

**REPUBLIC OF THE PHILIPPINES
SUPREME COURT
Manila**

ROMULO L. NERI, in his capacity as Chairman of the Commission on Higher Education (CHED) and as former Director General of the National Economic Development Authority (NEDA),
Petitioner,

- versus -

G.R. NO. 180643

SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS & INVESTIGATIONS (BLUE RIBBON), SENATE COMMITTEE ON TRADE & COMMERCE, and SENATE COMMITTEE ON NATIONAL DEFENSE & SECURITY,
Respondents.

XX - - - - - XX

MOTION FOR RECONSIDERATION

THE RESPONDENT SENATE COMMITTEES in the above-entitled case, by their undersigned counsel, respectfully move this Honorable Court for a reconsideration of its Decision dated 25 March 2008, a copy of which was received on 26 March upon the following considerations:

PREFATORY STATEMENT

What began as respondents' simple and straightforward quest for truth in aid of legislation has, with the Decision dated 25 March

2008, become a fight for survival by the respondents and, by extension, the Senate, if not the Congress itself, in order that they can continue to meaningfully perform their primary function to enact laws and thus maintain their constitutional role as a co-equal branch of our tripartite, republican, and democratic system of government.

In upholding the claim of executive privilege to shield the President against what was perceived to be undue encroachment by respondents, the majority opinion effectively rendered the Senate and its Committees inutile to inquire into actions of the President which are clearly relevant to issues of profound national concern and which are evidently necessary to craft much-needed legislation to address such issues. Justice Brandeis of the United States Supreme Court once profoundly said that the three great branches of government must have that “inevitable friction” to be able preserve the vibrancy of a democracy and save the citizenry from “autocratic” rule where there are no “checks and balances”.¹ Unfortunately, the *Neri* Decision, if allowed to become final, shall be the jurisprudential springboard to unduly destroy such “inevitable friction” paving the way for autocracy in our government. The signs of the times are already portentous. Emblazoned in one newspaper is the headline “CABINET TO SKIP PROBES”.² When “*asked if cabinet members could ignore Senate*

¹ *Myers v. United States*, 272 U.S. 52, 293 (1926).

² *Philippine Daily Inquirer*, March 31, 2008.

subpoenas, Executive Secretary Ermita said ‘Of course, they can invoke the ruling’.”³

Worse, in arriving at its Decision, the majority of this Honorable Court seems to have turned a blind eye to facts which are of record and disregarded settled jurisprudence. Instead, the majority seems to have uncritically taken the representations of petitioner at face value and adopted his position hook, line, and sinker.

Wittingly or not, the majority opinion, with one broad stroke, established a “*dangerous and crippling*” precedent which does not merely gag respondents from asking petitioner the three (3) questions on which the instant petition is based, but has serious, far-reaching emasculating results on future legislative inquiries such that it may have the unintended effect of “killing all birds with one stone”, so to speak. The debilitating ripple-effect to the Senate of this “*dangerous*” *Neri* decision, if allowed to become final, on other legitimate inquiries on questionable “executive agreement” or contracts (*whether missing, misplaced, untraceable, concealed, or existing*) involving, directly or indirectly, public funds is inevitable. The fundamental role of the Senate as a contributor to the formulation of a national agenda and to curb corruption at high places of government will be damagingly eroded.

³ Philippine Daily Inquirer, March 31, 2008, at page A21.

In the end, all the respondents pray for is that this Honorable Court carefully re-examine the facts, carefully apply the proper laws and jurisprudence in their appropriate perspective and in accordance with their intent, and hopefully, arrive at a more circumspect decision to ensure that we have a “workable government.” For, in the end, the exigencies of the moment will ultimately be judged in the harsh light of history.

GROUND S

I

CONTRARY TO THIS HONORABLE COURT’S DECISION, THERE IS NO DOUBT THAT THE ASSAILED ORDERS WERE ISSUED BY RESPONDENT COMMITTEES PURSUANT TO THE EXERCISE OF THEIR LEGISLATIVE POWER, AND NOT MERELY THEIR OVERSIGHT FUNCTIONS.

II

CONTRARY TO THIS HONORABLE COURT’S DECISION, THERE CAN BE NO PRESUMPTION THAT THE INFORMATION WITHHELD IN THE INSTANT CASE IS PRIVILEGED.

III

CONTRARY TO THIS HONORABLE COURT’S DECISION, THERE IS NO FACTUAL OR LEGAL BASIS TO HOLD THAT THE COMMUNICATIONS ELICITED BY THE SUBJECT THREE (3) QUESTIONS ARE COVERED BY EXECUTIVE PRIVILEGE, CONSIDERING THAT:

- A. THERE IS NO SHOWING THAT THE MATTERS FOR WHICH EXECUTIVE PRIVILEGE IS CLAIMED CONSTITUTE STATE SECRETS.**
- B. EVEN IF THE TESTS ADOPTED BY THIS HONORABLE COURT IN THE DECISION IS APPLIED, THERE IS NO SHOWING THAT THE**

ELEMENTS OF PRESIDENTIAL COMMUNICATIONS PRIVILEGE ARE PRESENT.

- C. ON THE CONTRARY, THERE IS ADEQUATE SHOWING OF A COMPELLING NEED TO JUSTIFY THE DISCLOSURE OF THE INFORMATION SOUGHT.
- D. TO UPHOLD THE CLAIM OF EXECUTIVE PRIVILEGE IN THE INSTANT CASE WOULD SERIOUSLY IMPAIR THE RESPONDENTS' PERFORMANCE OF THEIR PRIMARY FUNCTION TO ENACT LAWS.
- E. FINALLY, THE CONSTITUTIONAL RIGHT OF THE PEOPLE TO INFORMATION, AND THE CONSTITUTIONAL POLICIES ON PUBLIC ACCOUNTABILITY AND TRANSPARENCY OUTWEIGH THE CLAIM OF EXECUTIVE PRIVILEGE.

IV

CONTRARY TO THIS HONORABLE COURT'S DECISION, RESPONDENTS DID NOT COMMIT GRAVE ABUSE OF DISCRETION IN ISSUING THE ASSAILED CONTEMPT ORDER, CONSIDERING THAT:

- A. THERE IS NO LEGITIMATE CLAIM OF EXECUTIVE PRIVILEGE IN THE INSTANT CASE.
- B. RESPONDENTS DID NOT VIOLATE THE SUPPOSED REQUIREMENTS LAID DOWN IN *SENATE V. ERMITA*.
- C. RESPONDENTS DULY ISSUED THE CONTEMPT ORDER IN ACCORDANCE WITH THEIR INTERNAL RULES.
- D. RESPONDENTS DID NOT VIOLATE THE REQUIREMENT UNDER ARTICLE VI, SECTION 21 OF THE CONSTITUTION REQUIRING THAT ITS RULES OF PROCEDURE BE DULY PUBLISHED, AND WERE DENIED DUE PROCESS WHEN THE COURT CONSIDERED THE OSG'S INTERVENTION ON THIS ISSUE WITHOUT GIVING RESPONDENTS THE OPPORTUNITY TO COMMENT.

E. RESPONDENTS' ISSUANCE OF THE CONTEMPT ORDER IS NOT ARBITRARY OR PRECIPITATE.

DISCUSSION

I

CONTRARY TO THIS HONORABLE COURT'S DECISION, THERE IS NO DOUBT THAT THE ASSAILED ORDERS WERE ISSUED BY RESPONDENT COMMITTEES PURSUANT TO THE EXERCISE OF THEIR LEGISLATIVE POWER, AND NOT MERELY THEIR OVERSIGHT FUNCTIONS.

1. At the outset, it bears emphasis that the assailed Orders were issued by respondent Committees pursuant to the exercise of their power to conduct inquiries in aid of legislation under Article VI, Section 21⁴ of the 1987 Constitution, and not merely the power to conduct a question hour pursuant to their oversight function under Article VI, Section 22⁵ thereof.

2. Such distinction is material to the instant case because it will have a direct bearing in evaluating the main issues, specifically: (a) whether the claim of executive privilege is valid; and (b) whether respondents can validly compel petitioner to appear before them and testify in the subject inquiry.

⁴ 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.

⁵ Section 22. The heads of departments may upon their own initiative, with the consent of the President, or upon the request of either House, 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 the 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.

2.1. As held in the landmark case of *Senate v. Ermita*,⁶ the validity of a claim of executive privilege will depend not only on the type of information for which the claim is made, but the context and procedural setting where the claim is invoked, thus

–

“Executive privilege is, nonetheless, not a clear or unitary concept. It has encompassed claims of varying kinds. Tribe, in fact, comments that while it is customary to employ the phrase ‘executive privilege,’ it may be more accurate to speak of executive *privileges* ‘since *presidential refusals to furnish information may be actuated by any of at least three distinct kinds of considerations*, and may be asserted, *with differing degrees of success, in the context of either judicial or legislative investigations.*’

X X X.

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.”⁷

2.2. Moreover, the Decision’s preliminary discussion on the difference between respondents’ legislative and oversight powers not only in terms of objectives, but also in terms of compelling the attendance of petitioner, foreshadows this Honorable Court’s ruling in petitioner’s favor, thus –

“At the outset, a glimpse at the landmark case of *Senate v. Ermita*, becomes imperative. Senate draws in bold strokes the distinction between the **legislative** and

⁶ 488 SCRA 1 (2006).

⁷ *Id.* at pp. 46-47; emphasis and underscoring supplied.

oversight powers of the Congress, as embodied under Sections 21 and 22, respectively, of Article VI of the Constitution x x x.

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 to elicit information that may be used for legislation, while 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. 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. x x x."⁸

3. More importantly, the proper characterization of the power exercised by respondents as legislative (as opposed to being merely oversight, as the Decision seems to suggest⁹) in nature should give greater pause to this Honorable Court striking down the assailed Contempt Order (not to mention even the rules and procedure employed by respondents for the issuance thereof), in deference to a co-equal branch exercising its primary function under the Constitution.

4. That said, it is clear that the inquiry subject of the instant case was being conducted by respondents in aid of legislation, as

⁸ Decision, p. 12.

⁹ "Here, the record is bereft of any categorical explanation from respondent Committees to show a compelling or critical need for 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 functions of Congress may be facilitated by a 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." Decision, p. 20; underscoring supplied.

shown by the various resolutions, privilege speeches and pending bills related thereto.

4.1. Here, it is undisputed that the various Resolutions introduced in the Senate, *i.e.*, P.S. Res. Nos. 127,¹⁰ 129,¹¹ 136,¹² and 144,¹³ called for the conduct of an investigation, in aid of legislation, into the circumstances surrounding the award of the National Broadband Network (NBN) Project in favor of ZTE Corporation, with a view to enacting remedial legislation to plug loopholes in existing laws to prevent anomalies in the future.

4.2. The same legislative intent behind the investigations can be gleaned from the privilege speeches of Senator Panfilo

¹⁰ 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.

¹¹ 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 AWARDED 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.

¹² 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.

¹³ P.S. Res. No. 144, introduced by Senator Mar Roxas, entitled A RESOLUTION URGING PRESIDENT GLORIA MACAPAGAL ARROYO TO DIRECT THE CANCELLATION OF THE ZTE CONTRACT.

M. Lacson delivered on 11 September 2007¹⁴, and Senator Miriam Defensor Santiago delivered on 24 November 2007.¹⁵

4.3. It is likewise readily apparent that such investigation, for which petitioner was subpoenaed to testify, is relevant to three (3) pending bills in the Senate, *i.e.*, Senate Bill Nos. 1793¹⁶, 1794,¹⁷ and 1317.¹⁸

5. Moreover, considering the broad scope of the legislative power of inquiry, it is not for this Honorable Court to second-guess the purpose or motives of respondents for conducting the subject investigations.

5.1. To start with, where the general subject of investigation is one which Congress can legislate, and the information might aid the congressional inquiry, in such a situation a legitimate legislative purpose must be presumed.¹⁹

¹⁴ Privilege Speech of Senator Panfilo M. Lacson, delivered on 11 September 2007, entitled LEGACY OF CORRUPTION.

¹⁵ Privilege Speech of Senator Miriam Defensor Santiago delivered on 24 November 2007, entitled INTERNATIONAL AGREEMENTS IN CONSTITUTIONAL LAW: THE SUSPENDED RP-CHINA (ZTE) LOAN AGREEMENT.

¹⁶ Senate Bill No. 1793, introduced by Senator Mar Roxas, entitled AN ACT SUBJECTING TREATIES, INTERNATIONAL OR EXECUTIVE AGREEMENTS INVOLVING FUNDING 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.

¹⁷ 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. 8555, OTHERWISE KNOWN AS THE OFFICIAL DEVELOPMENT ASSISTANCE ACT OF 1996, AND FOR OTHER PURPOSES.

¹⁸ Senate Bill No. 1317, introduced by Senator Miriam Defensor Santiago, entitled AN ACT MANDATING CONCURRENCE TO INTERNATIONAL AGREEMENTS AND EXECUTIVE AGREEMENTS.

¹⁹ United States v. Orman, 207 F. 2d 3d. 148 (1953).

5.2. This is because the power to investigate encompasses everything that concerns the administration of existing laws, as well as proposed or possibly needed statutes; hence, 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.²⁰

5.3. Indeed, this Honorable Court has held in ***Sabio v. Gordon***²¹ that the power of inquiry is co-extensive with the power to legislate, thus –

“It can be said that the Congress' power of inquiry has gained more solid existence and expansive construal. The Court's high regard to such power is rendered more evident in *Senate v. Ermita*, where it categorically ruled that **‘the power of inquiry is broad enough to cover officials of the executive branch.’** Verily, the Court reinforced the doctrine in *Arnault* that **‘the operation of government, being a legitimate subject for legislation, is a proper subject for investigation’** and that **‘the power of inquiry is co-extensive with the power to legislate’.**”²²

6. Furthermore, it is also worth noting that during the Oral Arguments on 4 March 2008, counsel for petitioner, in response to the interpellation of Associate Justice Ynares-Santiago, concedes that the investigation being conducted by the respondents in this case is in aid of legislation.²³

²⁰ John T. Watkins v. United States, 354 U.S. 178, 1 L. ed. 2d 1273 (1957).

²¹ 504 SCRA 704 (2006).

²² *Id.* at pp. 725-726.

²³ Transcript of Stenographic Notes dated 4 March 2008 (TSN), p. 82.

7. All told, contrary to the insinuation of the majority in the Decision, the issuance of the assailed Orders in this case was pursuant to the exercise by respondents of their legislative power. As such, it is within the context of an inquiry in aid of legislation—and not merely the exercise of respondents’ oversight function—that the validity of petitioner’s claim of executive privilege and the propriety of the issuance of the assailed Contempt Order must be determined. Viewed in this light, the Decision has effectively crippled not merely the power of oversight, but the primary and plenary legislative power of respondent Committees as a co-equal branch.

II

CONTRARY TO THIS HONORABLE COURT’S DECISION, THERE CAN BE NO PRESUMPTION THAT THE INFORMATION WITHHELD IN THE INSTANT CASE IS PRIVILEGED.

1. In applying the doctrine of executive privilege to the three questions at bar, the Honorable Court drew out the elements of the presidential communications privilege from American jurisprudence as follows –

“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.²⁴

2. Utilizing the three prongs listed above, the Honorable Court concluded –

“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. 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.”²⁵

3. With due respect, it is submitted that the Honorable Court committed error in its above-quoted conclusion, especially with reference to the application of the third element considering that: (a) the American cases relied on by the Court are not applicable to the case at bar; and (b) in the balancing of interests, the Court failed to include specific provisions of the Constitution into the equation.

²⁴ Decision, pp. 18-19. (Underscoring supplied).

²⁵ Decision, p. 19.

4. With regard to the applicability of the American decisions relied on by the Court,²⁶ we submit that such reliance is misplaced.

4.1. From *U.S. v. Nixon*, the Court drew the third element that the presidential communications privilege is a qualified privilege that may be overcome by a showing of adequate need. It was from this premise that the Court required respondent Senate Committees to overcome the presumptive privilege by showing critical need for the information sought and that such is not available elsewhere.

4.2. This element effectively **reversed** the presumption laid down in *Senate v. Ermita*²⁷ that –

“the extraordinary character of the exemptions indicate that the presumption inclines heavily **against** executive secrecy and in favor of disclosure.”

4.3. Such cavalier reversal of the presumption adopted in this jurisdiction cannot be sustained because, in the words of *Senate v. Ermita*²⁸ –

“This is impermissible. For what the - ‘republican theory did accomplish . . . was to **reverse** the old presumption in favor of secrecy, based on the divine right of kings and nobles, and **replace** it with a **presumption in favor of publicity**, based on the doctrine of popular sovereignty’.”

²⁶ *U.S. v. Nixon*, 418 U.S. 683 (1974); *In re Sealed Case (Espy)*, 121 F. 3d 729 (1997); and *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108.

²⁷ *Senate v. Ermita*, 488 SCRA at 51.

²⁸ *Ibid.*, quoting Hoffman, *Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls* (1981), 13.

4.4. It is also from the Nixon cases, specifically the case of ***Senate Select Committee on Presidential Campaign Activities v. Nixon***,²⁹ that the Court borrowed the methodology of balancing of interests which, as “justice” is defined by Thrasymachus in Plato’s ***Republic***, is the “interest of the stronger”. Such balancing of interest in the ***Senate Select Committee*** case was employed by the D.C. Circuit Court in holding that –

“x x x 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.”³⁰

4.5. The application of methodology in the ***Senate Select Committee*** case to the present petition is not appropriate because: ***first***, it is antithetical to the ruling in ***Senate v. Ermita***; and, ***second***, the D.C. Court in the ***Senate Select Committee*** case found that the request for the tapes was merely ***cumulative*** inasmuch as the same matter had already been released to the House Judicial Committee.³¹ In the case at bar, no such information was ever released elsewhere, and such is not available anywhere.

²⁹ 498 F.2d.

³⁰ *Id.* at 730.

³¹ *Id.* at 732.

5. Moreover, in holding that presidential communications are presumptively privileged in line with *U.S. v. Nixon*, this Honorable Court failed to take into consideration the keen observation of Chief Justice Puno in his Dissenting Opinion that, “the provisions of the U.S. Constitution say little about government secrecy or public access. In contrast, the 1987 Philippine Constitution is replete with provisions on government transparency, accountability and disclosure of information.”³²

5.1. Specifically, Article III, Section 7 of the 1987 Constitution provides for the right to information, thus –

“Sec. 7. 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.”

5.2. In conjunction with this right, the 1987 Constitution enshrines the policy of the State on information and disclosure in the Declaration of Principles and Policies in Article II, Sections 24 and 28, thus –

“Sec. 24. The State recognizes the vital role of communication and information in nation-building.

“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.”

³² Dissenting Opinion of Chief Justice Puno, p. 24.

5.3. Another complementary provision is Article XI, Section 1 on the Accountability of Public Officers, which states that –

“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.”

5.4. In the concluding articles of the 1987 Constitution, information is again given importance in Article XVI, Section 10 on the General Provisions, which states that –

“Sec. 10. The State shall provide the policy environment for the full development of Filipino capability and the emergence of communications 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.”

6. Worse, the Court failed to take into account **specific** provisions of the Constitution pertaining to securing foreign loans (as is the case here), which weigh heavily against executive secrecy and in favor of disclosure, and which should therefore prevail over any **general** presumption of privilege.

6.1. To start with, the power of the President to contract foreign loans in behalf of the Philippines is circumscribed by the requirement of prior concurrence of the Monetary Board, and is subject to reportorial requirements to Congress under Article VII, Section 20 of the 1987 Constitution, thus –

“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 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.)

6.2. Moreover, Article XII, Section 9 of the 1987 Constitution provides for the interplay and information sharing between the National Economic and Development Authority (NEDA), which is the lead agency in the NBN-ZTE Project, and of which petitioner was former Director General and the President is the head, thus –

“Sec. 9. The Congress may establish an independent economic and planning agency headed by the President, which shall, **after consultations** with the appropriate public agencies, various private sectors, and local government units, **recommend to Congress**, and implement continuing integrated and coordinated programs and policies for national development. Until the Congress provides otherwise, the National Economic and Development Authority shall function as the independent planning agency of the government.” (Emphasis supplied)

6.3. More importantly, Article XII, Section 21 adopts a policy of full disclosure on foreign loans obtained by the Government, thus –

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

6.4. In fact, acts which violate the foregoing provisions on transparency and disclosure, are considered inimical to the national interest under Article XII, Section 22, thus –

“Sec. 22. Acts which circumvent or negate any of the provisions of this Article **shall be considered inimical to the national interest** and subject to criminal and civil sanctions, as may be provided by law.” (Emphasis supplied.)

6.5. Considering that the conversation here in question between petitioner and the President was made in their capacity as NEDA top officials, and they were talking about a government project funded by a big foreign loan from China, it is submitted that the specific provisions of the 1987 Constitution of the Philippines quoted above should prevail over the general presumptive privilege of presidential communications under American jurisprudence.

7. Finally, it is also worth noting that during the Oral Argument, counsel for petitioner, in response to the interpellation by Associate Justice Azcuna, concedes that the general rule should be transparency and accountability, and the exception is privilege, such

that in case of doubt, this Honorable Court should rule in favor of transparency.³³

8. In light of the clear and unequivocal provisions of the 1987 Constitution favoring public accountability, transparency, and disclosure, specifically with respect to the contracting of foreign loans (as is the case here), it is submitted that a blind adherence to the *Nixon* case on the point of presidential communications being presumptively privileged is misplaced, if not misguided, and should be re-examined. It therefore behooves this Honorable Court to affirm its ruling in *Senate v. Ermita* that the presumption is against executive secrecy and in favor of disclosure, thus –

“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.**”³⁴

9. As shall be discussed hereunder, it is readily apparent that petitioner utterly failed to show, with or without the presumption against executive privilege, that indeed the three (3) questions

³³ TSN dated 4 March 2008, pp. 123-124.

³⁴ At p. 51; emphasis and underscoring supplied.

subject of his petition come within the protective mantle of such privilege.

III

CONTRARY TO THIS HONORABLE COURT'S DECISION, THERE IS NO FACTUAL OR LEGAL BASIS TO HOLD THAT THE COMMUNICATIONS ELICITED BY THE SUBJECT THREE (3) QUESTIONS ARE COVERED BY EXECUTIVE PRIVILEGE, CONSIDERING THAT:

A. THERE IS NO SHOWING THAT THE MATTERS FOR WHICH EXECUTIVE PRIVILEGE IS CLAIMED CONSTITUTE STATE SECRETS.

1. In *Senate v. Ermita*, the state secrets privilege is defined and contrasted with the other types of executive privilege in this wise

—

“One variety of the privilege, Tribe explains, is the *state secrets privilege* invoked by U.S. Presidents, beginning with Washington, on the ground that the information is of such nature that its disclosure would subvert **crucial military or diplomatic objectives**. Another variety is the *informer's privilege*, or the privilege of the Government not to disclose the **identity of persons who furnish information of violations of law** to officers charged with the enforcement of that law. Finally, a *generic privilege* for **internal deliberations** has been said to attach to intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”³⁵

2. Here, the Decision seems to suggest that what was raised was not only a general claim of privilege on the basis of

³⁵ 488 SCRA at 46; emphasis and underscoring supplied.

presidential communications, but also on the basis diplomatic secrets, thus –

“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**.”³⁶

3. However, the Executive Secretary’s claim “that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People’s Republic of China” does not meet the standard of specificity laid down in **Senate v. Ermita** to warrant a finding that the claim of executive privilege based on the said grounds was validly made.

3.1. In its Decision, the Honorable Court found the claim of executive privilege to be specific enough, thus –

“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 specific enough so as not ‘to leave respondent

³⁶ Decision, p. 19.

Committees in the dark on how the requested information could be classified as privilege.’ 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. 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 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.”³⁷

3.2. With due respect, it is difficult to understand in this case how the petitioner’s telephone conversation with the President will impair our diplomatic as well as our economic relations with China. The members of respondent Committees found this claim of Executive Secretary Ermita too general, abstract, and speculative, considering that the NBN project contractor is just a private corporation.

3.3. Furthermore, with respect to the foreign loan of US\$329M, the Constitution requires that foreign loans may only be incurred with the prior concurrence of the Monetary Board,³⁸ and that information on foreign loans obtained by the government **shall be made available to the public.**³⁹ Acts

³⁷ Decision, pp. 25-26.

³⁸ Art. VII, Sec. 20.

³⁹ Art. XII, Sec. 21.

which circumvent or negate this provision on information on foreign loans is **considered inimical to the public interest.**⁴⁰

3.4. Clearly, therefore, the Executive Secretary's claim "that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China" does not meet the standard of specificity laid down in *Senate v. Ermita*, to wit –

"Certainly, **Congress has the right to know why the executive considers the requested information privileged. It does not suffice to merely declare that the President or an authorized head of office, has determined that it is so,** and that the President has not overturned that determination. **Such declaration leaves Congress in the dark on how the requested information could be classified as privileged.** That the message is couched in terms that, on first impression, do not seem like a claim of privilege only makes it more pernicious. It threatens to make Congress doubly blind to the question of why the executive branch is not providing it with the information that it has requested.

A claim of privilege, being a claim of exemption from an obligation to disclose information, must, therefore, be clearly asserted. As *U.S. v. Reynolds* teaches:

"The privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. **The court itself must determine whether the circumstances are appropriate for the claim of privilege,** and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."⁴¹

⁴⁰ Art. XII, Sec. 22.

⁴¹ 488 SCRA at pp. 63-64.

3.5. The example seized on by the Court in ***Senate v. Ermita*** is a good gauge of specificity. In the cited case of ***U.S. v. Reynolds***,⁴² a case filed by the widows of civilian passengers on a crashed military plane, the government’s claim was not merely to protect “military secrets”; it had to specify that the crashed plane **carried secret electronic equipment** which was the subject of the U. S. Air Force’s investigation report. Denying discovery of the report, the U. S. Supreme Court held nonetheless—that claims of executive privilege are not conclusive on the Court, and that “the court itself must determine whether the circumstances are appropriate for the claim of privilege”.⁴³ The Court emphasized that **not “military secrets” merely, but only those which the court is satisfied “in the interest of national security should not be divulged”**.⁴⁴

3.6. In the case at bar, the Honorable Court should therefore have given some weight, under the political question doctrine, to the conclusion arrived at by the respondent Committees that Petitioner’s generalized claim of “presidential conversation,” or even possible impairment of diplomatic relations with China, is unsatisfactory. Where full discretionary authority has been delegated to the legislative branch of government, or there is a textually demonstrated constitutional

⁴² 345 U.S. 1 [1953].

⁴³ *Id.* at 8.

⁴⁴ *Id.* at 10.

commitment of the issue to a coordinate political department, the question is political in nature and addressed solely to Congress by constitutional fiat.⁴⁵

4. Indeed, nowhere in the Decision was any basis laid to support a finding that the information sought to be withheld “is of such nature that its disclosure would subvert crucial military or diplomatic objectives” as to constitute state secrets.

5. **First.** There is absolutely no factual basis for the claim that the disclosure sought involves diplomatic secrets.

5.1. Here, the allegation that there are diplomatic secrets involved is premised solely on the bare and unsubstantiated claim in the letter of Executive Secretary Ermita.⁴⁶

5.2. However, during the Oral Arguments, counsel for petitioner could not provide sufficient basis for claiming diplomatic secrets privilege upon interpellation by Associate Justice Carpio.⁴⁷ It was likewise admitted by counsel for petitioner, upon interpellation by Chief Justice Puno, that there was no referral of any aspect of the ZTE Contract to the Department of Foreign Affairs for its comment and study.⁴⁸

⁴⁵ Estrada v. Desierto, 353 SCRA 452 (2001).

⁴⁶ Annex “D” of the Petition.

⁴⁷ TSN dated 4 March 2008, pp. 35-38.

⁴⁸ *Id.* at p. 291.

Finally, it was also admitted that there was in fact no diplomatic protest that arose from the cancellation of the ZTE Contract.⁴⁹

6. **Second.** There is likewise absolutely no factual basis for the belated claim that the disclosure sought involves military secrets.

6.1. It bears stressing that in the letter of Executive Secretary Ermita, where executive privilege was claimed in behalf of the President, military secrets was not even mentioned. As Justice Carpio pointed out in his Dissenting Opinion, it was only in the letter of petitioner's counsel dated 29 November 2007 that such claim was made.⁵⁰ Certainly, such claim by counsel, apart from being belated, does not satisfy the requirement in ***Senate v. Ermita*** that the invocation must be made only by the President or the Executive Secretary, by her order. On this score alone, such claim of military secrets should not even be recognized.

6.2. In any event, again, there was utter failure by counsel for petitioner, upon interpellation by Associate Justice Carpio, to sufficiently explain during the oral arguments how military secrets or national security matters are involved.⁵¹ Moreover, it was also admitted by counsel for petitioner, upon interpellation by Chief Justice Puno, that the ZTE Contract was

⁴⁹ *Id.* at pp. 306-309.

⁵⁰ Dissenting Opinion, p. 27.

⁵¹ TSN dated 4 March 2008, pp. 35-38.

not even referred to the Department of National Defense for comment.⁵²

7. In any event, the claim of executive privilege based on state secrets, whether diplomatic or military in nature, is misplaced.

7.1. A reading of *United States v. Reynolds*,⁵³ which serves as authority for a claim of privilege based on state secrets, limits the state secrets covered by the privilege to those which are vital to national defense, such that the disclosure would present a clear and present danger to national security, thus –

“In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common knowledge that air power is one of the most potent weapons in scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.”

7.2. Evidently, the same (or even remotely similar) circumstances do not obtain in the instant case, where there is no showing, even preliminarily, that the information sought are in the nature of diplomatic or military secrets, such that

⁵² *Id.* at pp. 291-292.

⁵³ 345 U.S. 1, 97 L. Ed., 727 (1953).

disclosure would pose a danger to national security or international relations.

8. **Third.** There is absolutely no legal basis for a claim of privilege based on “economic” reasons.

8.1. Anent the allegation of possible economic loss that may be caused by disclosure of information, *i.e.*, loss of confidence of foreign investors and lenders in the Philippines, it is submitted such is not covered under the rubric of “state secrets” which properly pertain only to military, diplomatic and similar matters, and which must be based on public interest of the highest importance, as was held in ***Almonte v. Vasquez***,⁵⁴ thus –

“At common law a governmental privilege against disclosure is recognized with respect to the state secrets **bearing on military, diplomatic and similar matters. This privilege is based upon public interest of such paramount importance as in and of itself transcending the individual interests of a private citizen**, even though, as a consequence thereof, the plaintiff cannot enforce his legal rights.”⁵⁵

9. Under the foregoing circumstances, it is clear that what is involved in the instant case is a mere claim of presidential communications privilege, nothing more, and there is absolutely no basis to sustain a finding that there are state secrets involved,

⁵⁴ 244 SCRA 286 (1995).

⁵⁵ *Id.* at p. 295.

whether diplomatic or military, which may properly fall within the protective mantle of executive privilege.

B. EVEN IF THE TESTS ADOPTED BY THIS HONORABLE COURT IN THE DECISION IS APPLIED, THERE IS NO SHOWING THAT THE ELEMENTS OF PRESIDENTIAL COMMUNICATIONS PRIVILEGE ARE PRESENT.

1. At the outset, it must be emphasized that the claim of presidential communications privilege, without any more, is inherently weak.

1.1. In *U.S. v. Nixon*,⁵⁶ which is cited as the leading case on presidential communications privilege, the United States Supreme Court noted that absent a claim of state secrets, a mere general claim on presidential communications privilege is weak –

“However, neither 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 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

⁵⁶ 418 U.S. 683 (1974).

court will be obliged to provide.” (Emphasis and underscoring supplied)

1.2. Indeed, even this Honorable Court in *Almonte v. Vasquez*, recognized that the privilege attaching to presidential communications is of a much lower order than that of state secrets and cannot therefore be lightly invoked, thus –

“On the other hand, when the claim of confidentiality does not rest on the need to protect military, diplomatic or other national security secrets but on a general public interest in the confidentiality of his conversations, courts have declined to find in the Constitution an absolute privilege of the President against a subpoena considered essential to the enforcement of criminal laws.”⁵⁷

2. That said, the instant claim of presidential communications privilege, even when tested against the three supposed elements constituting the same,⁵⁸ must fail.

3. **First.** There is no showing that the supposedly privileged communication relates to a “quintessential and non-delegable power” of the President.

3.1. In finding that the first element of presidential communication privilege is present, the Decision uses as a premise the following –

“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

⁵⁷ *Id.* at p. 297

⁵⁸ Decision, pp. 18-19.

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, appointing, pardoning, and diplomatic powers. Consistent with the doctrine of separation of powers, the information relating to these powers may enjoy greater confidentiality than others.”⁵⁹

3.2. The Court thus arrived at the following conclusion –

“**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.”⁶⁰

3.3. However, Article VII, Section 21 of the 1987 Constitution provides that the power to enter into international agreements, which include executive agreements, is shared with the Senate, thus –

“Sec. 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of the Members of the Senate.”

3.4. Here, there is no conclusive proof to show that the ZTE Contract is a mere “executive agreement” which does not need the concurrence of the Senate, inasmuch as even counsel for the petitioner admitted that he has not even seen the said contract.⁶¹

⁵⁹ *Id.* at p. 18.

⁶⁰ *Id.* at p. 19.

⁶¹ TSN dated 4 March 2008, pp. 310-311.

3.5. In any event, it is undisputed that what was involved in the instant case is a foreign loan secured by the President from the ZTE Corporation. In this regard, the Constitution is crystal clear that the power to secure such foreign loan is not vested solely with the President alone, but must be with the prior concurrence of the Monetary Board, as shown in Article VII, Section 20, thus –

“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-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.” (Emphasis and underscoring supplied)

3.6. More importantly, the Constitution itself ensures that there is no secrecy that would attach to the contracting of foreign loans, inasmuch as it adopts a policy of full disclosure thereof even to the public, by providing in Article XII, Section 21, that –

“Sec. 21. Foreign loans may only be incurred in accordance with law and the regulation of the monetary authority. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public.”

3.7. It is therefore inaccurate to say that the subject questions in the instant case fall within the exclusive power of the President to enter into executive agreements. As duly noted by Chief Justice Puno in his extensive and exhaustive Dissenting Opinion, the subject matter of the legislative inquiry in the instant case is a foreign loan agreement, the consummation of which is not an exclusive prerogative of the President, as shown by the need for prior concurrence of the Monetary Board and its subsequent reporting to Congress with respect to foreign loans precisely for the purpose of allowing the necessary investigation in aid of legislation, to wit –

“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, **subject 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. (emphasis supplied)⁶²

3.8. Thus, as further explained by the Chief Justice in his Dissenting Opinion, the qualified presumption obtaining in the instant case, if there is any, is weaker and will require a less demonstrable need to overcome the presumption.⁶³

3.9. Clearly, therefore, the Decision erroneously concluded that the power of the President to contract foreign loans is a “quintessential and non-delegable power” such that it would satisfy the supposed first requisite for a valid claim of presidential communications privilege.

4. **Second.** The doctrine of “operational proximity” is of no moment in the instant case.

4.1. Here, the Decision cites the *In Re: Sealed Case*, as basis to say that the supposed second element of presidential communications privilege is that the communications are “received” by a close advisor of the President. Hence, the Decision concludes that “[u]nder the ‘operational proximity’ test,

⁶² Dissenting Opinion, pp. 78-80.

⁶³ *Id.* at pp. 78 and 102.

petitioner can be considered a close advisor, being a member of President Arroyo's cabinet."⁶⁴

4.2. However, since for information to be considered as falling with the presidential communications privilege, the same must necessarily involve the President and someone with "operational proximity" to her, then the second element adds no value to determining the privileged nature of their communications in the instant case.

4.3. Nevertheless, the adoption of "operational proximity" as another element should be reconsidered insofar as it may be misconstrued to expand the scope of presidential communications privilege to communications between those who are "operationally proximate" to the President but who may have had no direct communications with her.

5. **Third.** More importantly, there is no showing that a disclosure would impair the functions of the President.

5.1. In the Decision, the third element, *i.e.*, whether there is an adequate showing of a compelling need to justify the limitation of the privilege and of the unavailability of the information elsewhere by an appropriate investigating authority, was discussed in line with both the balancing of interest and the functional impairment tests, citing ***Nixon v. Sirica***, where "[t]he

⁶⁴ Decision, p. 19.

courts are enjoined to resolve the competing interests of the political branches of government ‘in the manner that preserves the essential functions of each Branch.’”⁶⁵

5.2. In its Decision, the Honorable Court ruled that the answers to the subject questions fall within the parameters of executive privilege as these involve communications received by petitioner as a close advisor of the President and relate to a “quintessential and non-delegable power” of the President to enter into an executive agreement with other countries. The Honorable Court explained the rationale for such privilege in this wise –

“The Nixon and post-Watergate cases established the broad contours of the **presidential communications privilege**. In *United States v. Nixon*, the U.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.**’”

5.3. Clearly, therefore, the purpose of presidential communications privilege is to allow the President to fulfill her

⁶⁵ Decision, pp. 19-20.

duties and responsibilities without undue hindrance, as was held in *Senate v. Ermita*, thus –

“x x x. Executive privilege, as already discussed, is recognized with respect to information the confidential nature of which is **crucial to the fulfillment of the unique role and responsibilities of the executive branch, or in those instances where exemption from disclosure is necessary to the discharge of highly important executive responsibilities.** The doctrine of executive privilege is thus premised on the fact that certain information must, **as a matter of necessity**, be kept confidential **in pursuit of the public interest.** The privilege being, by definition, an exemption from the obligation to disclose information, in this case to Congress, **the necessity must be of such high degree as to outweigh the public interest in enforcing that obligation in a particular case.**” (At p. 68; emphasis and underscoring supplied)

5.4. However, it cannot be claimed that discussions which may reveal the extent of the President’s participation in the NBN Project despite her knowledge of a bribe offer, are crucial in the fulfillment of her executive duties and responsibilities as to outweigh the greater public interest in the enactment of remedial legislation, coupled with the Constitutional mandates of public accountability and the people’s right to information.

5.5. More to the point, the need to protect the confidentiality of presidential communications is not present anent the subject questions. As aptly noted by Justice Antonio Carpio in his Dissenting and Concurring Opinion, the answers

of petitioner to the subject questions will not disclose confidential Presidential communications, to wit –

“The three questions that Executive Secretary Ermita claims are covered by executive privilege, if answered by petitioner, will not disclose confidential Presidential communications. Neither will answering the questions disclose diplomatic secrets. Counsel for petitioner **admitted** this during the oral arguments in the following exchange:

ASSOCIATE JUSTICE CARPIO: Going to the first question x x x whether the President followed up the NBN project, is there anything wrong if the President follows up with NEDA the status of projects in government x x x, is there anything morally or legally wrong with that?

ATTY. LANTEJAS: There is nothing wrong, Your Honor, because (interrupted)

ASSOCIATE JUSTICE CARPIO: That’s normal.

ATTY. LANTEJAS: That’s normal, because the President is the Chairman of the NEDA Board, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yes, so there is nothing wrong. So why is Mr. Neri afraid to be asked this question?

ATTY. LANTEJAS: I just cannot (interrupted)

ASSOCIATE JUSTICE CARPIO: You cannot fathom?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom. The second question, were you dictated to prioritize the ZTE [contract], is it the function of NEDA to prioritize specific contract[s] with private parties? No, yes?

ATTY. LANTEJAS: The prioritization, Your Honor, is in the (interrupted).

ASSOCIATE JUSTICE CARPIO: Project?

ATTY. LANTEJAS: In the procurement of financing from abroad, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yes. The NEDA will prioritize a project, housing project, NBN project, the Dam project, but never a specific contract, correct?

ATTY. LANTEJAS: Not a contract, Your Honor.

ASSOCIATE JUSTICE CARPIO: This question that Secretary Neri is afraid to be asked by the Senate, he

can easily answer this, that NEDA does not prioritize contract[s], is that correct?

ATTY. LANTEJAS: It is the project, Your Honor.

ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question?

ATTY. LANTEJAS: I cannot, I cannot fathom. Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: But is there anything wrong if the President will tell the NEDA Director General, you prioritize this project, is there anything legally or morally wrong with that?

ATTY. LANTEJAS: There is nothing wrong with that, Your Honor.

ASSOCIATE JUSTICE CARPIO: There is nothing [wrong]. It happens all the time?

ATTY. LANTEJAS: The NEDA Board, the Chairman of the NEDA Board, yes, she can.

ASSOCIATE JUSTICE CARPIO: [S]he can always tell that?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay. Let's go to the third question, whether the President said, to go ahead and approve the project after being told about the alleged bribe. Now, x x x it is not the NEDA Director General that approves the project, correct?

ATTY. LANTEJAS: No, no, Your Honor.

ASSOCIATE JUSTICE CARPIO: It is the (interrupted)

ATTY. LANTEJAS: It is the NEDA Board, Your Honor.

ASSOCIATE JUSTICE CARPIO: The NEDA Board headed by the President.

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: So this question, is not correct also, x x x whether the President said to Secretary Neri to go ahead and approve the project? Secretary Neri does not approve the project, correct?

ATTY. LANTEJAS: He's just the Vice Chairman, Your Honor.

ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question?

ATTY. LANTEJAS: I cannot tell you, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also.

ATTY. LANTEJAS: Yes, Your Honor.

Petitioner's counsel admits that he "cannot fathom" why petitioner refuses to answer the three questions. Petitioner's counsel admits that the three questions, even if answered by petitioner, will not disclose confidential Presidential discussions or diplomatic secrets. The invocation of executive privilege is thus unjustified.

Of course, it is possible that the follow-up questions to the three questions may call for disclosure of confidential presidential discussions or diplomatic secrets. However, executive privilege cannot be invoked on possible questions that have not been asked by the legislative committee. Executive privilege can only be invoked after the question is asked, not before, because the legislative committee may after all not ask the question. But even if the follow-up questions call for the disclosure of confidential Presidential discussions or diplomatic secrets, still executive privilege cannot be used to cover up a crime."

5.6. Hence, it is not enough for petitioner to claim that the answers to the questions are privileged as they pertain to his conversations with the President. He still must show that the conversations relate to information of a sensitive character, which the presidential communications privilege seeks to protect. As the Honorable Court stressed in ***Senate v. Ermita***

—

"x x x 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. x x x.”⁶⁶

5.7. Accordingly, by his categorical admissions during the 04 March 2008 Oral Arguments before this Honorable Court that the answers to the subject questions do not pertain to any sensitive information he had discussed with the President, petitioner has evidently demonstrated that the claim of executive privilege by the Executive Secretary is without basis.

5.8. Moreover, during the Oral Arguments, counsel for petitioner, in response to the interpellation of Chief Justice Puno, categorically admitted that any adverse impact or “chilling effect” on the President’s performance of her functions that may result from the disclosure of the information sought, is merely his opinion.⁶⁷ In other words, the disclosure of the information sought would not result in the impairment of the President’s performance of her functions such that presidential communications privilege can be upheld.

5.9. On the other hand, if the opinion of petitioner’s counsel were adopted, *i.e.*, that the disclosure would show the President’s possible involvement in corruption and/or a cover-up thereof, then even the majority opinion agrees and sees no

⁶⁶ 488 SCRA 1 (2006).

⁶⁷ TSN dated 4 March 2008, pp. 297-305.

dispute that the presidential communications privilege does not guard against a possible disclosure of a crime or wrongdoing.⁶⁸

6. In fine, there is simply no factual or legal basis to uphold the claim of executive privilege based on presidential communications in the instant case.

C. ON THE CONTRARY, THERE IS ADEQUATE SHOWING OF A COMPELLING NEED TO JUSTIFY THE DISCLOSURE OF THE INFORMATION SOUGHT.

1. Even assuming *arguendo* that the burden is on respondents to show that a compelling need to justify the limitation of the privilege and of the unavailability of the information elsewhere by an appropriate investigating authority, it is readily apparent that respondents have overcome such burden.

2. As this Honorable Court has held in the case of ***Arnault v. Nazareno***, and as pointed out by Chief Justice Puno in his Dissenting Opinion, the determination of whether there is a specific need for the information withheld in legislative investigations hinges on two (2) requisites, to wit: (1) the question seeking the withheld information must be pertinent if not to the proposed or possible legislation, then at least to the subject of the inquiry; and (2) the evidence is not available with due diligence elsewhere.⁶⁹

⁶⁸ Decision, p. 20.

⁶⁹ Dissenting Opinion, pp. 82-83.

2. In upholding the confidentiality of petitioner's conversations with the President, the Honorable Court explained that respondent Senate Committees have failed to show an adequate need for the disclosure of the information as well as the unavailability of the information elsewhere. This failure is rooted in the fact that, allegedly: (a) there is no showing that the answers to the subject question will lead to the enactment of a law; (b) though the subject questions pertain to bribery and corruption by high government officials, these are nonetheless being asked in a legislative inquiry in aid of legislation, and not in a criminal proceeding like in *US v. Nixon*⁷⁰; and (c) respondent Senate Committees are investigating matters which can be the subject matter of an impeachment proceeding.

3. However, the compelling need for disclosure before respondent Senate Committees within the confines of a legislative inquiry in aid of legislation is evident from the records.

4. **First.** Respondent Senate Committees had sufficiently shown that the subject matter of their inquiries in aid of legislation is within their legislative functions.

4.1. In his Dissenting Opinion, the Honorable Chief Justice cited the standard laid down in *Arnault v. Nazareno*⁷¹ in determining whether respondent Senate Committees have

⁷⁰ 418 US 683 (1974).

⁷¹ 87 Phil. 29 (1950).

the jurisdiction to inquire into the NBN-ZTE Project, that is – “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.”⁷²

4.2. In this instance, there is no dispute that the pertinent Senate resolutions as well as by three pending bills namely: Senate Bill Nos. 1793⁷³ and 1794⁷⁴, which were introduced by Senator Mar Roxas and Senate Bill No. 1317⁷⁵, introduced by Senator Miriam Defensor-Santiago, duly falls within the legislative functions of respondent Senate Committees.

4.3. The Honorable Court, however, pointed out in the challenged Decision that the questions being asked herein do not pertain to the foregoing matters, but to graft and corruption, an area which properly lies in the prosecutorial function of the executive. Again, respondent Senate Committees most respectfully beg to disagree.

⁷² Dissenting Opinion of Chief Justice Puno, p. 32.

⁷³ Senate Bill No. 1793 is 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.”

⁷⁴ Senate Bill No. 1794 is entitled “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.”

⁷⁵ Senate Bill No. 1317 is entitled “An Act Mandating Concurrence to International Agreements and Executive Agreements.”

4.4. Curbing graft and corruption among officials of the executive branch is a legitimate legislative function. This was affirmed as early as the case of *Arnault v. Nazareno*, and was further recently reinforced in *Sabio v. Gordon*⁷⁶, as follows:

“It can be said that the Congress' power of inquiry has gained more solid existence and expansive construal. The Court's high regard to such power is rendered more evident in *Senate v. Ermita*, where it categorically ruled that **‘the power of inquiry is broad enough to cover officials of the executive branch’**. Verily, the Court reinforced the doctrine in *Arnault* that **‘the operation of government, being a legitimate subject for legislation, is a proper subject for investigation’** and that ‘the power of inquiry is co-extensive with the power to legislate’.

Considering these jurisprudential instructions, we find Section 4(b) directly repugnant with Article VI, Section 21. Section 4(b) exempts the PCGG members and staff from the Congress' power of inquiry. This cannot be countenanced. Nowhere in the Constitution is any provision granting such exemption. **The Congress' power of inquiry, being broad, encompasses everything that concerns the administration of existing laws as well as proposed or possibly needed statutes.** It even extends ‘to government agencies created by Congress and officers whose positions are within the power of Congress to regulate or even abolish.’ PCGG belongs to this class.” (Emphasis supplied).

4.5 Furthermore, inquiries in aid of legislation, as in the case at bar, also have the function of “ventilating issues of profound national concern”. As the eminent Harvard law professor, Prof. Laurence H. Tribe, has explained in his treatise on American Constitutional Law, thus -

“[Legislative] hearings have served an important role in ventilating issues of profound national concern. In fact,

⁷⁶ 504 SCRA 704, 725-726 (2006).

the modern function of hearings is often simply to focus the national attention and place a pressing issue on the nation's agenda. Some might say that, in certain legislative sessions, such consciousness-raising ranks among Congress' most constructive accomplishments." (Emphasis supplied)

5. Second, it had likewise been shown that the subject questions are relevant to the subject matter of the inquiry and the answers thereto could not be obtained elsewhere.

5.1. The relevance of the subject questions to the subject matter of the inquiry was duly noted by the Honorable Chief Justice in his Dissenting Opinion as follows –

"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 to 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. (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 particular 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.

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?'
- '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?'

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

x x x.

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. 129); and (3) legal and economic justification of the NBN Project (P.S. Res. 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); (2) the imposition of safeguards in the contracting of loans classified under Official Development Assistance (Senate Bill No. 1794); and (3) the concurrence of the Senate in international and executive agreements (Senate Bill No. 1317)."

5.2. The relevance of the questions was likewise summarized by Justice Carpio-Morales in her Dissenting Opinion as follows:

"Indeed, it may be gathered that all three questions were directed toward the same end, namely, to determine the reasons why the NBN project, despite the apparent overpricing, ended up being approved by the Executive and financed via a government loan, contrary to the original intention to follow a BOT scheme. The three questions should be understood in this light."

5.3. The lack of an effective substitute for the information withheld was likewise duly noted by the Honorable Chief Justice in his Dissenting Opinion as follows –

“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 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**. 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. 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**. 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.”

6. Third, juxtaposing the foregoing need over the general need of the President in the instant case to protect her conversations with petitioner, it is respectfully submitted that the latter must give way to the former.

6.1. This supremacy is summarized by the Honorable Chief Justice Puno in his Dissenting Opinion as follows:

“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 and compel petitioner Neri to answer the three disputed questions.**”

6.2. The supremacy is further elucidated in the Dissenting Opinion of Justice Carpio-Morales, to wit:

“If the three questions were understood apart from their context, a case can perhaps be made that petitioner’s responses, whatever they may be, would not be crucial to the intelligent crafting of the legislation intended in this case. As earlier discussed, however, it may be perceived from the context that they are all attempts to elicit information as to why the NBN project, despite the apparent overpricing, ended up being approved by the Executive and financed via a government loan, contrary to the original intention to follow a BOT scheme. This is the fundamental query encompassing the three questions.

This query is not answerable by a simple yes or no. Given its implications, it would be unreasonable to expect respondent Committees to merely hypothesize on the alternative responses and come up with legislation on that basis. This is a situation where at least a credible, if not precise, reconstruction of what really happened is necessary for the intelligent crafting of the intended legislation. Why is it that, after petitioner reported the alleged bribe to the President, things proceeded as if nothing was reported? Respondent Senate Committees are certainly acting within their rights in trying to find out the reasons for such a turn of events. If it was in pursuit of the public interest, respondents surely have a right to know what this interest was so that it may be taken into account in determining whether the laws on government procurement, BOT, ODA and other similar matters should be amended and, if so, in what respects.

It is certainly reasonable for respondents to believe that the information which they seek may be provided by petitioner. **This is all the more so now that petitioner, contrary to his earlier testimony before the respondent Committees that he had no further discussions with the President on the issue of the bribe offer, has admitted in his petition that**

he had other discussions with the President regarding ‘the bribery scandal involving high Government officials.’ These are the very same discussions which he now refuses to divulge to respondents on the ground of executive privilege.

Apropos is this Court’s pronouncement in *Sabio v. Gordon*:

Under the present circumstances, the alleged anomalies in the PHILCOMSAT, PHC and POTC, ranging in the millions of pesos, and the conspiratorial participation of the PCGG and its officials **are compelling reasons for the Senate to exact vital information from the directors and officers of Philcomsat Holdings Corporation, as well as from Chairman Sabio and his Commissioners to aid it in crafting the necessary legislation to prevent corruption and formulate remedial measures and policy determination regarding PCGG’s efficacy** x x x (Emphasis and underscoring supplied)

If, in a case where the intended remedial legislation has not yet been specifically identified, the Court was able to determine that a testimony is vital to a legislative inquiry on alleged anomalies – so vital, in fact, as to warrant compulsory process – *a fortiori* should the Court consider herein petitioner’s testimony as vital to the legislative inquiry subject of this case where there are already pending bills touching on the matter under investigation.

Thus, the claim of privilege in this case should **not** be honored with respect to the fundamental query mentioned above. Nonetheless, petitioner’s conversations with the President on all other matters on the NBN project should still be generally privileged. On matters not having to do with the apparent overpricing of the NBN project and the alleged bribe offer, respondents no longer have a showing of need sufficient to overcome the privilege. The intrusion into these conversations pursuant to this opinion would thus be a limited one. In that light, it is hard to see how the impairment of the public interest in candid opinions in presidential decision-making can, in this case, outweigh the immense good that can be achieved by well-crafted legislation reforming the procurement process.

The conclusion that respondent Committees have a sufficient need for petitioner’s testimony is further supported by the fact that the information is

apparently unavailable anywhere else. Unlike in the *Senate Select* case, the House of Representatives in the present case is not in possession of the same information nor conducting any investigation parallel to that of the respondent Committees. These were the considerations for the court's ruling against the senate committee in the *Senate Select* case.

Still, there is another reason for considering respondents' showing of need as adequate to overcome the claim of privilege in this case.

Notably, both parties unqualifiedly conceded to the truism laid down in the *Senate Select* case 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.'

While the U.S. Court in that case proceeded to qualify its statement by saying that 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,

I submit that it would be unwise to infer therefrom that, in the assessment of claims of privilege, indications that the privilege is being used to shield officials from investigation is immaterial. Otherwise, what would then be the point of stating that '[a] claim of privilege may not be used to shield executive officials and employees from investigations by the proper government institutions into possible criminal wrongdoing'?

At the very least, such indications should have the effect of severely **weakening** the presumption that the confidentiality of presidential communications in a given case is supported by public interest. Accordingly, the burden on the agency to overcome the privilege being asserted becomes less, which means that judicial standards for what counts as a 'sufficient showing of need' become less stringent.

Finally, the following statement of Dorsen and Shattuck is instructive:

x x x there should be no executive privilege when the Congress has already acquired substantial evidence that the information requested concerns criminal wrong-doing by executive officials or presidential aides. There is obviously an

overriding policy justification for this position, since the opposite view would permit criminal conspiracies at the seat of government to be shrouded by a veil of an advice privilege. While the risk of abusive congressional inquiry exists, as the McCarthy experience demonstrates, the requirement of `substantial evidence' of criminal wrong-doing should guard against improper use of the investigative power.

When, as in this case, Congress has gathered evidence that a government transaction is attended by corruption, and the information being withheld on the basis of executive privilege has the potential of revealing whether the Executive merely tolerated the same, or worse, is responsible therefor, it should be sufficient for Congress to show – for overcoming the privilege – that its inquiry is in aid of legislation.”

6.3. ***Fourth***. It was inappropriate for the Honorable Court to apply the ruling in ***Senate Select Committee on Presidential Campaign Activities v. Nixon***, in negating the right of respondent Senate Committees to investigate the NBN-ZTE Project in the instant case. As duly noted by the Honorable Court in the challenged Decision, an impeachment proceeding had been initiated in the former case, while no such proceeding is present herein. It is respectfully submitted that this material difference would render the ruling in the aforesaid case as far as the possible conflict of interest is concerned wholly inapplicable to the instant case. Speculations and conjectures have no place under our rules of evidence.

D. TO UPHOLD THE CLAIM OF EXECUTIVE PRIVILEGE IN THE INSTANT CASE WOULD SERIOUSLY IMPAIR THE RESPONDENTS' PERFORMANCE OF THEIR PRIMARY FUNCTION TO ENACT LAWS.

1. Further applying the balancing of interest and functional impairment tests, if this Honorable Court were to uphold the claim of executive privilege in the instant case it would seriously impair the respondents' performance of their primary function to enact laws.

2. In *U.S. v. Nixon*, it was held that separation of powers was designed to ensure that all three (3) branches are able to perform their Constitutionally-mandated functions with a view to establishing a "workable government," thus –

"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 prosecution would plainly conflict with the function of the courts under Art. III. **In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal 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.'

X X X.

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." (Emphasis and underscoring supplied)

3. Here, it is readily apparent that to deny the respondents the power to conduct investigations in aid of legislation in the instant case would effectively cripple, if not totally bar, the effective

performance of their primary function of enacting laws, more so their secondary function of oversight to ensure that there is a check-and-balance on the President to secure the proper implementation of laws.

4. As clearly asserted in respondents' Comment, "there is an urgent need for remedial legislation to regulate the obtention and negotiation of official development assisted (ODA) projects because these have become rich source of 'commissions' secretly pocketed by high executive officials."

5. It is noteworthy that nowhere in the Decision is there even any dispute that, as Chief Justice Puno observed in his Dissenting Opinion –

"x x x the information sought from petitioner 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." (At p. 94)

6. Moreover, as sufficiently demonstrated during the oral argument by counsel for respondents, in response to the interpellation by Chief Justice Puno, the need to obtain the information withheld is essential in order that the proposed or possible legislation have factual bases; otherwise, respondents will just be speculating in the performance of their legislative functions (TSN, pp. 416-422).

7. All told, it is very clear that the denial of the instant claim of executive privilege is imperative, for without the withheld information, respondents cannot effectively perform their primary function of enacting laws, as *Senate v. Ermita*, held –

“Indeed, if the separation of powers has anything to tell us on the subject under discussion, it is that the Congress has the right to obtain information from any source – even from officials of departments and agencies in the executive branch. In the United States there is, unlike the situation which prevails in a parliamentary system such as that in Britain, a clear separation between the legislative and executive branches. **It is this very separation that makes the congressional right to obtain information from the executive so essential, if the functions of the Congress as the elected representatives of the people are adequately to be carried out.** *The absence of close rapport between the legislative and executive branches in this country, comparable to those which exist under a parliamentary system, and the nonexistence in the Congress of an institution such as the British question period have perforce made reliance by the Congress upon its right to obtain information from the executive essential, if it is intelligently to perform its legislative tasks.* **Unless the Congress possesses the right to obtain executive information, its power of oversight of administration in a system such as ours becomes a power devoid of most of its practical content, since it depends for its effectiveness solely upon information parceled out ex gratia by the executive.**” (At pp. 56-57; emphasis and underscoring supplied)

E. FINALLY, THE CONSTITUTIONAL RIGHT OF THE PEOPLE TO INFORMATION, AND THE CONSTITUTIONAL POLICIES ON PUBLIC ACCOUNTABILITY AND TRANSPARENCY OUTWEIGH THE CLAIM OF EXECUTIVE PRIVILEGE.

1. In *Senate v. Ermita*, this Honorable Court held that to sustain a claim of executive privilege, the same must be of such a high degree as to outweigh public interest, thus –

“x x x. Executive privilege, as already discussed, is recognized with respect to information the confidential nature of which is *crucial* to the fulfillment of the unique role and responsibilities of the executive branch, or in those instances where exemption from disclosure is *necessary* to the discharge of *highly important* executive responsibilities. **The doctrine of executive privilege is thus premised on the fact that certain informations must, as a matter of necessity, be kept confidential in pursuit of the public interest. The privilege being, by definition, an exemption from the obligation to disclose information, in this case to Congress, the necessity must be of such high degree as to outweigh the public interest in enforcing that obligation in a particular case.**” (At p. 68; emphasis and underscoring supplied)

2. Here, it is readily apparent that there are greater public interests that will be served with a full disclosure of the matters which are claimed to be within the coverage of “executive privilege”.

3. To allow petitioner to hide behind the shield of executive privilege would destroy the basic principle of public accountability of government officials and transparency in government dealings.

3.1. Article XI, Section 1 of the Constitution provides –

“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.”

3.2. In ***Sabio v. Gordon***, 504 SCRA 704 (2006), this Honorable Court, in reference to the aforementioned Constitutional provision, ruled that –

“The provision presupposes that since an incumbent of a public office is invested with certain powers and charged with certain duties pertinent to sovereignty, the powers so delegated to the officer are held **in trust for the people and are to be exercised in behalf of the government or of all citizens who may need the intervention of the officers. Such trust extends to all matters within the range of duties pertaining to the office. In other words, public officers are but the servants of the people, and not their rulers.**” (At pp. 726-727; emphasis and underscoring supplied)

3.3. Clearly, the sweeping claim of executive privilege in the instant case is being waved around like an immunity insofar as it seeks to place certain executive officials beyond the reach of Congress, which this Honorable Court has held to be –

“x x x inconsistent with the principle of public accountability. x x x. Instead of encouraging public accountability, the same provision only institutionalizes irresponsibility and non-accountability.” (*Id.*)

3.4. Interestingly, this issue on public accountability, coupled with the Constitutional directive that the President shall ensure that the laws are faithfully executed (Article VII, Section 17), were not even touched upon in the majority opinion.

4. Moreover, petitioner’s refusal to disclose vital information in aid of legislation is violative of the people’s Constitutional right to information.

4.1. To ensure the people’s access to information, the Constitution provides in Article II, Section 28, that –

“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.”

and in Article III, Section 7, that –

“Sec. 7. 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.

4.2. In *Sabio v. Gordon*, this Honorable Court sustained the people’s right to information based on the aforementioned provisions, thus –

“These twin provisions of the Constitution seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to enable them to exercise effectively their constitutional rights. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation.” In *Valmonte v. Belmonte, Jr.* the Court explained that an informed citizenry is essential to the existence and proper functioning of any democracy, thus:

An essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people’s will. Yet, this open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in the discussion are aware

of the issues and have access to information relating thereto can such bear fruit.

Consequently, the conduct of inquiries in aid of legislation is not only intended to benefit Congress but also the citizenry. The people are equally concerned with this proceeding and have the right to participate therein in order to protect their interests. The extent of their participation will largely depend on the information gathered and made known to them. In other words, the right to information really goes hand-in-hand with the constitutional policies of full public disclosure and honesty in the public service. It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in the government. The cases of *Tañada v. Tuvera* and *Legaspi v. Civil Service Commission* have recognized a citizen's interest and personality to enforce a public duty and to bring an action to compel public officials and employees to perform that duty." (At pp. 728-729; emphasis and underscoring supplied)

4.3. Thus, petitioner's claim of executive privilege should not have been sustained in light of the pronouncement of this Honorable Court in ***Senate v. Ermita*** that –

“To the extent that investigations in aid of legislation are generally conducted in public, **however, any executive issuance tending to unduly limit disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid of legislation, is presumed to be a matter of public concern.** The citizens are thereby denied access to information which they can use in formulating their own opinions on the matter before Congress – opinions which they can then communicate to their representatives and other government officials through the various legal means allowed by their freedom of expression.” (At pp. 729-730)

5. Instead, the Decision harps on the submission of petitioner to questioning for eleven (11) hours, as well as his

supposed manifestation of willingness to answer more questions. Suffice it to state that it is presumptuous for petitioner to assume that no further questions will be asked of him such that his appearance will no longer be required.

6. Anent the supposed limitations on the right to public information under certain laws, it is respectfully submitted that such finding is misplaced.

6.1. Here, the laws which will be allegedly violated by disclosure of the withheld information, i.e., Section 7, R.A. No. 6713, Article 229 of the Revised Penal Code, Section 3 (k) of R.A. No. 3019, and Section 24[e] of Rule 130 of Rules of Court, seek to prevent unlawful disclosure of information, which is not the case when such information is compelled by respondents in the exercise of their legislative power.

6.2. On this score, ***Sabio v. Gordon*** is instructive that –

“A statute may be declared unconstitutional because **it is not within the legislative power to enact**; or it creates or established methods of forms that infringe constitutional principles; or its purpose or **effect violates the Constitution or its basic principles**. As shown in the above discussion, Section 4(b) is inconsistent with **Article VI, Section 21** (Congress’ power of inquiry), **Article XI, Section 1** (principle of public accountability), **Article II, Section 28** (policy of full disclosure) and **Article III, Section 7** (right to public information).” (At pp. 729-730)

6.3. Applying the foregoing by analogy, the laws cited in the Decision cannot be construed to limit or obstruct the power of Congress to secure from petitioner information and other data in aid of its power to legislate; otherwise, they would violate the Constitution.

7. In the challenged Decision, the Honorable Court further held that respondent Senate Committees cannot properly invoke the constitutional right of the people to information under Section 7, Article III of the 1987 Constitution, because, as held in *Senate v. Ermita*, 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. It is respectfully submitted that such ruling is misplaced.

7.1. The foregoing ruling fails to consider the qualification made in *Senate v. Ermita* that consequently enabled the Honorable Court to rule that an invalid claim of executive privilege in a legislative inquiry in aid of legislation would likewise violate the people's constitutional right to information, to wit –

“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.

To the extent that investigations in aid of legislation are generally conducted in public, however, any executive issuance tending to unduly limit

disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid of legislation, is presumed to be a matter of public concern. The citizens are thereby denied access to information which they can use in formulating their own opinions on the matter before Congress — opinions which they can then communicate to their representatives and other government officials through the various legal means allowed by their freedom of expression. Thus holds *Valmonte v. Belmonte*:

It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit. (Emphasis and underscoring supplied)

The impairment of the right of the people to information as a consequence of E.O. 464 is, therefore, in the sense explained above, just as direct as its violation of the legislature's power of inquiry.

7.2. This ruling was reiterated in *Sabio v. Gordon*⁷⁷,

where the Honorable Court categorically declared as follows:

“These twin provisions of the Constitution seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to enable them to exercise effectively their constitutional rights. **Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation.** In *Valmonte v. Belmonte, Jr.*, the Court explained that an informed citizenry is essential to the existence and proper functioning of any democracy, thus:

An essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It

⁷⁷ 504 SCRA at 728-729.

is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit.

Consequently, the conduct of inquiries in aid of legislation is not only intended to benefit Congress but also the citizenry. The people are equally concerned with this proceeding and have the right to participate therein in order to protect their interests. The extent of their participation will largely depend on the information gathered and made known to them. In other words, the right to information really goes hand-in-hand with the constitutional policies of full public disclosure and honesty in the public service. It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in the government. The cases of *Tañada v. Tuvera* and *Legaspi v. Civil Service Commission* have recognized a citizen's interest and personality to enforce a public duty and to bring an action to compel public officials and employees to perform that duty." (Emphasis supplied).

7.3. Hence, in this sense, it is respectfully submitted that respondent Senate Committees can similarly invoke the constitutional right of the people to information in asserting their need for the answers to the subject questions.

7.4 Even assuming that the right to information of the public and that of respondent Committees may be distinguished, it is respectfully submitted that any such distinction cannot diminish the right to information of respondent Committees, and that respondents' right to

information should instead be considered paramount in view of the importance and necessity of any information thus secured in the legislative process.

8. In the light of all the foregoing, it is clear that the majority opinion's blind acceptance at face value of the bare and self-serving claim of executive privilege in the instant case cannot be sustained.

IV

CONTRARY TO THIS HONORABLE COURT'S DECISION, RESPONDENTS DID NOT COMMIT GRAVE ABUSE OF DISCRETION IN ISSUING THE ASSAILED CONTEMPT ORDER, CONSIDERING THAT:

A. THERE IS NO LEGITIMATE CLAIM OF EXECUTIVE PRIVILEGE IN THE INSTANT CASE.

1. At the outset, it bears emphasis that, in essence, the instant Petition is anchored on the sweeping premise that once "executive privilege" is claimed, then a person subpoenaed by the Senate or any of its committees may no longer be compelled to appear and testify.

1.1. On its face, the Petition assails the issuance of the Show Cause Order dated 22 November 2007 issued by respondents (Annex "A" of the Petition) in light of petitioner's failure to appear despite receipt of respondents' Subpoena Ad Testificandum, which in part states –

“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.”

1.2. On the other hand, the Supplemental Petition assails the issuance of the Order dated 30 January 2008 (Annex “A” of the Supplemental Petition) citing petitioner in contempt, thus –

“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 and subject reported irregularities, AND for failure to explain satisfactory 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 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.”

1.3. Thus, the assailed orders of respondents both stemmed from petitioner’s refusal to obey the Subpoena Ad Testificandum (Annex “B” of the Petition) duly issued by respondents, which reads –

“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** x x x.”
(Emphasis and underscoring supplied)

2. However, a mere claim of executive privilege with respect to the three questions subject of the instant case does not justify petitioner’s blanket refusal to appear before respondent Committees.

2.1. Here, it is readily apparent on the face of the Subpoena that the scope of inquiry to be conducted by the respondents includes relevant facts within the knowledge of petitioner, but has not been limited to matters which fall within the ambit of executive privilege. As was held in ***Senate v. Ermita***, even if a type of information is recognized as privileged, the validity of a claim of privilege will depend on the context in which it is made, thus –

“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.” (At p. 47; emphasis and underscoring supplied)

2.2. It is therefore premature, if not highly presumptuous, for petitioner to claim that his entire testimony

before the respondents will consist of matters which are covered by “executive privilege”. In any event, nothing would prevent him from raising such claim when confronted with a question which seeks to elicit information recognized as privileged.

2.3. Certainly, it is not for petitioner to unilaterally determine that respondents’ duly-issued Subpoena should be totally disregarded, for as ***Philippine Association of Free Labor Unions v. Salvador***, 25 SCRA 393 (1968), has held –

“x x x. The failure to abide by the orders and processes of judicial and quasi-judicial agencies x x x gives rise to a serious concern. It engenders at the very least the well-founded suspicion that such an attitude betrays an absence of good faith. It is indicative of a belief at war with all that adjudication stands for.

“No one may be permitted to take the law into his own hands. No one, much less the party immediately concerned, should have the final say on the validity or lack of it of one's course of conduct. Centuries of reliance on the judicial process repel such a notion. As was so aptly stated in *Gompers v. Buck's Stove & Range Company*: **‘If the party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the ‘judicial power x x x’ would be a mere mockery.’**

x x x.

“Law stands for order, for the peaceful and systematic adjustment of frictions and conflicts unavoidable in a modern society with its complexities and clashing interests. The instrumentality for such balancing or harmonization is the judiciary and other agencies exercising quasi-judicial powers. x x x.

“Such is the way of the law. So it has been in the past. So it should continue to be. If it were otherwise, the intellect no longer holds sway, the dictates of

moderation are ignored, and passion takes over. The words of Dean Pound come to mind: 'Civilization involves subjection of force to reason, and the agency of this subjection is law.'

"x x x.

"x x x. It is equally well-settled, however, that a tribunal, whenever confronted with a particular question, is not devoid of the authority to pass precisely on the existence or non-existence of its power to act. Whether, therefore, the urgent petition x x x is proper for respondent Judge to pass upon is not for petitioner itself to decide. x x x.

"Even if, therefore, the good faith of petitioner be conceded, the failure to abide by the commands of the orders herein challenged finds no justification if the rule of law has any meaning at all. x x x. **It does not mitigate such defiance of law to urge that hard-won liberties x x x were at stake. The most prized liberties themselves pre-supposed an independent judiciary through which liberties may be, as they often have been, vindicated. When in real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy."** (At pp. 402-404; emphasis and underscoring supplied)

2.4. On this, the observation of Justice Carpio-Morales

in her Dissenting Opinion is instructive, to wit:

"As to that broader issue, there should be no doubt at all about its proper resolution. Even assuming *arguendo* that the claim of privilege is valid, it bears noting that the coverage thereof is clearly limited to the three questions. Thus limited, the only way this privilege claim could have validly excused petitioner's not showing up at the November 20 hearing was if respondent Committees had nothing else to ask him except the three questions. Petitioner assumed that this was so, but without any valid basis whatsoever. It was merely his inference from his own belief that he had already given an exhaustive testimony during which he answered all the questions of respondent Committees except the three.

Petitioner harps on the fact that the September 26, 2007 hearing (September 26 hearing) lasted some 11 hours which length of hearing Sec. Ermita describes

as 'unprecedented,' when actually petitioner was not the only resource person who attended that hearing, having been joined by Department of Transportation and Communications (DOTC) Secretary Leandro Mendoza, Chairman Abalos, DOTC Assistant Secretary Lorenzo Formoso III, Vice-Governor Rolex Suplico, Jose de Venecia III, Jarius Bondoc, and R.P. Sales. And even if petitioner were the only resource person for the entire November 20 hearing, he would still have had no basis to believe that the only questions the senators were to ask him would all involve his conversations with the President. Surely, it could not have escaped his notice that the questions asked him during the September 26 hearing were wide ranging, from his professional opinion on the projected economic benefits of the NBN project to the role of the NEDA in the approval of projects of that nature.

Thus, insofar as petitioner can still provide respondent Committees with pertinent information on matters not involving his conversations with the President, he is depriving them of such information without a claim of privilege to back up his action. Following the ruling in *Senate v. Ermita* that '[w]hen Congress exercises its power of inquiry, the only way for department heads to exempt themselves therefrom is by a valid claim of privilege,' petitioner had no legal basis for failing to appear in the November 20 hearing. He should have appeared in the hearing and refused to answer the three questions as they were asked. On that score alone, the petition should be dismissed."

2.5. Hence, petitioner's disregard of the *subpoena* for him to appear on the 20 November 2007 hearing is unjustified and consequently warrants the issuance of a show cause and, subsequently, contempt orders against him.

3. Moreover, in light of the previous discussions which show that the claim of executive privilege is unavailing, it becomes clear that there is no grave abuse of discretion on the part of respondents in issuing the assailed Contempt Order, since it is clearly within the

power of respondents, in the conduct of inquiries in aid of legislation, to compel the appearance of petitioner.

3.1. Here, the issuance of the assailed Contempt Order was pursuant to the respondents' power to conduct an inquiry in aid of legislation which is enshrined in the 1987 Constitution, Article VI, Section 21 of which reads –

“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.”

3.2. Anent the power to hold petitioner in contempt after he has failed to show cause, the landmark case of *Arnault v. Nazareno*, 87 Phil. 29, 45 (1950), held that such power (which makes no distinction between direct or indirect contempt) is not only within the discretion of the Senate or any of its committees, but is essential for its function—nay, its very preservation—because –

“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.
 (Emphasis and underscoring supplied)

and therefore concluded that –

“x x x. **To deny such committees the power of inquiry with process to enforce it would be to defeat the very purpose for which that power is recognized in the legislative body as an essential and appropriate auxillary to its legislative function.** It is but logical to say that the power of self-preservation is coexistent with the life to be preserved.” (*Id.* at p. 62; emphasis and underscoring supplied)

3.3. In the said case, which involved an investigation by the Senate, thru the Special Committee created by it, to investigate a transaction involving a questionable and allegedly unnecessary and irregular expenditure of public funds, this Honorable Court held that –

“x x x. By refusing to answer the questions, the witness has obstructed the performance by the Senate of its legislative function, and the Senate has the power to remove the obstruction by compelling the witness to answer the questions thru restraint of his liberty until he shall have answered them. That power subsists as long as the Senate, which is a continuing body, persists in performing the particular legislative function involved. x x x.

As against the foregoing conclusion it is argued for the petitioner that the power may be abusively and oppressively exerted by the Senate which might keep the witness in prison for life. But we must assume that the Senate will not be disposed to exert the power beyond its proper bounds. And if, contrary to this assumption, proper limitations are disregarded, the

portals of this Court are always open to those whose rights must thus be transgressed.” (*Id.* at p. 65)

3.4. As to whether the respondents have the “power, through their own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it to efficiently exercise a legislative function belonging to it under the Constitution,” the said issue has already been answered in the affirmative and settled by ***McGrain v. Daugherty***, 273 U.S. 135 (1927).

3.5. Here, it is undisputed that the Contempt Order was signed by the Senate President, in the exercise of his powers under Rule III (The President, His Duties and Powers) of the Rules of the Senate, which expressly provides that –

“Sec. 3. The President is the Chief Executive of the Senate. His duties and powers are as follows:

X X X.

c) To sign all measures, memorials, joint and concurrent resolutions; issue warrants, **orders of arrest**, subpoenas and subpoenas *duces tecum*.”

3.6. Such power of the Senate and its Committees to compel the attendance of witnesses through coercive process has been recognized by this Honorable Court in ***Standard Chartered Bank (Philippine Branch), et. al. vs. Senate***

Committee on Banks, Financial Institutions & Currencies⁷⁸

where the Court said that:

“It is axiomatic that the **power of legislative investigation includes the power to compel the attendance of witnesses. Corollary to the power to compel the attendance of witnesses is the power to ensure that the said witnesses would be available to testify in the legislative investigation.** x x x considering that most of the officers of SCB-Philippines are not Filipino nationals who may easily evade the compulsive character of the respondent’s summons by leaving the country, it was reasonable for the respondent to request the assistance of the Bureau of Immigration and Deportation to prevent said witnesses from evading the inquiry and defeating its purpose. In any event, no HDO was issued by a court. The BID instead included them only in the Watch List, which had the effect of merely delaying petitioners’ intended travel abroad for five (5) days, provided no HDO is issued against them.”

3.7. In **Sabio v. Gordon**, the SC upheld the power of the Senate to order the arrest of Chairman Sabio, thus –

“It must be stressed that the Order of Arrest for ‘contempt of Senate Committees and the Philippine Senate’ was approved by Senate President Villar and signed by fifteen (15) Senators. From this, it can be concluded that the Order is under the authority, not only of the respondent Senate Committees, but of the entire Senate.

At any rate, Article VI, Section 21 grants the power of inquiry not only to the Senate and the House of Representatives, but also to any of their respective committees. Clearly, there is direct conferral of power to the committees. Father Bernas, in his Commentary on the 1987 Constitution, correctly pointed out its significance:

It should also be noted that the Constitution explicitly recognizes the power of investigation not just of Congress but also of ‘any of its committees.’ This is significant because it constitutes a direct

⁷⁸ G.R. No. 167173, December 27, 2007.

conferral of investigatory power upon the committees and it means that the means which the Houses can take in order to effectively perform its investigative function are also available to the Committees.

This is a reasonable conclusion. The conferral of the legislative power of inquiry upon any committee of Congress must carry with it all powers necessary and proper for its effective discharge. Otherwise, Article VI, Section 21 will be meaningless. The indispensability and usefulness of the power of contempt in a legislative inquiry is understood in a catena of cases, foreign and local.”

3.8. Indeed, the rationale for the grant and the nature of such power has been recognized by this Honorable Court in ***Standard Chartered Bank (Philippine Branch), et. al. v. Senate Committee on Banks, Financial Institutions & Currencies***,⁷⁹ where it held that –

“The exercise by Congress or by any of its committees of the power to punish contempt is based on the principle of self-preservation. As the branch of the government vested with the legislative power, independently of the judicial branch, it can assert its authority and punish contumacious acts against it. Such power is *sui generis*, as it attaches not to the discharge of the legislative functions *per se*, but to the sovereign character of the legislature as one of the three independent and coordinate branches of government.”

4. Given the foregoing, there can be no basis to sustain petitioner’s incontinent use of sweeping generalizations that respondents allegedly acted “arbitrarily” or “with grave abuse of discretion”.

⁷⁹ G.R. No. 167173, December 27, 2007.

4.1. It is beyond cavil that the errors correctible by a special civil action for certiorari are limited to errors of jurisdiction and not errors of judgment, with the burden of establishing such error of jurisdiction falling squarely on the shoulders of the petitioner. ***Montecillo v. Civil Service Commission***, 360 SCRA 99 (2001), teaches us that –

“First of all, it must be stressed that in this special civil action for certiorari, the Court is limited to the determination of whether or not respondent committed grave abuse of discretion amounting to lack or excess of jurisdiction x x x. **In this regard, it should also be emphasized that the burden of proving such grave abuse of discretion lies with petitioners. 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.**” (At pp. 103-104; emphasis and underscoring supplied)

4.2. Certainly, the allegations in the Petition and Supplemental Petition do not meet the unyielding yardstick that must be used in determining the sufficiency of a petition for certiorari, reiterated in ***San Miguel Corporation v. Sandiganbayan***, 340 SCRA 289 (2000), thus –

“To justify the issuance of the writ of certiorari, the abuse of discretion must be grave, as when the power is exercised in an arbitrary and despotic manner by reason of passion or personal hostility, and it must be so patent 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, as to be equivalent to having acted without jurisdiction.” (At pp. 310-311)

B. RESPONDENTS DID NOT VIOLATE THE SUPPOSED REQUIREMENTS LAID DOWN IN *SENATE V. ERMITA*.

1. In the Decision, the majority found that respondents allegedly failed to comply with the supposedly mandatory requirement laid down in ***Senate v. Ermita*** that –

“x x x 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 virtue of the express language of Section 22. Unfortunately, despite petitioner’s repeated demands, respondent Committees did not send him advance list of questions.” (At. pp. 27-28)

2. It is respectfully submitted that the invitations and *subpoena* issued to petitioner are not fatally defective under existing law and jurisprudence.

3. **First**, it is sufficient under existing laws and jurisprudence that the invitations and *subpoena* issued by Congress indicate the subject matter of the inquiry, because an inquiry may not necessarily lead to the enactment of a law, to wit –

“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 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 propounded to a witness must be material to any proposed or possible legislation. In other words, the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.

x x x. We have already indicated that it is not necessary for the legislative body to show that every question propounded to a witness is material to any proposed or possible legislation; what is required is that it be pertinent to the matter under inquiry.”⁸⁰

4. Nevertheless, respondents’ Subpoena Ad Testificandum (Annex “B” of the Petition) clearly states the “possible needed statute which prompted the need for the inquiry,” along with “the usual indication of the subject of inquiry” to sufficiently apprise petitioner of the matters he is expected to testify on.

5. **Second**, Section 21 of Article VI does not clearly require the Senate to furnish the witnesses in its inquiries in aid of legislation with the questions relative to the subject matter of the inquiry, as opposed to Section 22 where such a requirement is clearly expressed. It is respectfully submitted that the omission of such requirement in Section 21 is intentional and indicates the constitutional intent to give Congress the discretion in doing so when it is an inquiry in aid of legislation.

⁸⁰ Arnault vs. Nazareno, 87 Phil. 29.

6. **Third**, a reading of ***Senate v. Ermita*** shows that the alleged “imperative” requirements are nothing but suggestions, if not outright obiter, and certainly not mandatory, thus –

“Parenthetically, 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 statement in its invitations, along with the usual indication of the subject of inquiry and the questions relative to and in furtherance thereof, there would be less room for speculation on the part of the person invited on whether the inquiry is in aid of legislation.” (Emphasis supplied).

7. Hence, with all due respect, the ruling clearly did not make it mandatory for Congress to furnish witnesses in its inquiries in aid of legislation with the questions relative to the subject of inquiry. It merely gave Congress a means of avoiding speculation on whether the inquiry is indeed in aid of legislation. Thus, the Honorable Court left it to the discretion of Congress on whether to follow the said means or take the risk of having its witnesses speculate on the genuineness of the legislative purpose of the inquiry.

8. Consequently, any perceived failure on the part of respondents to observe the foregoing suggestions cannot be invoked to invalidate the assailed Contempt Order.

C. RESPONDENTS DULY ISSUED THE CONTEMPT ORDER IN ACCORDANCE WITH THEIR INTERNAL RULES.

1. In the Decision, it was alleged that the needed vote of majority of all the members of the Committee was not obtained since members who did not actually participate in the deliberation were made to sign the assailed Contempt Order; hence, it is posited that there is a cloud of doubt as to the validity of the Contempt Order dated 30 January 2008 (At p. 28).

2. Contrary to the ruling of the majority, the issuance of the Contempt Order is valid and in accordance with the Senate Rules of Procedure Governing Inquiries in Aid of Legislation, Section 18 of which provides for the power of contempt, thus –

“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 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 testify, or otherwise purge himself of that contempt.” (Emphasis supplied)

3. Here, there is no issue that the Contempt Order was indeed signed by the majority of the members of respondent Senate Blue Ribbon Committee as required under Section 18 thereof. In fact, to put this issue to rest, the respondents submitted to this Honorable Court on 17 March 2008 a document showing the composition of respondent Senate Committees, certified to be a true

copy by the Deputy Secretary for Legislation, which was found satisfactory by Chief Justice Puno, as stated in his Dissenting Opinion, thus –

“Vis-à-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 Section 18 of the Rules Governing Inquiries in Aid of Legislation x x x.” (At p. 119)

4. Insofar as the Decision claims that allegedly, only a minority of the members of respondent Senate Blue Ribbon Committee were present during the deliberations while the rest only signed the Contempt Order thereafter, suffice it to state that there is no requirement in the subject Rules that those who will sign the contempt order are those who actually took part in the deliberation and voted on the citing for contempt.

5. In any event, it is respectfully submitted that such issue is beyond the reach of this Honorable Court’s power.

5.1. To start with, under Article VI, Section 16(3) of the 1987 Constitution, each House of Congress “may determine the rules of its proceedings x x x.”

5.2. Thus, in the celebrated case of ***Osmeña, Jr. v. Pendatun***, 109 Phil 863 (1960), this Honorable Court refused to interfere with the internal rules of a House of Congress since “the theory of separation of powers, fastidiously observed by

this Court, demands in such a situation a prudent refusal to intervene.” (At p. 872)

5.3. As to the binding force of internal rules, this Honorable Court further held in *Osmeña, Jr. v. Pendatun* that

–

“[C]ourts have declared that ‘the rules adopted by deliberative bodies are subject to revocation, modification or waiver at the pleasure of the body adopting them. And it has been said that ‘Parliamentary rules are merely procedural, and with their observance, the courts have no concern. They may be waived or disregarded by the legislative body.’ Consequently, ‘mere failure to conform to parliamentary usage will not invalidate action (taken by a deliberative body) when the requisite number of members have agreed to a particular measure.’” (At pp. 870-871)

6. Clearly, therefore, respondent Senate Blue Ribbon Committee’s implementation of Section 18 of the Rules of Procedure Governing Inquiries in Aid of Legislation is a matter that is beyond the reach of the courts.

D. RESPONDENTS DID NOT VIOLATE THE REQUIREMENT UNDER ARTICLE VI, SECTION 21 OF THE CONSTITUTION REQUIRING THAT ITS RULES OF PROCEDURE BE DULY PUBLISHED, AND WERE DENIED DUE PROCESS WHEN THE COURT CONSIDERED THE OSG’S INTERVENTION ON THIS ISSUE WITHOUT GIVING RESPONDENTS THE OPPORTUNITY TO COMMENT.

1. In the Decision, this Honorable Court found that the Rules of Procedure Governing Inquiries in Aid of Legislation have allegedly

not been published, purportedly violating the requirement under Article VI, Section 21 of the 1987 Constitution that inquiries in aid of legislation must be in accordance with “duly published rules of procedure”.

2. In reaching its finding, this Honorable Court relied simply on the explanation of the Office of the Solicitor General (OSG) in its Memorandum filed with the Court at the eleventh hour, i.e., on March 17, 2008 or 13 days after the oral argument. Said Memorandum was sent to respondent Committees by registered mail and was received by respondent Committees only on March 25, 2008, the day the Decision of this Honorable Court came out. Hence, respondent Committees were not given the opportunity to comment on the OSG Memorandum and be heard on the issue. This is inconsistent with the “cardinal primary” requirements of due process in administrative proceedings.⁸¹ It is respectfully submitted that the Court should have allowed respondents to be heard on this issue, and a re-hearing on this matter would be justified.

3. Nonetheless, and with due respect, it is submitted that respondents have complied with the mandate of the Constitution of having its Rules of Procedure Governing Inquiries in Aid of Legislation duly published.

3.1. The Senate Rules of Procedure Governing Inquiries in Aid of Legislation have been duly published in two

⁸¹ Ang Tibay v. Court of Industrial Relations, 69 Phil 635 (1940)

newspapers of general circulation in 1995, *i.e.*, in the 24 August 1995 issues of The Philippine Star and Malaya (August 24, 1995). Since its adoption and publication in 1995, the Rules of Procedure Governing Inquiries in Aid of Legislation have not been substantially amended, modified nor repealed.

3.2. The Senate republished the same Rules of Procedure Governing Inquiries in Aid of Legislation on 1 December 2006 in two newspapers of national circulation, *i.e.*, in the Philippine Daily Inquirer and The Philippine Star.

3.3. Thus, not having been amended, modified or repealed since 1995, the Rules of Procedure Governing Inquiries in Aid of Legislation remain in force and effect.

4. Contrary to the ruling in the Decision, the Senate Rules need not be published every three (3) years.

4.1. To start with, there is nothing in the wordings of Article VI, Section 21 of the Constitution that commands **every Congress** to publish its Rules of Procedure Governing Inquiries in Aid of Legislation. The Constitution **only** requires that the Rules of the Senate on Inquiries in Aid of Legislation be duly published.

4.2. Moreover, the Senate is a continuing body since the term of the members of the Senate expire at different times

(Article XVIII, Section 2, 1987 Constitution). As such, it is not required to formally adopt and publish its Rules Governing Inquiries in Aid of Legislation for every Congress, unless the same is repealed or amended.

4.3. That the Senate is a continuing body was laid down in the landmark case of *Arnault v. Nazareno*,⁸² where the Supreme Court adopted the ruling in *Mcgrain v. Daugherty*, thus –

“The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the **Senate, which is a continuing body** whose members are all elected for a term of six years and so divided into classes that the seats of one third only become vacant at the end of each Congress, two thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

X X X.

There is no sound reason to limit the power of the legislative body to punish for contempt to the end of every session and not to the end of the last session terminating the existence of that body. While the existence of the House of Representatives is limited to four years, that of the Senate is not limited. **The Senate is a continuing body, which does not cease to exist upon the periodical dissolution of the Congress or of the House of Representatives. There is no limit as to time to the Senate’s power to punish for contempt in cases where that power may constitutionally be exerted.**” (Emphasis supplied)

4.4. Even the framers of the 1987 Constitution intended the Senate as a continuing body. The term of office of the senators was devised in such a way that 12 senators end their

⁸² 87 Phil. 29,61.

term every 3 years while the other 12 will end theirs 3 years thereafter. Thus, the Senate shall not at anytime be completely dissolved. One-half of the membership is retained as the other half is replaced or reelected every three years. During the Constitutional Commission (ConCom) deliberations on the composition of Congress and term of office of elective officials, the exchange among the framers is enlightening, 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 the 24 Senators will be elected, so that 12 Senators will remain in the Senate. In other words, we will have a continuing Senate.**⁸³

x x x.

MR. DAVIDE. This is just a paragraph of that section that will follow what had earlier been approved. It reads: “OF THE SENATORS ELECTED IN THE ELECTION IN 1992, THE FIRST TWELVE OBTAINING THE HIGHEST NUMBERS 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 the does the Committee say?

⁸³ Constitutional Commission Record, July 24, 1986, p.208.

MR. SUAREZ. The Committee accepts the Davide proposal, Mr. Presiding Officer.”⁸⁴
(Emphasis supplied)

4.5. The Senate itself has traditionally considered itself a continuing body, as observed by Chief Justice Puno in his Dissenting Opinion, thus –

“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.” (At p. 111)

4.6. Indeed, even this Honorable Supreme Court has relied upon, applied and cited certain provisions of the Rules of the Senate in resolving certain legal issues, thus recognizing the validity thereof even without re-publication. One such case is *Sabio v. Gordon*,⁸⁵ thus –

“Anent the right against self-incrimination, it must be emphasized that this right maybe invoked by the said directors and officers of Philcomsat Holdings Corporation only when the incriminating question is being asked, since they have no way of knowing in advance the nature or effect of the questions to be asked of them.” That this right may possibly be violated or abused is no ground for denying respondent Senate Committees their power of inquiry. The consolation is that when this power is abused, such issue may be presented before the courts. At this juncture, what is important is that **respondent Senate Committees have sufficient Rules to guide them** when the right against self-incrimination is invoked. Sec. 19 reads:

“Sec. 19. Privilege Against Self-Incrimination”

⁸⁴ Constitutional Commission Record, October 3, 1986, p.434.

⁸⁵ 504 SCRA 704 (2006).

x x x.

The same directors and officers contend that the Senate is barred from inquiring into the same issues being litigated before the Court of Appeals and the Sandiganbayan. **Suffice it to state that the Senate Rules of Procedure Governing Inquiries in Aid of Legislation provide that** the filing or pendency of any prosecution of criminal or administrative action should not stop or abate any inquiry to carry out a legislative purpose.” (Emphasis supplied)

5. Even in the absence 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.”

5.1. In this connection, even the Civil Code states that “[L]aws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary.”⁸⁶ Thus, the Senate Rules of Procedure Governing Inquiries in Aid of Legislation remains effective and valid.

5.2. Thus, Chief Justice Puno correctly observes that –

“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.” (*Id.*)

6. It should also be stressed that the publication requirement is meant to serve notice to the public which, in this case, is

⁸⁶ Article 7, Civil Code of the Philippines.

substantially complied with and achieved, as shown by the uncontroverted fact that the Rules of the Senate and its Rules of Procedure Governing Inquiries in Aid of Legislation are both duly published in the Senate's website which is readily accessible to the public.

6.1. Here, it is beyond dispute that The Senate Rules of Procedure Governing Inquiries in Aid of Legislation have been posted in the Internet since 1996 and through the Senate website since 2001 and can be accessed at www.senate.gov.ph.

6.2. Respondents submit that publication in the Internet through the official website of the Senate is also sufficient compliance with the publication requirement of the Constitution and the law. Aside from the publication made in newspapers of general circulation, the Internet (i) could better perform the function of communicating the laws to the people, (ii) is more easily available, (iii) has a wider subscriber or readership, and (iv) can be read anytime of the day and night.⁸⁷

6.3. This Honorable Court may even take judicial notice of the fact that more people access the Internet than newspapers with the average daily circulation of even the largest print media outfit.

⁸⁷ Reasons relied upon in the issuance of Executive Order No. 200 entitled, "*Providing for the Publication of Laws Either in the Official Gazette or in a Newspaper of General Circulation in the Philippines as a Requirement for their Effectivity.*"

6.4 Moreover, the publication of the Senate Rules in the Senate website places them under the coverage of R.A. No. 8792 (Electronic Commerce Act of 2000) which provides that “electronic documents shall have the legal effect, validity or enforceability as any other document or legal writing” (Sec. 7), and are likewise admissible in evidence in any legal proceedings (Sec. 12).

7. In any event, one must not lose sight of the fact that the Senate and respondent Committees are entitled to the presumption of regularity in the performance of their official functions and great respect from the courts as a co-equal branch.

7.1. Thus, in the case of *Tañada v. Angara*,⁸⁸ this Honorable Court held that –

“x x x this Court never forgets that the Senate, whose act is under review, is one of two sovereign houses of Congress and is thus entitled to great respect in its actions. It is itself a constitutional body independent and coordinate, and thus **its actions are presumed regular and done in good faith**. Unless convincing proof and persuasive arguments are presented to overthrow such presumptions, this Court will resolve every doubt in its favor.” (bold scoring ours, for emphasis)

7.2. That courts should approach with prudence and caution in exercising its great power of judicial review when the party whose act is questioned is a co-equal branch of

⁸⁸ 272 SCRA 18 (1997).

government was reiterated in *Mantruste Systems, Inc. v.*

Court of Appeals,⁸⁹ thus –

“While the judicial power may appear to be pervasive, the truth is that under the system of separation of powers set up in the Constitution, **the power of the courts over the other branches and instrumentalities of the Government is limited only to the determination of ‘whether or not there has been a grave abuse of discretion (by them) amounting to lack or excess of jurisdiction’ in the exercise of their authority and in the performance of their assigned tasks (Sec. 1, Art. VIII, 1987 Constitution).** Courts may not substitute their judgment for that of the APT, nor block, by an injunction, the discharge of its functions and the implementation of its decisions in connection with the acquisition, sale or disposition of assets transferred to it.” (Emphasis supplied)

7.3. In *Miriam Defensor Santiago, et al. v. Teofisto T. Guingona, Jr., et al.*,⁹⁰ this Honorable Court again had the opportunity to emphasize the importance of extending courtesy and respect among co-equal branches of the government mentioned above, to wit –

“The principle of separation of powers ordains that each of the three great branches of government has exclusive cognizance of and is supreme in matters falling within its own constitutionally allocated sphere. **Constitutional respect and a becoming regard for the sovereign acts, of a co-equal branch prevents this Court from prying into the internal workings of the Senate. Where no provision of the Constitution or the laws or even the Rules of the Senate is clearly shown to have been violated, disregarded or overlooked, grave abuse of discretion cannot be imputed to Senate officials for acts done within their competence and authority.** This Court will be neither a tyrant nor a wimp; rather, it will remain steadfast and

⁸⁹ 179 SCRA 137 (1989).

⁹⁰ 298 SCRA 756 (1998).

judicious in upholding the rule and majesty of the law.”
(Emphasis supplied)

7.4. The Supreme Court stressed once more the doctrine of restraint flowing from the separation of powers of co-equal branches of government in ***Association of Small Landowners in the Phils., Inc. v. Sec. of Agrarian Reform***,⁹¹ thus –

“x x x. **The doctrine of separation of powers imposes upon the courts a proper restraint, born of the nature of their functions and of their respect for the other departments, in striking down the acts of the legislative and the executive as unconstitutional. The policy, indeed, is a blend of courtesy and caution. To doubt is to sustain. The theory is that before the act was done or the law was enacted, earnest studies were made by Congress or the President, or both, to insure that the Constitution would not be breached.**

In addition, the Constitution itself lays down stringent conditions for a declaration of unconstitutionality, requiring therefore the concurrence of a majority of the members of the Supreme Court who took part in the deliberations and voted on the issue during their session *en banc*. And as established by judge-made doctrine, the Court will assume jurisdiction over a constitutional question only if it is shown that the essential requisites of a judicial inquiry into such a question are first satisfied. Thus, there must be an actual case or controversy involving a conflict of legal rights susceptible of judicial determination, the constitutional question must have been opportunely raised by the proper party, and the resolution of the question is unavoidably necessary to the decision of the case itself.” (Emphasis supplied)

8. All told, it would be wise for the majority to heed the call of Chief Justice Puno in his Dissenting Opinion that –

⁹¹ 175 SCRA 343 (1989).

“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.” (*Id.*)

E. RESPONDENTS’ ISSUANCE OF THE CONTEMPT ORDER IS NOT ARBITRARY OR PRECIPITATE.

1. With due respect, there is no basis for the majority’s finding that the respondents’ issuance of the assailed Contempt Order was arbitrary or precipitate.

2. It is undisputed that the issuance of the Contempt Order was made only after petitioner had clearly disregarded the *subpoena* issued to him to appear on the 20 November 2007 hearing.

2.1. It bears recalling that, in all the previous hearings prior to 20 November 2007, where Petitioner did not appear, respondent Committees did not yet exercise its coercive power to compel his attendance at the said hearings. Instead, they gave petitioner much leeway until he was able to attend the hearing on 26 September 2007.

2.2. And even during the 26 September 2007 hearing, which petitioner attended, respondent Committees did not exercise their coercive powers to compel him to answer questions, which petitioner believed were covered by executive privilege, even though, at that time, there was no written

instruction from the President to invoke executive privilege in her behalf. In fact, respondent Committees even gave him an opportunity to obtain such written instruction from the President through the Executive Secretary. And when petitioner promised to do so and promised to return at the next hearing, respondent Committees allowed him to leave.

2.3. Thus, when petitioner did not return as promised and instead submitted a letter issued by Executive Secretary Ermita claiming executive privilege, respondent Committees were forced to issue a show cause order against petitioner.

2.4. And instead of claiming of physical inability to attend the Senate hearings, petitioner arrogantly claimed in his letter explanation that he was allegedly excused from attending the Senate hearings because the only questions which he thinks the Senate would be asking from him were those already falling within the claim of executive privilege being invoked by the President.

2.5. Thus, petitioner severely prejudiced the on-going legislative inquiry in aid of legislation being conducted by respondent Committees. Under these circumstances, it is not difficult to see why respondent Senate Committees have to resort to their contempt and arrest powers to compel

petitioner's attendance at the Senate hearings on the NBN-ZTE deal.

2.6. In fact, as established in the oral argument on March 4, 2008, one of the respondents, the Committee on Trade and Commerce, had filed a test case, now docketed as G. R. No. 180030 captioned "**Senator Manuel A. Roxas, et. al. v. Executive Secretary Ermita, et. al.**" in order to avoid declaring petitioner in contempt. Unfortunately, the Solicitor General delayed the resolution of the case with so many motions for extension to file Comment.

3. Under the foregoing circumstances, respondents clearly gave petitioner ample time and sufficient opportunity to show cause why he should not be cited in contempt for failure to obey the respondents' Subpoena Ad Testificandum, in observance of the requirements of due process, as held in **Associated Communications and Wireless Services, Ltd. v. Dumlao**, 392 SCRA 269 (2002), where the sending of a show cause order was deemed sufficient, because –

“(a)s long as a party was given the opportunity to defend his interests in due course, he cannot be said to have been denied due process of law, for this opportunity to be heard is the very essence of due process. x x x.” (At p. 285)

4. As for the dismissal of petitioner's letter-explanation as unsatisfactory, it suffices to state that it is *akin* to minute resolutions issued by the Honorable Court and that it is sufficient as it succinctly

explains that respondent Senate Committees do not agree with the reasons adduced by the petitioner in invoking executive privilege.

5. Moreover, as Chief Justice Puno pointed out in his Dissenting Opinion –

“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.” (At p. 114)

6. Hence, with all due respect, it is inaccurate to say that respondent Senate Committees did not first pass upon the claim of executive privilege. It bears stressing that respondent Senate Committees had wanted to do so, but petitioner had deprived them of that opportunity by refusing to appear at the 20 November 2007 hearing.

7. Thus, all told, it is respectfully submitted that there is no basis to hold that the contempt orders issued by the respondent Senate Committees were attended with grave abuse of discretion amounting to lack or excess of jurisdiction.

A FINAL WORD

While respondents recognize the possible difficulty in deciding a question of first impression, particularly when it involves what appears to be a direct clash between two contending co-equal branches of government, it is respectfully submitted that the solution is clear and it simply lies in this Honorable Court performing its sworn Constitutional duty and function to uphold the Rule of Law with utmost impartiality and circumspection, not for the benefit of either branch, but as an end unto itself.

The *ponencia* of Madam Justice Teresita de Castro, concurred in by eight other Justices of the Court, namely Justices Quisumbing, Corona, Tinga, Velasco, Nachura, Reyes, Nazario, and Brion (the newest one appointed by President Gloria Macapagal Arroyo) is a “*dangerous and chilling decision*”.⁹² The *Neri* decision did not, by any stretch of one’s imagination, contribute to the fight against graft and corruption. Rather, it directly makes the executive less transparent and weakens government accountability. In the face of a pattern of concealment by executive officials as apparent in many legislative investigations, the dangers of abuse of executive privilege by the executive branch have significantly increased. Rightly or wrongly, the perpetuation of this *Neri* ruling will cause the lingering impression that this Court, through the *ponencia* of Madam Justice Teresita de Castro, has lost its independence. And with all due respect to the

⁹² Fr. Joaquin Bernas, Dean Emeritus of the Ateneo de Manila School of Law, Philippine Daily Inquirer March 31, 2008.

incumbent Honorable Chief Justice Reynato Puno who wrote a highly enlightening, if not perfect, dissenting opinion, the question may be truly asked: will this Court be known essentially as the “*Arroyo Supreme Court?*”⁹³ Were majority of the justices swayed by the various “*propaganda for the president?*”⁹⁴ Harsh as they may sound, the perception is very serious.

Significantly, the *Neri* decision seriously strikes a debilitating blow to the very heart of the most **fundamental mechanism** designed to ensure the continued survival of a vibrant, living, and growing republican state: **CHECKS AND BALANCES** among the three great departments of our democratic government. By legitimizing the mere presentation by the executive department to the Senate of a letter invoking “executive privilege” and by ruling, in effect, that the Senate should desist making any legitimate inquiries upon receipt thereof, the *Neri* decision effectively provided the executive department with a simple, ready, and expedient tool to resist legitimate legislative inquiry. This could also make it easier for misguided government officials to commit wrongdoings with utmost concealment and impunity. If not corrected, the *Neri* decision would have “*effectively turned executive privilege into a refuge for scoundrels,*”⁹⁵ for “*when secrecy is invoked amid accusation of*

⁹³ Retired Chief Justice Artemio Y. Panganiban of the Supreme Court of the Philippines, Philippine Daily Inquirer, March 30, 2008.

⁹⁴ Retired Justice Isagani A. Cruz of the Supreme Court of the Philippines, , Philippine Daily Inquirer, March 30, 2008.

⁹⁵ Editorial, Philippine Star, April 1, 2008.

*corruption, it is nothing but a tool for a criminal cover-up.*⁹⁶ If allowed to become final, it could result in a “*democracy of kept secrets*”⁹⁷ buttressed by the *Neri* jurisprudence.

Respondents therefore most urgently request that this Honorable Court take a second circumspect look at this transcendental *Neri* case, schedule another oral argument if necessary, wherein it will imperatively require the presence of the petitioner Romulo Neri himself in the proceedings, and hold an *in camera* proceeding as this Honorable Court may deem appropriate.

In the end, that is all that respondents are praying for, and all that is required, for in the words of Chief Justice Puno, “the Judiciary has but one constituency and it is a constituency of one—the blindfolded lady with a sword unsheathed. She represents justice, fair justice to all, unfairness to none.”⁹⁸

P R A Y E R

WHEREFORE, it is respectfully prayed that this Honorable Court reconsider its Decision dated 25 May 2008 and instead render a new one dismissing the Petition for Certiorari dated 06 December 2007 and the Supplemental Petition (with URGENT application for TRO/ preliminary injunction) dated 01 February 2008 for lack of merit.

⁹⁶ *Id.*

⁹⁷ Dean Raul Pangalangan, former Dean of the University of the Philippines College of Law , Philippine Daily Inquirer, March 28, 2008.

⁹⁸ Acceptance Speech of Chief Justice Reynato Puno, during his appointment as the 22nd Chief Justice of the Philippine Supreme Court, December 8, 2006.

Copy Furnished:

ATTYS. ANTONIO R. BAUTISTA
PAUL LENTEJAS
JOSE MARI VELEZ, JR.
Counsel for the Petitioner
Bautista Law Building
30 Eugenio Lopez St., (formerly Sct. Albano St.)
Diliman, Quezon City

EXPLANATION

(Pursuant to Sec. 11, Rule 13 of the 1997 Rules of Civil Procedure)

The foregoing motion for reconsideration is being served by registered mail due to lack of manpower that would effect personal service.

Atty. David Jonathan V. Yap
Senate Legal Counsel
Office of the Senate Legal Counsel
4th Floor, Senate Bldg., GSIS Headquarters, Complex
Financial Center, 1300 Pasay City