

G.R. No. 180643 (Romulo L. Neri, in his capacity as Chairman of the Commission Higher Education and as former Director General of the National Economic Development Authority v. Senate Committee on Accountability of Public Of Investigations, et al.)

Promulgated:

March 25, 2008

X ----- X

SEPARATE CONCURRING OPINION

NACHURA, J.:

I concur in the comprehensive and well-reasoned *ponencia* of Justice Leonardo-De Castro.

However, I wish to add a few thoughts on the matter of executive privilege, specifically on the area of the presumptive privilege of confidentiality enjoyed by the President re Presidential conversations and correspondences necessary for shaping policies decision-making.

I

U.S. v. Nixon,^[1] the leading case on executive privilege in the United States, acknowledges a constitutionally-recognized “presumptive privilege” on the confiden presidential communications.

The rationale for such privilege is expressed in the following disquisition:

The expectation of a President to the confidentiality of his conversations and correspondences, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens, and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. [\[2\]](#)

However, it is simply a generalized privilege of confidentiality and does not enjoy the same degree of unqualified acceptance as the governmental privilege against public disclosure of state secrets regarding military, diplomatic and other national security matters. Further, it must be formally claimed or asserted by the appropriate executive official. As held in *U.S. v. Reynolds*: [\[3\]](#)

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 the 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.

In the Philippines, we ruled in *Senate v. Ermita*, [\[4\]](#) that it is only the President, or the Executive Secretary “by order of the President,” who may invoke executive privilege.

Because the foundation of the privilege is the protection of the public interest, any demand for disclosure of information or materials over which the privilege has been invoked must likewise, be anchored on the public interest. Accordingly, judicial recognition of the validity of the claimed privilege depends upon “a weighing of the public interest protected by privilege against the public interest that would be served by disclosure in a particular

case.”^[5]

While a “demonstrated specific need” for material may prevail over a generalized asset privilege, whoever seeks the disclosure must make “a showing of necessity sufficient outweigh the adverse effects the production would engender.”^[6]

It is in light of these principles that, in the case at bench, we are called upon to strike a balance between two clashing public interests: the one espoused by the Executive Department, and the other asserted by the respondents Senate Committees.

More specifically, the controversy on this particular issue has boiled down to whether presumptive (executive) privilege may be validly invoked – and whether the invocation procedurally proper – over the following questions which the petitioner refused to answer when he appeared at the hearing conducted by the respondents:

1. Whether the President followed-up the NBN project?
2. Were you dictated (by the President) to prioritize the ZTE (proposal)?
3. Whether the President said to go ahead and approve the project after being told about the alleged bribe (offer)?^[7]

Executive Secretary Ermita articulated the position taken by the executive department in the following wise:

Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision-making process. The expectation of a President to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for the protection of the public interest in candid, objective, and even blunt harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People’s Republic of China.

Given the confidential nature in which these information were conveyed to the President, [the petitioner] cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.^[8]

On the other hand, the respondents contended that in the exercise of their power to conduct inquiries in aid of legislation under Section 21, Article VI of the Constitution, they are entitled to the disclosure of the information sought from the petitioner. In opposition to the claim of executive privilege, they also raised the general constitutional principles of full public disclosure of all transactions involving public interest,^[9] the right of the people to information on matters of public concern,^[10] public office is a public trust,^[11] the President's duty to faithfully execute the laws,^[12] and the due process clause.^[13] Finally, they cited the postulate that executive privilege cannot be resorted to in order to shield criminal activity or wrongdoing.

A survey of relevant jurisprudence is useful. *Almonte v. Vasquez*,^[14] *Chavez v. PCGG*,^[15] and *Chavez v. Public Estates Authority*^[16] acknowledged the right of government to withhold certain types of information from the public. In the *Chavez* cases, there was already recognition of "privileged information" arising from "separation of powers," commonly understood to include Presidential conversations, correspondences and discussion in closed-door Cabinet meetings. But it was in *Senate v. Ermita* that the matter of the President's presumptive privilege was explicitly discussed.

However, foreign jurisprudence, notably American decisions from which this Court repeatedly drawn its conclusions, still appear to be the more insightful. For the case at bench, they should provide this Court the proper perspective to deal with the problem at hand.

First, in *U.S. v. Nixon*, it is abundantly clear that when the general privilege confidentiality of Presidential communications notably made in the performance of

President's duties and responsibilities is ranged against the requirements in the administration of criminal justice, executive privilege must yield. According to the U.S. Supreme Court, the right to the production of evidence at a criminal trial has constitutional dimensions. The high tribunal declared:

The interest in preserving confidentiality is weighty indeed and entitled to great respect.

However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal case.^[17]

However, in almost the same breath, the U.S. Court aired the caveat that this ruling is "not concerned with the balance between the President's generalized interest in confidentiality and **the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's in preserving state secrets.**"^[18]

Indeed, with respect to civil cases, this admonition was reiterated and clarified in a subsequent decision involving the Vice-President of the United States.

In *Cheney v. U.S. District Court for the District of Columbia*,^[19] where the United States District Court for the District of Columbia entered orders permitting discovery from Vice-President Cheney, other federal officials and members of the National Energy

Development Group (NEPDG) on the basis of the allegation of a public interest organization and environmental group that NEPDG was subject to procedural and disclosure requirements of the Federal Advisory Committee Act (FACA), the U.S. Supreme Court stressed the disparity between criminal and civil judicial proceedings in so far as the need for invocation of executive privilege with sufficient specificity is concerned. In reversing the Court of Appeals, the U.S. Supreme Court declared:

The Court of Appeals dismissed these separation of powers concerns. Relying on *United States v. Nixon*, it held that even though respondents' discovery requests are overbroad and "go well beyond FACA's requirements," the Vice-President and his former colleagues on the NEPDG "shall bear the burden" of invoking privilege with narrow specificity and objecting to the discovery requests with "detailed precision." In its view, this result was required by *Nixon's* rejection of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances". x x x

The analysis, however, overlooks fundamental differences in the two cases. *Nixon* involves the proper balance between the Executive's interest in the confidentiality of its communication and the "constitutional need for production of relevant evidence in a criminal proceeding."

The Court's decision was explicit that it was "not ... concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation ... We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."

The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. x x x In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, not only must the Executive Branch first assert privilege to resist disclosure, but privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be "expansively construed, for they are in derogation of the search for truth." The need for information for use in civil cases, while far from negligible, does not share the urgency significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to the production of relevant evidence in civil proceedings does not have the same "constitutional dimensions."^[20]

As to the conflict between the confidentiality interest invoked by the President and congressional demands for information in a legislative investigation, there is a close parallel between the instant case and *Senate Select Committee on Presidential Campaign Activities v.*

[\[21\]](#)
Nixon.

In that case, the Senate Committee was created by resolution of the Senate to investigate “illegal, improper or unethical activities” occurring in connection with the presidential campaign and election of 1972, and “to determine ... the necessity or desirability of congressional legislation to safeguard the electoral process by which the President of the United States is chosen.”

In testimony before the Committee, Alexander Butterfield, a former Deputy Assistant President, stated that certain presidential conversations, presumably including those which Mr. Dean and others had previously testified to, had been recorded on electronic tapes. The Committee thereupon attempted informally to obtain certain tapes and other materials from the President.

When these efforts proved unsuccessful, the Committee issued the subpoena subject of the [\[22\]](#) case.

Refusing to apply *Nixon v. Sirica*, [\[23\]](#) the U.S. appellate court’s ratiocination is instructive:

We concluded that presidential conversations are presumptively privileged, even from the limited intrusion represented by in camera examination of the conversations by a court. The presumption can be overcome only by an appropriate showing of public need by the party seeking access to the conversations. In *Nixon v. Sirica*, such a showing was made by the Special Prosecutor: we think that this presumption of privilege premised on the public interest in confidentiality must fall in the face of the uniquely powerful showing by the Special Prosecutor.

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 this authority. [\[24\]](#)

The Court then denied the prayer of the Select Committee in this wise:

We find that the Select Committee has failed to make the requisite showing. In its papers below and in its initial briefs to this Court, the Committee stated that it seeks the materials in question in order to resolve particular conflicts in the voluminous testimony it has heard, conflicts relating to “the extent of malfeasance in the executive branch,” and, most importantly, the possible involvement of the President himself. The Committee has argued that the testimony before it makes out “a prima facie case that the President and his closest associates have been involved in criminal conduct,” that the “materials bear on that involvement,” and that these facts alone must defeat any presumption of privilege that might otherwise prevail.

It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigation by the proper governmental institutions into possible criminal wrongdoing. x x x But under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s functions.

x x x x

The sufficiency of the Committee’s showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions.

There is a clear difference between Congress’s legislative tasks and the responsibility of a grand jury, or an institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in *Nixon v. Sirica*, one of those crimes is perjury concerning the content of certain conversations, the grand jury’s need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. We see no comparable need in the legislative process, at least, not in the circumstances of this case. [\[25\]](#)

Applying the foregoing decisions to the case at bench, it is my view that the respondents’ need

for disclosure of the information sought from the petitioner does not at all approach “constitutional dimensions” involved in criminal proceedings. While it is true that the Senate Committees, when engaged in inquiries in aid of legislation, derive their power from the Constitution, this is not a situation analogous to that in *Nixon*, where the court’s ability to fulfill its constitutional mandate to resolve a case or controversy within its jurisdiction hinged on the availability of certain indispensable information. Rather, as in *Senate Select Committee*, this is a situation where Senate Committees insist on obtaining information from the petitioner, without at all any convincing showing how and why the desired information is demonstrably critical to the responsible fulfillment of the Committees’ functions.” Indeed, respondents have not adequately explained how petitioner’s answers to the three questions crucial to the task of crafting the intended legislation given the inescapable fact that numerous other persons, from the ranks of government and the private sector, had been called to and had already testified at the respondent’s hearings.

My own legislative experience echoes the perceptive observation of *Senate Select Committee*:

While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings.

It is not uncommon for some legislative measures to be fashioned on the strength of assumptions that may have no solid factual precedents. In any event, the respondents have not demonstrated that the information sought is unqualifiedly necessary for a legitimate legislative purpose, or that the intended legislation would be stillborn without petitioner’s responses to the three questions.

The respondents have likewise failed to show that the information needed for legislation cannot be obtained from sources other than the petitioner. In fine, the presumption was not successfully rebutted.

II

On the procedure for the invocation of the privilege, it is the respondents' position that when the President decides to claim this presumptive privilege, there arises the concomitant duty on her part to express the reason/s therefor with specificity. From the vantage point of the respondents, it appears that the burden of showing the propriety of the claim of privilege devolves upon whoever invokes it, even if the corresponding obligation on the part of whoever demands disclosure to prove necessity of access to the information desired has not been met.

My own view of the process is quite the opposite. When the President invokes the privilege, announcing the reasons therefor – in this case, the possible rupture of diplomatic and economic relations with the People's Republic of China, and the chilling effect that disclosure of confidential information will have on the President's policy- and decision-making responsibilities [\[26\]](#) -- then the presumptive privilege attaches. At this point, the burden to overcome the presumption rests on the shoulders of whoever demands disclosure – in this case, the Senate Committees – and to discharge this burden requires showing that the public interest will be better served by the revelation of the information.

In *Nixon*, the criminal subpoenas were required to comply with the exacting standards of **relevancy, admissibility and specificity**. As declared by the U.S. Supreme Court:

Upon invocation of the claim of privilege by the President to whom subpoena duces tecum had been directed, it was the duty of the district court to treat the subpoenaed material as presumptively privileged and to require the special prosecutor to demonstrate that the presidential material was essential to justice of the pending criminal case. [\[27\]](#)

Thus, the Court addressed the issue of executive privilege only after it was satisfied that the special prosecutor had adequately met these demanding requirements.

In *Nixon v. Sirica*, the Court found that the Special Prosecutor had made a unique powerful showing that the subpoenaed tapes contain evidence peculiarly necessary to carrying out the vital functions of the grand jury – evidence for which no effective substitute was available. In that light, the presumptive privilege had to yield.

In the present controversy, no such standards were set, and none was observed.

In lieu of a showing of a specific necessity for disclosure, the respondent Committees continue to insist on the primacy of its power of legislative inquiry, upon a claim that to uphold presumptive privilege is an impermissible infringement of the legislative power, and to permit the withholding of the desired information will result in the emasculation of the Senate legislative body.

Of course, this is accompanied by the invocation of the general constitutional principles of transparency, right to information, due process, public office is a public trust, among others and the unbending adherence to the pronouncement in *Senate v. Ermita* that: "A claim of privilege, being a claim of exemption from an obligation to disclose information, must therefore, be clearly asserted."

But if *U.S. v. Nixon* is to be our anchor, then we must concede that the requirements of necessity and specificity are demanded not only of he who claims the presumptive privilege, but also of the one who desires disclosure. And to our mind, the respondents have fallen short of these requirements.

Then, there is the undeniable imperative that executive privilege cannot be used to shield criminal activity or wrongdoing. Again, we must draw reason from extant jurisprudence. *Senate Select Committee* explicates the point which the respondents are missing:

But under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.

It is the function of the respondents to investigate criminal activity; this is a responsibility of other agencies, such as the Office of the Ombudsman. This Court may even take judicial notice of the fact that the Ombudsman, upon a request of the President, has already commenced a criminal investigation into the subject of the legislative inquiry, the NBN deal. Presumably, the Ombudsman has already summoned the petitioner to give testimony therein and by analogy with *Nixon v. Sirica*, petitioner cannot withhold information in the investigation by invoking executive privilege.

Finally, it should not escape this Court that on oral argument, the respondents were asked if they had complied with the following guidelines suggested in *Senate v. Ermita*, as a way of avoiding the pitfalls in *Bengzon v. Senate Blue Ribbon Committee*:^[28]

One possible way for Congress to avoid such a result as occurred in *Bengzon* is to indicate in its invitations to the public officials concerned or to any person for that matter, the possible needed statute which prompted the need for the inquiry. Given such statements in its invitations, along with the usual indication of the subject of the inquiry and the questions relative to and in furtherance thereof, there would be less room for speculation on the part of the person invited on whether the inquiry is in aid of legislation.

In reply, the respondents admitted that they did not. This admission has cast a shadow on the regularity of the inquiry such that even the main argument of respondents could fall.

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

ANTONIO EDUARDO B. NACHURA
Associate Justice

^[1] 418 U.S. 683; 41 L. Ed. 2d 1039 (1973).

^[2] *U.S. v. Nixon*, supra., cited in *Almonte v. Vasquez*, 314 Phil. 150 (1995).

^[3] 345 U.S. 1, 73 S. Ct. 528 (1953).

^[4] Supra.

^[5] *Black v. Sheraton Corporation of America*, 564 f. 2D 531, 184 U.S. App. D.C. 46, 23 Fed. R. Serv. 2d 1490, citing

Nixon v. Sirica, 159 U.S. App. D.C., at 74, 487 F. 2d, at 716.

[6] *Black v. Sheraton Corporation of America*, supra.

[7] Letter dated November 15, 2007, of Executive Secretary Eduardo R. Ermita to Senate Blue Ribbon Committee Chairman Alan Peter Cayetano; Annex "C", Petition. Parenthetically, events occurring after the start of the legislative inquiry, such as the cancellation of the NBN contract and Presidential directive for the Ombudsman to conduct its own investigation into the possible criminal liability of persons concerned for non-issues in this case.

[8] Id.

[9] Philippine Constitution, Art. II, Sec. 26.

[10] Philippine Constitution, Art. III, Sec. 7.

[11] Philippine Constitution, Art. XI, Sec. 1.

[12] Philippine Constitution, Art. VII, Sec. 17.

[13] Philippine Constitution, Art. III, Sec. 1.

[14] 314 Phil. 150 (1995).

[15] 360 Phil. 133 (1998).

[16] 433 Phil. 506 (2002).

[17] *U.S. v. Nixon*, supra.

[18] Underscoring supplied.

[19] 542 U.S. 367, 124 S. Ct. 2576 (2004).

[20] Id.

[21] 498 F. 2d 725, 162 U.S. Appl. D.C. 183.

[22] *Senate Select Committee v. Nixon*, supra.

[23] 159 U.S. App. D.C. 58, 487 F. 2d 700.

[24] Senate Select Committee, supra.

[25] Id.

[26] See letter of Executive Secretary Ermita, Annex "C," Petition.

[27] *U.S. v. Nixon*, supra.

[28] G.R. No. 89914, November 20, 1991, 203 SCRA 767.