

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

Promulgated:

March 25, 2008

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## SEPARATE CONCURRING OPINION

TINGA, J.:

The determination of this petition must rest in part on the constitutional character and purpose of the legislative inquiry function of Congress, as delineated in Section 21, Article V of the Constitution. That such function is constitutionally vested in and plenary to the legislature is indubitable. Yet the mere existence of the function does not mean that it is insusceptible to appreciable limitations. <sup>[1]</sup>

The purpose of legislative inquiry is constitutionally and jurisprudentially linked to the function of legislation, *i.e.*, the task of formulating laws. The method of enacting sensible laws necessarily requires a legislature that is well-informed of the factual background behind the intended legislation. It is for such purpose, morally or politically neutral as it may be, that the function exists as a constitutional principle.

Given the wide publicity some legislative inquiries are able to attract, especially when they call attention to wrongdoings on the part of government officials or private individuals, there is somehow a public perception that legislative inquiries are primarily vital in their truth-seeking faculty. Perhaps the legislators who function as inquisitors feel ennobled by that perception as well. Can this purpose, which admittedly is neither morally nor politically neutral, be accommodated in the constitutional function of legislative inquiries? Facially yes, since the goal of legislative oversight is integrally wedded to the function of legislative

inquiries. In aiming to create effective laws, it is necessary for our lawmakers to identify the flaws in our present statutes. To the extent that such flaws are linked to the malperformance of public officials, the resultant public exposure and embarrassment of such officials retain relevance to the legislative oversight and inquiry process.

Yet all the righteous, divinely-inspired fulminations that find expression in the legislative inquiry cannot bestow on that process a higher or different purpose than that intended by the Constitution. Contrary as it may be to the public expectation, legislative inquiries do not share the same goals as the criminal trial or the impeachment process: orientation of legislative inquiries may be remedial in nature, yet they cannot be punitive in the sense that they cannot result in legally binding deprivation of a person's life, liberty or property. No doubt that a legislative inquiry conducted under the glare of klieg lights can end up destroying one's life, livelihood or public reputation – as many suspected American leftists discovered when they were caught in the dragnet of persecution during the McCarthy era – yet such unfortunate results should only incidentally obtain as a result of an inquiry aimed not at specific persons, but at the framework of the laws of the land.

It is vital to draw the distinction between legislative inquiries and the other legal processes, such as impeachment or criminal trials, that are oriented towards imposing sanctions in the name of the State. As the latter processes embody the avenue of the State to impose punishment, the Constitution establishes elaborate procedural safeguards, also subsumed under the principles of due process and equal protection, to assure a fair proceeding before sanction is levied. In contrast, since the end result of a legislative inquiry is constitutionally intended to be legally detrimental to persons subject of or participatory in the inquiry, the procedural safeguards attached to it are more lenient. The Constitution does not require that “[t]he rights of persons appearing in or affected by such inquiries shall be respected”, but such expression is less definitive than the rights assured to persons subject to criminal procedure. For example, there is no explicit constitutional assurance that persons appearing before legislative inquiries are entitled to counsel, though Congress in its wisdom may impose such a requirement.

Then there are the bald realities that a legislative inquiry is legally animated and

recognizable legislative function to seek out the truth, but the existence of a political majority that desires to constitute the inquiry. In the same manner that it is the legislative majority rule that breathes life to, prolongs or shortens deliberation of legislation, or simply dictate legislative path, the same nakedly political considerations drive the life, length and breadth of legislative inquiries. Investigations are viable avenues for legislators to exploit the headlines of the day for political capital, whether they may concern rising oil prices, the particular diplomatic ties with one or some nations, or the spectacle of Filipina actresses making entertainment trips to Brunei. For as long as that political majority exists, only the innate good sense of our legislators may inhibit the inquiry, and certainly it is beyond the province of courts to prevent Congress from conducting inquiries on any or all matters.

Thus, it may be conceded that a legislative inquiry is not constrained by the same strictures that bind the criminal investigation process for the benefit of an accused, and that such standards may operate to the detriment of persons appearing in or affected by legislative inquiries. Yet this relative laxity is set off by the recognition of the constitutional limitations on legislative inquiries even to the extent of affirming that it cannot embody official expression of moral outrage, or of the State's punitive functions. As compared to the processes that encapsulate the moral virtues of truth and justice, the legislative process including the inquiry function, is ultimately agnostic. There can be no enforceable demand that a legislative inquiry seek out the truth, or be an implement of justice, in the same way that the legislature cannot be judicially compelled to enact just or truth-responsive laws. The courts cannot sanction the legislative branch for simply being morally dense, even at the expense of appearing morally dense itself.

A different judicial attitude should obtain in analyzing State functions allocated to the investigation of crimes and, concurrently, the determination of the truth, for the ultimate purpose of laying down the full force of the law. For such purpose, the courts may not be morally neutral, since the very purpose of the criminal justice system is to enforce the paragon virtues of equal justice, truth, and fair retribution. We are impelled to assume that the prosecutors and judges proceed from rectitude, fair-mindedness and impartiality; and they necessarily must be quick to condemn if they instead act upon socio-political motives or tainted considerations.

In view of the differing constitutive purposes and constitutional considerations between legislative inquiries and criminal trials, there can be differing applicable standards that the courts may appreciate between these two processes. In the case at bar, if the question involved were a claim of executive privilege invoked against a criminal investigation, my analysis would be vastly different. If what was involved was a criminal investigation, attendant function is to the right of the State to punish wrongdoing, then any claim of executive privilege designed to countermand the investigation could easily be quashed. After all, democracy is founded on the consensual rule of a civilian president who is not above the law, rather than a monarch who, by divine right, is the law himself.

But if the claim of executive privilege is invoked against a legislative inquiry, run by a body that bears vastly different attributes from those tasked with conducting criminal inquiries and one which is, quite frankly, politically animated by constitutional design, then the claim deserves greater deference. After all, such claim at that instance cannot result in evasion of wrongdoers from punishment by the State. At most, it would retard the ability of Congress to acquire information that may be necessary for it to enact informed legislation. It is against such constitutional purpose of Congress that the claim of executive privilege should be tested.

To recall, the respondent Senate committees had asked petitioner Neri three questions which he declined to answer, invoking executive privilege, during his testimony on 26 September 2007. The three questions were: (1) whether the President followed up on the NBN project; (2) whether the petitioner was dictated upon to prioritize ZTE; and (3) whether the president said go ahead and approve the project after being told about the bribe attempt by former COMELEC Chairman Benjamin Abalos.

Inescapably, all three questions pertain to the content of the conversations of the president with petitioner Neri, who then was the Chairman of the National Economic Development Authority. They involve a government contract, the negotiation, review and approval of which was related to the official functions of petitioner Neri and the president.

In *Senate v. Ermita*, the Court stated, as a general proposition, that “the extraordinary character of the exemptions indicates that the presumption inclines heavily against executive privilege and in favor of disclosure.”<sup>[2]</sup> The pronouncement was necessary in *Ermita*, which involved a wrongheaded attempt by the President to shield executive officials from testimony before Congress with a blanket claim of executive privilege, irrespective of context. However, when the claim is rooted in a conversation with the president and an executive official relating to their official functions, should the presumption against executive privilege apply? After all, not just six years ago, the Court, through Justice Carpio, acknowledged that “Pre-conversations, correspondences, or discussions during closed-door Cabinet meetings which like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential.”<sup>[3]</sup>

In the United States, perhaps the leading case on executive privilege is *U.S. v. Nixon*,<sup>[4]</sup> where the claim was posed against the enforcement of a judicial subpoena to produce conversations with then-President Richard Nixon, issued after seven individuals were indicted as criminal conspirators in relation to the Watergate scandal. Manifestly, *Nixon* pertained to an invocation of executive privilege to evade compliance with a judicial order issued in a criminal proceeding, and not, as in this case, in a legislative inquiry; indeed, the U.S. Supreme Court firmly moored its ruling against President Nixon on the character of the criminal investigation. Still, the U.S. Supreme Court acknowledged that there was “a presumptive privilege for Presidential communications,” such being “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”<sup>[5]</sup> That point, which the parties in *Nixon* acceded to without contest, was justified, thus:

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

considerations justifying a presumptive privilege for Presidential communications. <sup>[6]</sup>

The existence of a presumption is hardly a foolproof shelter for the president since it overturned, as was done in *Nixon*. Still, it would be highly useful for the Court to acknowledge that the presumption exists. Otherwise, the traditional exercise of functions by all three branches of government will falter. If the president is denied the presumption of confidentiality of his communications and correspondence, there is no reason to extend the presumption of confidentiality to executive sessions conducted by Congress, or to the deliberations of this Court and all other lower courts. After all, the three branches of government are co-equals.

Thus, at bar, the conversations between the president and petitioner Neri should enjoy presumptive privilege, on the same level as any other official conversation or correspondence between the president and her executive officials. They enjoy the same presumptive privilege as the conversations or correspondence between the members of this Court who used to work for the executive branch of government and the presidents under whom they served.

The presumptive privilege attaching to presidential conversations or correspondences fall under what the Court, in *Ermita*, had characterized as “generic privilege,” which covers internal deliberations within the government, including “intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process

by which governmental decisions and policies are formulated.” <sup>[7]</sup> In such a case, the privilege attaches not because of the content of the correspondence, but because of the process under which such correspondence has come into existence. In contrast, there are varieties of executive privilege that pertain to the specific content of the information. Most striking of these is the so-called “state secrets privilege” which is predicated on the ground that information is of such nature that its disclosure would subvert crucial military or diplomatic objectives.” <sup>[8]</sup>

The state secrets privilege is undoubtedly content-based in character, such that there would be

no way of assessing whether the information is indeed of such crucial character unless the court is actually familiar with the information.

Petitioner Neri also cites diplomatic and state secrets as basis for the claim of executive privilege, alluding for example to the alleged adverse impact of disclosure on national security and on our diplomatic relations with China. The argument hews closely to the state secrets privilege. The problem for petitioner Neri though is that unless he informs this Court of the contents of his questioned conversations with the president, the Court would have no basis to accept his claim that diplomatic and state secrets would indeed be compromised by divulging the same in a public Senate hearing.

Indeed, if the claim of executive privilege is predicated on the particular content of information, such as the state secrets privilege, which the claimant refuses to divulge, there is no way to assess the validity of the claim unless the court judging the case becomes privy to such information. If the claimant fails or refuses to divulge such information, I submit that the courts may not pronounce such information as privileged on content-based grounds, such as the state secrets privilege.

Otherwise, there simply would be no way to dispute such claim of executive privilege. All the claimant would need to do is to invoke the state secrets privilege even if no state secret is at all involved, and the court would then have no way of ascertaining whether the claim has been validly raised, absent judicial disclosure of such information.

Still, just because the claim of executive privilege in this case is invoked as to the contents of presidential conversations with executive officials, we must consider the presumptive privilege extant and favorable to petitioner Neri. There is now need for respondents to demonstrate that this presumptive privilege is outweighed by the constituent functions of its own subject legislative inquiries.

How do we assess whether respondents have been able to overcome the presumptive privilege? If the test is simply the need to divulge “the truth,” then the presumption will always be defeated, without any consideration to the valid concerns that gave rise to the presumption in the first place. A more sophisticated approach is called for.

In *Nixon*, the U.S. Supreme Court weighed the presumptive privilege against the aims of the criminal justice system, since the claim was invoked in a criminal proceeding:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. <sup>[9]</sup>

By the same measure, the present claim of executive privilege should be tested against the function of the legislative inquiry, which is to acquire insight and information for the purpose of legislation. Simply put, would the divulgence of the sought-after information impede or prevent the Senate from enacting legislation?

I submit, with respect to the three questions asked of petitioner Neri, that the Senate will not be impeded from crafting and enacting any legislation it may link to the present inquiry should the privilege be upheld. **There is no demonstration on the part of respondents that legislation will be rendered necessary or unnecessary should petitioner Neri refuse to answer those questions. Respondents are operating under the premise that the president and/or her executive officials have committed wrongdoings that need to be corrected or prevented from recurring by remedial legislation, the answers to those three questions will not**

**necessarily bolster or inhibit respondents from proceeding with such legislation. They could easily presume the worst of the president in enacting such legislation.**

Likewise material to my mind is the well-reported fact that the subject NBN-ZTE contract has since been scuttled by the president. If this contract were still in existence and binding, it comes a greater legislative purpose in scrutinizing the deal since Congress has sufficient capability to enact legislation or utilize the power of appropriations to affect the contract's enforcement. Under such circumstances, which do not obtain at present, the case for rejecting the presumptive privilege would be more persuasive.

Let me supply a contrasting theoretical example. Congress has a well-founded suspicion that the president and the executive officials have not been candid about the state of the economy and have manipulated official records in order to reflect an inaccurate economic picture. Congress, in passing economic legislation, must necessarily be informed of the accurate economic realities in order to pass laws that are truly responsive to the state of the economy. In such a case, the right of Congress to particular information related to the economic state affairs, as a means of passing appropriate legislation, will supersede the presumptive privilege. Thus, whatever conversations or correspondences the president may have had with executive officials regarding the true state of the economy will not be sheltered by executive privilege in the face of a duly constituted legislative inquiry.

But at bar, respondents failed to demonstrate how the refusal of petitioner Neri to answer the three subject questions would hamper its ability to legislate. As such, the general presumptive privilege that attaches to the conversations of the president with executive officials supersedes the right of respondents to such information for the purpose of its legislative inquiry.

The assailed Show-Cause Order, premised as it is on an improper rejection of the claim of executive privilege, must thus be invalidated. This does not mean that petitioner Neri should be accordingly exempted from further appearing before the respondents, but that he may not

be compelled to answer those three questions or similar variants thereof concerning conversations with the president.

My position would have been vastly different had the three questions arisen in the context of a criminal inquiry or an impeachment proceeding. Because the constitutive purposes of such proceedings are to ascertain the true set of facts for the purpose of prosecuting criminal impeachment trials, such purposes would outweigh the generic, presumptive privilege that attaches to presidential conversations. In such instance, if it is still desired to invoke that privilege, there would be no choice but to compel the claimant to adduce before a court precise information asserted as privileged, so that such court can decide whether the content of such conversation justifies the privilege.

I vote to GRANT the petition and the supplemental petition, and concur in the *ponencia* of Mme. Justice Teresita L. De Castro.

DANTE O. TINGA  
*Associate Justice*

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[1] See *Arnault v. Nazareno*, 87 Phil. 29, 45 (1950); *Senate v. Ermita*, G.R. 169777, 20 April 2006, 488 SCRA 1, 42.

[2] *Senate v. Ermita*, G.R. No. 169777, 20 April 2006, 488 SCRA 1, 51.

[3] *Chavez v. Public Estates Authority*, 433 Phil. 506, 534 (2002).

[4] 418 U.S. 683 (1974).

[5] *Id.* at 708.

[6] *Ibid.*

[7] *Senate v. Ermita*, G.R. No. 169777, 20 April 2006, 488 SCRA 1, 46; citing I L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3rd ed., 2000), at 770-771.

[8] *Ibid.*

[9] Supra note 4 at 709.