

## EN BANC

G.R. No. 180643

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**Romulo L. Neri in his capacity as Chairman of Commission on Higher Education (CHED) and as Director General of the National Economic & Development Authority (NEDA), *Petitioner, versus* Senate Committee on Accountability of Public Officers Investigations (Blue Ribbon), Senate Committee on Trade & Commerce, and Senate Committee on National Defense & Security, *Respondents.***

Promulgated:

March 25, 2008

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### *SEPARATE OPINION*

**YNARES-SANTIAGO, J.:**

The President does not have an unlimited discretionary privilege to withhold information from Congress, the Judiciary or the public, even if the claim is founded on one of the traditional privileges covered by the doctrine on executive privilege. It was clearly stated

in *Senate* v. *Ermita*<sup>[1]</sup> that a claim of executive privilege may be valid or not depending on the ground invoked justify it and the context in which it is made. In this sense, therefore, executive privilege is not absolute.

Petitioner justified his non-appearance before the respondent Senate Committees on the ground that the information sought by these committees pertain to conversations he had with the President. These conversations, if disclosed, would allegedly affect our “diplomat relations and economic and military affairs” and would result to “possible loss of confidence of foreign investors and lenders.” Specifically, petitioner assumed that he was being

summoned by the Senate Committees for the purpose of responding to three questions which he refused to answer when he testified during the September 26, 2007 Senate hearing. These questions are: (1) whether the President followed up the ZTE-NBN project after petitioner informed her of the P200M bribery attempt allegedly committed by then COMELEC

Chairman Benjamin Abalos;<sup>[2]</sup>  
 (2) whether the President instructed or dictated upon him to prioritize the ZTE-NBN project;<sup>[3]</sup>  
 and (3) whether the President instructed petitioner to go ahead and approve the project despite being told of the alleged bribery attempt.<sup>[4]</sup>

First, it was wrong for petitioner to assume that he was being summoned by the Committees only to answer the three questions cited above. It may be true that he had exhaustively testified on the ZTE-NBN project during the September 26, 2007 hearing, however, it is not for him to conclude that the Senate Committees have gathered all the necessary information that they needed. He cannot refuse to appear before the Senate Committees on the assumption that he will testify only on matters that are privileged. The Senate Committees, in the exercise of their constitutionally-mandated functions, can inquire into any matter that is pertinent and relevant to the subject of its investigation.

Indeed, presidential conversations and correspondences have been recognized as presumptively privileged under case law.<sup>[5]</sup> In *US v. Nixon*,<sup>[6]</sup> the US Supreme Court upheld the privilege by reasoning that a “President and those who assist him must be free to explore all 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.” However, the privilege attached to presidential communications was not regarded as absolute. For while the President’s need for complete candor and objectivity from advisers calls for great deference from the courts, a generalized claim of confidentiality, without more, cannot prevail over a specific need for evidence in a pending criminal trial.<sup>[7]</sup>

Thus, presidential conversations and correspondences are not entirely confidential and

privilege attached to this type of information may yield to other considerations. In *US v. Nixon*, it was the “fundamental demands of due process of law in the fair administration of criminal justice” that was the overriding consideration which led to the disallowance of the claim of privilege. In the instant case, I submit that the grave implications on public accountability and government transparency justify the rejection of the claim of executive privilege.

The doctrine of executive privilege applies only to certain types of information of a sensitive character that would be against the public interest to divulge. As held in *Senate v. Ermita*,<sup>[8]</sup> the doctrine is premised on the fact that certain information must, **as a matter of necessity**, be kept confidential in pursuit of the public interest. Considering that the privilege is an exemption from the obligation to disclose information, the necessity for non-disclosure must be of such high degree as to outweigh public interest.

Petitioner miserably failed to demonstrate that the reasons for his non-disclosure far outweigh public interest.

He has not sufficiently shown that there is an imperative need to keep confidential conversations with the President regarding the ZTE-NBN scandal. He failed to show how disclosure of the presidential conversations would affect the country’s military, diplomatic and economic affairs, as he so asserted to the Senate Committees and before this Court. In fact, his counsel admitted that no military secrets were involved in the conversations, or military “concerns”.<sup>[9]</sup> Neither did the conversations necessarily refer to diplomatic secrets but only to “our relationship in general with a friendly foreign power.”<sup>[10]</sup> These generalized claims do not suffice to justify his refusal to disclose.

Moreover, petitioner’s legal consultant, Atty. Paul Lentejas, admitted during the arguments that there was nothing legally or morally wrong if the President followed up on the status of the ZTE-NBN project because she is, after all, the chairperson of the NEDA Board. It was likewise admitted that by virtue of her position in the NEDA, the President could justifiably prioritize the ZTE-NBN project. Petitioner could have also pointed out that, as

NEDA Director General, he had no authority to approve the project, as that power belonged to the NEDA Board which is headed by the President. <sup>[11]</sup> Evidently, petitioner had no valid reason not to answer the three questions propounded by the Senators.

Except for generally claiming that to require petitioner to answer the three questions would have a “chilling effect” on the President, in that she would be apprehensive to consult her advisers for fear of being scrutinized by third parties, petitioner has not established compelling and demonstrable ground for claiming executive privilege. The following exchange between Chief Justice Reynato S. Puno and petitioner’s counsel, Atty. Anton Bautista, is enlightening:

CHIEF JUSTICE PUNO:

In the functional test, the trust is to balance what you said as the benefits versus the harm on the two branches of government making conflicting claims of their powers and privileges. Now, using the functional test, please tell the Court how the Office of the President will be seriously hampered in the performance of its powers and duties, if petitioner Neri would be allowed to appear in the Senate and answer the three questions that he does not want to answer?

ATTY. BAUTISTA:

Your Honor, the effect, the chilling effect on the President, she will be scared to talk to her advisers any longer, because for fear that anything that the conversation that she had with them will be opened to examination and scrutiny by third parties, and that includes Congress. And (interrupted)

CHIEF JUSTICE PUNO:

Let us be more specific. Chilling effect, that is a conclusion. The first question is, whether the President followed up the NBN Project. If that question is asked from petitioner Neri, and he answers the question, will that seriously affect the way the Chief Executive will exercise the powers and privileges of the Office?

ATTY. BAUTISTA:

Well, if the answer to that question were in the affirmative, then it would imply, Your Honor, that the President has some undue interest in the contract.

CHIEF JUSTICE PUNO:

The President may have interest, but not necessarily undue interest.

x x x x

How about the second question, which reads, were you dictated to prioritize the ZTE, again, if this question is asked to petitioner Neri, and responds to it?

ATTY. BAUTISTA:

In the affirmative?

CHIEF JUSTICE PUNO:

I don't know how he will respond.

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How will that affect the functions of the President, will that debilitate the Office of the President?

ATTY. BAUTISTA:

Very much so, Your Honor.

x x x x

Because there are lists of projects, which have to be-which require financing from abroad. And if the President is known or it's made public that she preferred this one project to the other, then she opens herself to condemnation by those who were favoring the other projects which were not prioritized.

CHIEF JUSTICE PUNO:

Is this not really an important project, one that is supposed to benefit the Filipino people? So if the President says you prioritize this project, why should the heavens fall on the Office of the President?

ATTY. BAUTISTA:

Well, there are also other projects which have, which are supported by a lot of people. Like the Cyber Ed project, the Angat Water Dam project. If she is known that she gave low priority to these other projects, she opens herself to media and public criticism, not only media but also in rallies, Your Honor.

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CHIEF JUSTICE PUNO:

How about the third question, whether the President said to go ahead and approve the project after being told of the alleged bribe? Again, how will that affect the functions of the President using that balancing test of functions?

ATTY. BAUTISTA:

Well, if the answer is in the affirmative, then it will be shown, number one, that she has undue interest in this thing, because she sits already on the ICC and the Board.

CHIEF JUSTICE PUNO:

Again, when you say undue interest, that is your personal opinion.

ATTY. BAUTISTA:

Yes, Your Honor. [\[12\]](#)

I do not see how public condemnation and criticism can have an adverse effect President's performance of her powers and functions as Chief Executive. In a democracy such as ours, it is only to be expected that official action may be met with negative feedback or even outrage from a disapproving public. If at all, the public's opinion, negative or otherwise, should enhance the President's performance of her constitutionally-mandated duties. It is through open discussion and dialogue that the government better responds to needs of its citizens and the ends of government better achieved.

At this point, it would not be amiss to state that it was petitioner who provided the Senate Committees with information that, prior to the signing of the ZTE-NBN contract, he had told the President of the P200M bribery attempt allegedly perpetrated by Chairman Abalos. As admitted by petitioner's counsel during the oral arguments of this case, t

allegation, if proven, would constitute a crime under our penal laws.<sup>[13]</sup> To allow the details of this alleged crime to be shrouded by a veil of secrecy “would permit criminal conspiracies at the seat of government.”<sup>[14]</sup> Needless to say, the Constitution could never sanction executive privilege as a shield for official wrongdoing.

Finally, in his treatise on *Executive Privilege and Congressional Investigatory Power*,<sup>[15]</sup> Professor Bernard Schwartz<sup>[16]</sup> explained that the exercise of its authority to enact laws is but part of the work of a legislature like the Congress. He further discussed, to wit:

The primary tasks of modern legislative assemblies may be arranged in four classes. First, but not necessarily foremost, is the function of lawmaking. At least equally important is the responsibility of supervising the Executive; the Legislature in this role may be compared to a board of directors of a business corporation which at least theoretically, endeavors to hold “administrative officers to a due accountability for the manner in which they perform their duties.”

A third legislative office, broad in its implications, involves activities as an organ of public opinion; a lawmaking body may serve as a national forum for the expression, formulation, or molding of opinion.

The remaining function, which may be termed membership, concerns internal matters especially the judging of the qualifications and conduct of the delegates to the Legislative

Assembly.<sup>[17]</sup>

I thus vote for the dismissal of the petition.

**CONSUELO YNARES-SANTIAGO**  
Associate Justice

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<sup>[1]</sup> G.R. No. 169777, April 20, 2006, 488 SCRA 1.

<sup>[2]</sup> Senate TSN, September 26, 2007, p. 91.

<sup>[3]</sup> *Id.* at 114-116.

<sup>[4]</sup> *Id.* at 275-276.

<sup>[5]</sup> See *Almonte v. Vasquez*, 314 Phil. 150 (1995).

[6] 418 U.S. 683 (1974).

[7] *Id.*

[8] *Senate v. Ermita*, *supra* note 1 at 68.

[9] Senate TSN, September 26, 2007, p. 42.

[10] *Id.* at 51.

[11] *Id.* at 321-328.

[12] *Id.* at 297-304.

[13] *Id.* at 34.

[14] *Executive Privilege, the Congress and the Courts*, Norman Dorsen and John H.F. Shattuck, *Ohio Law State Journal*, Vol. 35 (1974), p. 33.

[15] *California Law Review*, Vol. 47 (1959), pp. 10-11.

[16] Professor of Law, New York University.

[17] Citing McGeary, *The Development of Congressional Investigative Power* 23 (1940).