executive privilege shows that the **privilege is strongest when used not out of a personal desire to avoid culpability, but based on a legitimate need to protect the President's constitutional mandate to execute the law, to uphold prudential separation of powers, and above all, to promote the public interest.** Under these circumstances, both the Congress and the judiciary have afforded most respect to the President's prerogatives.[92]

3. Scope, kinds and context of executive privilege

With the wealth of literature on government privileges in the U.S., scholars have not reached a consensus on the number of these privileges or the proper nomenclature to apply to them.[93] Governmental privileges are loosely lumped under the heading "executive privilege."[94]

The occasions in which information requests trigger the invocation of executive privilege vary. The request may come from

Congress or via a criminal or civil case in court. In a criminal case, the request may come from the accused. The request may also come from a party to a civil case between private parties or to a civil case by or against the government. The proceeding may or may not be for the investigation of alleged wrongdoing in the executive branch.[95]

In the U.S., at least four kinds of **executive privilege can be identified in criminal and civil litigation and the legislative inquiry context**: (1) military and state secrets, (2) presidential communications, (3) deliberative process, and (4) law enforcement privileges.[96]

First, military and state secrets. The state secrets privilege "is a common law evidentiary rule" that allows the government to **protect "information from discovery when disclosure would be inimical to national security"[97] or result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments**."[98] To properly invoke the privilege, "(t)here must be a formal claim of privilege, lodged by the head of the department[99] having control over the matter, after actual personal consideration by that officer."[100] A court confronted with an assertion of the state secrets privilege must find "that there is a reasonable danger that disclosure of the particular facts . . . will jeopardize national security."[101]

Second, Presidential communications privilege. The U.S. Supreme Court recognized in **U.S. v. Nixon** that there is "a presumptive privilege for Presidential communications" based on the "President's generalized interest in confidentiality." This ruling was made in the context of a criminal

case. The Presidential communications privilege was also recognized in a civil proceeding, **Nixon v. Administrator of General Services**.[102]

Third, deliberative process. Of the various kinds of executive privilege, the deliberative process privilege is the most frequently litigated in the United States. It entered the portals of the federal courts in the 1958 case **Kaiser Aluminum & Chem. Corp**. The privilege "rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."[103]

Of common law origin, the deliberative process privilege allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[104] Courts have identified three purposes in support of the privilege: (1) it protects candid discussions within an agency; (2) it prevents public confusion from premature disclosure of agency opinions before the agency establishes final policy; and (3) it protects the integrity of an agency's decision; the public should not judge officials based on information they considered prior to issuing their final decisions.[105] For the privilege to be validly asserted, the material must be pre-decisional and deliberative.[106]

Fourth, law enforcement privilege. The law enforcement privilege protects against the disclosure of confidential sources and law enforcement techniques, safeguards the privacy of those involved in a criminal investigation, and otherwise prevents interference with a criminal investigation.[107]

We now focus on Presidential communications privilege and Philippine jurisprudence.

III. Presidential Communications Privilege and Philippine Jurisprudence

As enunciated in **Senate v. Ermita**, a claim of executive privilege may be valid or not depending on the **ground invoked** to justify it and the **context** in which it is made. The ground involved in the case at bar, as stated in the letter of Secretary Ermita, is **Presidential communications privilege** on information that "might impair our **diplomatic as well as economic relations** with the People's Republic of China." This particular issue is one of first impression in our jurisdiction. Adjudication on executive privilege in the Philippines is still in its infancy stage, with the Court having had only a few occasions to resolve cases that directly deal with the privilege.

The **1995 case Almonte v. Vasquez**[108] involved an investigation by the Office of the Ombudsman of petitioner Jose T. Almonte, who was the former Commissioner of the Economic Intelligence and Investigation Bureau (EIIB) and Villamor C. Perez, Chief of the EIIB's Budget and Fiscal Management Division. An anonymous letter from a purported employee of the bureau and a concerned citizen, alleging that funds representing savings from unfilled positions in the EIIB had been illegally disbursed, gave rise to the investigation. The Ombudsman required the Bureau to produce all documents relating to Personal Services Funds for the year 1988; and all evidence, such as vouchers (salary) for the whole plantilla of EIIB for 1988. Petitioners refused to comply.

The **Court recognized a government privilege** against disclosure with respect to **state secrets bearing on military, diplomatic and similar matters**. Citing **U.S. v. Nixon**, the Court acknowledged that the necessity to

protect **public interest in candid, objective and even blunt or harsh opinions in Presidential decision-making justified a presumptive privilege of Presidential communications**. It also recognized that the "privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution," as held by the U.S. Supreme Court in **U.S. v. Nixon**. The Court found, however, that no military or diplomatic secrets would be disclosed by the production of records pertaining to the personnel of the EIIB. Nor was there any law making personnel records of the EIIB classified. Thus, the **Court concluded that the Ombudsman's need for the documents outweighed the claim of confidentiality of petitioners.**

While the Court alluded to **U.S. v. Nixon** and made pronouncements with respect to Presidential communications, a closer examination of the facts of **Almonte**would reveal that the requested **information did not refer to Presidential communications**, but to alleged confidential government documents. Likewise, **U.S. v. Nixon** specifically confined its ruling to criminal proceedings, but **Almonte** was about a prosecutorial investigation involving public interests and constitutional values different from a criminal proceeding.

The **1998 case Chavez v. PCGG**[109] concerned a **civil litigation**. The question posed before the Court was whether the government, through the Presidential Commission on Good Government (PCGG), could be required to reveal the proposed terms of a compromise agreement with the Marcos heirs as regards their alleged ill-gotten wealth. The petitioner, a concerned citizen and taxpayer, sought to compel respondents to make public all negotiations and agreement, be they ongoing or perfected, and all documents related to the negotiations and agreement between the PCGG and the Marcos heirs.

The Court ruled in favor of petitioner. It acknowledged petitioner's right to information under the Bill of Rights of the 1987 Constitution, but citing **Almonte**, also recognized restrictions on the exercise of this right, *viz*: national security matters; trade secrets and banking transactions; criminal/law enforcement matters; other confidential or classified

information officially known to public officials by reason of their office and not made available to the public; diplomatic correspondence; closed-door Cabinet meetings and executive sessions of either house of Congress; as well as the internal deliberations of the Supreme Court.

On the issue whether petitioner could access the settlement documents, the Court ruled that it was incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they had decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, however, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the "exploratory" stage. At the same time, the Court noted the need to observe the same restrictions on disclosure of information in general, such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.

Again, it is stressed that the information involved in **Chavez** did not fall under the category of Presidential communications.

More recently, this Court decided the **2006 case Senate of the Philippines v. Ermita.**[110] At issue in this case was the constitutionality of Executive Order (EO) No. 464, "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and for Other Purposes." The presidential issuance was handed down at a time when the Philippine Senate was conducting investigations on the alleged overpricing of the North Rail Project; and the alleged fraud in the 2004 national elections, exposed through the much-publicized taped conversation allegedly between President Gloria Macapagal-Arroyo and Commission on Elections Commissioner Virgilio Garcillano.

EO No. 464 required heads of the executive departments of government and other government officials and officers of the Armed Forces of the Philippines and the Philippine National Police to secure prior consent

from the President before appearing in Congressional inquiries. Citing the **Almonte case**, the issuance emphasized that the rule on confidentiality based on executive privilege was necessary for the operation of government and rooted in the separation of powers. Alluding to both the **Almonte** and **Chavez cases**, the issuance enumerated the kinds of information covered by executive privilege, *viz*: (1) conversations and correspondence between the President and the public official covered by the executive order; (2) military, diplomatic and other national security matters which in the interest of national security should not be divulged; (3) information between inter-government agencies prior to the conclusion of treaties and executive agreements; (4) discussion in closed-door Cabinet meetings; and (5) matters affecting national security and public order.

Relying on EO No. 464, various government officials did not appear in the hearings of the Senate on the North Rail Project and the alleged fraud in the 2004 elections, prompting various cause-oriented groups to file suits in the Supreme Court to seek the declaration of the unconstitutionality of EO No. 464.

The Court upheld the doctrine of executive privilege but found the Presidential issuance partly infirm, specifically Sections 2(b) and 3 which required government officials below the heads of executive departments to secure consent from the President before appearing in congressional hearings and investigations. The Court acknowledged that Congress has the right to obtain information from the executive branch whenever it is sought in aid of legislation. Thus, if the executive branch withholds such information because it is privileged, it must so assert it and state the reason therefor and why it must be respected.

In this case, the Court again alluded to **U.S. v. Nixon** and also recognized that Presidential communications fall under the mantle of protection of executive privilege in the setting of a legislative inquiry. But since the issue for resolution was the constitutionality of EO No. 464 and not whether an actual Presidential communication was covered by the privilege, the Court did not have occasion to rule on the same.

Prescinding from these premises, we now discuss the **test and procedure to determine the validity of the invocation of executive privilege covering Presidential communications in a legislative inquiry.**

IV. Test and Procedure to Determine the Validity of the Invocation of Executive Privilege Covering Presidential Communications in a Legislative Inquiry

In **U.S. v. Nixon**, the leading U.S. case on executive privilege, the U.S. Supreme Court emphasized that its ruling addressed "**only** the conflict between the President's assertion of a **generalized privilege of confidentiality** and the constitutional need for relevant evidence in **criminal trials**"[111] and that the **case was not concerned** with the balance "between the President's generalized interest in confidentiality…and congressional demands for information."[112] Nonetheless, the Court laid down principles and procedures that can serve as torch lights to illumine us on the scope and use of Presidential communication privilege in the case at bar. Hence, it is appropriate to examine at length **U.S. v. Nixon.**

A. U.S. v. Nixon

1. Background Proceedings

U.S. v. Nixon[113] came about because of a break-in at the Democratic National Committee (DNC) headquarters in the Watergate Hotel. In the early morning of June 17, 1972, about four and a half months before the U.S. Presidential election, police discovered five men inside the DNC offices carrying electronic equipment, cameras, and large sums of cash. These men were operating as part of a larger intelligence gathering plan of the Committee to Re-elect the President, President Richard Nixon's

campaign organization for the 1972 election. Their mission was to fix a defective bugging device which had been placed a month before on the telephone of the DNC chairperson. Their orders came from the higher officials of the CRP.[114]

A grand jury[115] was empanelled to **investigate** the incident. On July 23, 1973, Watergate Special Prosecutor Archibald Cox,[116] acting on behalf of the June 1972 grand jury, caused to be issued a subpoena *duces tecum* to President Nixon in the case **In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects**[117] in the District Court of the District of Columbia with Honorable John J. Sirica as District Judge. The **subpoena** required President Nixon to **produce for the grand jury** certain **tape recordings and documents** enumerated in an attached schedule.

President Nixon partially complied with the subpoena, but otherwise declined to follow its directives. In a letter to the Court that issued the subpoena, **the President advised that the tape recordings sought would not be provided, as he asserted that the President is not subject to the compulsory process of the courts**.[118] The Court ordered the President or any appropriate subordinate official to **show cause** "why the documents and objects described in [the subpoena] should not be produced as evidence before the grand jury."

After the filing of briefs and arguments, the Court resolved **two questions**: (1) whether it had jurisdiction to decide the issue of privilege, and (2) whether it had authority to enforce the subpoena *duces tecum* by way

of an order requiring production for inspection *in camera*. **The Court answered both questions in the affirmative**.[119]

President Nixon **appealed** the order commanding him to produce documents or objects identified in the subpoena for the court's *in camera* inspection. This appeal in the Court of Appeals of the District of Columbia Circuit was the subject of **Nixon v. Sirica**.[120] The central issue addressed by the D.C. Court of Appeals was whether the President may, in his sole discretion, **withhold from a grand jury** evidence in his possession that is relevant to the grand jury's investigations.[121] It overruled the President's invocation of executive privilege covering Presidential communications and upheld the order of the District Court ordering President Nixon to produce the materials for *in camera* inspection subject to the procedure it outlined in the case. **President Nixon did not appeal the Court's ruling**.

As a result of the investigation of the grand jury, a **criminal case** was filed against **John N. Mitchell**, former Attorney General of the U.S. and later head of the Committee to Re-elect the President, and other former government officials and presidential campaign officials in **U.S. v. Mitchell**[122] in the District Court of theDistrict of Columbia. In that case, the Special Prosecutor filed a motion for a subpoena *duces tecum* for the production **before trial** of certain **tapes and documents**relating to precisely identified **conversations and meetings of President Nixon**. The President, claiming executive privilege, moved to quash the subpoena. The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements for a subpoena had been satisfied. The Court then issued an **order for an *in camera* examination** of

the subpoenaed material. The Special Prosecutor filed in the **U.S. Supreme Court** a petition for a writ of certiorari which upheld the order of the District Court in the well-known case**U.S. v. Nixon**.[123]

2. Rationale of Presidential Communications Privilege

For the **first time** in 1974, the U.S. Supreme Court recognized the **Presidential communications privilege and the qualified presumption in its favor** in**U.S. v. Nixon.** The decision cited two reasons for the **privilege and the qualified presumption**: (1) the "necessity for protection of the **public interest** in **candid**,**objective,** and even **blunt or harsh opinions** in **Presidential decision-making**"[124] and (2) it "… is **fundamental to the operation of Government** and inextricably **rooted in the separation of powers under the Constitution.**"[125]

a. Public Interest in Candor or Candid Opinions in Presidential Decision-making

In support of the first reason, the **Nixon Court** held that "a President and those who assist him must be **free to explore alternatives in the process of shaping policies and making decisions** and to do so in a way many would be unwilling to express except **privately**.[126]

The **Nixon Court** pointed to **two bases** of this need for confidentiality. The **first is common sense and experience.** In the words of the Court, "the importance of this confidentiality is **too plain to require further discussion**. Human experience teaches that those who expect **public dissemination** of their remarks may well **temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process**."[127]

The **second** is the **supremacy of each branch in its own sphere of duties** under the Constitution and the **privileges flowing from these duties.** Explained the Court, *viz*: "Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II (presidential) powers, the **privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.** Certain powers and **privileges flow from the nature of enumerated powers**; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."[128] In this case, the Special Prosecutor seeking access to the tape recordings of conversations of the President argued that the U.S. Constitution does not provide for privilege as to the President's communications corresponding to the privilege of Members of Congress under the Speech and Debate Clause. But the **Nixon Court** disposed of the argument, *viz*: "(T)he silence of the Constitution on this score is not dispositive. 'The rule of constitutional interpretation announced in **McCulloch v. Maryland**, 4 Wheat. 316, 4 L.Ed. 579, that that which was **reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant**, has been so universally applied that it suffices merely to state it.'"[129]

b. Separation of Powers

The **Nixon Court** used **separation of powers** as the second ground why presidential communications enjoy a privilege and qualified presumption. It explained that while the **Constitution divides power among the three coequal branches of government and affords independence to each branch in its own sphere, it does not intend these powers to be exercised with absolute independence.** It held, *viz*: "In

designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a **comprehensive system**, but the **separate powers** were **not intended to operate with absolute independence**. 'While the Constitution diffuses power the better to secure liberty, it also contemplates that **practice will integrate the dispersed powers into a workable government.** It enjoins upon its branches **separateness but interdependence, autonomy but reciprocity**.'"(*emphasis supplied*)[130]

Thus, while the **Nixon Court** recognized the Presidential communications privilege based on the independence of the executive branch, **it also considered the effect of the privilege on the effective discharge of the functions of the judiciary**.

3. Scope of the Presidential Communications Privilege

The scope of Presidential communications privilege is clear in **U.S. v. Nixon**. **It covers communications in the "performance of the President's responsibilities"[131] "of his office"[132] and made "in the process of shaping policies and making decisions."**[133] This scope was affirmed three years later in **Nixon v. Administrator of General Services.**[134]

4. Qualified Presumption in Favor of the Presidential Communications Privilege

In **U.S. v. Nixon,** the High Court alluded to **Nixon v. Sirica** which held that Presidential communications are "**presumptively privileged**" and noted that this ruling was accepted by both parties in the case before it.[135] In **Nixon v. Sirica,** the D.C. Court of Appeals, without expounding, agreed with the presumptive privilege status afforded to Presidential communications by its precursor case **In re Subpoena for Nixon** in the D.C. District Court.[136] The latter case ushered the birth of the presumption in the midst of a **general disfavor of government privileges**. In **In re Subpoena for Nixon,** the D.C. District Court began with the observation that "a search of the Constitution and the history of its creation reveal a general disfavor of government privileges…"[137] In deciding whether the Watergate tapes should be covered by a privilege, the Court acknowledged that it must accommodate **two competing policies**: one, "the **need to disfavor** privileges and narrow their application as far as possible"; and two, "the **need to favor** the privacy of Presidential deliberations" and "indulge in a presumption in favor of the President." The Court **tilted the balance** in favor of the latter and held that "respect for the President, the Presidency, and the duties of the office, gives the advantage to this second policy."[138] The **Court explained** that the need to protect Presidential privacy and the presumption in favor of that privacy arises from the "paramount **need for frank expression and discussion among the President and those consulted by him in the making of Presidential decisions**." [139](*emphasis supplied*)

5. Demonstrable Specific Need for Disclosure Will Overcome the Qualified Presumption

The **Nixon Court** held that to overcome the qualified presumption, there must be "sufficient showing or demonstration of specific need" for the withheld information on the branch of government seeking its disclosure. **Two standards** must be met to show the specific need: one is **evidentiary**; the other is **constitutional**.

a. Evidentiary Standard of Need

In **U.S. v. Nixon,** the High Court first determined whether the subpoena ordering the disclosure of Presidential communications satisfied the evidentiary requirements of **relevance, admissibility and specificity** under Rule 17(c) of the Federal Rules of Criminal Procedure. Rule 17(c) governs all subpoenas for documents and materials made in criminal proceedings. In the 1997 **In re Sealed Case (Espy),**[140] the D.C. Court of Appeals held that there must also be a showing that "**evidence is not available with due diligence elsewhere**" or that the **evidence is particularly and apparently useful** as in that case where an **immediate** White House **advisor** was being investigated for criminal behavior. It explained that the information covered by Presidential communication privilege should not be treated as just another specie of information. Presidential communications are treated with confidentiality to strengthen the President in the performance of his duty.

b. Demonstrable Specific Need for Disclosure to be Balanced with the Claim of Privilege using the Function Impairment Test

The claim of executive privilege must then be balanced with the specific need for disclosure of the communications on the part of the other branch of government. The "**function impairment test"** was utilized in making the balance albeit it was not the term used by the Court. By this test, the **Court weighs** how the disclosure of the witheld information would **impair the President's ability to perform his constitutional** duties more than nondisclosure would **impair the other branch's ability to perform its constitutional functions.** It proceeded as follows:

First, **it assessed how significant the adverse effect of disclosure is on the performance of the functions of the President.** While affording great deference to the President's need for complete candor and objectivity from advisers, the **Nixon Court** found that the **interest in confidentiality of Presidential communications is not significantly diminished by production of the subject tape recordings for *in camera* inspection,** with all the **protection** that a district court will be obliged to provide in **infrequent occasions** of a **criminal proceeding**. It ruled, *viz*:

> … The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends **solely** on the **broad, undifferentiated claim of public interest in the confidentiality of such conversations**, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, **we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.**[141]
>
> xxx xxx xxx

> … The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, **we cannot conclude** that **advisers will be moved to temper the candor** of their remarks by the **infrequent occasions of disclosure** because of the **possibility that such conversations will be called for in the context of a criminal prosecution**.[142] (*emphasis supplied*)

Second, it considered the ill effect of nondisclosure of the withheld information on the performance of functions of the judiciary. The Nixon Courtfound that an absolute, unqualified privilege would **impair the judiciary's performance of its constitutional duty to do justice in criminal prosecutions.** In balancing the competing interests of the executive and the judiciary using the function impairment test, it held:

> The impediment that an absolute, unqualified privilege would place in the way of the **primary constitutional duty of the Judicial Branch to do justice** in criminal prosecutions would plainly conflict with the **function of the courts under Art. III**.
>
> xxx xxx xxx
>
> To read the **Art. II powers of the President** as providing an absolute privilege as against a subpoena essential to **enforcement of criminal statutes** on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would **upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III**.
>
> xxx xxx xxx
>
> Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to **resolve those competing interests in a manner that preserves the essential functions of each branch**.[143]
>
> xxx xxx xxx

… this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer.' Berger v. United States, 295 U.S., at 88, 55 S.Ct., at 633. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law**. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available** for the production of evidence needed either by the prosecution or by the defense.[144]

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The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the **right 'to be confronted with the witnesses against him' and 'to have compulsory process** for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also **guarantees that no person shall be deprived of liberty without due process of law**. It is the **manifest duty of the courts to vindicate those guarantees**, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case **we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the**

fair administration of criminal justice.[145] (*emphasis supplied*)

xxx xxx xxx

… the allowance of the privilege to withhold evidence that is **demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.** A **President's acknowledged need for confidentiality** in the communications of his office is **general** in nature, whereas the **constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice.** Without access to specific facts a criminal prosecution may be **totally frustrated**. The **President's broad interest in confidentiality of communications** will **not be vitiated** by **disclosure of a limited number of conversations preliminarily shown to have some bearing** on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the**generalized interest in confidentiality**, it **cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice**. The generalized assertion of privilege must yield to the **demonstrated, specific need** for evidence in a pending **criminal trial**.[146](*emphasis supplied*)

Third, the Court examined the **nature or content of the communication sought to be withheld**. It found that the Presidential communications privilege invoked by President Nixon "depended **solely** on the broad, **undifferentiated** claim of public interest in the confidentiality"[147] of his conversations. He did not claim the need to

protect **military, diplomatic, or sensitive national security secrets.**[148] Held the Court, *viz*:

> … He (President Nixon) **does not place his claim of privilege on the ground that they are military or diplomatic secrets**. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities…
>
> In **United States v. Reynolds**, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said: 'It may be possible to **satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect** by insisting upon an examination of the evidence, even by the judge alone, in chambers.' *Id.*, at 10.
>
> **No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality.** Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.[149] (*emphasis supplied*)

In balancing the competing interests of the executive and judicial branches of government, the **Nixon Court** emphasized that while government privileges are**necessary, they impede the search for truth and must not therefore be lightly created or expansively construed. It held, *viz*:**

> The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are **not lightly created nor expansively construed, for they are in derogation of the search for truth**.[150]

6. In Camera Determination of Information to be Disclosed

After determining that the Special Prosecutor had made a sufficient showing of a "demonstrable specific need" **to overcome the qualified presumption** in favor of the Presidential communications privilege, the High Court upheld the order of the D.C. District Court in **U.S. v. Mitchell** that an ***in camera*** **examination of the subpoenaed material was warranted**. Its purpose was to determine if there were parts of the subpoenaed material that were not covered by executive privilege and should therefore be disclosed or parts that were covered by executive privilege and must therefore be kept under seal.

The U.S. Supreme Court acknowledged that in the course of the *in camera* inspection, **questions may arise on the need to excise parts of the material that are covered by executive privilege**. It afforded the D.C. District Court the discretion to seek the **aid of the Special Prosecutor and the President's counsel** for*in camera* consideration of the validity of the particular excisions, whether on the basis of **relevancy** or **admissibility,** or

the **content** of the material being in the**nature of military or diplomatic secrets**.[151]

In **excising materials that are not relevant or not admissible or covered by executive privilege because of their nature as military or diplomatic secrets**, the High Court emphasized the heavy responsibility of the D.C. District Court to ensure that these excised parts of the Presidential communications would be accorded that "high degree of respect due the President," considering the "singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article … a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.'"[152] It was "necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice."[153] Thus, the High Court sternly ordered that **until released by the judge to the Special Prosecutor, no *in camera* material be revealed to anyone, and that the excised material be restored to its privileged status and returned under seal to its lawful custodian.**[154]

The procedure enunciated in **U.S. v. Nixon** was cited by the Court of Appeals of the District of Columbia Circuit in the 1997 case **In re Sealed Case (Espy)**.[155]

B. Resolving the Case at Bar with the Aid of U.S. v. Nixon and Other Cases

1. Procedure to Follow When Diplomatic, Military and National Security Secrets Privilege is Invoked

In the case at bar, Executive Secretary Ermita's letter categorically invokes the Presidential communications privilege and in addition, raises possible impairment of diplomatic relations with the People's Republic of China. Hence, the letter states, *viz*:

> The **context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President,** he (Secretary Neri) cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.[156] (*emphasis supplied*)

As afore-discussed, this Court recognized in **Almonte v. Vasquez**[157] and **Chavez v. PCGG**[158] a governmental privilege against public disclosure of**state secrets** covering **military, diplomatic and other national security matters**. In **U.S. v. Reynolds,**[159] the U.S. Supreme Court laid down the **procedure** for invoking and assessing the validity of the invocation of the military secrets privilege, **a privilege based on the nature and content of the information**, which can be analogized to the diplomatic secrets privilege, also a **content-based** privilege. In **Reynolds**, it was held that there must be a **formal claim** of privilege lodged by the head of the department that has control over the matter after actual personal consideration by that officer. The court must thereafter **determine whether the circumstances are appropriate for the claim of privilege, without forcing a disclosure of the very thing the privilege is designed to protect**.[160] It was stressed that "(j)udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers…"[161] It is

possible for these officers "to satisfy the court, **from all the circumstances of the case**, that there is a **reasonable danger** that compulsion of the evidence will **expose military matters which, in the interest of national security, should not be divulged.** When this is the case, the **occasion for the privilege is appropriate**, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[162] It was further held that "(i)n each case, **the showing of necessity which is made will determine how far the court should probe** in satisfying itself that the occasion for invoking the privilege is appropriate."[163]

Thus, the facts in **Reynolds** show that the Secretary of the Air Force filed a formal "Claim of Privilege" and stated his objection to the production of the document "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force."[164] The Judge Advocate General of the U.S. Air Force also filed an affidavit, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[165] On the record before the trial court, it appeared that the accident that spawned the case occurred to a military plane that had gone aloft to test secret electronic equipment.[166] The **Reynolds Court** found that **on the basis of all the circumstances of the case before it**, there was **reasonable danger** that the accident investigation report would contain references to the **secret electronic equipment** that was the primary concern of the mission, which would be exposed if the investigation report for the accident was disclosed.[167]

In the case at bar, we cannot assess the validity of the claim of the Executive Secretary that disclosure of the withheld information may impair our diplomatic relations with the People's Republic of China. There is but a **bare assertion** in the letter of Executive Secretary Ermita that the "**context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China."** There is absolutely **no explanation** offered by the Executive Secretary on how diplomatic secrets will be exposed at the expense of our national interest if petitioner answers the three disputed questions propounded by the respondent Senate Committees. In the Oral Argument on March 4, 2008, petitioner Neri similarly failed to explain how diplomatic secrets will be compromised if the three disputed questions are answered by him.[168] Considering this paucity of explanation, the Court cannot **determine whether there is reasonable danger** that petitioner's answers to the three disputed questions would **reveal privileged diplomatic secrets. The Court cannot engage in guesswork in resolving this important issue.**

Petitioner Neri also invokes executive privilege on the **further ground** that his conversation with the President dealt with **national security matters.** OnNovember 29, 2007, petitioner wrote to Senator Alan Peter S. Cayetano as Chairperson of the Committee on Accountability of Public Officers and Investigations in reply to the respondent Senate Committees' Show Cause Order requiring petitioner to explain why he should not be cited for contempt for failing to attend the respondent Senate Committees' November 20, 2007 hearing. Petitioner attached to his letter

the letter of his lawyer, Atty. Antonio Bautista, also dated November 29, 2007. In this letter, Atty. Bautista **added other reasons to justify** petitioner's failure to attend the Senate hearings. He stated that petitioner's "conversations with the President dealt with delicate and sensitive **national security** and diplomatic matters **relating to the impact of the bribery scandal involving high government officials** and the possible loss of confidence of foreign investors and lenders in the Philippines."[169] In his Petition, Neri did not use the term "national security," but the term "military affairs," *viz*:

> Petitioner's discussions with the President were candid discussions meant to explore options in making policy decisions (see Almonte v. Vasquez, 244 SCRA 286 [1995]). These discussions dwelt on the impact of the bribery scandal involving high Government officials on the country's **diplomatic relations and economic and military affairs**, and the possible loss of confidence of foreign investors and lenders in the Philippines.[170]

In **Senate v. Ermita, we ruled that only the President or the Executive Secretary, by order of the President, can invoke executive privilege.** Thus,**petitioner, himself or through his counsel, cannot expand the grounds** invoked by the President through Executive Secretary Ermita in his November 15, 2007 letter to Senator Alan Peter S. Cayetano. In his letter, **Executive Secretary Ermita invoked only the Presidential communications privilege** and, as earlier explained, suggested a claim of **diplomatic secrets privilege**. But even assuming *arguendo* that petitioner Neri can properly invoke the privilege covering "national security" and "military affairs," still, the records will show that he failed to provide the Court knowledge of the **circumstances** with which the Court

can **determine whether there is reasonable danger** that his answers to the three disputed questions would indeed **divulge secrets** that would compromise our national security.

In the Oral Argument on March 4, 2008, petitioner's counsel argued the basis for invoking executive privilege covering diplomatic, military and national security secrets, but those are arguments of petitioner's counsel and can hardly stand for the "formal claim of privilege lodged by the head of the department which has control over the matter after actual personal consideration by that officer" that **Reynolds** requires.[171]

Needless to state, the diplomatic, military or national security privilege claimed by the petitioner has no leg to stand on.

2. Applicability of the Presidential Communications Privilege

The **Presidential communications privilege attaches to the office of the President**; it is **used** after careful consideration in order to uphold public interest in the confidentiality and **effectiveness of Presidential decision-making to benefit the Office of the President.** It is **not to be used** to personally benefit the person occupying the office. In **In re Subpoena for Nixon**[172] Chief Judge Sirica emphasized, *viz*: "… **[P]rivacy, in and of itself, has no merit**. Its importance and **need of protection arise from 'the paramount need for frank expression and discussion among the President and those consulted by him** in the making of**Presidential decisions**.'"[173] In **Kaiser Aluminum & Chemical Corp. v. United States,**[174] in which the term "executive privilege" was first used, the U.S. Court of Claims emphasized that executive privilege is granted "**for the**

benefit of the public, not of executives who may happen to then hold office."[175](*emphasis supplied*)

The **rationale** for the Presidential communications privilege is enunciated in **U.S. v. Nixon.**[176] As aforestated, it is **based** on common sense and on the principle that flows from the enumerated powers of the President and the doctrine of separation of powers under the Constitution. This rationale was recognized in both**Almonte v. Vasquez** and **Senate v. Ermita.**

It is worthy to note that **U.S. v. Nixon** involved the executive and the judicial branches of government **in the context of a criminal proceeding**. In **the case at bar**, the branches of government in conflict and the context of the conflict are different: the conflict is between the **executive versus the legislature in the context of a Senate investigation in aid of legislation. Be that as it may, the clash of powers between the executive and the legislature** must be resolved in a manner that will best allow each branch to **perform its designed functions** under the Constitution, using the **"function impairment test."** In accord with this **test**, it is the Court's task to **balance** whether the disclosure of the disputed information **impairs the President's ability to perform her constitutional duty to execute the laws** more than non-disclosure would **impair the respondent Senate Committees' ability to perform their constitutional function to enact laws.**

2. a. Presidential Communications Enjoy a Qualified Presumption in Their Favor

The function impairment test begins with a recognition that Presidential communications are **presumptively privileged.**

In their Comment, respondent Senate Committees contend that petitioner has the burden of overcoming the **presumption against executive privilege**, citing**Senate v. Ermita,** *viz*:

> **From the above discussion on the meaning and scope of executive privilege, both in the United States and in this jurisdiction,** a clear principle emerges. Executive privilege, whether asserted against Congress, the courts, or the public, is recognized only in relation to certain types of information of a sensitive character. While executive privilege is a constitutional concept, a claim thereof may be valid or not depending on the ground invoked to justify it and the context in which it is made. Noticeably absent is any recognition that executive officials are exempt from the duty to disclose information by the mere fact of being executive officials. Indeed, **the extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure**.[177] (*emphasis supplied*)

A hard look at **Senate v. Ermita** ought to yield the conclusion that it bestowed a qualified presumption in favor of the Presidential communications privilege. As shown in the previous discussion, **U.S. v. Nixon,** as well as the other related Nixon cases **Sirica**[178] and **Senate Select Committee on Presidential Campaign Activities, et al. v. Nixon**[179] in the D.C. Court of Appeals, as well as subsequent cases,[180] **all recognize** that there is a presumptive privilege in favor of Presidential communications. The **Almonte case**[181] quoted **U.S. v. Nixon** and recognized a presumption in favor of confidentiality of Presidential communications.

The statement in **Senate v. Ermita** that the "extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure"[182] must therefore be read to mean that there is a general disfavor of government privileges as held in **In**

Re Subpoena for Nixon,especially considering the bias of the 1987 Philippine Constitution towards full public disclosure and transparency in government. In fine, **Senate v. Ermita**recognized the Presidential communications privilege in **U.S. v. Nixon** and the qualified presumptive status that the U.S. High Court gave that privilege. **Thus, respondent Senate Committees' argument that the burden is on petitioner to overcome a presumption against executive privilege cannot be sustained.**

2. b. Next, the Strength of the Qualified Presumption Must be Determined

Given the **qualified presumption** in favor of the confidentiality of Presidential communications, the Court should proceed to determine the **strength of this presumption as it varies in light of various factors**. Assaying the strength of the presumption is important, as it is **crucial** in determining the demonstrable specific need of the respondent Senate Committees in seeking the disclosure of the communication in aid of its duty to legislate. The **stronger the presumption, the greater the demonstrable need required to overcome the presumption; conversely**, **the weaker the presumption, the less the demonstrable need required to overcome the presumption**.

A **primary factor** to consider in determining the strength of the presumption is to look where the Constitution textually committed the power in question. **U.S. v. Nixon** stressed that the Presidential communications privilege flows from the enumerated powers of the President. The **more concentrated power is in the President**, the greater the need for confidentiality and the **stronger the presumption**; contrariwise, the more **shared or diffused the power** is with other branches or agencies of government, the **weaker the presumption.** For, indisputably, there is less

need for confidentiality considering the likelihood and expectation that the branch or agency of government sharing the power will need the same information to discharge its constitutional duty.

In the case at bar, the subject matter of the respondent Senate Committees' inquiry is a **foreign loan agreement** contracted by the President with the People's Republic of China. The power of the President to contract or guarantee foreign loans is **shared** with the Central Bank. Article VII, Section 20 of the 1987 Constitution, provides, *viz*:

> Sec. 20. The president may contract or guarantee **foreign loans** on behalf of the Republic of the Philippines with the **prior concurrence of the Monetary Board,** and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, **submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-controlled corporations which would have the effect of increasing the foreign debt**, and containing other matters as may be provided by law. (*emphasis supplied*)

In relation to this provision, the Constitution provides in Article XII, Section 20 that majority of the members of the Monetary Board (the Central Bank) shall come from the **private sector** to maintain its independence. Article VII, Section 20 is a revision of the corresponding provision in the 1973 Constitution. The intent of the revision was explained to the 1986 Constitutional Commission by its proponent, Commissioner Sumulong, *viz*:

> The next constitutional change that I would like to bring to the body's attention is the **power of the President to contract or guarantee domestic or foreign loans in behalf of the Republic of the Philippines**. We studied this provision as it appears in the 1973 Constitution. In the 1973 Constitution, it is provided that the President may contract or guarantee domestic or foreign loans in behalf of the Republic of the Philippines subject to such limitations as may be provided by law.
>
> In view of the fact that our foreign debt has amounted to $26 billion – it may reach up to $36 billion including interests – we studied this provision in the 1973 Constitution, so that **some limitations may be placed upon this power of the President.** We consulted representatives of the Central Bank and the National Economic Development Authority on this matter. After studying the matter, we decided to provide in Section 18 that **insofar as the power of the President to contract or guarantee foreign loans is concerned, it must receive the prior concurrence of the Monetary Board.**
>
> We placed this **limitation** because, as everyone knows, the Central Bank is the custodian of foreign reserves of our country, and so, it is in the best position to determine whether an application for foreign loan initiated by the President is within the paying capacity of our country or not. That is the reason we require **prior concurrence of the Monetary Board** insofar as **contracting and guaranteeing of foreign loans** are concerned.
>
> We also provided that the **Monetary Board should submit complete quarterly report of the decisions it**

> **has rendered on application for loans to be contracted or guaranteed by the Republic of the Philippines so that Congress, after receiving these reports, can study the matter. If it believes that the borrowing is not justified by the amount of foreign reserves that we have, it can make the necessary investigation in aid of legislation, so that if any further legislation is necessary, it can do so.**[183] (*emphasis supplied*)

There are other factors to be considered in determining the strength of the presumption of confidentiality of Presidential communications. They pertain to the**nature of the disclosure** sought, namely: (1) time of disclosure, whether contemporaneous disclosure or open deliberation, which has a greater chilling effect on rendering candid opinions, as opposed to subsequent disclosure; (2) level of detail, whether full texts or whole conversations or summaries; (3) audience, whether the general public or a select few; (4) certainty of disclosure, whether the information is made public as a matter of course or upon request as considered by the U.S. Supreme Court in **Nixon v. Administrator of General Services;**[184] (5) frequency of disclosure as considered by the U.S. Supreme Court in **U.S. v. Nixon** and**Cheney v. U.S. District Court for the District of Columbia;**[185] and (6) form of disclosure, whether live testimony or recorded conversation or affidavit. The**type of information** should also be considered, whether involving military, diplomatic or national security secrets.[186]

2. c. Determining Specific Need of Respondent Senate Committees for the Withheld Information to Overcome the Qualified Presumption

1) The first aspect: evidentiary standard of need

We have considered the factors determinative of the strength of the **qualified presumption in favor of the Presidential communications privilege.** We now determine whether the Senate has sufficiently demonstrated its specific need for the information withheld to overcome the presumption in favor of Presidential communications.

In **U.S. v. Nixon,** the **"**demonstration of a specific need" was **preceded by a showing** that the tripartite requirements of Rule 17(c) of the Federal Rules of Criminal Procedure had been satisfied, namely: **relevance, admissibility and specificity**. **U.S. v. Nixon**, however, involved a **criminal proceeding**. **The case at bar involves a Senate inquiry** not bound by rules equivalent to Rule 17(c) of the Federal Rules of Criminal Procedure. Indeed, the Senate Rules of Procedure Governing Inquiries in Aid of Legislation provides in Section 10 that "technical rules of evidence applicable to judicial proceedings which do not affect substantive rights need not be observed by the Committee."

In legislative investigations, the requirement is that the question seeking the withheld information must be **pertinent.** As held in **Arnault,** the following is the**rule on pertinency**, *viz*:

> Once an inquiry is admitted or established to be within the jurisdiction of a legislative body to make, we think the **investigating committee has the power to require a witness to answer any question pertinent to that inquiry**, subject of course to his constitutional right against self-incrimination. The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and **every question which the investigator is empowered to coerce a witness to answer**

> **must be material or pertinent to the subject matter of the inquiry or investigation.** So a **witness may not be coerced to answer a question that obviously has no relation to the subject of the inquiry.** But from this it does not follow that every question that may be propounded to a witness be material to any proposed or possible legislation. In other words, **the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.**[187] *(emphasis supplied)*

As afore-discussed, to establish a "demonstrable specific need," there must be a showing that "**evidence is not available with due diligence elsewhere**" or that the **evidence is particularly and apparently useful.** This requirement of **lack of effective substitute** is meant to decrease the frequency of incursions into the confidentiality of Presidential communications, to enable the President and the Presidential advisers to communicate in an atmosphere of necessary confidence while engaged in decision-making. It will also help the President to focus on an energetic performance of his or her constitutional duties.[188]

Let us proceed to apply these **standards** to the case at bar: **pertinence of the question propounded and lack of effective substitute for the information sought.**

The first inquiry is the pertinence of the question propounded. The three questions propounded by the respondent Senate Committees for

which Executive Secretary Ermita, by Order of the President, invoked executive privilege as stated in his letter dated November 15, 2007, are:

> "a) Whether the President followed up the (NBN) project?"[189]
>
> "b) Were you dictated to prioritize the ZTE?"[190]
>
> "c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?"[191]

The **context** in which these questions were asked is shown in the transcripts of the Senate hearing on September 26, 2007, *viz*:

On the first question -

> SEN. LACSON. So, how did it occur to you, ano ang dating sa inyo noong naguusap kayo ng NBN project, may ibubulong sa inyo iyong chairman (Abalos) na kalaro ninyo ng golf, "Sec, may 200 ka rito." Anong pumasok sa isip ninyo noon?
>
> MR. NERI. I was surprised.
>
> SEN. LACSON. You were shocked, you said.
>
> MR. NERI. Yeah, I guess, I guess.
>
> SEN. LACSON. Bakit kayo na-shock?
>
> MR. NERI. Well, I was not used to being offered.
>
> SEN. LACSON. Bribed?
>
> MR. NERI. Yeah. Second is, medyo malaki.
>
> SEN. LACSON. In other words, at that point it was clear to you that you were being offered bribe money in the amount of 200 million, kasi malaki, sabi ninyo?
>
> MR. NERI. I said no amount was put, but I guess given the magnitude of the project, siguro naman hindi P200 or P200,000, so…
>
> SEN. LACSON. Dahil cabinet official kayo, eh.
>
> MR. NERI. I guess. But I – you know.
>
> SEN. LACSON. Did you report this attempted bribe offer to the President?

MR. NERI. I mentioned it to the President, Your Honor.

SEN. LACSON. What did she tell you?

MR. NERI. She told me, "Don't accept it."

SEN. LACSON. And then, that's it?

MR. NERI. Yeah, because we had other things to discuss during that time.

SEN. LACSON. And then after the President told you, "Do not accept it," what did she do? How did you report it to the President? In the same context it was offered to you?

MR. NERI. I remember it was over the phone, Your Honor.[192]

xxx xxx xxx

SEN. PANGILINAN. You mentioned earlier that you mentioned this to the President. Did the President after that discussion over the phone, was this ever raised again, the issue of the 200 ka rito?

MR. NERI. We did not discuss it again, Your Honor.

SEN. PANGILINAN. With the President? But the issue, of course, the NBN deal, was raised again? After that, between you and the President. Pinalow up (followed up) ba niya?

MR. NERI. May I claim the executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature.[193]

xxx xxx xxx

MR. NERI. …Under EO 464, Your Honor, the scope is, number one, state secrets; number two, informants privilege; number three, intra-governmental documents reflecting advisory opinions, recommendations and deliberations. And under **Section 2(A) of EO 464, it includes all confidential or classified information between the President and public officers covered by the EO, such as conversations, correspondence between the President and the public official** and discussions in closed-door Cabinet meetings.

Section 2(A) was held valid in Senate versus Ermita.[194] (*emphasis supplied*)

On the second question –

SEN. LEGARDA. Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI (Amsterdam Holdings, Inc.) as you've previously done…

MR. NERI. As I said, Your Honor…

SEN. LEGARDA. …but to prefer or prioritize the ZTE?

MR. NERI. Yeah. As the question may involve – as I said a conversation/correspondence between the President and a public official, Your Honor.

SEN. LEGARDA. I'm sorry. Can you say that again?

MR. NERI. As I said, I would like to invoke Sec. 2(a) of EO 464.[195] (*emphasis supplied*)

On the third question –

SEN. CAYETANO, (P). …I was told that you testified, that you had mentioned to her that there was P200 something offer. I guess it wasn't clear how many zeroes were attached to the 200. And I don't know if you were asked or if you had indicated her response to this. I know there was something like "Don't accept." And can you just for my information, repeat.

MR. NERI. She said "Don't accept it," Your Honor.

SEN. CAYETANO, (P). And was there something attached to that like… "But pursue with a project or go ahead and approve," something like that?

MR. NERI. As I said, I claim the right of executive privilege on further discussions on the…[196]

The **Senate resolutions**, **titles of the privilege speeches**, and **pending bills** that show the **legislative purpose of the investigation** are:

Senate resolutions and privilege speeches:

1. P.S. Res. No. 127: "Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and Other Pertinent Legislations."[197]

2. P.S. Res. No. 129: "Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will further Protect our National Sovereignty Security and Territorial Integrity."[198]

3. P.S. Res. No. 136: "Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government."[199]

4. P.S. Res. No. 144: "Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract."[200]

5. Privilege Speech of Senator Panfilo M. Lacson, delivered on September 11, 2007, entitled "Legacy of Corruption."[201]

6. Privilege Speech of Senator Miriam Defensor Santiago delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement."[202]

Pending bills:

1. Senate Bill No. 1793: "An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes."[203]
2. Senate Bill No. 1794: "An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes."[204]
3. Senate Bill No. 1317: "An Act Mandating Concurrence to International Agreements and Executive Agreements."[205]

It is self-evident that the **three assailed questions** are **pertinent** to the subject matter of the legislative investigation being undertaken by the respondent Senate Committees. More than the **Arnault** standards, the questions to petitioner have **direct relation not only to the subject of the inquiry, but also to the pending bills thereat.**

The three assailed questions seek information on how and why the NBN-ZTE contract -- an international agreement embodying a foreign loan for the undertaking of the NBN Project -- was consummated. The three questions are **pertinent to at least three subject matters of the Senate inquiry**: (1) possible anomalies in the consummation of the NBN-ZTE Contract in relation to the Build-Operate-Transfer Law and other laws (P.S. Res. No. 127); (2) national security implications of awarding the NBN

Project to ZTE, a foreign-owned corporation (P.S. Res. No. 129); and (3) legal and economic justification of the NBN Project (P.S. Res. No. 136).

The three questions are **also pertinent to pending legislation in the Senate**, namely: (1) the subjection of international agreements involving funds for the procurement of infrastructure projects, goods and consulting services to Philippine procurement laws (Senate Bill No. 1793);[206] (2) the imposition of safeguards in the contracting of loans classified under Official Development Assistance (Senate Bill No. 1794);[207] and (3) the concurrence of the Senate in international and executive agreements (Senate Bill No. 1317).[208]

The second inquiry relates to whether there is an effective substitute for the information sought. There is none. The three questions demand information on how the President **herself** weighed options[209] and the factors she considered in concluding the NBN-ZTE Contract. In particular, the information sought by the **first question** - "Whether the President followed up the (NBN) project" - cannot be effectively substituted as it refers to the **importance of the project to the President herself.**[210] This information relates to the inquiry on the legal and economic justification of the NBN project (P.S. Res. No. 136).

Similarly, the **second question** - "Were you dictated to prioritize the ZTE?" - seeks **information on the factors considered by the President herself in opting for NBN-ZTE, which involved a foreign loan.** Petitioner testified that the President had initially given him directives that **she preferred a no-loan, no-guarantee unsolicited Build-Operate-Transfer (BOT) arrangement,** which according to petitioner, was being offered by Amsterdam Holdings, Inc.[211] The information sought cannot be

effectively substituted in the inquiry on the legal and economic justification of the NBN project (P.S. Res. No. 136), the inquiry on a possible violation of the BOT Law (P.S. Res. No. 127); and in the crafting of pending bills, namely, Senate Bill No. 1793 tightening procurement processes and Senate Bill No. 1794 imposing safeguards on contracting foreign loans.

The information sought by the **third question** - "Whether the President said to go ahead and approve the project after being told about the alleged bribe?" - cannot be effectively substituted for the same reasons discussed on both the first and second questions. In fine, all three disputed questions seek information **for which there is no effective substitute.**

In the Oral Argument held on March 4, 2008, petitioner, through counsel, argued that in propounding the three questions, **respondent Senate Committees were seeking** to establish the culpability of the President for alleged anomalies attending the consummation of the NBN-ZTE Contract. Counsel, however, contended that in invoking executive privilege, **the President is not hiding any crime**.[212] The short answer to petitioner's argument is that the **motive** of respondent Senate Committees in conducting their investigation and propounding their questions is beyond the purview of the Court's power of judicial review. So long as the questions are **pertinent** and there is **no effective substitute** for the information sought, the respondent Senate Committees should be deemed to have **hurdled the evidentiary standards to prove the specific need** for the information sought.

In the 1957 case **Watkins v. United States**,[213] as afore-discussed**,** the U.S. Supreme Court held that the power to investigate encompasses everything that concerns the administration of existing laws, as well as

proposed or possibly needed statutes.[214] It further ruled that the **improper motives** of members of congressional investigating committees will not vitiate an investigation instituted by a House of Congress if that assembly's legislative purpose is being served by the work of the committee.[215]

2) The second aspect: balancing the conflicting constitutional functions of the President and the Senate using the function impairment test

The second aspect involves a balancing of the constitutional functions between the contending branches of government, *i.e.*, the President and the Senate. The court should determine whether disclosure of the disputed information **impairs the President's ability to perform her constitutional** duties more than disclosure would **impair Congress's ability to perform its constitutional functions.**[216] The balancing should result in the promotion of the public interest.

First, we assess whether nondisclosure of the information sought will seriously impair the performance of the constitutional function of the Senate to legislate. In their Comment, respondent Senate Committees assert that "there is an urgent need for remedial legislation to regulate the obtention (sic) and negotiation of official development assisted (ODA) projects because these have become rich source of 'commissions' secretly pocketed by high executive officials."

It cannot be successfully disputed that the information sought from the petitioner relative to the NBN Project is essential to the proposed amendments to the Government Procurement Reform Act and Official Development Assistance Act to enable Congress to plug the loopholes in

these statutes and prevent financial drain on our Treasury.[217] Respondent Senate Committees well point out that Senate Bill No. 1793, Senate Bill No. 1794, and Senate Bill No. 1317 will be crafted on the basis of the information being sought from petitioner Neri, *viz*:

> Without the testimony of Petitioner, Respondent Committees are effectively **denied of their right to access to any and all kinds of useful information** and consequently, their **right to intelligently craft and propose laws to remedy** what is called **"dysfunctional procurement system of the government."** Respondents are **hampered in intelligently studying and proposing what Congress should include in the proposed bill to include "executive agreements" for Senate concurrence**, which agreements **can be used by the Executive to circumvent the requirement of public bidding** in the existing Government Procurement Reform Act (R.A. 9184). (*emphasis supplied*)[218]

In the Oral Argument held on March 4, 2008, counsel for respondent Senate Committees bolstered the claim that nondisclosure will seriously impair the functions of the respondent Senate Committees, *viz*:

CHIEF JUSTICE PUNO

Mr. Counsel, may I go back to the case of U.S. vs. Nixon which used the functional impairment approach.

ATTY. AGABIN

Yes, Your Honor.

CHIEF JUSTICE PUNO

Is it not true that using this approach, there is the presumption in favor of the President's generalized interest in the confidentiality of his or her communication. I underscore the words generalized interest.

ATTY. AGABIN

Yes, Your Honor.

CHIEF JUSTICE PUNO

Now, you seek this approach, let me ask you the same question that I asked to the other counsel, Atty. Bautista. Reading the letter of Secretary Ermita it would seem that the Office of the President is invoking the doctrine of Executive Privilege only on not (sic) three questions.

ATTY. AGABIN

Yes, Your Honor.

CHIEF JUSTICE PUNO

So, can you tell the Court how critical are these questions to the lawmaking function of the Senate. For instance, **question Number 1, whether the President followed up the NBN project**. According to the other counsel, this question has already been asked, is that correct?

ATTY. AGABIN

Well, the question has been asked but it was not answered, Your Honor.

CHIEF JUSTICE PUNO

Yes. But my question is how critical is this to the lawmaking function of the Senate?

ATTY. AGABIN

I believe it is critical, Your Honor.

CHIEF JUSTICE PUNO

Why?

ATTY. AGABIN

For instance, **with respect to the proposed Bill of Senator Miriam Santiago, she would like to endorse a Bill to include Executive Agreements to be subject to ratification by the Senate in addition to treaties**, Your Honor.

CHIEF JUSTICE PUNO

May not the Senate craft a Bill, assuming that the President followed up the NBN project? May not the Senate proceed from that assumption?

ATTY. AGABIN

Well, it can proceed from that assumption, Your Honor, except that **there would be no factual basis for the Senate to say that indeed Executive Agreements had been used as a device to circumventing the Procurement Law**.

CHIEF JUSTICE PUNO

But the question is just following it up.

ATTY. AGABIN

I believe that may be the initial question, Your Honor, because if we look at this problem in its factual setting as counsel for petitioner has observed, there are intimations of a bribery scandal involving high government officials.

CHIEF JUSTICE PUNO

Again, about the **second question**, "were you dictated to **prioritize this ZTE**," is that critical to the lawmaking function of the Senate? Will it result to the failure of the Senate to cobble a Bill without this question?

ATTY. AGABIN

I think it is critical to **lay the factual foundations for a proposed amendment to the Procurement Law**, Your Honor, because the petitioner had already testified that he was offered a ₱200 Million bribe, so if he was offered a ₱200 Million bribe it is possible that other government officials who had something to do with the approval of that contract would be offered the same amount of bribes.

CHIEF JUSTICE PUNO

Again, that is **speculative**.

ATTY. AGABIN

That is why they want to continue with the investigation, Your Honor.

CHIEF JUSTICE PUNO

How about the **third question**, "whether the President said to **go ahead and approve the project after being told about the alleged bribe."** How critical is that to the lawmaking function of the Senate? And the question is may they craft a Bill, a remedial law, without forcing petitioner Neri to answer this question?

ATTY. AGABIN

Well, they can craft it, Your Honor, based on mere speculation. And **sound legislation requires that a proposed Bill should have some basis in fact**.

CHIEF JUSTICE PUNO

It seems to me that you say that this is critical.

ATTY. AGABIN

Yes, Your Honor. (*emphasis supplied*)[219]

The above exchange shows how petitioner's refusal to answer the three questions will seriously impair the Senate's function of **crafting specific legislation** pertaining to procurement and concurring in executive agreements **based on facts and not speculation**.

To complete the balancing of competing interests, the Court should also assess whether disclosure will significantly impair the President's performance of her functions, especially the duty to execute the laws of the land. In the Oral Argument held on March 4, 2008, petitioner, through counsel, was asked to show how the performance of the functions of the President would be adversely affected if petitioner is compelled to answer the three assailed questions, *viz:*

CHIEF JUSTICE PUNO:

> In the functional test, the thrust is to balance what you said are the benefits versus the harm on the two branches of government making conflicting claims of their powers and privileges. Now, using that functional test, please tell the Court how the Office of the President will be seriously hampered in the performance of its powers and duties, if petitioner Neri would be allowed to appear in the Senate and answer the three questions that he does not want to answer?

ATTY. BAUTISTA:

> Your Honor, the effect, the chilling effect on the President, she will be scared to talk to her advisers any longer, because for fear that anything that the conversation that she has with them will be opened to examination and scrutiny by third parties, and that includes Congress. And (interrupted)

CHIEF JUSTICE PUNO:

Let us be more specific. Chilling effect, that is a conclusion. The **first question** is, "whether the **President followed up the NBN Projec**t." If that question is asked from petitioner Neri, and he answers the question, will that seriously affect the way the Chief Executive will exercise the powers and the privileges of the Office?

ATTY. BAUTISTA:

Well, **if the answer to that question were in the affirmative**, then it would imply, Your Honor, that the President has some **undue interest in the contract.**

CHIEF JUSTICE PUNO:

The President may have interest, but **not necessarily undue interest.**

ATTY. BAUTISTA:

Well, but in the atmosphere that we are in, where there is already an **accusatory mood of the public**, that kind of information is going to be harmful to the President.

CHIEF JUSTICE PUNO:

When you say **accusatory, that is just your impression**?

ATTY. BAUTISTA:

Yes, Your Honor, but I think it's a normal and justified impression from--I am not oblivious to what goes on, Your Honor.

CHIEF JUSTICE PUNO:

But that is your impression?

ATTY. BAUTISTA:

Yes, Your Honor.

CHIEF JUSTICE PUNO:

How about the **second question, which reads, "were you dictated to prioritize the ZTE,"** again, if this question is asked to petitioner Neri, and (he) responds to it…

ATTY. BAUTISTA:

In the affirmative?

CHIEF JUSTICE PUNO:

I don't know how he will respond.

ATTY. BAUTISTA:

Yes.

CHIEF JUSTICE PUNO:

How will that affect the functions of the President, will that debilitate the Office of the President?

ATTY. BAUTISTA:

Very much so, Your Honor.

CHIEF JUSTICE PUNO:

Why? Why?

ATTY. BAUTISTA:

Because there are lists of projects, which have to be--which require financing from abroad. And if the President is

known or it's made public that she preferred this one project to the other, then she **opens herself to condemnation by those who were favoring the other projects which were not prioritized.**

CHIEF JUSTICE PUNO:

Is this not really an important project, one that is supposed to benefit the Filipino people? So if the President, says, you **prioritize this project**,**why should the heavens fall on the Office of the President**?

ATTY. BAUTISTA:

Well, there are also other projects which have, which are supported by a lot of people. Like the Cyber Ed project, the Angat Water Dam project. If she is known that she gave low priority to these other projects, she **opens herself to media and public criticism, not only media but also in rallies**, Your Honor.

CHIEF JUSTICE PUNO:

So, again, **that is just your personal impression**?

ATTY. BAUTISTA:

Well**, I cannot avoid it,** Your Honor.

CHIEF JUSTICE PUNO:

How about the **third question**, "whether the President said to go ahead and approve the project after being told the alleged bribe." Again, how will that affect the functions of the President using that balancing test of functions?

ATTY. BAUTISTA:

Well, **if the answer is in the affirmative, then it will be shown, number one, that she has undue interest** in this thing, because she sits already on the ICT and the Board.

CHIEF JUSTICE PUNO:

Again, when you say **undue interest, that is your personal opinion.**

ATTY. BAUTISTA:

Yes, Your Honor.

CHIEF JUSTICE PUNO:

It may be an interest, but it **may not be undue.**

ATTY. BAUTISTA:

But in the climate, present climate of public opinion as whipped up by people that will be the **impression,** Your Honor. She does not operate in a vacuum. She has to take into account what is going on.

CHIEF JUSTICE PUNO:

That is your **personal opinion** again?

ATTY. BAUTISTA:

Yes, Your Honor. (*emphasis supplied*)[220]

From the above exchange, it is clear that petitioner's invocation of the Presidential communications privilege is based on a **general claim** of a chilling effect on the President's performance of her functions if the three questions are answered. The general claim is unsubstantiated by specific proofs that the performance of the functions of the President will be adversely affected in a significant degree. Indeed, petitioner's counsel can only manage to submit his **own impression and personal opinion on the subject.**

Summing it up, on one end of the balancing scale is the President's **generalized** claim of confidentiality of her communications, and petitioner's failure to justify a claim that his conversations with the President involve diplomatic, military and national security secrets. We accord Presidential communications a presumptive privilege but the strength of this **privilege is weakened by the fact that the subject of the communication involves a contract with a foreign loan. The power to contract foreign loans** is a power not exclusively vested in the President, but is shared with the Monetary Board (Central Bank). We also consider the **chilling effect** which may result from the disclosure of the information sought from petitioner Neri but the chilling effect is **diminished** by the **nature of the information sought, which is narrow, limited as it is to the three assailed questions.** We take judicial notice also of the fact that in

a Senate inquiry, there are **safeguards** against an indiscriminate conduct of investigation.

On the other end of the balancing scale is the **respondent Senate Committees' specific and demonstrated need** for the Presidential communications in reply to the three disputed questions. Indisputably, these questions are **pertinent** to the subject matter of their investigation, and there is **no effective substitute** for the information coming from a reply to these questions. In the absence of the information they seek, the Senate Committees' **function of intelligently enacting laws** "to remedy what is called 'dysfunctional procurement system of the government'" and to possibly include "executive agreements for Senate concurrence" to prevent them from being used to circumvent the requirement of public bidding in the existing Government Procurement Reform Act **cannot but be seriously impaired**. With all these considerations factored into the equation, **we have to strike the balance in favor of the respondent Senate Committees**[221] **and compel petitioner Neri to answer the three disputed questions.**

C. Presidential Communications Privilege and Wrongdoing

Respondent Senate Committees contend that executive privilege cannot be used **to hide a wrongdoing.**[222] A brief discussion of the contention will put it in its proper perspective.

Throughout its history -- beginning with its use in 1792 by U.S. President George Washington to withhold information from a committee of Congress investigating a military expedition headed by General Arthur St. Clair against Native Americans[223] -- **executive privilege has never**

justified the concealment of a wrongdoing. As afore-discussed, the first U.S. President, Washington, well understood the crucial role he would play in setting precedents, and so he said that he "devoutly wished on my part that these precedents may be fixed in **true principles**."[224] (*emphasis supplied*) President Washington established that he had the right to **withhold information if disclosure would injure the public, but he did not believe that it was appropriate to withhold embarrassing or politically damaging information.**[225]

Two centuries thence, the principle that executive privilege cannot hide a wrongdoing remains unchanged. While very few cases on the Presidential communications privilege have reached the U.S. Supreme Court, the District of Columbia Court of Appeals, being the appellate court in the district where the federal government sits has been more visible in this landscape. In several of its prominent decisions on the Presidential communications privilege, the D.C. Court of Appeals reiterated the rule that executive privilege cannot cover up wrongdoing. In **Nixon v. Sirica,** the D.C. Circuit Court of Appeals rejected the contention of President Nixon that executive privilege was absolute and held that, if it were so, "the head of an executive department would have the power on his own say so to **cover up all evidence of fraud and corruption** when a federal court or grand jury was investigating malfeasance in office, and **this is not the law**."[226] (*emphasis supplied*) In**Senate Select Committee v. Nixon,** the Appellate Court reiterated its pronouncement in **Sirica** that the "Executive **cannot**…invoke a general confidentiality privilege to **shield its officials and employees** from investigations by the proper governmental institutions into **possible criminal wrongdoing**."[227]

Nonetheless, while confirming the time-honored principle that executive privilege is not a shield against an investigation of wrongdoing, the D.C. Circuit Court of Appeals, in both **Sirica** and **Senate Select Committee**, also made it clear that **this time-honored principle was not the sword that would pierce the Presidential communications privilege;** it was instead the **showing of a need for information by an institution to enable it to perform its constitutional functions**.

In **Sirica**, the Appellate Court held that "(w)e emphasize that the grand jury's **showing of need in no sense relied on any evidence that the President was involved in, or even aware of, any alleged criminal activity**. We freely assume, for purposes of this opinion, that the President was engaged in the performance of his constitutional duty. Nonetheless, we hold that the District Court may order disclosure of all portions of the tapes **relevant to matters within the proper scope of the grand jury's investigations**, unless the Court judges that the public interest served by nondisclosure of *particular* statements or information outweighs the **need for that information demonstrated by the grand jury**." (*emphasis supplied*)[228]

In **Senate Select Committee**, the court reiterated its ruling in **Sirica**, *viz*: "…under **Nixon v. Sirica**, the **showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal,[229] but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment.** Here also **our task requires and our decision implies no judgment whatever**

concerning possible presidential involvement in culpable activity. On the contrary, we think the **sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions**."[230] (*emphasis supplied*)

In **U.S. v. Nixon**, the U.S. Supreme Court ruled that the Special Prosecutor had demonstrated a specific need for the Presidential communications without mentioning that the subject tapes had been subpoenaed for criminal proceedings against former Presidential assistants charged with committing criminal conspiracy while in office. This omission was also observed by the D.C. Circuit appellate court in the 1997 case **In re Sealed Case (Espy),**[231] in which the court ruled that "a party seeking to **overcome the presidential privilege** seemingly must always **provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials**. In holding that the Watergate Special Prosecutor had provided a sufficient showing of evidentiary need to obtain tapes of President Nixon's conversations, the **U.S. Supreme Court made no mention of the fact that the tapes were sought for use in a trial** of former Presidential assistants charged with engaging in a **criminal conspiracy** while in office."[232]

That a wrongdoing -- which the Presidential communications privilege should not shield -- has been committed is an allegation to be proved with the required evidence in a proper forum. The Presidential communications privilege can be pierced by a showing of a specific need of the party seeking the Presidential information in order to perform its functions mandated by the Constitution. It is after the privilege has been pierced by this

demonstrated need that one can discover if the privilege was used to shield a wrongdoing, or if there is no wrongdoing after all. We should not put the cart before the horse.

D. Negotiations and Accommodations

Before putting a close to the discussion on test and procedure to determine the validity of the invocation of executive privilege, it is necessary to make short shrift of the matter of negotiations and accommodation as a procedure for resolving disputes that spawned the case at bar.

In the U.S. where we have derived the doctrine of executive privilege, most congressional requests for information from the executive branch are handled through an informal process of accommodation and negotiation, away from the judicial portals. **The success of the accommodation process** hinges on the **balance of interests between Congress and the executive branch**. The more diffused the interest of the executive branch in withholding the disputed information, the more likely that this interest will be overcome by a specifically articulated congressional need related to the effective performance of a legislative function. Conversely, the less specific the congressional need for the information and the more definite the need for secrecy, the more likely that the dispute will be resolved in favor of the executive.[233] In arriving at accommodations, what is "required is **not simply an exchange of concessions or a test of political strength.** It is an **obligation of each branch** to make a **principled effort to acknowledge,** and if possible to **meet, the legitimate needs of the other branch."**[234]

In **Cheney v. D.C. District Court**, the U.S. Supreme Court cautioned that executive privilege is an extraordinary assertion of power "not to be lightly invoked."[235] Once it is invoked, coequal branches of government are set on a collision course. These "occasion(s) for constitutional confrontation between the two branches" should be avoided whenever possible.[236] Once a judicial determination becomes inevitable, the courts should facilitate negotiations and settlement as did the court in **U.S. v. American Telephone & Telegraph Co.**[237] In that case, the D.C. Circuit Court of Appeals remanded the case for negotiation of a settlement, which, however, proved unavailing. The appellate court then outlined a procedure under which the Congressional subcommittee was granted limited access to the documents requested, with any resulting disputes surrounding the accuracy of redacted documents to be resolved by the district court *in camera*.

In facilitating a settlement, the court should consider intermediate positions, such as ordering the executive to produce document summaries, indices, representative samples, or redacted documents; or allowing Congressional committee members to view documents but forbidding members from obtaining physical custody of materials or from taking notes.[238]

The lesson is that collisions in the exercise of constitutional powers should be avoided in view of their destabilizing effects. Reasonable efforts at negotiation and accommodation ought to be exerted, for when they succeed, constitutional crises are avoided.

V. Validity of the Order of Arrest

Finally, we come to the **last issue** delineated in the Oral Argument last March 4, 2008: whether respondent Senate Committees gravely abused their discretion in ordering the arrest of petitioner for noncompliance with the subpoena. The contempt power of the respondent Senate Committees is settled in **Arnault** and conceded by petitioner.[239] What are disputed in the case at bar are the validity of the Senate Rules of Procedure Governing Inquiries in Aid of Legislation for lack of re-publication and the alleged arbitrary exercise of the contempt power.

The Senate Rules of Procedure Governing Inquiries in Aid of Legislation is assailed as invalid allegedly for failure to be re-published. It is contended that the said rules should be re-published as the Senate is not a continuing body, its membership changing every three years. The assumption is that there is a new Senate after every such election and it should not be bound by the rules of the old. We need not grapple with this contentious issue which has far reaching consequences to the Senate. The precedents and practice of the Senate should instead guide the Court in resolving the issue. For one, the Senators have traditionally considered the Senate as a continuing body despite the change of a part of its membership after an election. It is for this reason that the Senate does not cease its labor during the period of such election. Its various Committees continue their work as its officials and employees. For another, the Rules of the Senate is silent on the matter of re-publication. Section 135, Rule L of the Rules of the Senate provides that, "if there is no Rule applicable to a specific case, the precedents of the Legislative Department of thePhilippines shall be resorted to xxx." It appears that by tradition, custom and practice, the Senate does not re-publish its rules especially when the same has not undergone any material change. In other words, existing rules which have already undergone

publication should be deemed adopted and continued by the Senate regardless of the election of some new members. Their re-publication is thus an unnecessary ritual. We are dealing with internal rules of a co-equal branch of government and unless they clearly violate the Constitution, prudence dictates we should be wary of striking them down. The consequences of striking down the rules involved in the case at bar may spawn serious and unintended problems for the Senate.

We shall now discuss the substantive aspect of the contempt power. This involves a determination of the purpose of the Senate inquiry and an assessment of the pertinence of the questions propounded to a witness.

To reiterate, there is no doubt about the **legislative purpose** of the subject Senate inquiry. It is evident in the title of the resolutions that spawned the inquiry. **P.S. Res. No. 127**[240] **and the privilege speech of Senator Panfilo Lacson**[241] seek an investigation into the circumstances leading to the approval of the NBN-ZTE Contract and to make persons accountable for any anomaly in relation thereto. That the subject matter of the investigation is the expenditure of public funds in an allegedly anomalous government contract leaves no doubt that the investigation comes within the pale of the Senate's power of investigation in aid of legislation.

Likewise, the following are all within the purview of the Senate's investigative power: subject matter of **P.S. Res. No. 129** concerning the national sovereignty, security and territorial integrity implications of the NBN-ZTE Contract,[242] of **P.S. Res. No. 136** regarding the legal and economic justification of the National Broadband Network (NBN) project of the government,[243] of **P.S. Res. No. 144** on the cancellation of the ZTE Contract,[244] and the **Privilege Speech of Senator**

Miriam Defensor Santiago on international agreements in constitutional law.[245] The Court also takes note of the fact that there are three pending bills in relation to the subject inquiry: **Senate Bill No. 1793**,[246] **Senate Bill No. 1794**[247] and **Senate Bill No. 1317.**[248] It is not difficult to conclude that the subject inquiry is within the power of the Senate to conduct and that the respondent Senate Committees have been given the authority to so conduct, the inquiry.

We now turn to the pertinence of the questions propounded, which the witness refused to answer. The subpoena *ad testificandum* issued to petitioner states that he is "required to appear before the Committee on Accountability of Public Officers and Investigations (Blue Ribbon) of the Senate… testify under oath on what you know relative to the subject matter under inquiry by the said Committee." The subject matter of the inquiry was indicated in the heading of the subpoena, which stated the resolutions and privilege speeches that initiated the investigation. Respondent Senate Committees have yet to propound to petitioner Neri their questions on this subject matter; hence, he cannot conclude beforehand that these questions would not be pertinent and simply refuse to attend the hearing of November 20, 2007.

It is worth noting that the letter of Executive Secretary Ermita, signed "by Order of the President," merely **requested** that petitioner's testimony on November 20, 2007 on the NBN Contract be dispensed with, as he had exhaustively testified on the subject matter of the inquiry. Executive privilege was invoked only with respect to the three questions Neri refused to answer in his testimony before respondent Senate Committees on September 26, 2007. But there is no basis for either petitioner or the

Executive Secretary to assume that petitioner's further testimony will be limited only on the three disputed questions. Needless to state, **respondent Senate Committees have good reasons in citing Neri for contempt for failing to appear in the November 20, 2007 hearing**.

Next, we come to the **procedural aspect** of the power of the respondent Senate Committees to order petitioner's arrest. The question is whether the respondents followed their own rules in ordering petitioner's arrest.

The Order of arrest issued by respondent Senate Committees on January 30, 2008 states that it was issued "for failure to appear and testify in the Committees'**hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007**…AND for **failure to explain satisfactorily** why he should not be cited for contempt (**Neri letter of 29 November 2007**, herein attached)." The Order reads, *viz*:

ORDER

> For failure to appear and testify in the Committees' hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007, despite personal notice and a Subpoena Ad Testificandum sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007, herein attached) **ROMULO L. NERI** is hereby cited in contempt of this (sic) Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.

> The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make a return hereof within twenty four (24) hours from its enforcement.
>
> SO ORDERED.
>
> Issued this 30th day of January, 2008 at the City of Pasay.[249]

The facts should not be obfuscated. The Order of arrest refers to several dates of hearing that petitioner failed to attend, for which he was ordered arrested, namely: **Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007; and Tuesday, November 20, 2007.** The "failure to explain satisfactorily (Neri letter of 29 November 2007)," however, refers only to the **November 20, 2007** hearing, as it was in reference to this particular date of hearing that respondent Senate Committees required petitioner to show cause why he should not be cited for contempt. This is clear from respondent Senate Committees' letter to petitioner dated November 22, 2007.[250] The records are bereft of any letter or order issued to petitioner by respondent Senate Committees for him to show cause why he should not be cited for contempt for failing to attend the hearings on **Tuesday, September 18, 2007; Thursday, September 20, 2007; and Thursday, October 25, 2007.**

We therefore examine the procedural validity of the issuance of the Order of arrest of petitioner for **his failure to attend the November 20, 2007 hearing after the respondent Senate Committees' finding that his explanation in his November 29, 2007 letter was unsatisfactory**.

Section 18 of the Senate Rules Governing Inquiries in Aid of Legislation provides, *viz*:

> Sec. 18. Contempt. - The Committee, **by a vote of a majority of all its members**, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members, or testifying, testifies falsely or evasively. A contempt of the Committee shall be deemed a contempt of the Senate. Such witness may be ordered by the Committee to be detained in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself of that contempt. (*emphasis supplied*)

On March 17, 2008, the respondent Senate Committees submitted to the Court a document showing the composition of respondent Senate Committees, certified to be a true copy by the Deputy Secretary for Legislation, Atty. Adwin B. Bellen. Set forth below is the composition of each of the respondent Senate Committees, with an indication of whether the signature of a Senator appears on the Order of arrest,[251] *viz*:

1. **Committee on Accountability of Public Officers and Investigations (17 members excluding 3 *ex-officio* members)**:

Chairperson: Cayetano, Alan Peter - signed
Vice-Chairperson:

Members: Cayetano, Pia - signed
Defensor Santiago, Miriam
Enrile, Juan Ponce
Escudero, Francis - signed
Gordon, Richard
Honasan II, Gregorio Gringo - signed
Zubiri, Juan Miguel
Arroyo, Joker
Revilla, Jr., Ramon
Lapid, Manuel
Aquino III, Benigno - signed

Biazon, Rodolfo - signed
Lacson, Panfilo - signed
Legarda, Loren - signed
Madrigal, M.A. - signed
Trillanes IV, Antonio

Ex-Officio Members: Ejercito Estrada, Jinggoy - signed
Pangilinan, Francis - signed
Pimentel, Jr., Aquilino - signed

2. Committee on National Defense and Security (19 members excluding 2 *ex-officio* members)

Chairperson: Biazon, Rodolfo - signed
Vice-Chairperson:

Members: Angara, Edgardo
Zubiri, Juan Miguel
Cayetano, Alan Peter - signed
Enrile, Juan Ponce
Gordon, Richard
Cayetano, Pia - signed
Revilla, Jr., Ramon
Honasan II, Gregorio Gringo - signed
Escudero, Francis - signed
Lapid, Manuel
Defensor Santiago, Miriam
Arroyo, Joker
Aquino III, Benigno - signed
Lacson, Panfilo - signed
Legarda, Loren - signed
Madrigal, M.A. - signed
Pimentel, Jr. Aquilino - signed
Trillanes IV, Antonio

Ex-Officio Members: Ejercito Estrada, Jinggoy - signed
Pangilinan, Francis - signed

3. Committee on Trade and Commerce (9 members excluding 3 *ex-officio* members)

Chairperson: Roxas, MAR - signed
Vice-Chairperson:

Members: Cayetano, Pia - signed
Lapid, Manuel
Revilla, Jr., Ramon
Escudero, Francis - signed
Enrile, Juan Ponce
Gordon, Richard

Biazon, Rodolfo - signed
Madrigal, M.A.- signed

Ex-Officio Members: Ejercito Estrada, Jinggoy -signed
Pangilinan, Francis - signed
Pimentel, Jr., Aquilino - signed

Vis-a-vis the composition of respondent Senate Committees, the January 30, 2008 Order of arrest shows the satisfaction of the requirement of a majority vote of each of the respondent Senate Committees for the contempt of witness under Sec. 18 of the Rules Governing Inquiries in Aid of Legislation, *viz*:

1. Committee on Accountability of Public Officers and Investigations: nine (9) out of seventeen (17)

2. Committee on National Defense and Security: ten (10) out of nineteen (19)

3. Committee on Trade and Commerce: five (5) out of nine (9)

Even assuming *arguendo* that *ex-officio* members are counted in the determination of a majority vote, the majority requirement for each of the

respondent Senate Committees was still satisfied, as all the *ex-officio* members signed the Order of arrest.

The substantive and procedural requirements for issuing an Order of arrest having been met, the respondent Senate Committees did not abuse their discretion in issuing the January 30, 2008 Order of arrest of petitioner.

Epilogue

Article VI, Section 21 of the 1987 Constitution provides for the power of the legislature to conduct inquiries in aid of legislation.[252] It explicitly provides respect for the constitutional rights of persons appearing in such inquiries. Officials appearing in legislative inquiries in representation of coequal branches of government carry with them not only the protective cover of their individual rights, but also the shield of their prerogatives – including executive privilege -- flowing from the power of the branch they represent. These powers of the branches of government are independent, but they have been fashioned to work interdependently. When there is abuse of power by any of the branches, there is no victor, for a distortion of power works to the detriment of the whole government, which is constitutionally designed to function as an organic whole.

I vote to dismiss the petition.

REYNATO S. PUNO
Chief Justice

[1] Comment, pp. 3-4.
[2] Petition, p. 3.
[3] Comment, p. 4.
[4] Id. at 4-5.
[5] Id. at 5.
[6] Id. at 5-6.
[7] Id. at 6.
[8] Id. at 5.
[9] Id. at 6.

[10] Id. at 6-7; Annex A.
[11] Id. at 7; Annex B.
[12] Ibid.; Annex C.
[13] Id. at 8.
[14] Petition, p. 3.
[15] Petitioner is the current Chairman of the Commission on Higher Education (CHED) and was Director General of the National Economic and Development Authority (NEDA) from December 17, 2002 to July 17, 2006, and February 16, 2006 to August 15, 2007; Petition, p. 2.
[16] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

> **MR. NERI**. And at that time, I expressed to the Chinese, to the ZTE representatives the President's instructions that they want it to be…she wants it as a BOT project, probably unsolicited because I think she can read from the minutes of the previous NEDA meetings – no loan, no guarantee; performance undertaking but not take or pay. Meaning that if we don't use it, we don't pay. So I made that very clear to the ZTE people that these are the wishes of the President. (p. 66)
>
> xxx xxx xxx
>
> **MR. NERI**. Your Honor, it was originally conceived as a BOT project.
>
> **THE CHAIRMAN (SEN. ROXAS).** Ah, originally conceived as a BOT project. Iyon, iyon ang puntos natin dito. Kasi kung BOT Project ito, hindi uutang ang gobyerno nito, hindi ho ba?

MR. NERI. That's right, Your Honor. (p. 351)

[17] Comment, p. 8; TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

> **THE CHAIRMAN (SEN. ROXAS)**. Okay. So in this instance, the President's policy direction is something that I can fully support, 'no. Because it is BOT, it is user pay, it doesn't use national government guarantees and we don't take out a loan, hindi tayo uutang dito. Iyan ang policy directive ng Pangulo. So ang tanong ko is, what happened between November and March na lahat itong mga reservations na ito ay naiba? In fact, it is now a government undertaken contract. It requires a loan, it is a loan that is tied to a supplier that doesn't go through our procurement process, that doesn't go through the price challenge, as you say, and what happened, what was (sic) the considerations that got us to where we are today?
>
> **MR. NERI.** I am no longer familiar with those changes, Your Honor. We've left it to the line agency to determine the best possible procurement process, Your Honor. (p. 360)

[18] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

> **MR. NERI**. But we had a nice golf game. The Chairman (Abalos) was very charming, you know, and – but there was something that he said that surprised me and he said that, "Sec, may 200 ka dito." I believe we were in a golf cart. He was driving, I was seated beside him so medyo nabigla ako but since he was our host, I chose to ignore it.
>
> xxx xxx xxx
>
> **MR. NERI**. As I said I guess I was too shocked to say anything, but I informed my NEDA staff that perhaps they should be careful in assessing this project viability and maybe be careful with the costings because I told them what happened, I mean, what he said to me.
>
> **THE SENATE PRESIDENT**. Naisip mo ba kung para saan iyong 200 na iyon?
>
> xxx xxx xxx
>
> **THE SENATE PRESIDENT**. Two hundred lang, walang ano iyon, wala namang million or pesos…

MR. NERI. I guess we were discussing the ZTE projects… (pp. 33-34)

xxx xxx xxx

SEN. LACSON. Pumunta ho tayo dun sa context ng usapan kung saan pumasok iyong 200 as you mentioned. Pinag-uusapan ninyo ba golf balls?

MR. NERI. I don't think so, Your Honor.

SEN. LACSON. Ano ho ang pinag-uusapan ninyo? Paano pumasok iyong 200 na – was it mentioned to you in the vernacular, "may 200 ka rito" or in English?

MR. NERI. I think, as I remember, Mr. Chair, Your Honors, the words as I can remember is, "Sec, may 200 ka dito."

SEN. LACSON. May 200 ka rito. Ano ang context noong "may 200 ka rito?" Ano ang pinag-uusapan ninyo? Saan nanggaling iyon - iyong proposal?

MR. NERI. I guess the topic we were discussing, you know…

SEN. LACSON. NBN.

MR. NERI. Basically was NBN.

SEN. LACSON. So, how did it occur to you, ano ang dating sa inyo noong naguusap kayo ng NBN project, may ibubulong sa inyo iyong chairman (Abalos) na kalaro ninyo ng golf, "Sec, may 200 ka rito." Anong pumasok sa isip ninyo noon?

MR. NERI. I was surprised.

SEN. LACSON. You were shocked, you said.

MR. NERI. Yeah, I guess, I guess.

SEN. LACSON. Bakit kayo na-shock?

MR. NERI. Well, I was not used to being offered.

SEN. LACSON. Bribed?

MR. NERI. Yeah. Second is, medyo malaki.

SEN. LACSON. In other words, at that point it was clear to you that you were being offered bribe money in the amount of 200 million, kasi malaki, sabi ninyo?

MR. NERI. I said no amount was put, but I guess given the magnitude of the project, siguro naman hindi P200 or P200,000, so…

SEN. LACSON. Dahil cabinet official kayo, eh.

MR. NERI. I guess. But I – you know. (pp. 42-44)

[19] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

SEN. LACSON. Did you report this attempted bribe offer to the President?

MR. NERI. I mentioned it to the President, Your Honor.

SEN. LACSON. What did she tell you?

MR. NERI. She told me, "Don't accept it."

SEN. LACSON. And then, that's it?

MR. NERI. Yeah, because we had other things to discuss during that time.

SEN. LACSON. And then after the President told you, "Do not accept it," what did she do? How did you report it to the President? In the same context it was offered to you?

MR. NERI. I remember it was over the phone, Your Honor. (pp. 43-44)

[20] Id. It reads in relevant part, *viz*:

SEN. PANGILINAN. You mentioned earlier that you mentioned this to the President. Did the President after that discussion over the phone, was this ever raised again, the issue of the 200 ka rito?

MR. NERI. We did not discuss it again, Your Honor.

SEN. PANGILINAN. With the President? But the issue, of course, the NBN deal, was raised again? After that, between you and the President. Pinalow up (followed up) ba niya?

MR. NERI. May I claim the executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature. (pp. 91-92)

xxx xxx xxx

MR. NERI. …Under EO 464, Your Honor, the scope is, number one, state secrets; number two, informants privilege; number three, intra-governmental documents reflecting advisory opinions, recommendations and deliberations. And under **Section 2(A) of**

EO 464, it includes all confidential or classified information between the President and public officers covered by the EO, such as conversations, correspondence between the President and the public official and discussions in closed-door Cabinet meetings.

Section 2(A) was held valid in Senate versus Ermita. (*emphasis supplied*) (p. 105)

[21] Id. It reads in relevant part, *viz:*

MR. NERI. I think, Mr. Chair, Your Honors, that thing has been thoroughly discussed already because if we were to do a BOT the one - the pending BOT application was the application of AHI. (p. 263)

[22] Id. It reads in relevant part, *viz*:

SEN. LEGARDA. Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI (Amsterdam Holdings, Inc.) as you've previously done…

MR. NERI. As I said, Your Honor…

SEN. LEGARDA. …but to prefer or prioritize the ZTE?

MR. NERI. Yeah. As the question may involve – as I said a conversation/correspondence between the President and a public official, Your Honor.

SEN. LEGARDA. I'm sorry. Can you say that again?

MR. NERI. As I said, I would like to invoke Sec. 2(a) of EO 464. (*emphasis supplied*) (pp. 114-115)

[23] Id. It reads in relevant part, *viz*:

SEN. CAYETANO, (P). …I was told that you testified, that you had mentioned to her that there was ₱200 something offer. I guess it wasn't clear how many zeroes were attached to the 200. And I don't know if you were asked or if you had indicated her response to this. I know there was something like "Don't accept." And can you just for my information, repeat.

MR. NERI. She said "Don't accept it," Your Honor.

SEN. CAYETANO, (P). And was there something attached to that like… "But pursue with a project or go ahead and approve," something like that?

MR. NERI. As I said, I claim the right of executive privilege on further discussions on the… (*emphasis supplied*) (pp. 275-276)

[24] Id. It reads in relevant part, *viz*:

THE CHAIRMAN (SEN. BIAZON). Are you invoking it for you as a member of the Cabinet or are you invoking it in behalf of the President?

MR. NERI. I guess the law says it can be invoked in behalf of the President, and I've been instructed.

THE CHAIRMAN (SEN. BIAZON). In behalf of the President.

MR. NERI. And I've been instructed to invoke it, Your Honor.

THE CHAIRMAN (SEN. BIAZON). And we assume a written order will follow and be submitted to the committees?

MR. NERI. Yes, Your Honor, it's being prepared now. (p. 278)

[25] "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation Under the Constitution, and For Other Purposes."

[26] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

THE CHAIRMAN (SEN. BIAZON). … In your judgment, therefore, Mr. Secretary, which of the three instances would allow the invoking of executive privilege? First instance is, if the answer will involve military secrets. That's one. Second, if it will involve diplomatic issues; and Number 3, if it has something to do with national security.

We don't have to hear about the details, 'no. Which of these three, Mr. Secretary, instances – military secret, diplomatic issue and national security, which of these three will be affected by your answer to that specific question? We don't have to hear the details at this point.

MR. NERI. I am not a lawyer, Your Honor, but based on the notes of my lawyers here, it says: **Section 2(A) of EO 464 includes "all confidential or classified information between the President and public officers covered by the Executive Order, such as conversations, correspondence between the President and public official** and discussions in closed-door cabinet meetings.

THE CHAIRMAN (SEN. BIAZON)…But even then, we still have – **the Committee will still have to listen or in closed door, in executive session, your justification of invoking executive privilege and for the Committees to grant you the privilege**… (*emphasis supplied*) (pp. 473-474)

xxx xxx xxx

SEN. PIMENTEL…I'm willing to have this matter settled in a caucus where we will hear him so that we hear in the confidence of our conference room the reason why he is invoking executive privilege. But we certainly cannot allow him to do just that on his mere say so without demeaning the institution that's what I'm worried about, Mr. Chairman.

THE CHAIRMAN (SEN. CAYETANO, A.)…We cannot ask you questions about the nature that would eventually lead you to telling us what the communication is. But as to the**nature of the communication that would allow us to determine whether or not to grant your claim for executive privilege, that may be asked.** So, with the indulgence of the senators, anyway, the members of this Committee we have agreed to deal with it in caucus…(*emphasis supplied*) (p. 478)

xxx xxx xxx

THE CHAIRMAN (SEN. CAYETANO, A.)…The three committees are now going on **executive session**. And again, to repeat, **Secretary Neri, please join us**, you can bring your lawyer… (*emphasis supplied*) (p. 519)

[27] TSN, Oral Argument, March 4, 2008. It reads in relevant part, *viz*:

SENATOR CAYETANO. Yes, Your Honor, let me clarify this factual basis, Your Honor. We went into an Executive Session precisely because Secretary Neri said that if I tell you the nature of our conversation, I will be exposed – I will be telling it to the public. So we agreed to go into Executive Session. Allow me not to talk about what happened there. But at the end, all the Senators with Secretary Neri agreed that he will go home because he is having chills and coughing and he's sick. And number 2, we will tell everyone that he promised to be back. The warrant of arrest was issued, Your Honor, after we explained in open hearing, Your Honor, that he should attend and claim the privilege or claim any right not to answer in session. So, Your Honor, the Committees have not made a decision whether or not to consider to agree with him that the questions we want him to have answered will constitute executive privilege. We have not reached that point, Your Honor. (pp. 430-431)

[28] Petition, Annex B. The subpoena reads, *viz*:

In the Matter of **P.S. Res. No. 127 (**Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to Make Recommendations to Hale to the Courts of Law the

Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations); **P.S. Res. No. 129** (The National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation)); **Privilege Speech of Senator Panfilo M. Lacson**, delivered on September 11, 2007, entitled "Legacy of Corruption"; **P.S. Res. No. 136 (**The Legal and Economic Justification of the National Broadband Network [NBN] Project of the Government); **Privilege Speech of Senator Miriam Defensor Santiago** delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement"; **P.S. Res. No. 144** (A Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract).

SUBPOENA AD TESTIFICANDUM

TO: Mr. ROMULO L. NERI
Chairman
Commission on Higher Education
5th Floor, DAP Bldg, San Miguel Ave.,
Ortigas Center, Pasig City

By authority of Section 17, Rules of Procedure Governing Inquiries in Aid of Legislation of the Senate, Republic of the Philippines, you are hereby commanded and required to appear before the Committee on Accountability of Public Officers and Investigations (Blue Ribbon) of the Senate, then and there to testify under oath on what you know relative to the subject matter under inquiry by the said Committee, on the day, date, time and place hereunder indicated:

Day, Date & Time: Tuesday, November 20, 2007
10:00 a.m.
Place: Senator Ambrosio Padilla Room
2nd Floor, Senate of the Philippines
GSIS Bldg., Roxas Blvd.
Pasay City

WITNESS MY HAND and the Seal of the Senate of the Republic of the Philippines, at Pasay City, this 13th day of November, 2007.

(Signed)
ALAN PETER S. CAYETANO
Chairman
Committee on Accountability of

(Signed)
MAR ROXAS
Chairman
Committee on Trade

Public Officers & Investigations and Commerce
(Blue Ribbon)

(Signed)
RODOLFO G. BIAZON
Chairman
Committee on National Defense & Security

Approved:

(Signed)
MANNY VILLAR
Senate President

[29] Letter of Executive Secretary Eduardo R. Ermita to Senator Alan Peter Cayetano as Chairman of the Committee on Accountability of Public Officers and Investigations dated November 15, 2007; Petition, Annex C.

[30] Ibid.

[31] Petition, Annex A. The letter reads, *viz*:

22 November 2007

MR. ROMULO L. NERI
Chairman
Commission on Higher Education
5th Floor, DAP Building, San Miguel Ave.
Ortigas Center, Pasig City

Dear Mr. Neri:

A Subpoena Ad Testificandum has been issued and was duly received and signed by a member of your staff on 15 November 2007.

You were required to appear before the Senate Blue Ribbon hearing at 10:00 a.m. on 20 November 2007 to testify on the Matter of:

P.S. RES. NO. 127, introduced by SENATOR AQUILINO Q. PIMENTEL, JR. (Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if

any, in the BOT Law and other Pertinent Legislations); P.S. RES. NO. 129, introduced by SENATOR PANFILO M. LACSON **(**Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity; PRIVILEGE SPEECH OF SENATOR PANFILO M. LACSON, entitled "LEGACY OF CORRUPTION," delivered on September 11, 2007; P.S. RES. NO. 136, introduced by SENATOR MIRIAM DEFENSOR SANTIAGO **(**Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government); PRIVILEGE SPEECH OF SENATOR MIRIAM DEFENSOR SANTIAGO, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement" delivered on November 24, 2007; P.S. RES. NO. 144, introduced by SENATOR MANUEL ROXAS III **(**Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract).

Since you have failed to appear in the said hearing, the Committees on Accountability of Public Officers and Investigations (Blue Ribbon), Trade and Commerce and the National Defense and Security require you to show cause why you should not be cited in contempt under Section 6, Article 6 of the Rules of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon).

The Senate expects your explanation on or before 2 December 2007.

For the Senate:

(Signed)
ALAN PETER S. CAYETANO
Chairman
Committee on Accountability of
Public Officers & Investigations
(Blue Ribbon)

(Signed)
MAR ROXAS
Chairman
Committee on Trade
and Commerce

(Signed)
RODOLFO G. BIAZON
Chairman
Committee on National Defense & Security

Approved:

(Signed)
MANNY VILLAR
Senate President

[32] Petition, Annex D.
[33] Id., Annex D-1.
[34] Ibid.
[35] Ibid.

[36] Supplemental Petition, Annex A.
[37] Id., Annex B.
[38] Id., p. 3.
[39] Comment, p. 10.
[40] Id. at 23.
[41] Id. at 29.
[42] Id. at 35.
[43] These are the sub-issues:

1.a. Did Executive Secretary Ermita correctly invoke the principle of executive privilege, by order of the President, to cover (i) conversations of the President in the exercise of her executive and policy decision-making and (ii) information, which might impair our diplomatic as well as economic relations with the People's Republic of China?

1.b. Did petitioner Neri correctly invoke executive privilege to avoid testifying on his conversations with the President on the NBN contract on his assertions that the said conversations "dealt with delicate and sensitive national security and diplomatic matters relating to the impact of the bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines" xxx, within the principles laid down in **Senate v. Ermita** (488 SCRA 1 [2006])?

1.c. Will the claim of executive privilege in this case violate the following provisions of the Constitution:

Sec. 28, Art. II (Full public disclosure of all transactions involving public interest)

Sec. 7, Art. III (The right of the people to information on matters of public concern)

Sec. 1, Art. XI (Public office is a public trust)

Sec. 17, Art. VII (The President shall ensure that the laws be faithfully executed)

and the due process clause and the principle of separation of powers?

[44] Samaha, A., "Government Secrets, Constitutional Law, and Platforms for Judicial Intervention," UCLA Law Review, April 2006, 909, 916.

[45] Samaha, supra at 918.

[46] Levinson, J., "An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office," 72 Boston University Law Review (January 1992), p. 143, citing Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816), in 10 The Writings of Thomas Jefferson 4 (Paul L. Ford ed., 1899), cited in Library of Congress, Respectfully Quoted 97 (Suzy Platt ed., 1989).

[47] Iraola, R. "Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions," Iowa Law Review, vol. 87, no. 5, August 2002, p. 1559, 1565. The separation of powers was fashioned to avert tyranny as explained by James Madison in *The Federalist No. 47*:

> The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehension may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." (The Federalist No. 47, at 315 (James Madison) (Modern Library 1937).

[48] Ibid.

[49] Id. at 1565-1566, citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[50] Id. at 1559, citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

[51] Doherty, M., "Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques," 19 Northern Illinois University Law Review (Summer 1999) 801, 808.

[52] 63 Phil. 139 (1936).

[53] Id. at 156.

[54] Keefe, W., Ogul, M., The American Legislative Process: Congress and the States, 4th ed. (1977), p. 20. *See also* Gross, The Legislative Struggle (1953), pp. 136-137.

[55] Javits, J., Klein, G., "Congressional Oversight and the Legislative Veto: A Constitutional Analysis," New York University Law Review, vol. 52, no. 3, June 1977, p. 460.

[56] Keefe, W., Ogul, M., supra at 20-23.

[57] Id. at 25.

[58] Article VIII, Section 12 of the 1973 Constitution provides in relevant part, *viz*:

xxx xxx xxx

(2) The National Assembly or any of its committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in such inquiries shall be respected.

[59] 87 Phil. 29 (1950).

[60] Id. at 45.

[61] 354 U.S. 178 (1957), pp. 194-195.

[62] Id. at 187.

[63] Id. at 178.

[64] 360 U.S. 109 (1959).

[65] Arnault v. Nazareno, 87 Phil. 29 (1950), p. 46.

[66] Id. at 46-47.

[67] Id. at 45, citing McGrain vs. Daugherty, 273 U.S. 135.

[68] Annotation: Contempt of Congress, 3 L ed 2d 1649, footnotes omitted.

[69] Wollam v. United States (1957, CA9 Or) 244 F2d 212.

[70] Sacher v. United States (1957) 99 App DC 360, 240 F2d 46.

[71] 87 Phil. 29 (1950), p. 48.

[72] Rozell, M., "Executive Privilege and the Modern Presidents: In Nixon's Shadow," Symposium on United States v. Nixon: Presidential Power and Executive Privilege Twenty-Five Years Later, 83Minnesota Law Review (May 1999) 1069.

[73] Doherty, M., "Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques," 19 Northern Illinois University Law Review 801, 810 (Summer 1999) (footnotes omitted).

[74] 157 F. Supp. 939 (Ct. Cl. 1958).

[75] McNeely-Johnson, K.A., "United States v. Nixon, Twenty Years After: The Good, the Bad and the Ugly –An Exploration of Executive Privilege," 14 Northern Illinois University Law Review (Fall, 1993) 251, 261-262, citing Kaiser Aluminum & Chemical Co. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958), 946.

[76] 418 US 613 (1974).

[77] Rozell, M., "Restoring Balance to the Debate Over Executive Privilege: A Response to Berger," Symposium: Executive Privilege and the Clinton Presidency," 8 William and Mary Bill of Rights Journal (April 2000) 541, 557 citing Letter from George Washington to James Madison (May 5, 1789), in 30 The Writings of George Washington, 1745-1799, at 311 (John Fitzpatrick ed., 1931-1944).

[78] Doherty, M., "Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques," 19 Northern Illinois University Law Review 801, 821 (Summer 1999).

[79] Rozell, M., supra note 77. *See also* Boughton, J.R., "Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?" 21 Whittier Law Review (Summer, 2000) 797, footnotes omitted.

[80] Boughton, "Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?" 21 Whittier Law Review (Summer, 2000) 797, p. 814.

[81] Rozell, M., supra note 77 at 582.

[82] 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

[83] Boughton, supra at 815.

[84] Ibid.

[85] Doherty, supra at 801, 822.

[86] Boughton, supra at 817.

[87] Id. at 826, citing Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability (1994).

[88] 418 U.S. 683 (1974).

[89] Boughton, supra at 819.

[90] Ibid.

[91] Doherty, supra at 828.

[92] Id. at 820.

[93] Iraola, supra at 1571, citing 26A Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5662, at 484-90 (1992) (footnotes omitted).

[94] Id. at 1571, citing 26A Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5662, at 490 n.3.

[95] Wald, P. and Siegel, J., "The D.C. Circuit and the Struggle for Control of Presidential Information," Symposium, The Bicentennial Celebration of the Courts of the District of Columbia Circuit, 90Georgetown Law Journal (March 2002) 737, 740.

[96] Iraola, supra at 1571.

[97] Id. at 1559.

[98] Id. at 1572, citing Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983) (footnotes omitted). It has been aptly noted that "[i]n the hierarchy of executive privilege, the 'protection of national security' constitutes the strongest interest that can be asserted by the President and one to which the courts have traditionally shown the utmost deference." 12 Op. Off. Legal Counsel 171, 176-77 (1988).

[99] United States v. Reynolds, 345 U.S. 1; Iraola, supra at 1572.

[100] United States v. Reynolds, 345 U.S. 1, 7-8 (1953); Iraola, supra at 1572, citing Bowles v. United States, 950 F.2d 154, 156 (4th Cir. 1991); In re United States, 872 F.2d 472, 475 (1989).

[101] United States v. Reynolds, 345 U.S. 1; Iraola, supra at 1572, citing Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (1991).

[102] 433 US 425 (1977).

[103] Iraola, supra at 1577, citing First E. Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994) (quoting Dudman Communications Corp. v. Dept. of Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987)); see also Missouri v. United States Army Corps of Eng'rs, 147 F.3d 708, 710 (8th Cir. 1998) ("The purpose of the

deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny.")

[104] Id. at 1578 citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir. 1967); accord NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-53 (1975); EPA v. Mink, 410 U.S. 73, 86-93 (1973).

[105] Ibid, citing Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 12 (D.D.C. 1995) (citation omitted), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

[106] Id. at 1578 (footnotes omitted).

[107] Id. at 1579, citing In re Dep't of Investigation, 856 F.2d 481, 484 (2d Cir. 1988); United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981); Black v. Sheraton Corp. of Am., 564 F.2d 531, 545 (D.C. Cir. 1977).

[108] Almonte, et al. v. Vasquez, et al., G.R. No. 95367, May 23, 1995, 244 SCRA 286.

[109] G.R. No. 130716, December 9, 1998, 299 SCRA 744.

[110] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006).

[111] U.S. v. Nixon, 418 U.S. 683 (1974), Note 19 at 713.

[112] Ibid.

[113] 418 U.S. 683 (1974).

[114] U.S. v. Haldeman, 559 F.2d 31 (1976), p. 52.

[115] A grand jury is an investigatory body charged with the duty to determine whether or not a crime has been committed. (U.S. v. R. Enterprises, Inc., et al. 498 US 292, 296 [1991]).

[116] In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects, 360 F. Supp 1 (1973), Note 1 which states, *viz*: The Special Prosecutor has been designated as the attorney for the Government to conduct proceedings before the grand jury investigating the unauthorized entry into the Democratic National Committee Headquarters and related offenses.

[117] 360 F. Supp 1 (1973).

[118] In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects (also referred to as In re Subpoena for Nixon), 360 F. Supp 1, 3 (1973).

[119] Supra note 116.

[120] 487 F. 2d 700.

[121] Id. at 704.

[122] 377 F. Supp. 1326 (1974).

[123] 418 U.S. 683 (1974).

[124] Id. at 708.

[125] Ibid., explaining in Note 17 that, "Freedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. . . . (G)overnment . . . needs open but protected channels

for the kind of plain talk that is essential to the quality of its functioning." Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 325 (DC 1966). *See* Nixon v. Sirica, 159 U.S.App.D.C. 58, 71, 487 F.2d 700, 713 (1973); Kaiser Aluminum & Chem. Corp. v. United States, 141 Ct.Cl. 38, 157 F.Supp. 939 (1958) (Reed, J.); The Federalist, No. 64 (S. Mittell ed. 1938).

[126] Id. at 708.

[127] Id. at 705, explaining in Note 15 that, "There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. *See* 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledge that without secrecy no constitution of the kind that was developed could have been written. C. Warren, The Making of the Constitution, 134-139 (1937).

[128] Id. at 708.

[129] Id. at 706, Note 16, citing Marshall v. Gordon, 243. U.S. 521, 537, 37 S.Ct. 448, 451, 61 L.Ed. 881 (1917).

[130] Id. at 707, citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S., at 635, 72 S.Ct., at 870 (Jackson, J., concurring).

[131] Id. at 711 where the Court held, *viz*:

> In this case we must weigh the importance of the general privilege of **confidentiality of Presidential communications in performance of the President's responsibilities** against the inroads of such a privilege on the fair administration of criminal justice. (*emphasis supplied*)

[132] Id. at 712-713 where the Court held, *viz*:

> A President's acknowledged **need for confidentiality in the communications of his office** is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. (*emphasis supplied*)

[133] Id. at 708 where the Court held, *viz*:

> … A President and those who assist him must be **free to explore alternatives in the process of shaping policies and making decisions** and to do so in a way many would be unwilling to express except **privately**. (*emphasis supplied*)

[134] Id. at 449, where the Court held, *viz*:

> The appellant may legitimately assert the **Presidential privilege**, of course, **only as to those materials whose contents fall within the scope of the privilege recognized in United States v. Nixon**, *supra*. In that case the Court held that the **privilege is limited to communications 'in performance of (a President's) responsibilities**,' 418 U.S., at 711, 94 S.Ct., at 3109, '**of his office**,' *id.*, at 713, and **made 'in the process of**

shaping policies and making decisions,'*id.*, at 708, 94 S.Ct., at 3107. (*emphasis supplied*)

[135] U.S. v. Nixon, 418 U.S. 613 at 708, where the Court held, *viz*:

… In Nixon v. Sirica, 159 U.S.App.D.C. 58, 487 F.2d 700 (1973), the Court of Appeals held that such Presidential communications are 'presumptively privileged,' *id.*, at 75, 487 F.2d, at 717, and this position is accepted by both parties in the present litigation.

[136] 487 F.2d 700 at 717. The Court held, *viz*:

We recognize this great public interest, and agree with the District Court that such (Presidential) conversations are **presumptively privileged…** (*emphasis supplied*)

[137] 360 F. Supp. 1, 4.

[138] Id. at 10-11.

[139] Id. at 5, citing Note 8 quoting Brief in Opposition at 3.

[140] In re Sealed Case (Espy), 121 F3d 729 at 754.

[141] U.S. v. Nixon, 418 U.S. 683 at 706.

[142] Id. at 712.

[143] Id. at 707.

[144] Id. at 709.

[145] Id. at 711-712.

[146] Id. at 712-713.

[147] Id. at 706.

[148] Ibid.

[149] Id. at 710-711.

[150] Id. at 709-710, explaining in Note 18 that, "Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Mr. Justice Frankfurter, dissenting in **Elkins v. United States**, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454,4 L.Ed.2d 1669 (1960), said of this: 'Limitations are properly placed upon the operation of this general principle only to the very limited extent that **permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth**.'" (*emphasis supplied*)

[151] Id. at 714, Note 21, citing United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), or C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

[152] Id. at 714-715.

[153] Id. at 715.

[154] Ibid.

[155] 121 F.3d 729, pp. 744-745. The Court held, *viz*:

The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential

decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need. If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material. The remaining relevant material should be released. Further, the President should be given an opportunity to raise more particularized claims of privilege if a court rules that the presidential communications privilege alone is not a sufficient basis on which to withhold the document.

[156] Letter of Executive Secretary Eduardo R. Ermita to Senator Alan Peter Cayetano as Chairman of the Committee on Accountability of Public Officers and Investigations dated November 15, 2007, Annex C of the Petition.

[157] G.R. No. 95367 May 23, 1995, 244 SCRA 286 (1995).

[158] G.R. No. 130716, December 9, 1998, 299 SCRA 744 (1998), citing IV Record of the Constitutional Commission 621-922, 931 (1986) and Almonte v. Vasquez, 244 SCRA 286, 295, 297,May 23, 1995.

[159] 345 U.S. 1 (1953).
[160] Id. at 7-8.
[161] Id. at 9-10.
[162] Id. at 10.
[163] Id. at 11.
[164] Id. at 4.
[165] Id. at 4-5.
[166] Id. at 10.
[167] United States v. Reynolds, 345 U.S. 1 (1953) at 10.
[168] TSN, Oral Argument, March 4, 2008, pp. 35-38. Counsel for petitioner did not provide sufficient basis for claiming diplomatic secrets privilege as supplied by the President or the proper head of agency involved in foreign affairs, *viz*:

> **JUSTICE CARPIO:** But where is the diplomatic secret there, my question was – does this refer, do the conversations refer to diplomatic secrets?
>
> **ATTY. BAUTISTA:** Well, it refers to our relationship with a friendly foreign power.
>
> **JUSTICE CARPIO:** But that doesn't mean that there are secrets involved with our relationships?

> **ATTY. BAUTISTA:** Just the same Your Honors the disclosure will harm our relationship with China as it now appears to have been harmed.
>
> **JUSTICE CARPIO:** But how can it harm when you have not given us any basis for leading to that conclusion, you are just saying it is a commercial contract, they discussed about the broadband contract but where are the secrets there?

Counsel for petitioner also admitted that there was no referral of any aspect of the ZTE Contract to the Department of Foreign Affairs, *viz*:

> **CHIEF JUSTICE PUNO**: Do you also know whether there is any aspect of the contract relating to diplomatic relations which was referred to the Department of Foreign Affairs for its comment and study?
>
> **ATTY. LANTEJAS**: As far as I know, Your Honors, there was no referral to the Department of Foreign Affairs, Your Honor.
>
> **CHIEF JUSTICE PUNO**: And yet you are invoking the doctrine of Executive Privilege, because allegedly, this contract affects national security, and would have serious impact on our diplomatic relations, is that true? (p. 291)

[169] Petition, Annex D-1.

[170] Ibid.

[171] TSN, Oral Argument, March 4, 2008, pp. 35-38. Counsel for petitioner did not provide sufficient basis for claiming military and national secrets privilege as supplied by the President or the proper head of agency involved in military and national security, *viz*:

> **JUSTICE CARPIO:** Okay, you mentioned that the nature of the discussion refers to military secrets, are you claiming that?
>
> **ATTY. BAUTISTA:** Yes, Your Honor, military concerns.
>
> **JUSTICE CARPIO:** Yes, was the Armed Forces of the Philippines or the Intelligence Service of the Armed Forces of the Philippines were they ever involved in the negotiation of the NBN contract, were they part of the team that designed the NBN network?
>
> **ATTY. BAUTISTA:** I do not know Your Honor.

JUSTICE CARPIO: So, how can you claim that it involves military secret when the army, the military, the navy were not involved?

ATTY. BAUTISTA: Because for one thing the Committee on National Defense and Security is investigating it and there was mention that this facility will be accessed and used by our military.

JUSTICE CARPIO: So, you are just basing that on what the Senate is doing, conducting an investigation, you are not basing it on what the President is claiming?

ATTY. BAUTISTA: Well, we cannot really divulge what it was that the President said on the matter.

Counsel for petitioner also admitted that in offering the justifications for the invocation of executive privilege, he was only representing petitioner and not speaking in behalf of the government,*viz*:

JUSTICE TINGA: You do not in any way speak in behalf of the government or any other government official let alone the Chief Executive, do you?

ATTY. BAUTISTA: It is not my job, Your Honor, maybe the Solicitor General. (p. 144)

Counsel for petitioner also admitted that the ZTE Contract was not referred to the Department of National Defense, *viz*:

CHIEF JUSTICE PUNO: May I call, again, Atty. Lantejas. In the whole process when this contract was conceptualized, negotiated and concluded, was there any aspect of the contract that involved national security and that was referred to the Department of National Defense for comment?

ATTY. LANTEJAS: As far as I know, Your Honor, I think there was no referral to the National Defense, Your Honor. (pp. 291-292)

[172] In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects, 360 F. Supp 1, August 29, 1973.

[173] Id., Note 8, p. 5, citing Brief in Opposition, p. 3.

[174] 157 F.Supp. 939, 944, 141 Ct.Cl. 38 (1958).

[175] 141 Ct. Cl. 38, 157 F.Supp. 939 (1958).

[176] Almonte v. Vasquez, G.R. No. 95367 May 23, 1995, 244 SCRA 286 (1995); Senate v. Ermita, G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006).

[177] Senate v. Ermita, G.R. No. 169777, April 20, 2006, 488 SCRA 1, 51; Comment, pp. 16-17.

[178] 487 F.2d 700, 717. The Court held, viz:

> We recognize this great public interest, and agree with the District Court that such (Presidential) conversations are **presumptively privileged…** (*emphasis supplied*)

[179] Id. at 730. The Court, affirming **Sirica** held, viz:

> The staged decisional structure established in Nixon v. Sirica was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. **So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government-** a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations- **we believed in Nixon v. Sirica, and continue to believe**, that the effective functioning of the presidential office will not be impaired. (*emphasis supplied*)

[180] *See* U.S. v. Haldeman, et al, 559 F.2d 31 (1976) and In re Sealed Case (Espy), 121 F.3d 729 (1997).

[181] G.R. No. 95367 May 23, 1995, 244 SCRA 286 (1995). Citing **U.S. v. Nixon**, the Court held, viz:

> In addition, in the litigation over the Watergate tape subpoena in 1973, the U.S. Supreme Court recognized the right of the President to the confidentiality of his conversations and correspondence, which it likened to "the claim of confidentiality of judicial deliberations." Said the Court in *United States v. Nixon*: [11]
>
> > The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. **A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive**

> **privilege for Presidential communications.** The privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution. . . . (*emphasis supplied*)

[182] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006) at 51; Comment, pp. 16-17.

[183] II Record of the Constitutional Commission, p. 387.

[184] *See* note 186, infra.

[185] In **Cheney v. United States District Court for the District of Columbia, et al.,** the U.S. Supreme Court pointed out the distinction in context between the case before it and **U.S. v. Nixon**. It cautioned that the observation in **U.S. v. Nixon** that production of confidential information in a criminal proceeding would not disrupt the functioning of the Executive Branch could not be applied mechanically to the civil litigation before it. The Court pointed out that in the criminal justice system, there are mechanisms to filter out insubstantial legal claims such as through responsible exercise of prosecutorial discretion to prosecute a criminal case. In contrast, in civil litigation, there is no sufficient mechanism to screen out unmeritorious or vexatious claims against the Executive Branch wherein access to Presidential communications may be sought. **Cheney v. United States District Court for the District of Columbia, et al.,** 542 U.S. 367 (2004). *See also* note 186, infra.

[186] Lee, G., The President's Secrets, 76 George Washington Law Review, February 2008, 197.

Gia B. Lee, professor of the UCLA School of Law and an outside counsel for the General Accounting Office's suit against US Vice President Richard B. Cheney in **Walker v. Cheney** (230 F. Supp.2d 51, 53 [D.D.C. 2002]), suggests a "differentiation approach" in assessing the President's need for confidentiality of his communications. She argues that the commonsense or "too plain to require further discussion" assertion in **U.S. v. Nixon** overstates the strength of the President's interest in confidentiality. The unexamined presumption fails to take into account the qualified and contingent nature of the President's need for confidentiality. According to her, "(t)he **extent to which the lack of confidentiality will chill presidential deliberations is neither fixed nor always substantial, but turns on a range of factors, including the information under discussion and the specifics of the proposed disclosure**." (Lee, G., The President's Secrets, George Washington Law Review, February 2008, 202) Thus, the "differentiation approach" makes a searching review and assesses the likelihood that the proposed disclosure would chill candid deliberations.

In analyzing the Nixon cases, she asserts that the US Supreme Court in **U.S. v. Nixon** adopted a slight "differentiation approach" in considering the effect of the **frequency of disclosure** on the candor of advisers and concluding that advisers will not be moved to temper the candor of their remarks by

the **infrequent occasions** of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution. Three years later, after Nixon had resigned as President, the Court again employed a "differentiation approach," this time more heavily, in **Nixon v. Administrator of General Services**. In that case, the Court ruled in favor of disclosure of varied documents and communications of former President Nixon pursuant to the Presidential Recordings and Materials Preservation Act which directed the General Services Administrator to take custody of the Nixon Administration's papers and tape recordings. The Court considered that the alleged infringement on presidential confidentiality was not as great as the President claimed it to be because the statute directed the Administrator to issue regulations that would allow the President to **assert the privilege claims before any eventual public release of the documents**, thus **only the archivists would have access to the materials**; professional archivists had regularly screened similar materials for each of the prior presidential libraries and there had never been any suggestion that such screening interfered with executive confidentiality even if executive officials knew of the practice. Furthermore, the Court held that the limited intrusion was justified in light of the desire of Congress to preserve the materials for "legitimate historical and governmental purposes" and the need in the wake of the Watergate incident "to restore public confidence" in the nation's political processes, and the need to enhance Congress's ability to craft remedial legislation.

The **"differentiation approach" takes a measured approach to invocations of presidential confidentiality.** This approach argues against a constitutional approach that simply assumes the substantiality of a "generalized or undifferentiated interest in confidential presidential communications, and in favor of an approach that demands **differentiating among confidentiality claims, depending on the nature of the disclosures sought and the type of information sought to be disclosed**.

[187] 87 Phil. 29 (1950), p. 48.

[188] Cheney v. United States District Court for the District of Columbia, 542 U.S. 367
(2004).

[189] Letter of Executive Secretary Eduardo R. Ermita to Senator Alan Peter Cayetano as Chairman of the Committee on Accountability of Public Officers and Investigations dated November 15, 2007, Annex C of the Petition; TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 91-92.

[190] Id.; TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 114-115.

[191] Id.; TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 275-276.

[192] TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 43-44.

[193] Id. at 91-92.

[194] Id. at 105.

[195] Id. at 114-115.

[196] Id. at 275-276.

[197] Comment, pp. 4-5.

[198] Id. at 5.

[199] Ibid.

[200] Ibid.

[201] Id. at 6.

[202] Id. at 5-6.

[203] Id. at 6 and 24, Annex A.

[204] Id. at 7 and 24, Annex B.

[205] Id. at 7, 24-25, Annex C.

[206] An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes.

[207] An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes.

[208] An Act Mandating Concurrence to International Agreements and Executive Agreements.

[209] In the Oral Argument on March 4, 2008, counsel for the petitioner revealed that included in the conversation of the President with petitioner that respondent Senate Committees seek to be disclosed is the weighing of options of the President, *viz*:

> **ATTY. BAUTISTA**: The subject of the communications from the setting which gathered (sic), they dealt with the scenario of what if the contract were scrapped, what if it were suspended, what if it were modified this way and that way. (p. 26)
>
> xxx xxx xxx
>
> **ASSOCIATE JUSTICE DE CASTRO**: …What was the subject matter of the Executive and policy decision-making process which you cite as one of the grounds to invoke Executive privilege?
>
> xxx xxx xxx
>
> **ATTY. BAUTISTA:** That's the subject matter, Your Honor. They were discussing possible alternatives, the scenario what would happen if you scrap it… (pp. 214-215)

[210] In the Oral Argument on March 4, 2008, counsel for the petitioner argued on the question of interest of the President in the NBN project in relation to the first question, *viz*:

> **CHIEF JUSTICE PUNO**: Let us be more specific. Chilling effect, that is a conclusion. The first question is, whether the President followed up the NBN Project. If that question is asked from petitioner Neri, and he answers the question, will that seriously affect the way the Chief Executive will exercise the powers and the privileges of the Office?
>
> **ATTY. BAUTISTA**: Well, if the answer to that question were in the affirmative, then it would imply, Your Honor, that the President has some undue interest in the contract.
>
> **CHIEF JUSTICE PUNO**: The President may have interest, but not necessarily undue interest.
>
> **ATTY. BAUTISTA**: Well, but in the atmosphere that we are in, where there is already an accusatory mood of the public, that kind of information is going to be harmful to the President.
> **CHIEF JUSTICE PUNO**: When you say accusatory, that is just your impression?
>
> **ATTY. BAUTISTA**: Yes, Your Honor, but I think it's a normal and justified impression from--I am not oblivious to what goes on, Your Honor.
>
> **CHIEF JUSTICE PUNO**: But that is your impression?
>
> **ATTY. BAUTISTA**: Yes, Your Honor. (pp. 299-300)

[211] TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, p. 66.

[212] In the Oral Argument on March 4, 2008, counsel for petitioner argued on this point, *viz*:

> **ATTY. BAUTISTA**: First, on page 2 of their Comment they said that there is information which Neri refuses to disclose which may reveal her – meaning, the President's participation in the anomalous National Broadband Project, no such thing, Your Honor. Page 27 of their Comment, there is a mention that the invocation of the privilege is to protect criminal activities like the bribery allegations of unprecedented magnitude involved in the controversial NBM Project. No such intent, Your Honor, the bribery he mentioned it - he said Chairman Abalos – "Sec, may Two Hundred ka dito". And what did the President say – he said - do not accept it, that is all – he did not say that the President do not accept it but ask for more and have it split, no such thing Your Honor these are all speculative. (pp. 11-12)

[213] 354 U.S. 178 (1957), pp. 194-195.

[214] Id. at 187.

[215] Id. at 178.

[216] Miller, R., "Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege," 81 Minnesota Law Review, February 1997, 631, 684-685 citing Mistretta v. United States, 488 U.S. 361, 384-97 (1989) (upholding the Sentencing Guidelines promulgated by the United States Sentencing Commission); Morrison v. Olson, 487 U.S. 654, 691 (1988) (upholding provisions of the Ethics in Government Act); Nixon v. Administrator of Gen. Services., 433 U.S. 425, 441-46 (1977) (upholding the Presidential Records and Materials Preservation Act because the Act is not "unduly disruptive of the Executive Branch"); cf. Public Citizen v. United States Department of Justice, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring) (suggesting that formalism should be applied "[w]here a power has been committed to a particular branch of the Government in the text of the Constitution ... [i.e.,] where the Constitution draws a clear line").

[217] Comment, p. 25.

[218] Id. at 26.

[219] TSN, Oral Argument, March 4, 2008, pp. 416-422.

[220] Id. at 297-306.

[221] There is no case involving Presidential communications privilege invoked in a legislative inquiry that has reached the US Supreme Court. The case that comes closest to the facts of the case at bar is **Senate Select Committee v. Nixon** (498 F.2d 725 [1974]) decided by the Court of Appeals of the District of Columbia Circuit where it **laid down the "demonstrably critical test" to overcome the presumption of confidentiality of presidential communication in a Senate investigation.** In this case, the Senate Committee to investigate wrongdoing by the Nixon Administration subpoenaed taped conversations of President Nixon. The D.C. Circuit Appellate Court ruled that the Committee's showing of need for the subpoenaed tapes "must depend solely on whether the subpoenaed evidence is **demonstrably critical** to the responsible fulfillment of the Committee's functions." The subpoena did not pass the test because as observed by the court, there were two possible reasons why the Committee needed the tapes -- to expose corruption in the executive branch and to determine whether new legislation was needed. The power of the Senate Committee to investigate wrongdoing by the Nixon Administration did not provide sufficient justification because the House Judiciary Committee was conducting an impeachment inquiry at the same time and already had copies of the subpoenaed tapes. The court, therefore, concluded that the Watergate Committee's need for the subpoenaed tapes to investigate President Nixon was "merely cumulative." The court also assessed that the Committee did not need the tapes to educate itself for it to recommend legislation. Noticeably similar or at least consistent with the "function impairment approach," the "demonstrably critical test" of the D.C. Circuit Court of Appeals also weighs how nondisclosure will impair the performance of the function of the Senate Committee. Thus,

subjecting the case at bar to the "demonstrably critical test," the Court should arrive at the same result using the "function impairment test."

[222] Comment, p. 27.

[223] Doherty, M., supra at 801.

[224] Rozell, M., supra note 77 at 541, 555-556, citing Letter from George Washington to James Madison (May 5, 1789), *in* 30 The Writings of George Washington, 1745-1799, at 311 (John Fitzpatrick ed., 1931-1944).

[225] Id. at 541, citing Raoul Berger, executive Privilege: A Constitutional Myth (1974).

[226] Nixon v. Sirica, 487 F.2d 700, p. 717, citing Committee for Nuclear Responsibility v. Seaborg, 149 U.S.App.D.C. 385, 391; 463 F.2d 788, 794 (1971).

[227] 498 F.2d 725, 731 (1974), citing Committee for Nuclear Responsibility v. Seaborg, 149 U.S.App.D.C. 385, 463 F.2d 788, 794 (1971). *See* Gravel v. United States, 408 U.S. 606, 627, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

[228] Nixon v. Sirica 487 F.2d 700 at 719.

[229] 487 F.2d at 718.

[230] Nixon v. Sirica, 487 F.2d 700 at 731.

[231] 121 F.3d 729 (1997).

[232] Id. at 746 (1997).

[233] Iraola, R., supra at 487.

[234] Id. at 1586 (August 2002), footnote 161, citing 5 Op. Off. Legal Counsel 27, 31 (1981); see also 10 Op. Off. Legal Counsel 68, 92 (1986) ("[I]n cases in which Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligations of each branch to accommodate the legitimate needs of the other.") (citing United States v. AT&T, 567 F.2d 121, 130 (D.C. Cir. 1977).

[235] Cheney v. D.C. District Court, 542 U.S. 367 (2004), citing United States v. Reynolds, 345 U.S. 1, 7, 73 S.Ct. 528, 97 L.Ed. 727 (1953).

[236] Id. at 367, citing U.S. v. Nixon, 418 U.S. 683 at 692.

[237] 567 F.2d 121, 130 (D.C. Cir. 1977).

[238] Miller, R., "Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege," 81 Minnesota Law Review, February 1997, 631.

[239] TSN, Oral Argument, March 4, 2008, p. 13.

[240] Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations. (Comment, pp. 4-5)

[241] Delivered on September 11, 2007, entitled "Legacy of Corruption"; Comment, p. 5.

[242] Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity; Comment, p. 5.

[243] Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government; Comment, pp. 5-6.

[244] Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract; Comment, p. 6.

[245] Delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement"; Comment, p. 6.

[246] "An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes"; Comment, pp. 6-7; Annex A.

[247] "An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes"; Comment, p. 7; Annex B.

[248] "An Act Mandating Concurrence to International Agreements and Executive Agreements"; Comment, p. 7; Annex C.

[249] Supplemental Petition, Annex A.

[250] Petition, Annex A.

[251] The January 30, 2008 Order of arrest shows that it was signed by the following Senators, *viz*:

Chairpersons:

1. Cayetano, Alan Peter
2. Roxas, MAR
3. Biazon, Rodolfo

Members:

4. Cayetano, Pia
5. Escudero, Francis
6. Honasan II, Gregorio Gringo
7. Aquino III, Benigno
8. Lacson, Panfilo

9. Legarda, Loren
10. Madrigal, M.A.
11. Pimentel, Jr., Aquilino

Ex-Officio Members:

12. Ejercito Estrada, Jinggoy
13. Pangilinan, Francis
14. Pimentel, Jr., Aquilino

Senate President:

15. Manuel Villar. (Supplemental Petition, Annex A)

[252] Sec. 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.