

EN BANC

G.R.

No.

180643

- ROMULO L. NERI in his capacity as Chairman of the Commission on Education (CHED) and as former Director General of the National Economic Development Authority (NEDA), *Petitioner*, v. SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS & INVESTIGATIONS (RIBBON), SENATE COMMITTEE ON TRADE & COMMERCE, and SENATE COMMITTEE ON NATIONAL DEFENSE & SECURITY,
Respondents.

Promulgated:

March

25, 2008

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DISSENTING OPINION

CARPIO MORALES, J.:

Executive Order No. 464^[1]

(E.O. 464) practically became a dead letter upon the promulgation of *Senate v. Ermita*,^[2] and was formally interred by Memorandum Circular No. 151.^[3] Its ashes have since fertilized the legal landscape on presidential secrecy.

E.O. 464 allowed executive officials not to attend investigations conducted by Congress in aid of legislation by the mere invocation of that Order, without having to explain the specific reasons why the information being requested of them may not be disclosed.

When, however, the Court in *Senate v. Ermita*^[4] interpreted Section 1 of that Order as applying only to the “question period” and Section 2(a) as merely a non-binding expression of opinion, and invalidated Sections 2(b) and 3 for they allowed executive officials not to attend legislative investigations without need of an explicit claim of executive privilege, E.O. 464 became powerless as a shield against investigations in aid of legislation.

Thenceforth, to justify withholding information which, in their judgment, may be validly kept confidential, executive officials have to obtain from the President, or the Executive Secretary “by order of the President,” a claim of executive privilege which states the grounds on which it is based.

The present petition for certiorari involves one such claim of executive privilege, the validity of which claim the Court is now called upon to determine.

Since September 2007, respondents Senate Committees on Accountability of Public Officers and Investigations (Blue Ribbon), on Trade and Commerce, and on National Defense and Security (Senate Committees) have been holding investigatory hearings, in aid of legislation on the National Broadband Network (NBN) – Zhong Xing Telecommunications Equipment Ltd.^[5] (ZTE) Contract.

On September 26, 2007, petitioner, Romulo Neri, former Director General of the National Economic and Development Authority, testified before the Senate Committees, during which he, invoking executive privilege, refused to answer questions on what he and the President discussed on the NBN-ZTE Project after the President told him not to accept what he perceived to have been a bribe offer from former COMELEC Chairman Benja Abalos.

Asked by senators on whether he had a written order from the President to invoke executive privilege, petitioner answered that one was being prepared. The hearing ended without him divulging any further information on his conversations with the President following disclosure of the perceived bribe offer of Chairman Abalos.

Respondent Senate Committees then issued a subpoena *ad testificandum* dated November 13, 2007 for petitioner to appear in another hearing to be held on November 20, 2007 (November 20 hearing). In a November 15, 2007 letter, however, Executive Secretary Eduardo Ermita (Sec. Ermita), by order of the President, formally invoked executive privilege with respect to the following questions (the three questions) addressed to petitioner:

- 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? [\[6\]](#)

Sec. Ermita then asked that petitioner's testimony be dispensed with, given that he answered all questions propounded to him except the three questions which, so he claimed, involved executive privilege.

Petitioner having failed to appear on the November 20, 2007 hearing, the Senate Blue Ribbon Committee issued a Show Cause Order of November 22, 2007 for him to explain why he should not be cited for contempt. Petitioner personally replied via November 29, 2007 letter to the Senate Committees.

On December 7, 2007, petitioner filed the present petition for certiorari to nullify the Show Cause Order, praying for injunctive reliefs to restrain the Senate Committees from citing him in contempt. The Senate Committees thereafter issued an Order dated January 30, 2008

citing petitioner in contempt and ordering his arrest for his failure to appear, not only November 20 hearing, but also in three earlier Senate hearings to which he was also invited.^[7]

On February 1, 2008, petitioner filed a Supplemental Petition for Certiorari to nullify the Senate's January 30, 2008 Order and prayed for urgent injunctive reliefs to restrain his impending arrest.

This Court issued a *status quo ante* order on February 5, 2008.

In his petition, petitioner alleges that his discussions with the President were “candid discussions meant to explore options in making policy decisions,” citing *Almonte v. Vasquez*,^[8] and “dwelt on the impact of the bribery scandal involving high [g]overnment officials country's diplomatic relations and economic and military affairs, and the possible loss of confidence of foreign investors and lenders in the Philippines.”^[9]

In sum, petitioner avers that the timely invocation of executive privilege upon the authority of the President was well within the parameters laid down in *Senate v. Ermita*.^[10]

In determining whether the claim of privilege subject of the present petition for certiorari is valid, the Court should not lose sight of the fact that the same is only part of the broader issue of whether respondent Senate Committees committed grave abuse of discretion in citing petitioner in contempt and ordering his arrest.

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

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. [\[11\]](#)

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 “unprecedented,” [\[12\]](#) 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 Governor Rolex Suplico, Jose de Venecia III, Jarius Bondoc, and R.P. Sales. [\[13\]](#) 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 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 professional opinion on the projected economic benefits of the NBN project to the role of 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.

Petitioner, however, claims that the power of respondent Committees to punish witnesses is limited to “direct contempt” for acts committed while present before them.

committees, and not for “indirect contempt,” citing Section 18 of their Rules of Procedure Governing Inquiries in Aid of Legislation which seemingly limits the contempt power of the Senate to witnesses who are “before it.”^[14] It bears noting that petitioner raised this claim only in its January 30, 2007 letter to the Senate but not in its main and supplemental petitions before the Court. In fact, petitioner concedes to this incidental power to punish for contempt.^[15]

At all events, the *sui generis* nature of the legislature’s contempt power precludes such point of comparison with the judiciary’s contempt power. The former is broad enough, nay, “full and complete” to deal with any affront committed against or any defiance of legislative authority or dignity, in the exercise of its power to obtain information on which to base intended legislation.

In another vein, petitioner claims that the Rules of Procedure Governing Inquiries in Aid of Legislation has not been published. Suffice it to state that the same argument was raised by the PCGG Commissioners who were petitioners in *Sabio v. Gordon*,^[16] and the Court considered the same as inconsequential in light of the more significant issue called for resolution therein, namely, whether Section 4(b) of E.O. No. 1 was repealed by the Constitution. The argument deserves the same scant consideration in the present case.

While it is clear that petitioner may validly be cited in contempt without any grave abuse of discretion on respondents’ part – and this petition consequently dismissed on that ground – the Court cannot evade the question of whether the claim of privilege subject of this case is valid.

The issue in this case does not have to do simply with the absence or presence of petitioner in respondents’ hearings, but with the scope of the questions that may be validly asked of him.

The President does not want petitioner to answer the three questions on the ground of executive privilege. Respecting the specific basis for the privilege, Sec. Ermita states that

the same questions “fall under conversations and correspondence between the President ; public officials which are considered executive privilege.”

Sec. Ermita goes on to state that “the context in which the privilege is being invoked that the information sought to be disclosed might impair our diplomatic as well as eco relations with the People’s Republic of China.” Evidently, this statement was occasioned by the ruling in *Senate v. Ermita* that a claim of privilege may be valid or not depending on the ground invoked to justify it and the context in which it is made.

What was meant by “context” in *Senate v. Ermita* has more to do with the degree of need shown by the person or agency asking for information, than with additional reasons which the Executive may proffer for keeping the same information confidential Sec. Ermita apparently understood “context” in the latter sense and proceeded to p circumstances that reinforced the claim of privilege.

Sec. Ermita’s statement that disclosure of the information being asked by res Committees might impair our diplomatic and economic relations with China, albeit proffered as the context of his claim of the presidential communications privilege, is actually a c privilege by itself, it being an invocation of the diplomatic secrets privilege.

The two claims must be assessed separately, they being grounded on different pu interest considerations.

Underlying the presidential communications privilege is the public interest in enhancing quality of presidential decision-making. As the Court held in the same case of *Senate v. Ermita*,

“A President and those who assist him must be free to explore alternatives in the proces shaping policies and making decisions and to do so in a way many would be unwilling express except privately.”

The diplomatic secrets privilege, on the other hand, has a different objective – to pres diplomatic relations with other countries.

Petitioner even asserts in his petition that his conversations with the President als involve military matters.

This allegation, however, is too remote from the reasons actually stated by Sec. Ermita in letter to be even considered as a basis for the claim of privilege. Evidently, it is an afterthought, either of petitioner or his counsel, which need not be seriously entertained.

Thus, two kinds of privilege are being claimed as basis to withhold the same information – the presidential communications privilege and the diplomatic secrets privilege. To sustain these claims of privilege, it must be evident from the implications of the questions, in the setting in which they are asked, that a responsive answer to these questions or explanation of why they cannot be answered might be dangerous because injurious disclosure could ^[17] result.

Whether the questions asked by respondent may lead to an injurious disclosure cannot, however, be determined without first having an accurate understanding of the questions themselves.

For this purpose, these questions must be read in the context of the exchanges in the September 26 hearing, as recorded in the official transcript thereof.

Before petitioner invoked executive privilege in that hearing, he testified that Chairman Abalos offered him a bribe in relation to the NBN project while they were playing golf sometime in January or February of 2007. ^[18] Petitioner stated thus:

MR. NERI But we had a nice golf game. The Chairman was very charming, you know, and – but **there was something that he said that surprised me and he said that, “Sec, may 200 ka dito.”** I believe we were in a golf cart. He was driving, I was seated beside him so medyo nabigla ako but since he was our host, I chose to ignore it.

THE SENATE PRESIDENT Ano’ng sinabi mo noong sabihin niyang 200?

MR. NERI

As I said, and I guess I was too shocked to say anything, but I informed my NEDA staff that perhaps they should be careful in assessing this project viability and maybe be careful with the costings because I told them what happened, I mean, what was said to me. (Emphasis supplied)

Upon further questioning, petitioner shortly thereafter testified that he reported to President what he perceived as Chairman Abalos’ bribe offer, to wit:

SEN. LACSON. You were shocked, you said.

MR. NERI. Yeah, I guess, I guess.

SEN. LACSON. Bakit kayo na-shock?

MR. NERI. Well, I [am] not used to being offered.

SEN. LACSON. Bribed?

MR. NERI. Yeah. Second is, medyo malaki.

SEN. LACSON.

In other words, at that point it was clear to you that you were being offered bribe money in the amount of 200 million, kasi malaki, sabi niyo?

MR. NERI.

I said no amount was put, but I guess given the magnitude of the project, siguro naman hindi P200 or P200,00, (sic) so...

SEN. LACSON. Dahil cabinet official kayo, eh.

MR. NERI. I guess. But I – you know...

SEN. LACSON. Did you report this attempted bribe offer to the President?

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

SEN. LACSON. What did she tell you?

MR. NERI. She told me, “Don’t accept it.”

SEN. LACSON. And then, that’s it?

MR. NERI. Yeah, because we had other things to discuss during that time.

SEN. LACSON. And then after the President told you, “Do not accept it,” what did she do? How did you report it to the President? In the same context that it was offered to you?

MR. NERI. I remember it was over the phone, Your Honor.

SEN. LACSON. Hindi nga. Papaano ninyo ni-report, “Inoperan (offer) ako ng bribe na P200 million ni Chairman Abalos” or what? How did you report it to her?

MR. NERI. Well, as I said, “Chairman Abalos offered me 200 million for this.”

SEN. LACSON. Okay. That clear?

x x x x

MR. NERI. I think so, Your Honor.

SEN. LACSON. And after she told, “Do not accept it,” what did she do?

MR. NERI.

I don’t know anymore, Your Honor, but I understand PAGC investigated it or – I was not privy to any action of PAGC.

SEN. LACSON. You are not privy to any recommendations submitted by PAGC?

MR. NERI. No, Your Honor.

SEN. LACSON.

How did she react, was she shocked also like you or was it just casually responded to as, “Don’t accept it.”

MR. NERI. It was over the phone, Your Honor, so I cannot see her facial expression.

SEN. LACSON.

Did it have something to do with your change of heart, so to speak – your attitude towards the NBN project as proposed by ZTE?

MR. NERI. Can you clarify, Your Honor, I don’t understand the change of heart?

SEN. LACSON.

Because, on March 26 and even on November 21, as early as November 21, 2006, during the NEDA Board Cabinet Meeting, you were in agreement with the President that it should be pay as you use and not take or pay. There should be no government subsidy and it should be BOT or BOO or any similar scheme and you were in agreement, you were not arguing. The President was not arguing with you, you were not arguing with the President, so you were in agreement and all of a sudden nauwi tayo doon sa lahat ng – ang proposal all in violation of the President’s guidelines and in violation of what you thought of the project.

MR. NERI.

Well, we defer to the implementing agency’s choice as to how to implement the project.

SEN. LACSON. Ah, so you defer to the DOTC.

MR. NERI.

Basically, Your Honor, because they are the ones who can now contract out the project and in the process of contracting, they can also decide how to finance it.

SEN. LACSON. In other words, NEDA performed a ministerial job?

MR. NERI. No, Your Honor. Basically NEDA’s job is to determine the viability. And as I said, after determining the viability, NEDA tells agency, “Go ahead and . . .”

SEN. LACSON.

But it did not occur to you that you were violating the specific guidelines of the President on the scheme?

MR. NERI. I am not privy to the changes anymore, Mr. Chair, Your [\[19\]](#) Honors.

When he was asked whether he and the President had further discussions on the N project after he reported to her the alleged bribe offer, petitioner began invoking executive privilege, thus:

SEN. PANGILINAN. You mentioned that you mentioned this to the President. **Did the President after that discussion over the phone, was this ever raised again, the issue of the 200 ka rito?**

MR. NERI. We did not discuss it again, Your Honor.

SEN. PANGILINAN. With the President? But the issue of course, the NBN deal, was raised again? After that, between you and the President. Pinalow up (followed up) ba niya?

MR. NERI. May I claim executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature.

x x x x

SEN. PANGILINAN. Well, you can assert it. But whether we will accept it or not is up to us, and then we can probably discuss it... However, I will tackle that at a later time. [\[20\]](#)
(Emphasis and underscoring supplied)

Although petitioner answered many other questions subsequent to his invocation of executive privilege, he kept on invoking the privilege whenever, in his judgment, the questions touched on his further conversations with the President on the NBN project. Hereunder is the exchange of Senator Legarda and petitioner, quoted extensively so as to provide the context of petitioner's invocation of executive privilege in this particular instance:

SEN. LEGARDA.
And when you expressed that support to AHI, does this mean the exclusion of all other proponents on the broadband project?

MR. NERI. Not at all, Your Honor. In effect, I'm telling him [Jose De Venecia III], "I think it's a great idea, please proceed." But as I said, Your Honor, we never process private sector . . .

SEN. LEGARDA. Suppliers contracts.

MR. NERI. Yeah, we do not.

SEN. LEGARDA. Okay, very clear.

Also in the letter of Chairman Ramon Sales, who is present here today, of the Commission of Information and Communications Technology [CICT] dated December 8, 2006 addressed to NEDA, he categorically stated and I quote: "That he cannot opine on the capability of the proponent" – referring to AHI which you had encouraged or supported earlier, two months earlier, to undertake the project referring to the broadband network financially and technically as AHI has not identified strategic partners. Do you confirm receipt of this letter?

MR. NERI. I believe so, Your Honor. I remember that letter.

x x x x

SEN.

LEGARDA.

In what way did this opinion of the CICT affect your endorsement or encouragement of AHI?

MR. NERI. I'm not sure. I think I encouraged him first before the CICT letter.

SEN. LEGARDA. Yes, that is a chronology.

MR. NERI. Yeah. So by that time, we left it already to the line agencies to decide. **So it is not for us anymore to say which supplier is better than one over the other.**

SEN.

LEGARDA.

Did you ever endorse any proponent of the broadband network, Secretary Neri?

MR. NERI. No, Your Honor. When I say "endorse", not formally choosing one over another. We do not do that.

SEN. LEGARDA. Do you believe in the Broadband Network Project of the Philippines, of the Philippine government regardless of supplier?

MR. NERI. The broadband is very important, Your Honor. Because as I said earlier, if you look at the statistics in our broadband cost, Philippines is \$20 per megabits per second as against...

SEN. LEGARDA. Yes, you have stated that earlier.

x x x x

SEN.

LEGARDA.

But no proponent for the local broadband networks had submitted any possible bid or any proposal to the NEDA?

MR. NERI. None that we know of, Your Honor.

SEN. LEGARDA. None that you know of. **Now, earlier you were in favor of a**

BOT but eventually changed your mind when the NEDA endorsed the ZTE project.
May we know, since NEDA is a collegial body, whether there was any voting into this project and whether you were outvoted?

MR. NERI.
Because we always defer to the line agencies as to the manner of implementation of the project.

SEN. LEGARDA.
Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI as you've previously done . . .

MR. NERI. As I said, Your Honor . . .

SEN. LEGARDA. . . . but to prefer or prioritize the ZTE?

MR. NERI. **Yeah.**
As the question may involve – as I said a conversation/correspondence between the President and a public official, Your Honor.

SEN. LEGARDA. I'm sorry. Can you say that again?

MR. NERI. As I said, I would like to invoke Sec. 2(a) of EO 464.

SEN. LEGARDA.
 I was not even referring to a conversation between you and the President. Are you saying then that the prioritization of ZTE was involved during your conversation with the President?

MR. NERI. As I said, I cannot comment on that, Your Honor.

SEN. LEGARDA.
Yes, but I was not referring to any conversation between you and the President but you brought it up now upon my questioning on whether there was any government official who had instructed you to favor the ZTE. We put two and two together and it is therefore assumed that the answer to the question is conveyed in your conversation with the President to which you are invoking that executive privilege.

MR. NERI.
There is no higher public official than me than the President, Mr. Chair, Your Honor.

SEN. LEGARDA. There's no higher official than you? It has to be the vice president . . .

MR. NERI.
In other words, when we talk about higher officials, I guess we are referring to the President, Your Honor.

SEN. LEGARDA.
So, you're invoking executive privilege and therefore, that answer to that question is left hanging, whether there was any official who gave instructions to prioritize the ZTE over

other proponents of the NBN project. And you're saying now that there was no voting among the NEDA and in fact . . .

MR. NERI. Mr. Chair, Your Honor, we don't vote. We don't vote on the manner of implementation. We vote on whether the project is deemed viable or not.

SEN. LEGARDA.
Yes, but were you overruled over your preference for a BOT project?

MR. NERI.
As I said Your Honor, this is a consensus of the NEDA Board, NEDA ICC. **Our consensus was that the project is viable. We leave it to the line agency to implement.** My own personal preference here will not matter anymore because it's a line agency . . .

SEN. LEGARDA.
But did you actually discuss this with the President and told her not to approve this project or not to proceed with this project? Did you discourage the President from pursuing this project?

MR. NERI. As I said, Mr. Chair, this covers conversations with the President. ^[21] (Emphasis and underscoring supplied)

Again, petitioner invoked executive privilege when Senator Pia Cayetano asked him what else the President told him besides instructing him not to accept the alleged bribe offer.

MR. NERI. She said "Don't accept it," Your Honor.

SEN. CAYETANO, (P). And was there something attached to that like . . . "But pursued with a project (sic) or go ahead and approve," something like that?

MR. NERI.
As I said, I claim the right of executive privilege on further discussions on the . . .

SEN. CAYETANO, (P).
Ah, so that's the part where you invoke your executive privilege, is that the same thing or is this new, this invocation of executive privilege?

My question is, after you had mentioned the 200 million and she said "Don't accept," was there any other statement from her as to what to do with the project?

MR. NERI. As I said, it was part of a longer conversation, Your Honor, so . . .

SEN. CAYETANO, (P). A longer conversation in that same – part of that conversation on an ongoing day-to-day, week-to-week conversation?

MR. NERI. She calls me regularly, Your Honor, to discuss various matters.

SEN. CAYETANO. But in connection with, "Ma'am na-offer-an ako ng 200." –

Ah, don't accept, next topic," ganoon ba 'yon? Or was there like, "Alam mo, magandang project sana 'yan, eh pero bakit naman ganyan."

MR.

NERI.

As I said, Your Honor, beyond that I would not want to go any further, Your Honor. ^[22]

(Emphasis and underscoring supplied)

Petitioner thereafter answered other questions on which he did not invoke executive privilege.

However, when asked about whether he advised the President not to proceed with the NBN project in light of the alleged bribe offer, petitioner again invoked the privilege.

SEN. LACSON. x x x

Would not an offer of 200 which you later on interpreted as a 200 million-peso bribe offer from Chairman Abalos in relation to the NBN project not posit the view that it was an outright overpriced contract?

MR. NERI. We cannot determine our pricing, Your Honor. The NEDA staff tried very, very hard . . .

SEN.

LACSON.

Even with an offer of 200 million, you would not think it was overpriced?

MR. NERI. That's right, Your Honor. It's possible that they take it out of their pockets. And I had a NEDA staff checked the internet for possible overpricing. The national interest issue in this case, Your Honor, is determined by the economic rate of return. And the economic rate of return was determined at 29.6%. It is very high. Meaning that the project has its benefits despite any potential overpricing, Your Honor.

SEN.

LACSON.

Did you not at least warn the President that it could be a potential stinking deal considering that it was attended by bribe offer?

MR. NERI. For that, Your Honor, I'd like to . . .

VOICE. Executive privilege.

SEN. LACSON. Executive privilege.

MR. NERI. That's right, Your Honor. ^[23] (Emphasis and underscoring supplied)

A similar concern, it bears noting, was expressed by Senator Roxas, as Chairm

respondent Committee on Trade and Commerce, when he asked the following question of the petitioner:

THE CHAIRMAN (SEN. ROXAS). Oh, sige, okay. Ngayon, I don't want to repeat anymore the debate as to the executive privilege that is still pending so I will set that aside. But my question is, since that time, since February of 2007, through the NEDA meetings, at least there were two in 2007, March 26 and March 29, when this was approved, did this subject of the bribe ever come up again? Hindi ka ba nagtaka na ni-report mo ito okay Pangulo, sinabihan ka na huwag mong tanggapin, tama naman iyong utos na iyon, huwag mong tanggapin, at matapos noon, wala nang na-take up and noong lumitaw muli itong NBN-ZTE, hindi ka ba nagkamot ng ulo, "What happened, bakit buhay pa rin ito, bakit hindi pa rin naimbestigahan ito o ano bang nangyari rito," since you reported this first hand experience of yours to the President.

From the foregoing excerpts of the September 26 hearing, it may be gleaned that the three questions fairly represent the questions actually posed by the senators respecting the petitioner invoked executive privilege.

Moreover, the same excerpts adequately provide the necessary backdrop for understanding the thrust of the three questions. While only the third question – Whether the President said to go ahead and approve the project after being told about the alleged bribe mentions the perceived bribe offer, it is clear from the context that the first question of whether the President followed up the NBN project was also asked in relation to the same alleged bribe. What Senator Pangilinan wanted to know was whether petitioner and the President had further discussions on the NBN project after petitioner informed her about the alleged bribe.

The second question – Were you dictated to prioritize the ZTE? – which was asked by Senator Legarda, was evidently aimed towards uncovering the reason why, in spite of the Executive's initial plan to implement the NBN project on a Build Operate and Transfer (BOT) basis, it ended up being financed via a foreign loan, with the ZTE as the chosen supplier. This was also the concern of Senator Lacson when he asked petitioner whether the bribe offer had anything to do with the change in the scheme of implementation from BOT to a foreign loan taken by the Philippine government.

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.

Having a clearer understanding of what information was being sought by respondent Committees, the assessment of the invocation of executive privilege is in order.

As earlier discussed, there are actually two kinds of privilege being claimed herein – the presidential communications and diplomatic secrets privilege.

The general criteria for evaluating claims of privilege have been laid down in *Senate v. Ermita*, to wit: “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.”

To assert that certain information falls under a recognized privilege is to allege that disclosure thereof may be harmful to the public interest. It would be impossible for the courts, however, to determine whether a potential harm indeed exists were the Executive allowed to claim the privilege without further explanation. Hence, the ruling in the same case of *Senate v. Ermita* that claims of privilege should state specific reasons for preserving confidentiality.

When the privilege being invoked against a subpoena *ad testificandum* is that for presidential communications, such specificity requirement is not difficult to meet, for it need only be evident from the questions being asked that the information being demanded pertains to conversations between the President and her adviser. In petitioner’s case, the three questions posed by respondent Committees clearly require disclosure of his conversations with the President in his capacity as adviser. This is obvious from Senator Pangilinan’s question as to whether the President followed up on the issue of the NBN project – meaning, whether there were further discussions on the subject between the President and petitioner. Likewise, both Senator Legarda’s query on whether petitioner discouraged the President from

pursuing the project, and Senator Pia Cayetano's question on whether the President dictated petitioner to approve the project even after being told of the alleged bribe, manifestly pertain to his conversations with the President.

While Senator Legarda's question – "Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority?" – does not necessarily require disclosure of petitioner's conversations with the President, petitioner has interpreted the same to mean "Has the President dictated you to prioritize the ZTE project?" The invocation of privilege is thus limited to this more specific question. Limited in this manner, requiring the Executive to explain more precisely how this question would involve petitioner's conversation with the President might compel him to disclose the very thing which the privilege was meant to protect. The reasons already provided must thus be considered sufficiently precise.

Compared to claims of the presidential communications privilege, it is more difficult to meet the specificity requirement in claims of the diplomatic secrets privilege, for the Executive must be able to establish a connection between the disclosure of the information being sought with the possible impairment of our diplomatic relations with other nations.

The claim of privilege for diplomatic secrets subject of this case fails to establish connection.

It has not been shown how petitioner's response to any of the three questions may be potentially injurious to our diplomatic relations with China. Even assuming that the three questions were answered in the negative – meaning that the President did not follow up on the NBN project, did not dictate upon petitioner to prioritize the ZTE, and did not instruct him to approve the NBN project – it is not clear how our diplomatic relations with China can be impaired by the disclosure thereof, especially given that the supply contract with ZTE was, in fact, eventually approved by the President. If, on the other hand, the answers to the three questions are in the affirmative, it would be even more difficult to see how our relations with China can be impaired by their disclosure.

The second criterion laid down in *Senate v. Ermita*, namely, whether the privilege should be honored in the given procedural setting, need only be applied, in petitioner's case,

to the claim of privilege based on presidential communications, the claim of privilege based on diplomatic secrets having been already ruled out in the immediately foregoing discussion.

A claim of privilege, even a legitimate one, may be overcome when the entity asking for information is able to show that the *public interest* in the disclosure thereof is **greater** than that in upholding the privilege.

The weighing of interests that courts must undertake in such cases was discussed by the Court in *Senate v. Ermita*, to wit:

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.**

The leading case on executive privilege in the United States is *U.S. v. Nixon*, decided in 1974.

In issue in that case was the validity of President Nixon's claim of executive privilege against a subpoena issued by a district court requiring the production of certain tapes and documents relating to the Watergate investigations. The claim of privilege was based on the President's general interest in the confidentiality of his conversations and correspondences. **The U.S. Court held that while there is no explicit reference to a privilege of confidentiality in the U.S. Constitution, it is constitutionally based to the extent that it relates to the effective discharge of a President's powers. The Court, nonetheless, rejected the President's claim of privilege, ruling that the privilege must be balanced against the public interest in the fair administration of criminal justice.** Notably, the Court was careful to clarify that it was not there addressing the issue of claims of privilege in a civil litigation or against congressional demands for information.

Cases in the U.S. which involve claims of executive privilege *against Congress* are rare.

Despite frequent assertion of the privilege to deny information to Congress, beginning with President Washington's refusal to turn over treaty negotiations records to the House of Representatives, **the U.S. Supreme Court has never adjudicated the issue.** However, **the U.S. Court of Appeals for the District of Columbia Circuit, in a case [*Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725; May 23, 1974.] decided in the same year as *Nixon*, recognized the President's privilege over his conversations against a congressional subpoena. Anticipating the balancing approach adopted by the U.S. Supreme Court in *Nixon*, the Court of Appeals weighed the public interest protected by the claim of privilege against the interest that would be served by disclosure to the Committee.**

Ruling that the balance favored the President, the Court declined to enforce the subpoena. ^[24]

(Emphasis and underscoring supplied)

In determining whether, in a given case, the public interest in favor of disclosure outweighs the public interest in confidentiality, courts often examine the showing of need proffered by the party seeking information. A discussion of what this showing of need entails is thus in order.

The case of *Nixon v. Sirica*, ^[25] decided by the United States Court of Appeals for the District of Columbia, involved a claim of the presidential communications privilege by President Nixon against a subpoena *duces tecum* issued by the grand jury – an agency roughly analogous to the Ombudsman in this jurisdiction. The grand jury subpoena called on the President to produce tape recordings of certain identified meetings and telephone conversations that had taken place between him and his advisers. The Court held thus:

The President's privilege cannot, therefore, be deemed absolute. **We think the Burr case makes clear that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.** We direct our attention, however, solely to the circumstances here.

With the possible exception of material on one tape, the President does not assert that the subpoenaed items involve military or state secrets; nor is the asserted privilege directed to the particular kinds of information that the tapes contain. Instead, the President asserts that the tapes should be deemed privileged because of the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties.

This privilege, intended to protect the effectiveness of the executive decision-making process, is analogous to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and similar to that contained in the fifth exemption to the Freedom of Information Act.

x x x x

We recognize this great public interest, and agree with the District Court that such conversations are presumptively privileged. But **we think that this presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case.** The function of the grand jury, mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. **As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function – evidence for which no effective substitute is available.**

The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way

to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority. x x x (Emphasis and underscoring supplied)

While *Sirica* involved a conflict between the Executive and the grand jury, not between the Executive and Congress, the same court later applied the same balancing approach, even explicitly citing the *Sirica* decision, in a controversy involving the President and a Senate committee over executive privilege.

In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,^[26] the case that was referred to in the *Senate v. Ermita* ruling quoted earlier, the party seeking information was a Select Committee of the U.S. Senate which was formed "to determine . . . the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." Similar to what transpired in *Sirica*, the Select Committee issued a subpoena *duces tecum* addressed to President Nixon for the production of tape recordings of his conversations with one of his aides, in which they discussed alleged criminal acts occurring in connection with the presidential election of 1972. The Court of Appeals for the District of Columbia ruled thus:

The staged decisional structure established in *Nixon v. Sirica* was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. So long as **the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government -- a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations** -- we believed in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired. Contrary, therefore, to the apparent understanding of the District Court, **we think that *Nixon v. Sirica* requires a showing of the order made by the grand jury before a generalized claim of confidentiality can be said to fail**, and before the President's obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the Court, **together with particularized claims that the Court will weigh against whatever public interests disclosure might serve.** The presumption against any judicially compelled intrusion into presidential confidentiality,

and the showing requisite to its defeat, hold with at least equal force here.

Particularly in light of events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision, we find that the Select Committee has failed to make the requisite showing. x x x (Emphasis and underscoring supplied)

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

Parenthetically, the presumption in favor of confidentiality only takes effect after the Executive has first established that the information being sought is covered by a recognized privilege.

The burden is initially with the Executive to provide precise and certain reasons for upholding his claim of privilege, in keeping with the more general presumption in favor of transparency.

Once it is able to show that the information being sought is covered by a recognized privilege, the burden shifts to the party seeking information, who may still overcome the privilege by a strong showing of need.

Turning now to the present controversy, respondent Committees must be held to have made a strong showing of need, one that certainly suffices to overcome the claim of privilege in this case.

Respondents assert that there is an urgent need for remedial legislation to regulate the procurement and negotiation of official development assisted (ODA) projects because these have become a rich source of "commissions" secretly pocketed by high executive officials. They claim that the information which they are trying to elicit from petitioner relative to the ODA project is essential and crucial to the enactment of proposed amendments to the Government Procurement Reform Act (R.A. No. 9184) and the Official Development Assistance Act (R.A. No. 8182), so that Congress will know how to plug the loopholes in these statutes and to prevent a drain on the public treasury.

That the crafting of such remedial legislation is at least one of the objectives of res Committees, if not its primary one, is borne out by the existence of the following pending bills in the Senate, to wit: (1) Senate Bill (S.B.) No. 1793, AN ACT SUBJECTING TREATIES, INTERNATIONAL OR EXECUTIVE AGREEMENTS INVOLVING FUNDING IN THE PROCUREMENT OF INFRASTRUCTURE PROJECTS, GOODS, AND CONSULTING SERVICES TO BE INCLUDED IN THE SCOPE AND APPLICATION OF PHILIPPINE PROCUREMENT LAWS, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 9184, OTHERWISE KNOWN AS THE GOVERNMENT PROCUREMENT REFORM ACT, AND FOR OTHER PURPOSES, AND (2) S.B. NO. 1794, AN ACT IMPOSING SAFEGUARDS IN CONTRACTING LOANS AS OFFICIAL DEVELOPMENT ASSISTANCE, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 8182, AMENDED BY REPUBLIC ACT NO. 8555, OTHERWISE KNOWN AS THE DEVELOPMENT ASSISTANCE ACT OF 1996, AND FOR OTHER PURPOSES.

Also worthy of note is the following statement of Senator Roxas during the September hearing that the reform of the procurement process was the chief objective of the investigations, thus:

THE CHAIRMAN (SEN. ROXAS). No, no, I'm not talking about – I'm not taking sides here whether it's AHI or ZTE or what. I'm looking at the approval process by government because that approval process which is the most important element of these entire hearings because it is that same approval process that billions and billions of government money are going through, 'no. So, we want to tighten that up. We want to make sure that what we discussed here in this very hall which is to raise VAT to 12 percent and to cover with VAT electricity and petrol is not just put to waste by approval process that is very loose and that basically has no checks and balances. (Underscoring supplied)

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**

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 intended 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 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 ground of executive privilege.

[27]

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 limited one. In that light, it is hard to see how the impairment of the public interest in candid opinion 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 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 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. [\[28\]](#)

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 was responsible therefor, it should be sufficient for Congress to show – for overcoming the privilege – that its inquiry is in aid of legislation.

In light of all the foregoing, I vote to **DISMISS** the petition.

CONCHITA CARPIO MORALES
Associate Justice

[\[1\]](#)

ENSURING OBSERVANCE OF THE PRINCIPLE OF SEPARATION OF POWERS, ADHERENCE TO THE RULE ON EXECUTIVE PRIVILEGE AND RESPECT FOR THE RIGHTS OF PUBLIC OFFICIALS APPEARING IN LEGISLATIVE INQUIRIES IN AID OF LEGISLATION UNDER THE CONSTITUTION, AND FOR OTHER PURPOSES.

[\[2\]](#)

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

[3] Issued on March 6, 2008.

[4] *Supra* note 2.

[5] ZTE is a corporation owned by the Government of the People's Republic of China.

[6] Sec. Ermita's November 15, 2007 letter.

[7] Hearings on September 18 and 20, and October 25, 2007.

[8] 244 SCRA 286 (1995).

[9] Petition for Certiorari, p. 8.

[10] *Supra* note 2.

[11] In his November 29, 2007 letter to Senator Alan Peter Cayetano, petitioner stated: "In good faith, after that exhaustive testimony, I thought that remained were only the three questions, where the Executive [S]ecretary claimed executive privilege."

[12] Letter of November 15, 2007.

[13] Senate TSN of September 27, 2007 hearing.

[14] Section 18.

The Committee, by a vote of a majority of all its members, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members, or testifying, testifies falsely or evasively. A contempt of the Committee shall be deemed a contempt of the Senate.

Such witnesses may be ordered by the Committee to be detained in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself of that contempt.

[15] TSN of the March 4, 2008 Oral Arguments at the Supreme Court, p. 13.

[16] G.R. No. 174340, October 17, 2006, 504 SCRA 704.

[17] *Senate v. Ermita*, *supra* note 2 at 67.

[18] TSN, September 26 hearing, p. 42.

[19] TSN of September 26, 2007 Senate Hearing, pp. 43-46.

[20] *Id.* at 91-92.

[21] *Id.* at 110-117.

[22] *Id.* at 276-277.

[23] *Id.* at 414-415.

[24] *Supra* note 2 at 47-49.

[25] 487 F.2d 725; October 12, 1973.

[26] 498 F.2d 725; May 23, 1974.

[27] *Supra* note 16.

[28] Norman Dorsen & John H.F. Shattuck, EXECUTIVE PRIVILEGE, THE CONGRESS AND THE COURTS 35 OHIO ST. L.J. 1, 32 (1974).