

## **ROMULO L. NERI, PETITIONER, VS. SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS, SENATE COMMITTEE ON TRADE AND COMMERCE, AND SENATE COMMITTEE ON NATIONA...**

*G.R. No. 180643. September 04, 2008*

Ponente: LEONARDO-DE CASTRO, J.

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### **LEONARDO-DE CASTRO, J.:**

Executive privilege is not a personal privilege, but one that adheres to the Office of the President. It exists to protect public interest, not to benefit a particular public official. Its purpose, among others, is to assure that the nation will receive the benefit of candid, objective and untrammelled communication and exchange of information between the President and his/her advisers in the process of shaping or forming policies and arriving at decisions in the exercise of the functions of the Presidency under the Constitution. The confidentiality of the President's conversations and correspondence is not unique. It is akin to the confidentiality of judicial deliberations. It possesses the same value as the right to privacy of all citizens and more, because it is dictated by public interest and the constitutionally ordained separation of governmental powers.

In these proceedings, this Court has been called upon to exercise its power of review and arbitrate a hotly, even acrimoniously, debated dispute between the Court's co-equal branches of government. In this task, this Court should neither curb the legitimate powers of any of the co-equal and coordinate branches of government nor allow any of them to overstep the boundaries set for it by our Constitution. The competing interests in the case at bar are the claim of executive privilege by the President, on the one hand, and the respondent Senate Committees' assertion of their power to conduct legislative inquiries, on the other. The particular facts and circumstances of the present case, stripped of the politically and emotionally charged rhetoric from both sides and viewed in the light of settled constitutional and legal doctrines, plainly lead to the conclusion that the claim of executive privilege must be upheld.

Assailed in this motion for reconsideration is our Decision dated March 25, 2008 (the "Decision"), granting the petition for certiorari filed by petitioner Romulo L. Neri against the respondent Senate Committees on Accountability of Public Officers and Investigations,[1] Trade and Commerce,[2] and National Defense and Security (collectively the "respondent Committees").[3]

A brief review of the facts is imperative.

On September 26, 2007, petitioner appeared before respondent Committees and testified for about eleven (11) hours on matters concerning the National Broadband Project (the "NBN Project"), a project awarded by the Department of Transportation and Communications ("DOTC") to Zhong Xing Telecommunications Equipment ("ZTE"). Petitioner disclosed that then Commission on Elections ("COMELEC") Chairman Benjamin Abalos offered him P200 Million in exchange for his approval of the NBN Project. He further narrated that he informed President Gloria Macapagal Arroyo ("President Arroyo") of the bribery attempt and that she instructed him not to

accept the bribe. However, when probed further on President Arroyo and petitioner's discussions relating to the NBN Project, petitioner refused to answer, invoking "executive privilege." To be specific, petitioner refused to answer questions on: (a) whether or not President Arroyo followed up the NBN Project,[4] (b) whether or not she directed him to prioritize it,[5] and (c) whether or not she directed him to approve it.[6]

Respondent Committees persisted in knowing petitioner's answers to these three questions by requiring him to appear and testify once more on November 20, 2007. On November 15, 2007, Executive Secretary Eduardo R. Ermita wrote to respondent Committees and requested them to dispense with petitioner's testimony on the ground of executive privilege.[7] The letter of Executive Secretary Ermita pertinently stated:

Following the ruling in *Senate v. Ermita*, the foregoing questions fall under conversations and correspondence between the President and public officials which are considered executive privilege (*Almonte v. Vasquez*, G.R. 95637, 23 May 1995; *Chavez v. PEA*, G.R. 133250, July 9, 2002). 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 protection of the public interest in candid, objective, and even blunt or 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, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

In light of the above considerations, this Office is constrained to invoke the settled doctrine of executive privilege as refined in *Senate v. Ermita*, and has advised Secretary Neri accordingly.

Considering that Sec. Neri has been lengthily interrogated on the subject in an unprecedented 11-hour hearing, wherein he has answered all questions propounded to him except the foregoing questions involving executive privilege, we therefore request that his testimony on 20 November 2007 on the ZTE / NBN project be dispensed with.

On November 20, 2007, petitioner did not appear before respondent Committees upon orders of the President invoking executive privilege. On November 22, 2007, the respondent Committees issued the show-cause letter requiring him to explain why he should not be cited in contempt. On November 29, 2007, in petitioner's reply to respondent Committees, he manifested that it was not his intention to ignore the Senate hearing and that he thought the only remaining questions were those he claimed to be covered by executive privilege. He also manifested his willingness to appear and testify should there be new matters to be taken up. He just requested that he be furnished "in advance as to what else" he "needs to clarify."

Respondent Committees found petitioner's explanations unsatisfactory. Without responding to his request for advance notice of the matters that he should still clarify, they issued the Order dated January 30, 2008; In Re: P.S. Res. Nos. 127,129,136 & 144; and privilege speeches of Senator Lacson and Santiago (all on the ZTE-NBN Project), citing petitioner in contempt of respondent Committees and ordering his arrest and detention at the Office of the Senate Sergeant-at-Arms until such time that he would appear and give his testimony.

On the same date, petitioner moved for the reconsideration of the above Order.[8] He insisted that he had not shown "any contemptible conduct worthy of contempt and arrest." He emphasized his willingness to testify on new matters, but respondent Committees did not respond to his request for advance notice of questions. He also

mentioned the petition for certiorari he previously filed with this Court on December 7, 2007. According to him, this should restrain respondent Committees from enforcing the order dated January 30, 2008 which declared him in contempt and directed his arrest and detention.

Petitioner then filed his Supplemental Petition for Certiorari (with Urgent Application for TRO/Preliminary Injunction) on February 1, 2008. In the Court's Resolution dated February 4, 2008, the parties were required to observe the status quo prevailing prior to the Order dated January 30, 2008.

On March 25, 2008, the Court granted his petition for certiorari on two grounds: first, the communications elicited by the three (3) questions were covered by executive privilege; and second, respondent Committees committed grave abuse of discretion in issuing the contempt order. Anent the first ground, we considered the subject communications as falling under the presidential communications privilege because (a) they related to a quintessential and non-delegable power of the President, (b) they were received by a close advisor of the President, and (c) respondent Committees failed to adequately show a compelling need that would justify the limitation of the privilege and the unavailability of the information elsewhere by an appropriate investigating authority. As to the second ground, we found that respondent Committees committed grave abuse of discretion in issuing the contempt order because (a) there was a valid claim of executive privilege, (b) their invitations to petitioner did not contain the questions relevant to the inquiry, (c) there was a cloud of doubt as to the regularity of the proceeding that led to their issuance of the contempt order, (d) they violated Section 21, Article VI of the Constitution because their inquiry was not in accordance with the "duly published rules of procedure," and (e) they issued the contempt order arbitrarily and precipitately.

On April 8, 2008, respondent Committees filed the present motion for reconsideration, anchored on the following grounds:

I

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

II

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

III

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

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

- EVEN IF THE TESTS ADOPTED BY THIS HON ORABLE COURT IN THE DECISION IS A PPLIED, THERE IS NO SHOWING THAT THE ELEMENTS OF PRESIDENTIAL COMMUNICATIONS PRIVILEGE ARE PRESENT.

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

- TO UPHOLD THE CLAIM OF EXECUTIVE PRIVILEGE IN THE INSTANT CASE WOULD

SERIOUSLY IMPAIR THE RESPONDENTS' PERFORMANCE OF THEIR PRIMARY FUNCTION TO ENACT LAWS.

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

#### IV

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

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

In his Comment, petitioner charges respondent Committees with exaggerating and distorting the Decision of this Court. He avers that there is nothing in it that prohibits respondent Committees from investigating the NBN Project or asking him additional questions. According to petitioner, the Court merely applied the rule on executive privilege to the facts of the case. He further submits the following contentions: first, the assailed Decision did not reverse the presumption against executive secrecy laid down in *Senate v. Ermita*; second, respondent Committees failed to overcome the presumption of executive privilege because it appears that they could legislate even without the communications elicited by the three (3) questions, and they admitted that they could dispense with petitioner's testimony if certain NEDA documents would be given to them; third, the requirement of specificity applies only to the privilege for State, military and diplomatic secrets, not to the necessarily broad and all-encompassing presidential communications privilege; fourth, there is no right to pry into the President's thought processes or exploratory exchanges; fifth, petitioner is not covering up or hiding anything illegal; sixth, the Court has the power and duty to annul the Senate Rules; seventh, the Senate is not a continuing body, thus the failure of the present Senate to publish its Rules of Procedure Governing Inquiries in Aid of Legislation (Rules) has a vitiating effect on them; eighth, the requirement for a witness to be furnished advance copy of questions comports with due process and the constitutional mandate that the rights of witnesses be respected; and ninth, neither petitioner nor respondent has the final say on the matter of executive privilege, only the Court.

For its part, the Office of the Solicitor General maintains that: (1) there is no categorical pronouncement from the Court that the assailed Orders were issued by respondent Committees pursuant to their oversight function; hence, there is no reason for them "to make much" of the distinction between Sections 21 and 22, Article VI of the Constitution; (2) presidential communications enjoy a presumptive privilege against disclosure as earlier held in *Almonte v. Vasquez*[9] and *Chavez v. Public Estates Authority (PEA)*[10]; (3) the communications elicited by the three (3) questions are covered by executive privilege, because all the elements of the presidential communications privilege are present; (4) the subpoena ad testificandum issued by respondent Committees to

petitioner is fatally defective under existing law and jurisprudence; (5) the failure of the present Senate to publish its Rules renders the same void; and (6) respondent Committees arbitrarily issued the contempt order.

Incidentally, respondent Committees' objection to the Resolution dated March 18, 2008 (granting the Office of the Solicitor General's Motion for Leave to Intervene and to Admit Attached Memorandum) only after the promulgation of the Decision in this case is foreclosed by its untimeliness.

The core issues that arise from the foregoing respective contentions of the opposing parties are as follows:

(1)

whether or not there is a recognized presumptive presidential communications privilege in our legal system;

(2)

whether or not there is factual or legal basis to hold that the communications elicited by the three (3) questions are covered by executive privilege;

(3)

whether or not respondent Committees have shown that the communications elicited by the three (3) questions are critical to the exercise of their functions; and

(4)

whether or not respondent Committees committed grave abuse of discretion in issuing the contempt order.

We shall discuss these issues seriatim.

## I

### There Is a Recognized Presumptive Presidential Communications Privilege

Respondent Committees ardently argue that the Court's declaration that presidential communications are presumptively privileged reverses the "presumption" laid down in *Senate v. Ermita*[11] that "inclines heavily against executive secrecy and in favor of disclosure." Respondent Committees then claim that the Court erred in relying on the doctrine in *Nixon*.

Respondent Committees argue as if this were the first time the presumption in favor of the presidential communications privilege is mentioned and adopted in our legal system. That is far from the truth. The Court, in the earlier case of *Almonte v. Vasquez*,[12] affirmed that the presidential communications privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. Even *Senate v. Ermita*,[13] the case relied upon by respondent Committees, reiterated this concept. There, the Court enumerated the cases in which the claim of executive privilege was recognized, among them *Almonte v. Chavez*, *Chavez v. Presidential Commission on Good Government (PCGG)*,[14] and *Chavez v. PEA*. [15] The Court articulated in these cases that "there are certain types of information which the government may withhold from the public,[16]" that there is a "governmental privilege against public disclosure with respect to state secrets regarding military, diplomatic and other national security matters";[17] and that "the right to information does not extend to matters recognized as 'privileged information' under the separation of powers, by which the Court meant Presidential conversations, correspondences, and discussions in closed-door Cabinet meetings." [18]

Respondent Committees' observation that this Court's Decision reversed the "presumption that inclines heavily

against executive secrecy and in favor of disclosure" arises from a piecemeal interpretation of the said Decision. The Court has repeatedly held that in order to arrive at the true intent and meaning of a decision, no specific portion thereof should be isolated and resorted to, but the decision must be considered in its entirety.[19]

Note that the aforesaid presumption is made in the context of the circumstances obtaining in *Senate v. Ermita*, which declared void Sections 2(b) and 3 of Executive Order (E.O.) No. 464, Series of 2005. The pertinent portion of the decision in the said case reads:

From the above discussion on the meaning and scope of executive privilege, both in the United States and in this jurisprudence, a clear principle emerges. Executive privilege, whether asserted against Congress, the courts, or the public, is recognized only in relation to certain types of information of a sensitive character. While executive privilege is a constitutional concept, a claim thereof may be valid or not depending on the ground invoked to justify it and the context in which it is made. Noticeably absent is any recognition that executive officials are exempt from the duty to disclose information by the mere fact of being executive officials. Indeed, the extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure. (Emphasis and underscoring supplied)

Obviously, the last sentence of the above-quoted paragraph in *Senate v. Ermita* refers to the "exemption" being claimed by the executive officials mentioned in Section 2(b) of E.O. No. 464, solely by virtue of their positions in the Executive Branch. This means that when an executive official, who is one of those mentioned in the said Sec. 2(b) of E.O. No. 464, claims to be exempt from disclosure, there can be no presumption of authorization to invoke executive privilege given by the President to said executive official, such that the presumption in this situation inclines heavily against executive secrecy and in favor of disclosure.

*Senate v. Ermita* [20]expounds on the premise of the foregoing ruling in this wise:

Section 2(b) in relation to Section 3 virtually provides that, once the head of office determines that a certain information is privileged, such determination is presumed to bear the President's authority and has the effect of prohibiting the official from appearing before Congress, subject only to the express pronouncement of the President that it is allowing the appearance of such official. These provisions thus allow the President to authorize claims of privilege by mere silence.

Such presumptive authorization, however, is contrary to the exceptional nature of the privilege. Executive privilege, as already discussed, is recognized with respect to information the confidential nature of which is crucial to the fulfillment of the unique role and responsibilities of the executive branch, or in those instances where exemption from disclosure is necessary to the discharge of highly important executive responsibilities. The doctrine of executive privilege is thus premised on the fact that certain information must, as a matter of necessity, be kept confidential in pursuit of the public interest. The privilege being, by definition, an exemption from the obligation to disclose information, in this case to Congress, the necessity must be of such high degree as to outweigh the public interest in enforcing that obligation in a particular case.

In light of this highly exceptional nature of the privilege, the Court finds it essential to limit to the President the power to invoke the privilege. She may of course authorize the Executive Secretary to invoke the privilege on her behalf, in which case the Executive Secretary must state that the authority is "By order of the President", which means that he personally consulted with her. The privilege being an extraordinary power, it must be wielded only by the highest official in the executive hierarchy. In other words, the President may not authorize her subordinates to exercise such power. There is even less reason to uphold such authorization in the instant case where the authorization is not explicit but by mere silence. Section 3, in relation to Section 2(b), is further invalid on this score.

The constitutional infirmity found in the blanket authorization to invoke executive privilege granted by the President to executive officials in Sec. 2(b) of E.O. No. 464 does not obtain in this case.

In this case, it was the President herself, through Executive Secretary Ermita, who invoked executive privilege on a specific matter involving an executive agreement between the Philippines and China, which was the subject of the three (3) questions propounded to petitioner Neri in the course of the Senate Committees' investigation. Thus, the factual setting of this case markedly differs from that passed upon in *Senate v. Ermita*.

Moreover, contrary to the claim of respondents, the Decision in this present case hews closely to the ruling in *Senate v. Ermita*,<sup>[21]</sup> to wit:

Executive privilege

The phrase "executive privilege" is not new in this jurisdiction. It has been used even prior to the promulgation of the 1986 Constitution. Being of American origin, it is best understood in light of how it has been defined and used in the legal literature of the United States.

Schwartz defines executive privilege as "the power of the Government to withhold information from the public, the courts, and the Congress. Similarly, Rozell defines it as "the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public." x x x In this jurisdiction, the doctrine of executive privilege was recognized by this Court in *Almonte v. Vasquez*. Almonte used the term in reference to the same privilege subject of *Nixon*. It quoted the following portion of the *Nixon* decision which explains the basis for the privilege:

"The expectation of a President to the confidentiality of his conversations and correspondences, like the claim of confidentiality of judicial deliberations, for example, he 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 x x x " (Emphasis and italics supplied)

Clearly, therefore, even *Senate v. Ermita* adverts to "a presumptive privilege for Presidential communication," which was recognized early on in *Almonte v. Vasquez*. To construe the passage in *Senate v. Ermita* adverted to in the Motion for Reconsideration of respondent Committees, referring to the non-existence of a "presumptive authorization" of an executive official, to mean that the "presumption" in favor of executive privilege "inclines heavily against executive secrecy and in favor of disclosure" is to distort the ruling in the *Senate v. Ermita* and make the same engage in self-contradiction.

*Senate v. Ermita*<sup>[22]</sup> expounds on the constitutional underpinning of the relationship between the Executive Department and the Legislative Department to explain why there should be no implied authorization or presumptive authorization to invoke executive privilege by the President's subordinate officials, as follows:

When Congress exercises its power of inquiry, the only way for department heads to exempt themselves therefrom is by a valid claim of privilege. They are not exempt by the mere fact that they are department heads. Only one executive official may be exempted from this power - the President on whom executive power is vested, hence, beyond the reach of Congress except through the power of impeachment. It is based on he being the highest official of the executive branch, and the due respect accorded to a co-equal branch of governments which is sanctioned by a long-standing custom. (Underscoring supplied)

Thus, if what is involved is the presumptive privilege of presidential communications when invoked by the President on a matter clearly within the domain of the Executive, the said presumption dictates that the same be recognized and be given preference or priority, in the absence of proof of a compelling or critical need for

disclosure by the one assailing such presumption. Any construction to the contrary will render meaningless the presumption accorded by settled jurisprudence in favor of executive privilege. In fact, *Senate v. Ermita* reiterates jurisprudence citing "the considerations justifying a presumptive privilege for Presidential communications." [23]

## II

There Are Factual and Legal Bases to

Hold that the Communications Elicited by the Three (3) Questions Are Covered by Executive Privilege

Respondent Committees claim that the communications elicited by the three (3) questions are not covered by executive privilege because the elements of the presidential communications privilege are not present.

A. The power to enter into an executive agreement is a "quintessential and non-delegable presidential power."

First, respondent Committees contend that the power to secure a foreign loan does not relate to a "quintessential and non-delegable presidential power," because the Constitution does not vest it in the President alone, but also in the Monetary Board which is required to give its prior concurrence and to report to Congress.

This argument is unpersuasive.

The fact that a power is subject to the concurrence of another entity does not make such power less executive. "Quintessential" is defined as the most perfect embodiment of something, the concentrated essence of substance. [24] On the other hand, "non-delegable" means that a power or duty cannot be delegated to another or, even if delegated, the responsibility remains with the obligor. [25] The power to enter into an executive agreement is in essence an executive power. This authority of the President to enter into executive agreements without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence. [26] Now, the fact that the President has to secure the prior concurrence of the Monetary Board, which shall submit to Congress a complete report of its decision before contracting or guaranteeing foreign loans, does not diminish the executive nature of the power.

The inviolate doctrine of separation of powers among the legislative, executive and judicial branches of government by no means prescribes absolute autonomy in the discharge by each branch of that part of the governmental power assigned to it by the sovereign people. There is the corollary doctrine of checks and balances, which has been carefully calibrated by the Constitution to temper the official acts of each of these three branches. Thus, by analogy, the fact that certain legislative acts require action from the President for their validity does not render such acts less legislative in nature. A good example is the power to pass a law. Article VI, Section 27 of the Constitution mandates that every bill passed by Congress shall, before it becomes a law, be presented to the President who shall approve or veto the same. The fact that the approval or vetoing of the bill is lodged with the President does not render the power to pass law executive in nature. This is because the power to pass law is generally a quintessential and non-delegable power of the Legislature. In the same vein, the executive power to enter or not to enter into a contract to secure foreign loans does not become less executive in nature because of conditions laid down in the Constitution. The final decision in the exercise of the said executive power is still lodged in the Office of the President.

B. The "doctrine of operational proximity" was laid down precisely to limit the scope of the presidential communications privilege but, in any case, it is not conclusive.

Second, respondent Committees also seek reconsideration of the application of the "doctrine of operational

proximity" for the reason that "it maybe misconstrued to expand the scope of the presidential communications privilege to communications between those who are 'operationally proximate' to the President but who may have "no direct communications with her."

It must be stressed that the doctrine of "operational proximity" was laid down in *In re: Sealed Case*[27] precisely to limit the scope of the presidential communications privilege. The U.S. court was aware of the dangers that a limitless extension of the privilege risks and, therefore, carefully cabined its reach by explicitly confining it to White House staff, and not to staffs of the agencies, and then only to White House staff that has "operational proximity" to direct presidential decision-making, thus:

We are aware that such an extension, unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected. Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigation and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. See *AAPS*, 997 F.2d at 910 (it is "operational proximity" to the President that matters in determining whether "[t]he President's confidentiality interests" is implicated). (Emphasis supplied)

In the case at bar, the danger of expanding the privilege "to a large swath of the executive branch" (a fear apparently entertained by respondents) is absent because the official involved here is a member of the Cabinet, thus, properly within the term "advisor" of the President; in fact, her alter ego and a member of her official family. Nevertheless, in circumstances in which the official involved is far too remote, this Court also mentioned in the Decision the organizational test laid down in *Judicial Watch, Inc. v. Department of Justice*.<sup>[28]</sup> This goes to show that the operational proximity test used in the Decision is not considered conclusive in every case. In determining which test to use, the main consideration is to limit the availability of executive privilege only to officials who stand proximate to the President, not only by reason of their function, but also by reason of their positions in the Executive's organizational structure. Thus, respondent Committees' fear that the scope of the privilege would be unnecessarily expanded with the use of the operational proximity test is unfounded.

C. The President's claim of executive privilege is not merely based on a generalized interest; and in balancing respondent Committees' and the President's clashing interests, the Court did not disregard the 1987 Constitutional provisions on government transparency, accountability and disclosure of information.

Third, respondent Committees claim that the Court erred in upholding the President's invocation, through the Executive Secretary, of executive privilege because (a) between respondent Committees' specific and

demonstrated need and the President's generalized interest in confidentiality, there is a need to strike the balance in favor of the former; and (b) in the balancing of interest, the Court disregarded the provisions of the 1987 Philippine Constitution on government transparency, accountability and disclosure of information, specifically, Article III, Section 7;[29] Article II, Sections 24[30] and 28;[31] Article XI, Section 1;[32] Article XVI, Section 10;[33] Article VII, Section 20;[34] and Article XII, Sections 9,[35] 21,[36] and 22.[37]

It must be stressed that the President's claim of executive privilege is not merely founded on her generalized interest in confidentiality. The Letter dated November 15, 2007 of Executive Secretary Ermita specified presidential communications privilege in relation to diplomatic and economic relations with another sovereign nation as the bases for the claim. Thus, the Letter stated:

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 this information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect. (emphasis supplied)

Even in *Senate v. Ermita*, it was held that Congress must not require the Executive to state the reasons for the claim with such particularity as to compel disclosure of the information which the privilege is meant to protect. This is a matter of respect for a coordinate and co-equal department.

It is easy to discern the danger that goes with the disclosure of the President's communication with her advisor. The NBN Project involves a foreign country as a party to the agreement. It was actually a product of the meeting of minds between officials of the Philippines and China. Whatever the President says about the agreement - particularly while official negotiations are ongoing - are matters which China will surely view with particular interest. There is danger in such kind of exposure. It could adversely affect our diplomatic as well as economic relations with the People's Republic of China. We reiterate the importance of secrecy in matters involving foreign negotiations as stated in *United States v. Curtiss-Wright Export Corp.*, [38] thus:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

US jurisprudence clearly guards against the dangers of allowing Congress access to all papers relating to a negotiation with a foreign power. In this jurisdiction, the recent case of *Akbayan Citizens Action Party, et al. v. Thomas G. Aquino, et al.*[39] upheld the privileged character of diplomatic negotiations. In *Akbayan*, the Court stated:

#### Privileged character of diplomatic negotiations

The privileged character of diplomatic negotiations has been recognized in this jurisdiction. In discussing valid limitations on the right to information, the Court in *Chavez v. PCGG* held that "information on inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest." Even earlier, the same privilege was upheld in *People's Movement for Press Freedom (PMPF) v. Manglapus* wherein the Court discussed the reasons for the privilege

in more precise terms.

In *PMPF v. Manglapus*, the therein petitioners were seeking information from the President's representatives on the state of the then on-going negotiations of the RP-US Military Bases Agreement. The Court denied the petition, stressing that "secrecy of negotiations with foreign countries is not violative of the constitutional provisions of freedom of speech or of the press nor of the freedom of access to information." The Resolution went on to state, thus:

The nature of diplomacy requires centralization of authority and expedition of decision which are inherent in executive action. Another essential characteristic of diplomacy is its confidential nature. Although much has been said about "open" and "secret" diplomacy, with disparagement of the latter, Secretaries of State Hughes and Stimson have clearly analyzed and justified the practice. In the words of Mr. Stimson:

"A complicated negotiation ...cannot be carried through without many, many private talks and discussion, man to man; many tentative suggestions and proposals. Delegates from other countries come and tell you in confidence of their troubles at home and of their differences with other countries and with other delegates; they tell you of what they would do under certain circumstances and would not do under other circumstances... If these reports... should become public... who would ever trust American Delegations in another conference? (United States Department of State, Press Releases, June 7, 1930, pp. 282-284)

x x x x

There is frequent criticism of the secrecy in which negotiation with foreign powers on nearly all subjects is concerned. This, it is claimed, is incompatible with the substance of democracy. As expressed by one writer, "It can be said that there is no more rigid system of silence anywhere in the world." (E.J. Young, *Looking Behind the Censorship*, J. B. Lipincott Co., 1938) President Wilson in starting his efforts for the conclusion of the World War declared that we must have "open covenants, openly arrived at." He quickly abandoned his thought.

No one who has studied the question believes that such a method of publicity is possible. In the moment that negotiations are started, pressure groups attempt to "muscle in." An ill-timed speech by one of the parties or a frank declaration of the concession which are exacted or offered on both sides would quickly lead to a widespread propaganda to block the negotiations. After a treaty has been drafted and its terms are fully published, there is ample opportunity for discussion before it is approved. (The New American Government and Its Works, James T. Young, 4[th] Edition, p. 194) (Emphasis and underscoring supplied)

Still in *PMPF v. Manglapus*, the Court adopted the doctrine in *U.S. v. Curtiss-Wright Export Corp.* that the President is the sole organ of the nation in its negotiations with foreign countries, viz:

"x x x In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great arguments of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Annals*, 6[th] Cong., col. 613... (Emphasis supplied; underscoring in the original)

Considering that the information sought through the three (3) questions subject of this Petition involves the President's dealings with a foreign nation, with more reason, this Court is wary of approving the view that Congress may peremptorily inquire into not only official, documented acts of the President but even her confidential and informal discussions with her close advisors on the pretext that said questions serve some vague legislative need. Regardless of who is in office, this Court can easily foresee unwanted consequences of subjecting a Chief Executive to unrestricted congressional inquiries done with increased frequency and great publicity. No Executive can effectively discharge constitutional functions in the face of intense and unchecked

legislative incursion into the core of the President's decision-making process, which inevitably would involve her conversations with a member of her Cabinet.

With respect to respondent Committees' invocation of constitutional prescriptions regarding the right of the people to information and public accountability and transparency, the Court finds nothing in these arguments to support respondent Committees' case.

There is no debate as to the importance of the constitutional right of the people to information and the constitutional policies on public accountability and transparency. These are the twin postulates vital to the effective functioning of a democratic government. The citizenry can become prey to the whims and caprices of those to whom the power has been delegated if they are denied access to information. And the policies on public accountability and democratic government would certainly be mere empty words if access to such information of public concern is denied.

In the case at bar, this Court, in upholding executive privilege with respect to three (3) specific questions, did not in any way curb the public's right to information or diminish the importance of public accountability and transparency.

This Court did not rule that the Senate has no power to investigate the NBN Project in aid of legislation. There is nothing in the assailed Decision that prohibits respondent Committees from inquiring into the NBN Project. They could continue the investigation and even call petitioner Neri to testify again. He himself has repeatedly expressed his willingness to do so. Our Decision merely excludes from the scope of respondents' investigation the three (3) questions that elicit answers covered by executive privilege and rules that petitioner cannot be compelled to appear before respondents to answer the said questions. We have discussed the reasons why these answers are covered by executive privilege. That there is a recognized public interest in the confidentiality of such information is a recognized principle in other democratic States. To put it simply, the right to information is not an absolute right.

Indeed, the constitutional provisions cited by respondent Committees do not espouse an absolute right to information. By their wording, the intention of the Framers to subject such right to the regulation of the law is unmistakable. The highlighted portions of the following provisions show the obvious limitations on the right to information, thus:

Article III, Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

Article II, Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest. (Emphasis supplied)

In *Chavez v. Presidential Commission on Good Government*,<sup>[40]</sup> it was stated that there are no specific laws prescribing the exact limitations within which the right may be exercised or the correlative state duty may be obliged. Nonetheless, it enumerated the recognized restrictions to such rights, among them: (1) national security matters, (2) trade secrets and banking transactions, (3) criminal matters, and (4) other confidential information. National security matters include state secrets regarding military and diplomatic matters, as well as information on inter-government exchanges prior to the conclusion of treaties and executive agreements. It was further held that even where there is no need to protect such state secrets, they must be "examined in strict confidence and given scrupulous protection."

Incidentally, the right primarily involved here is the right of respondent Committees to obtain information allegedly in aid of legislation, not the people's right to public information. This is the reason why we stressed in the assailed Decision the distinction between these two rights. As laid down in *Senate v. Ermita*, "the demand of a citizen for the production of documents pursuant to his right to information does not have the same obligatory force as a subpoena duces tecum issued by Congress" and "neither does the right to information grant a citizen the power to exact testimony from government officials." As pointed out, these rights belong to Congress, not to the individual citizen. It is worth mentioning at this juncture that the parties here are respondent Committees and petitioner Neri and that there was no prior request for information on the part of any individual citizen. This Court will not be swayed by attempts to blur the distinctions between the Legislature's right to information in a legitimate legislative inquiry and the public's right to information.

For clarity, it must be emphasized that the assailed Decision did not enjoin respondent Committees from inquiring into the NBN Project. All that is expected from them is to respect matters that are covered by executive privilege.

### III.

Respondent Committees Failed to Show That  
the Communications Elicited by the Three Questions  
Are Critical to the Exercise of their Functions

In their Motion for Reconsideration, respondent Committees devote an unusually lengthy discussion on the purported legislative nature of their entire inquiry, as opposed to an oversight inquiry.

At the outset, it must be clarified that the Decision did not pass upon the nature of respondent Committees' inquiry into the NBN Project. To reiterate, this Court recognizes respondent Committees' power to investigate the NBN Project in aid of legislation. However, this Court cannot uphold the view that when a constitutionally guaranteed privilege or right is validly invoked by a witness in the course of a legislative investigation, the legislative purpose of respondent Committees' questions can be sufficiently supported by the expedient of mentioning statutes and/or pending bills to which their inquiry as a whole may have relevance. The jurisprudential test laid down by this Court in past decisions on executive privilege is that the presumption of privilege can only be overturned by a showing of compelling need for disclosure of the information covered by executive privilege.

In the Decision, the majority held that "there is no adequate showing of a compelling need that would justify the limitation of the privilege and of the unavailability of the information elsewhere by an appropriate investigating authority." In the Motion for Reconsideration, respondent Committees argue that the information elicited by the three (3) questions are necessary in the discharge of their legislative functions, among them, (a) to consider the three (3) pending Senate Bills, and (b) to curb graft and corruption.

We remain unpersuaded by respondents' assertions.

In *U.S. v. Nixon*, the U.S. Court held that executive privilege is subject to balancing against other interests and it is necessary to resolve the competing interests in a manner that would preserve the essential functions of each branch. There, the Court weighed between presidential privilege and the legitimate claims of the judicial process. In giving more weight to the latter, the Court ruled that the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

The Nixon Court ruled that an absolute and unqualified privilege would stand in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions. The said Court further ratiocinated, through its ruling extensively quoted in the Honorable Chief Justice Puno's dissenting opinion, as follows:

"... this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer.' *Berger v. United States*, 295 U.S., at 88, 55 S.Ct., at 633. 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.

xxx xxx xxx

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witness against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. (emphasis supplied)

xxx xxx xxx

... 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 communication will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. (emphasis supplied)

In the case at bar, we are not confronted with a court's need for facts in order to adjudge liability in a criminal case but rather with the Senate's need for information in relation to its legislative functions. This leads us to consider once again just how critical is the subject information in the discharge of respondent Committees' functions. The burden to show this is on the respondent Committees, since they seek to intrude into the sphere of competence of the President in order to gather information which, according to said respondents, would "aid" them in crafting legislation.

Senate Select Committee on Presidential Campaign Activities v. Nixon<sup>[41]</sup> expounded on the nature of a legislative inquiry in aid of legislation in this wise:

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' legislative tasks and the responsibility of a grand jury, or any 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. Indeed, whatever force there might once have been in the Committee's argument that the subpoenaed materials are necessary to its legislative judgments has been substantially undermined by subsequent events. (Emphasis supplied)

Clearly, the need for hard facts in crafting legislation cannot be equated with the compelling or demonstratively critical and specific need for facts which is so essential to the judicial power to adjudicate actual controversies. Also, the bare standard of "pertinency" set in *Arnault* cannot be lightly applied to the instant case, which unlike *Arnault* involves a conflict between two (2) separate, co-equal and coordinate Branches of the Government.

Whatever test we may apply, the starting point in resolving the conflicting claims between the Executive and the Legislative Branches is the recognized existence of the presumptive presidential communications privilege. This is conceded even in the Dissenting Opinion of the Honorable Chief Justice Puno, which states:

A hard look at *Senate v. Ermita* ought to yield the conclusion that it bestowed a qualified presumption in favor of the Presidential communications privilege. As shown in the previous discussion, *U.S. v. Nixon*, as well as the other related *Nixon* cases *Sirica* and *Senate Select Committee on Presidential Campaign Activities, et al., v. Nixon* in the D.C. Court of Appeals, as well as subsequent cases all recognize that there is a presumptive privilege in favor of Presidential communications. The *Almonte* case quoted *U.S. v. Nixon* and recognized a presumption in favor of confidentiality of Presidential communications.

The presumption in favor of Presidential communications puts the burden on the respondent Senate Committees to overturn the presumption by demonstrating their specific need for the information to be elicited by the answers to the three (3) questions subject of this case, to enable them to craft legislation. Here, there is simply a generalized assertion that the information is pertinent to the exercise of the power to legislate and a broad and non-specific reference to pending Senate bills. It is not clear what matters relating to these bills could not be determined without the said information sought by the three (3) questions. As correctly pointed out by the Honorable Justice Dante O. Tinga in his Separate Concurring Opinion:

...If 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 answer 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.

For sure, a factual basis for situations covered by bills is not critically needed before legislatures bodies can come up with relevant legislation unlike in the adjudication of cases by courts of law. Interestingly, during the Oral Argument before this Court, the counsel for respondent Committees impliedly admitted that the Senate could still come up with legislations even without petitioner answering the three (3) questions. In other words, the information being elicited is not so critical after all. Thus:

CHIEF JUSTICE PUNO

So can you tell the Court how critical are these questions to the lawmaking function of the Senate. For

instance, question Number 1 whether the President followed up the NBN project. According to the other counsel this question has already been asked, is that correct?

ATTY . AGABIN

Well, the question has been asked but it was not answered, Your Honor.

CHIEF JUSTICE PUNO

Yes. But my question is how critical is this to the lawmaking function of the Senate?

ATTY . AGABIN

I believe it is critical, Your Honor.

CHIEF JUSTICE PUNO

Why?

ATTY . AGABIN

For instance, with respect to the proposed Bill of Senator Miriam Santiago, she would like to indorse a Bill to include Executive Agreements had been used as a device to the circumventing the Procurement Law.

CHIEF JUSTICE PUNO

But the question is just following it up.

ATTY . AGABIN

I believe that may be the initial question, Your Honor, because if we look at this problem in its factual setting as counsel for petitioner has observed, there are intimations of a bribery scandal involving high government officials.

CHIEF JUSTICE PUNO

Again, about the second question, were you dictated to prioritize this ZTE, is that critical to the lawmaking function of the Senate? Will it result to the failure of the Senate to cobble a Bill without this question?

ATTY . AGABIN

I think it is critical to lay the factual foundations for a proposed amendment to the Procurement Law, Your Honor, because the petitioner had already testified that he was offered a P200 Million bribe, so if he was offered a P200 Million bribe it is possible that other government officials who had something to do with the approval of the contract would be offered the same amount of bribes.

CHIEF JUSTICE PUNO

Again, that is speculative.

ATTY . AGABIN

That is why they want to continue with the investigation, Your Honor.

CHIEF JUSTICE PUNO

How about the third question, whether the President said to go ahead and approve the project after being told about the alleged bribe. How critical is that to the lawmaking function of the Senate? And the question is may they craft a Bill a remedial law without forcing petitioner Neri to answer this question?

ATTY . AGABIN

Well, they can craft it, Your Honor, based on mere speculation. And sound legislation requires that a proposed Bill should have some basis in fact.[42]

The failure of the counsel for respondent Committees to pinpoint the specific need for the information sought or how the withholding of the information sought will hinder the accomplishment of their legislative purpose is very evident in the above oral exchanges. Due to the failure of the respondent Committees to successfully discharge this burden, the presumption in favor of confidentiality of presidential communication stands. The implication of the said presumption, like any other, is to dispense with the burden of proof as to whether the disclosure will significantly impair the President's performance of her function. Needless to state this is assumed, by virtue of the presumption.

Anent respondent Committees' bewailing that they would have to "speculate" regarding the questions covered by the privilege, this does not evince a compelling need for the information sought. Indeed, Senate Select Committee on Presidential Campaign Activities v. Nixon[43] held that 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 a precise reconstruction of past events. It added that, normally, Congress legislates on the basis of conflicting information provided in its hearings. We cannot subscribe to the respondent Committees' self-defeating proposition that without the answers to the three (3) questions objected to as privileged, the distinguished members of the respondent Committees cannot intelligently craft legislation.

Anent the function to curb graft and corruption, it must be stressed that respondent Committees' need for information in the exercise of this function is not as compelling as in instances when the purpose of the inquiry is legislative in nature. This is because curbing graft and corruption is merely an oversight function of Congress.[44] And if this is the primary objective of respondent Committees in asking the three (3) questions covered by privilege, it may even contradict their claim that their purpose is legislative in nature and not oversight. In any event, whether or not investigating graft and corruption is a legislative or oversight function of Congress, respondent Committees' investigation cannot transgress bounds set by the Constitution.

In *Bengzon, Jr. v. Senate Blue Ribbon Committee*,[45] this Court ruled:

The "allocation of constitutional boundaries" is a task that this Court must perform under the Constitution. Moreover, as held in a recent case, "the political question doctrine neither interposes an obstacle to judicial determination of the rival claims. The jurisdiction to delimit constitutional boundaries has been given to this Court. It cannot abdicate that obligation mandated by the 1987 Constitution, although said provision by no means does away with the applicability of the principle in appropriate cases.[46] (Emphasis supplied)

There, the Court further ratiocinated that "the contemplated inquiry by respondent Committee is not really 'in aid of legislation' because it is not related to a purpose within the jurisdiction of Congress, since the aim of the investigation is to find out whether or not the relatives of the President or Mr. Ricardo Lopa had violated Section 5 of R.A. No. 3019, the Anti-Graft and Corrupt Practices Act, a matter that appears more within the province of the courts rather than of the Legislature." [47] (Emphasis and underscoring supplied)

The general thrust and the tenor of the three (3) questions is to trace the alleged bribery to the Office of the President.[48] While it may be a worthy endeavor to investigate the potential culpability of high government officials, including the President, in a given government transaction, it is simply not a task for the Senate to perform. The role of the Legislature is to make laws, not to determine anyone's guilt of a crime or wrongdoing. Our Constitution has not bestowed upon the Legislature the latter role. Just as the Judiciary cannot legislate,

neither can the Legislature adjudicate or prosecute.

Respondent Committees claim that they are conducting an inquiry in aid of legislation and a "search for truth," which in respondent Committees' view appears to be equated with the search for persons responsible for "anomalies" in government contracts.

No matter how noble the intentions of respondent Committees are, they cannot assume the power reposed upon our prosecutorial bodies and courts. The determination of who is/are liable for a crime or illegal activity, the investigation of the role played by each official, the determination of who should be haled to court for prosecution and the task of coming up with conclusions and finding of facts regarding anomalies, especially the determination of criminal guilt, are not functions of the Senate. Congress is neither a law enforcement nor a trial agency. Moreover, it bears stressing that no inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress, i.e. legislation. Investigations conducted solely to gather incriminatory evidence and "punish" those investigated are indefensible. There is no Congressional power to expose for the sake of exposure.[49] In this regard, the pronouncement in *Barenblatt v. United States*[50] is instructive, thus:

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into the areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. (Emphasis supplied.)

At this juncture, it is important to stress that complaints relating to the NBN Project have already been filed against President Arroyo and other personalities before the Office of the Ombudsman. Under our Constitution, it is the Ombudsman who has the duty "to investigate any act or omission of any public official, employee, office or agency when such act or omission appears to be illegal, unjust, improper, or inefficient." [51] The Office of the Ombudsman is the body properly equipped by the Constitution and our laws to preliminarily determine whether or not the allegations of anomaly are true and who are liable therefor. The same holds true for our courts upon which the Constitution reposes the duty to determine criminal guilt with finality. Indeed, the rules of procedure in the Office of the Ombudsman and the courts are well-defined and ensure that the constitutionally guaranteed rights of all persons, parties and witnesses alike, are protected and safeguarded.

Should respondent Committees uncover information related to a possible crime in the course of their investigation, they have the constitutional duty to refer the matter to the appropriate agency or branch of government. Thus, the Legislature's need for information in an investigation of graft and corruption cannot be deemed compelling enough to pierce the confidentiality of information validly covered by executive privilege. As discussed above, the Legislature can still legislate on graft and corruption even without the information covered by the three (3) questions subject of the petition.

Corollarily, respondent Committees justify their rejection of petitioner's claim of executive privilege on the ground that there is no privilege when the information sought might involve a crime or illegal activity, despite the absence of an administrative or judicial determination to that effect. Significantly, however, in *Nixon v. Sirica*, [52] 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.

Respondent Committees assert that *Senate Select Committee on Presidential Campaign Activities v. Nixon* does not apply to the case at bar because, unlike in the said case, no impeachment proceeding has been initiated at

present. The Court is not persuaded. While it is true that no impeachment proceeding has been initiated, however, complaints relating to the NBN Project have already been filed against President Arroyo and other personalities before the Office of the Ombudsman. As the Court has said earlier, the prosecutorial and judicial arms of government are the bodies equipped and mandated by the Constitution and our laws to determine whether or not the allegations of anomaly in the NBN Project are true and, if so, who should be prosecuted and penalized for criminal conduct.

Legislative inquiries, unlike court proceedings, are not subject to the exacting standards of evidence essential to arrive at accurate factual findings to which to apply the law. Hence, Section 10 of the Senate Rules of Procedure Governing Inquiries in Aid of Legislation provides that "technical rules of evidence applicable to judicial proceedings which do not affect substantive rights need not be observed by the Committee." Court rules which prohibit leading, hypothetical, or repetitive questions or questions calling for a hearsay answer, to name a few, do not apply to a legislative inquiry. Every person, from the highest public official to the most ordinary citizen, has the right to be presumed innocent until proven guilty in proper proceedings by a competent court or body.

#### IV

##### Respondent Committees Committed Grave Abuse of Discretion in Issuing the Contempt Order

Respondent Committees insist that they did not commit grave abuse of discretion in issuing the contempt order because (1) there is no legitimate claim of executive privilege; (2) they did not violate the requirements laid down in *Senate v. Ermita*; (3) they issued the contempt order in accordance with their internal Rules; (4) they did not violate the requirement under Article VI, Section 21 of the Constitution requiring the publication of their Rules; and (5) their issuance of the contempt order is not arbitrary or precipitate.

We reaffirm our earlier ruling.

The legitimacy of the claim of executive privilege having been fully discussed in the preceding pages, we see no reason to discuss it once again.

Respondent Committees' second argument rests on the view that the ruling in *Senate v. Ermita*, requiring invitations or subpoenas to contain the "possible needed statute which prompted the need for the inquiry" along with the "usual indication of the subject of inquiry and the questions relative to and in furtherance thereof" is not provided for by the Constitution and is merely an obiter dictum.

On the contrary, the Court sees the rationale and necessity of compliance with these requirements.

An unconstrained congressional investigative power, like an unchecked Executive, generates its own abuses. Consequently, claims that the investigative power of Congress has been abused (or has the potential for abuse) have been raised many times.[53] Constant exposure to congressional subpoena takes its toll on the ability of the Executive to function effectively. The requirements set forth in *Senate v. Ermita* are modest mechanisms that would not unduly limit Congress' power. The legislative inquiry must be confined to permissible areas and thus, prevent the "roving commissions" referred to in the U.S. case, *Kilbourn v. Thompson*.<sup>[54]</sup> Likewise, witnesses have their constitutional right to due process. They should be adequately informed what matters are to be covered by the inquiry. It will also allow them to prepare the pertinent information and documents. To our mind, these requirements concede too little political costs or burdens on the part of Congress when viewed vis-à-vis the immensity of its power of inquiry. The logic of these requirements is well articulated in the study conducted by William P. Marshall,<sup>[55]</sup> to wit:

A second concern that might be addressed is that the current system allows committees to continually investigate the Executive without constraint. One process solution addressing this concern is to require each investigation be tied to a clearly stated purpose. At present, the charters of some congressional committees are so broad that virtually any matter involving the Executive can be construed to fall within their province. Accordingly, investigations can proceed without articulation of specific need or purpose. A requirement for a more precise charge in order to begin an inquiry should immediately work to limit the initial scope of the investigation and should also serve to contain the investigation once it is instituted. Additionally, to the extent clear statements of rules cause legislatures to pause and seriously consider the constitutional implications of proposed courses of action in other areas, they would serve that goal in the context of congressional investigations as well.

The key to this reform is in its details. A system that allows a standing committee to simply articulate its reasons to investigate pro forma does no more than imposes minimal drafting burdens. Rather, the system must be designed in a manner that imposes actual burdens on the committee to articulate its need for investigation and allows for meaningful debate about the merits of proceeding with the investigation. (Emphasis supplied)

Clearly, petitioner's request to be furnished an advance copy of questions is a reasonable demand that should have been granted by respondent Committees.

Unfortunately, the Subpoena Ad Testificandum dated November 13, 2007 made no specific reference to any pending Senate bill. It did not also inform petitioner of the questions to be asked. As it were, the subpoena merely commanded him to "testify on what he knows relative to the subject matter under inquiry."

Anent the third argument, respondent Committees contend that their Rules of Procedure Governing Inquiries in Aid of Legislation (the "Rules") are beyond the reach of this Court. While it is true that this Court must refrain from reviewing the internal processes of Congress, as a co-equal branch of government, however, when a constitutional requirement exists, the Court has the duty to look into Congress' compliance therewith. We cannot turn a blind eye to possible violations of the Constitution simply out of courtesy. In this regard, the pronouncement in *Arroyo v. De Venecia*[56] is enlightening, thus:

"Cases both here and abroad, in varying forms of expression, all deny to the courts the power to inquire into allegations that, in enacting a law, a House of Congress failed to comply with its own rules, in the absence of showing that there was a violation of a constitutional provision or the rights of private individuals.

*United States v. Ballin, Joseph & Co.*, the rule was stated thus: "The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."

In the present case, the Court's exercise of its power of judicial review is warranted because there appears to be a clear abuse of the power of contempt on the part of respondent Committees. Section 18 of the Rules provides that:

"The Committee, by a vote of majority of all its members, may punish for contempt any witness before it who disobey any order of the Committee or refuses to be sworn or to testify or to answer proper questions by the Committee or any of its members." (Emphasis supplied)

In the assailed Decision, we said that there is a cloud of doubt as to the validity of the contempt order because during the deliberation of the three (3) respondent Committees, only seven (7) Senators were present. This number could hardly fulfill the majority requirement needed by respondent Committee on Accountability of Public Officers and Investigations which has a membership of seventeen (17) Senators and respondent Committee on National Defense and Security which has a membership of eighteen (18) Senators. With respect to respondent Committee on Trade and Commerce which has a membership of nine (9) Senators, only three (3) members were

present.[57] These facts prompted us to quote in the Decision the exchanges between Senators Alan Peter Cayetano and Aquilino Pimentel, Jr. whereby the former raised the issue of lack of the required majority to deliberate and vote on the contempt order.

When asked about such voting during the March 4, 2008 hearing before this Court, Senator Francis Pangilinan stated that any defect in the committee voting had been cured because two-thirds of the Senators effectively signed for the Senate in plenary session.[58]

Obviously the deliberation of the respondent Committees that led to the issuance of the contempt order is flawed. Instead of being submitted to a full debate by all the members of the respondent Committees, the contempt order was prepared and thereafter presented to the other members for signing. As a result, the contempt order which was issued on January 30, 2008 was not a faithful representation of the proceedings that took place on said date. Records clearly show that not all of those who signed the contempt order were present during the January 30, 2008 deliberation when the matter was taken up.

Section 21, Article VI of the Constitution states that:

The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of person appearing in or affected by such inquiries shall be respected. (Emphasis supplied)

All the limitations embodied in the foregoing provision form part of the witness' settled expectation. If the limitations are not observed, the witness' settled expectation is shattered. Here, how could there be a majority vote when the members in attendance are not enough to arrive at such majority? Petitioner has the right to expect that he can be cited in contempt only through a majority vote in a proceeding in which the matter has been fully deliberated upon. There is a greater measure of protection for the witness when the concerns and objections of the members are fully articulated in such proceeding. We do not believe that respondent Committees have the discretion to set aside their rules anytime they wish. This is especially true here where what is involved is the contempt power. It must be stressed that the Rules are not promulgated for their benefit. More than anybody else, it is the witness who has the highest stake in the proper observance of the Rules.

Having touched the subject of the Rules, we now proceed to respondent Committees' fourth argument. Respondent Committees argue that the Senate does not have to publish its Rules because the same was published in 1995 and in 2006. Further, they claim that the Senate is a continuing body; thus, it is not required to republish the Rules, unless the same is repealed or amended.

On the nature of the Senate as a "continuing body," this Court sees fit to issue a clarification. Certainly, there is no debate that the Senate as an institution is "continuing", as it is not dissolved as an entity with each national election or change in the composition of its members. However, in the conduct of its day-to-day business the Senate of each Congress acts separately and independently of the Senate of the Congress before it. The Rules of the Senate itself confirms this when it states:

RULE XLIV  
UNFINISHED BUSINESS

SEC. 123. Unfinished business at the end of the session shall be taken up at the next session in the same status.

All pending matters and proceedings shall terminate upon the expiration of one (1) Congress, but may be taken by the succeeding Congress as if present for the first time. (emphasis supplied)

Undeniably from the foregoing, all pending matters and proceedings, i.e. unpassed bills and even legislative

investigations, of the Senate of a particular Congress are considered terminated upon the expiration of that Congress and it is merely optional on the Senate of the succeeding Congress to take up such unfinished matters, not in the same status, but as if presented for the first time. The logic and practicality of such a rule is readily apparent considering that the Senate of the succeeding Congress (which will typically have a different composition as that of the previous Congress) should not be bound by the acts and deliberations of the Senate of which they had no part. If the Senate is a continuing body even with respect to the conduct of its business, then pending matters will not be deemed terminated with the expiration of one Congress but will, as a matter of course, continue into the next Congress with the same status.

This dichotomy of the continuity of the Senate as an institution and of the opposite nature of the conduct of its business is reflected in its Rules. The Rules of the Senate (i.e. the Senate's main rules of procedure) states:

#### RULE LI

##### AMENDMENTS TO, OR REVISIONS OF, THE RULES

SEC. 136. At the start of each session in which the Senators elected in the preceding elections shall begin their term of office, the President may endorse the Rules to the appropriate committee for amendment or revision.

The Rules may also be amended by means of a motion which should be presented at least one day before its consideration, and the vote of the majority of the Senators present in the session shall be required for its approval. (emphasis supplied)

#### RULE LII

##### DATE OF TAKING EFFECT

SEC. 137. These Rules shall take effect on the date of their adoption and shall remain in force until they are amended or repealed. (emphasis supplied)

Section 136 of the Senate Rules quoted above takes into account the new composition of the Senate after an election and the possibility of the amendment or revision of the Rules at the start of each session in which the newly elected Senators shall begin their term.

However, it is evident that the Senate has determined that its main rules are intended to be valid from the date of their adoption until they are amended or repealed. Such language is conspicuously absent from the Rules. The Rules simply state "(t)hese Rules shall take effect seven (7) days after publication in two (2) newspapers of general circulation."<sup>[59]</sup> The latter does not explicitly provide for the continued effectivity of such rules until they are amended or repealed. In view of the difference in the language of the two sets of Senate rules, it cannot be presumed that the Rules (on legislative inquiries) would continue into the next Congress. The Senate of the next Congress may easily adopt different rules for its legislative inquiries which come within the rule on unfinished business.

The language of Section 21, Article VI of the Constitution requiring that the inquiry be conducted in accordance with the duly published rules of procedure is categorical. It is incumbent upon the Senate to publish the rules for its legislative inquiries in each Congress or otherwise make the published rules clearly state that the same shall be effective in subsequent Congresses or until they are amended or repealed to sufficiently put public on notice.

If it was the intention of the Senate for its present rules on legislative inquiries to be effective even in the next Congress, it could have easily adopted the same language it had used in its main rules regarding effectivity.

Lest the Court be misconstrued, it should likewise be stressed that not all orders issued or proceedings conducted pursuant to the subject Rules are null and void. Only those that result in violation of the rights of witnesses should

be considered null and void, considering that the rationale for the publication is to protect the rights of witnesses as expressed in Section 21, Article VI of the Constitution. Sans such violation, orders and proceedings are considered valid and effective.

Respondent Committees' last argument is that their issuance of the contempt order is not precipitate or arbitrary. Taking into account the totality of circumstances, we find no merit in their argument.

As we have stressed before, petitioner is not an unwilling witness, and contrary to the assertion of respondent Committees, petitioner did not assume that they no longer had any other questions for him. He repeatedly manifested his willingness to attend subsequent hearings and respond to new matters. His only request was that he be furnished a copy of the new questions in advance to enable him to adequately prepare as a resource person. He did not attend the November 20, 2007 hearing because Executive Secretary Ermita requested respondent Committees to dispense with his testimony on the ground of executive privilege. Note that petitioner is an executive official under the direct control and supervision of the Chief Executive. Why punish petitioner for contempt when he was merely directed by his superior? Besides, save for the three (3) questions, he was very cooperative during the September 26, 2007 hearing.

On the part of respondent Committees, this Court observes their haste and impatience. Instead of ruling on Executive Secretary Ermita's claim of executive privilege, they curtly dismissed it as unsatisfactory and ordered the arrest of petitioner. They could have informed petitioner of their ruling and given him time to decide whether to accede or file a motion for reconsideration. After all, he is not just an ordinary witness; he is a high-ranking official in a co-equal branch of government. He is an alter ego of the President. The same haste and impatience marked the issuance of the contempt order, despite the absence of the majority of the members of the respondent Committees, and their subsequent disregard of petitioner's motion for reconsideration alleging the pendency of his petition for certiorari before this Court.

On a concluding note, we are not unmindful of the fact that the Executive and the Legislature are political branches of government. In a free and democratic society, the interests of these branches inevitably clash, but each must treat the other with official courtesy and respect. This Court wholeheartedly concurs with the proposition that it is imperative for the continued health of our democratic institutions that we preserve the constitutionally mandated checks and balances among the different branches of government.

In the present case, it is respondent Committees' contention that their determination on the validity of executive privilege should be binding on the Executive and the Courts. It is their assertion that their internal procedures and deliberations cannot be inquired into by this Court supposedly in accordance with the principle of respect between co-equal branches of government. Interestingly, it is a courtesy that they appear to be unwilling to extend to the Executive (on the matter of executive privilege) or this Court (on the matter of judicial review). It moves this Court to wonder: In respondent Committees' paradigm of checks and balances, what are the checks to the Legislature's all-encompassing, awesome power of investigation? It is a power, like any other, that is susceptible to grave abuse.

While this Court finds laudable the respondent Committees' well-intentioned efforts to ferret out corruption, even in the highest echelons of government, such lofty intentions do not validate or accord to Congress powers denied to it by the Constitution and granted instead to the other branches of government.

There is no question that any story of government malfeasance deserves an inquiry into its veracity. As respondent Committees contend, this is founded on the constitutional command of transparency and public accountability. The recent clamor for a "search for truth" by the general public, the religious community and the academe is an indication of a concerned citizenry, a nation that demands an accounting of an entrusted power.

However, the best venue for this noble undertaking is not in the political branches of government. The customary partisanship and the absence of generally accepted rules on evidence are too great an obstacle in arriving at the truth or achieving justice that meets the test of the constitutional guarantee of due process of law. We believe the people deserve a more exacting "search for truth" than the process here in question, if that is its objective.

WHEREFORE, respondent Committees' Motion for Reconsideration dated April 8, 2008 is hereby DENIED.

**SO ORDERED.**

Corona, Tinga Chico-Nazario, Velasco, Jr., Nachura, and Brion, JJ., concur.

Puno, C.J., please see Dissenting Opinion

Quisumbing, J., pls. see Separate Opinion.

Ynares-Santiago, and Austria-Martinez, JJ., joined the Dissent of the C.J.

Carpio, J., maintained his Dissent.

Carpio Morales, J., dissents to the main ponencia remains

Azcuna, J., maintained his Dissent and joined the C.J.

Reyes, J., pls. see Separate Opinion

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[1] Chaired by Hon. Senator Alan Peter S. Cayetano.

[2] Chaired by Hon. Senator Manuel A. Roxas II.

[3] Chaired by Hon. Senator Rodolfo G. Biazon.

[4] Transcript of the September 26, 2007 Hearing of the respondent Committees, pp. 91-92.

[5] Id., pp. 114-115.

[6] Id., pp. 276-277.

[7] See Letter dated November 15, 2007.

[8] See Letter dated January 30, 2008.

[9] G.R. No. 95367, May 23, 1995, 244 SCRA 286.

[10] 433 Phil. 506 (2002)

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

[12] Supra., note 9.

[13] Supra., note 11.

[14] G.R. No. 130716, December 9, 1998, 299 SCRA 744.

[15] Supra., note 10.

[16] Almonte v. Vasquez, supra., note 9.

[17] Chavez v. PCGG, supra., note 14.

[18] Senate v. Ermita, supra., note 11.

[19] Telefunken Semiconductors Employees Union -FFW v. Court of Appeals, G.R. Nos. 143013-14, December

18, 2000, 348 SCRA 565,587; Valderama v. NLRC, G.R. No. 98239, April 25,1996, 256 SCRA 466, 472 citing Policarpio v. P.V.B. and Associated Ins. & Surety Co., Inc., 106 Phil. 125, 131 (1959).

[20] Supra, note 11 at pp. 68-69

[21] Id., at pp. 45-46

[22] Id., at p. 58

[23] Id., at p. 50

[24] Webster Encyclopedic Unabridged Dictionary, Gramercy Books 1994, p. 1181.

[25] Business Dictionary, <http://www.businessdictionary.com/definition/non-delegable-duty.html>

[26] Usaffe Veterans Association, Inc. v. Treasurer of the Philippines, et al. (105 Phil. 1030, 1038); See also Commissioner of Internal Revenue v. John Gotamco & Sons, Inc. G.R. No. L-31092, February 27, 1987,148 SCRA 36, 39.

[27] No. 96-3124, June 17, 1997, 121 F.3d 729,326 U.S. App. D.C. 276.

[28] 365 F 3d. 1108, 361 U.S. App. D.C. 183, 64 Fed. R. Evid. Serv.141.

[29] Article III, Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

[30] Article II, Sec. 24. The State recognizes the vital role of communication and information in nation-building.

[31] Article II, Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.

[32] Article XI, Sec. 1. Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.

[33] Article XVI, Sec. 10. The State shall provide the policy environment for the full development of Filipino capability and the emergence of communications structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press.

[34] Article VII , Sec. 20. The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

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

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

[37] Article XII, Sec. 22. Acts which circumvent or negate any of the provisions of this Article shall be considered inimical to the national interest and subject to criminal and civil sanctions, as may be provided by law.

[38] 14 F. Supp. 230, 299 U.S. 304 (1936).

[39] G.R. No. 170516, promulgated July 16, 2008.

[40] Supra note 14.

[41] Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

[42] TSN, Oral Argument, March 4, 2008, pp. 417 - 422.

[43] Supra, note 41 at pp. 725, 731-32.

[44] Senate Select Committee on Presidential Campaign Activities v. Nixon held that Congress' "asserted power to investigate and inform" was, standing alone, insufficient to overcome a claim of privilege and so refused to enforce the congressional subpoena. Id.

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

[46] Id., at p. 776.

[47] Id., at p. 783.

[48] The dialogue between petitioner and Senator Lacson is a good illustration, thus:

SEN. LACSON.

Did you report the 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, I said, `Chairman Abalos offered me 200 million for this.'

SEN. LACSON.

Okay. That clear?

MR. NERI.

I'm sorry.

SEN. LACSON.

That clear?

MR. NERI.

I think so, Your Honor.

SEN. LACSON.

And after she told you. `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 recommendation 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."

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 --- and 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.

[49] *Watkins v. United States*, 354 U.S. 178 (1957).

[50] 360 U.A. 109, 3 L Ed. 2d 1115, 69 S CT 1081 (1959).

[51] Article XI, Section 13, par.1 of the Constitution.

[52] 487 F. 2d 700.

[53] Professor Christopher Schroeder (then with the Clinton Justice Department), for example, labeled some of Congress's investigations as no more than "vendetta oversight" or "oversight that seems primarily interested in bringing someone down, usually someone close to the President or perhaps the President himself." Theodore Olson (the former Solicitor General in the Bush Justice Department), in turn, has argued that oversight has been used improperly by Congress to influence decision making of executive branch officials in a way that undercuts the President's power to assure that laws are faithfully executed. (Marshall, *The Limits on Congress' Authority to Investigate the President*, Marshall-Illinois.Doc, November 24, 2004.)

**[54] 103 U.S. 168 (1880).**

[55] Kenan Professor of Law, University of North Carolina.

[56] G.R. No. 127255, August 14, 1997, 277 SCRA 268.

[57] Transcript of the January 30, 2008 proceedings pp. 5-7.

[58] TSN, March 4, 2008, at pp. 529-530.

[59] Section 24, Rules of Procedure Governing Inquiries in Aid of Legislation.

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**DISSENTING OPINION**

**PUNO, C.J.:**

That the Senate is a continuing body is a constitutional notion often stated, but not much scrutinized.[1] Upon this notion rests the continued life of Senate rules of procedure; hence, the need to moor it on the proper doctrinal anchor.

The issues for resolution in respondent Senate Committees' Motion for Reconsideration are as follows:

"I. Contrary to this Honorable Court's Decision, there is no doubt that the assailed Orders were issued by

respondent Committees pursuant to the exercise of their legislative power, and not merely their oversight functions.

II. Contrary to this Honorable Court's Decision, there can be no presumption that the information withheld in the instant case is privileged.

III. Contrary to this Honorable Court's Decision, there is no factual or legal basis to hold that the communications elicited by the subject three (3) questions are covered by executive privilege considering that:

- There is no showing that the matters for which executive privilege is claimed constitute state secrets.
- Even if the tests adopted by this Honorable Court in the Decision is (sic) applied, there is no showing that the elements of presidential communications privilege are present.
- On the contrary, there is adequate showing of a compelling need to justify the disclosure of the information sought.
- To uphold the claim of executive privilege in the instant case would seriously impair the respondents' performance of their primary function to enact laws.
- Finally, the constitutional right of the people to information, and the constitutional policies on public accountability and transparency outweigh the claim of executive privilege.

IV. Contrary to this Honorable Court's Decision, respondents did not commit grave abuse of discretion in issuing the assailed contempt Order, considering that:

- There is no legitimate claim of executive privilege in the instant case.
- Respondents did not violate the supposed requirements laid down in *Senate v. Ermita*.
- Respondents duly issued the contempt Order in accordance with their internal rules.
- Respondents did not violate the requirement under Article VI, Section 21 of the Constitution requiring that its rules of procedure be duly published, and were denied due process when the Court considered the OSG's intervention on this issue without giving respondents the opportunity to comment.
- Respondents' issuance of the contempt Order is not arbitrary or precipitate."<sup>[2]</sup>

The Motion for Reconsideration presents a long list of issues, but I shall focus on the issue of violation of the requirement under Article VI, Section 21 of the 1987 Constitution that the rules of procedure governing inquiries in aid of legislation be "duly published." As to the remaining issues, I reiterate my position in my Dissenting Opinion to the March 25, 2008 Decision.

The textual hook for resolving the publication issue is Article VI, Section 21 of the 1987 Constitution, which provides, viz:

The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected. (emphasis supplied)

#### Publication as a due process requirement

As the 1987 Constitution does not provide the manner of "duly" publishing the rules of procedure under the afore-quoted Article VI, Section 21, the Records of the 1986 Constitutional Commission is a good place to start in interpreting this provision. The Records, however, are also bereft of deliberations to shed light on the publication requirement. Nonetheless, I submit that the landmark case *Tañada v. Tuvera*<sup>[3]</sup> is a lighthouse that can guide us in

navigating through the publication question.

In *Tañada*, the petitioners invoked their right to information on matters of public concern under Article IV, Section 6 of the 1973 Constitution,[4] and the principle that laws to be valid and enforceable must be published in the Official Gazette or otherwise effectively promulgated. They sought to compel the respondent public officials to publish or cause to be published in the Official Gazette various presidential decrees, letters of instruction, general orders, proclamations, executive orders, letters of implementation and administrative orders.

In ruling in favor of petitioners, the Court interpreted Article 2 of the Civil Code of the Philippines, which states that "(l)aws shall take effect after fifteen days following completion of their publication in the Official Gazette, unless it is otherwise provided x x x." It held that the phrase "unless it is otherwise provided" refers not to the requirement of publication in the Official Gazette, which is indispensable for the law or regulation to take effect, but to the period of time from publication after which the law shall take effect. The Court allowed the fifteen-day period to be extended or shortened, but not to the extent of altogether omitting publication.

The Court reasoned that an omission of publication would offend due process insofar as it would deny the public knowledge of the laws that are supposed to govern it. It noted that it is not unlikely that persons not aware of the laws would be prejudiced as a result, and not because of a failure to comply with them, but simply because they did not know of their existence. Thus, the Court concluded that "...all statutes, including those of local application and private laws, shall be published as a condition for their effectivity, which shall begin fifteen days after publication unless a different effectivity date is fixed by the legislature... Administrative rules and regulations must also be published if their purpose is to enforce or implement existing law pursuant to a valid delegation." [5]

While the Court acknowledged that newspapers of general circulation, instead of the Official Gazette, could better perform the function of communicating laws to the public -- as such periodicals are more easily available, have a wider readership, and come out regularly -- it was constrained to hold that publication must be made in the Official Gazette because that was the requirement in Article 2 of the Civil Code.

Subsequently, President Corazon C. Aquino issued Executive Order No. 200, allowing publication either in the Official Gazette or in a newspaper of general circulation in the Philippines.[6]

In the case at bar, the Senate of the Tenth Congress adopted the subject "Rules of Procedure Governing Inquiries in Aid of Legislation" ("Rules of Procedure Governing Inquiries") on August 21, 1995 pursuant to Article VI, Section 21 of the 1987 Constitution.[7] Section 24 of the Rules provides that the Rules "shall take effect seven (7) days after publication in two (2) newspapers of general circulation." The Senate thus caused it to be published in two newspapers of general circulation, *The Philippine Star* and *Malaya*, on August 24, 1995. The published Rules of Procedure Governing Inquiries indicated that it was adopted in the Tenth Congress on August 21, 1995.

The Senate of the Thirteenth Congress caused the re-publication of the Rules of Procedure Governing Inquiries on December 1, 2006 in two newspapers of general circulation, *The Philippine Star* and *Philippine Daily Inquirer*. The published rules appeared in the same manner it did in the August 24, 1995 publication, i.e., under the heading "Tenth Congress" and with August 21, 1995 as the date of adoption.[8] The publications also stated that the Rules of Procedure Governing Inquiries had been previously published in the August 24, 1995 issues of *The Philippine Star* and *Malaya*, and that "(n)o amendments have been made in the Rules since its adoption."

Evidently, the Senate of the Thirteenth Congress did not adopt anew the Rules of Procedure Governing Inquiries, as the publications in December 2006 indicated that it was the Rules of Procedure adopted in the Tenth Congress on August 21, 1995 and published on August 24, 1995. There was no amendment made on it since its adoption on August 21, 1995; thus, re-publication was apparently done merely for purposes of public information and not to

give effect to a new or amended Rules of Procedure Governing Inquiries. As respondent Senate Committees correctly contend, "not having been amended, modified or repealed since 1995, the Rules of Procedure Governing Inquiries in Aid of Legislation remain in full force and effect." [9]

I submit that the publication of the Rules of Procedure Governing Inquiries on August 24, 1995 has satisfied the due process requirement to inform the public of a rule that would govern them and affect their rights.

The Resolution of the majority, however, ruled that the respondent Senate Committees failed to meet the publication requirement under Article VI, Section 21 of the 1987 Constitution, as it is not sufficient that the Rules of Procedure Governing Inquiries be published once; instead, it should be published by the Senate of every Congress.

Should the Rules of Procedure Governing Inquiries be published by the Senate of every Congress?

In disputing the majority Resolution's conclusion and supporting my position that one-time publication suffices, let me first lay down the premise of the Resolution and the Comments of the petitioner and the Office of the Solicitor General (OSG). They all cite the disquisition on this matter by Justice Antonio T. Carpio in his Dissenting and Concurring Opinion to the March 25, 2008 Decision in this case, viz:

"In *Arnault v. Nazareno*, [footnote omitted] decided under the 1935 Constitution, this Court ruled that 'the Senate of the Philippines is a continuing body whose members are elected for a term of six years and so divided that the seats of only one-third become vacant every two years, two-thirds always continuing into the next Congress save as vacancies may occur thru death or resignation.' To act as a legislative body, the Senate must have a quorum, which is a majority of its membership. [Section 10(2), Article VI, 1935 Constitution; Section 16(2), Article VI, 1987 Constitution. Both the 1935 and 1987 Constitutions provide that '(A) majority of each House shall constitute a quorum to do business.'] Since the Senate under the 1935 Constitution always had two-thirds of its membership filled up except for vacancies arising from death or resignation, the Senate always maintained a quorum to act as a legislative body. Thus, the Senate under the 1935 Constitution continued to act as a legislative body even after the expiry of the term of one-third of its members. This is the rationale in holding that the Senate under the 1935 Constitution was a continuing legislative body. [See also *Attorney General Ex. Rel. Werts v. Rogers, et al.*, 56 N.J.L. 480, 652 (1844)]. The Supreme Court of New Jersey declared: '(T)he vitality of the body depends upon the existence of a quorum capable of doing business. That quorum constitutes a senate. Its action is the expression of the will of the senate, and no authority can be found which states any other conclusion. All difficulty and confusion in constitutional construction is avoided by applying the rule x x x that the continuity of the body depends upon the fact that in the senate a majority constitutes a quorum, and, as there is always more than a quorum of qualified senators holding seats in that body, its organic existence is necessarily continuous. x x x The senate of the United States remains a continuous body because two-thirds of its members are always, in contemplation of the constitution, in existence.']

"The present Senate under the 1987 Constitution is no longer a continuing legislative body. The present Senate has twenty-four members, twelve of whom are elected every three years for a term of six years each. Thus, the term of twelve Senators expires every three years, leaving less than a majority of Senators to continue into the next Congress. The 1987 Constitution, like the 1935 Constitution, requires a majority of Senators to 'constitute a quorum to do business.' [Section 16(2), Article VI, Constitution] Applying the same reasoning in *Arnault v. Nazareno*, the Senate under the 1987 Constitution is not a continuing body because less than majority of the Senators continue into the next Congress. The consequence is that the Rules of Procedure must be republished by the Senate after every expiry of the term of twelve Senators." [10] (emphasis supplied)

On the other hand, respondent Senate Committees point out that there is nothing in the wording of Article VI,

Section 21 of the 1987 Constitution that requires the Senate of every Congress to publish the Rules of Procedure Governing Inquiries. More than the absence of a textual basis for the requirement, respondent Senate Committees contend that the Senate is a continuing body since the terms of its members expire at different times, and as such, it is not required to formally adopt and publish its Rules of Procedure Governing Inquiries for every Congress, unless it is repealed or amended.[11]

It is my considered view that there is merit in the contention of respondent Senate Committees that the Rules of Procedure Governing Inquiries need not be published by the Senate of every Congress, as the Senate is a continuing body. The continuity of these rules from one Congress to the next is both an incident and an indicium of the continuing nature of the Senate.

The Senate is a continuing body

Excerpts from the deliberations of the 1986 Constitutional Commission provide us a brief history of the Senate of the Philippines and its intended nature as a continuing legislative body, viz:

"MR. TINGSON: Madam President and colleagues of this honorable Assembly, I would like to speak briefly on the need for a bicameral legislature elected on a national basis. I would like to thank the Chair and my colleagues for giving me this chance to express my personal view on the type of legislature that we may adopt as we undertake the task of drafting a new Constitution.

"Perhaps an approach based on historical perspective is relevant at this point in time, when our decision to adopt a more receptive form of legislature will not only determine our present but also direct our future as a nation. In the Malolos Constitution of 1899, the legislative power was exercised by an assembly of representatives of the nation. Upon the cession of the Philippines to the United States under the Treaty of Paris, we had a military government which was later replaced by a civil government in 1900. During this time, the executive and the legislative functions were exercised by a Commission. With the passage of the Philippine Bill of 1902, a bicameral legislature was created, transforming the Philippine Commission into the Upper Chamber and constituting the Philippine Assembly as the Lower House.

"In 1916, pursuant to the Jones Law, legislative power was vested in an all-Filipino bicameral legislature with the Senate as the Upper Chamber and the House of Representatives as the Lower Chamber. The Senators then were elected from the twelve senatorial districts. In the 1935 Constitution, we again adopted a unicameral legislative body known as the National Assembly. The Convention then rejected the proposal for a bicameral legislature with an Upper House called the Senate. The failure of the bicameralist position was due to the division on the question of representation. The Committee on the Legislative proposed that Senators be elected throughout the Philippines on the basis of proportional representation. Others, however, advocated that each province shall be entitled to one Senator, as the practice in the United States. Still others preferred the system of senatorial district under the Jones Law of 1916.

"During the time of President Manuel L. Quezon, an amendment providing for a bicameral legislature was adopted. Senators were elected nationwide. I may say that the reason President Quezon advocated for a bicameral form of legislature is not primarily that he was wary of a strong unicameral body that can dislodge him anytime by impeachment, but that he believed that the Senate affords a sufficient critical and methodical review of legislation. It assumes the role of moderating force in the formulation of legislative policies. It serves as a fiscalizer on the actions of the Lower House, which in usual practice is prone to passing excessive appropriations acts and other forms of legislations that may prove detrimental to the interest of the nation. The Senate, Madam President, according to President Quezon, will serve as a balance for harmony between the executive and the legislative departments and provide a training ground for future leaders. It may be said that it also serves as a vanguard against the activities of politicians and lobbying pressure groups and, likewise, safeguards any possible encroachment upon the constitutional liberties of the people.

"As to representation, the Upper House provides national representation which the Lower House cannot attain. In so doing, a bicameral form fosters national unity and consciousness, rather than a representative form merely based on the respective districts of the members of legislature. The scope of legislative responsibility is, therefore, unified with the presence of the Senate. One of the most important features, of course, is that the Senate insures stability of governmental policies as the Senate is a continuing body.[12]

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"MR. RODRIGO: ... I would like to state that in the United States Federal Congress, the term of the members of the Lower House is only two years. We have been used to a term of four years here but I think three years is long enough. But they will be allowed to run for reelection any number of times. In this way, we remedy the too frequent elections every two years. We will have elections every three years under this scheme and we will have a continuing Senate. Every election, 12 of the 24 Senators will be elected, so that 12 Senators will remain in the Senate. We will have a staggered membership in the Senate. In other words, we will have a continuing Senate.[13]

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"THE PRESIDING OFFICER (Mr. Rodrigo): Commissioner Davide is recognized.

"MR. DAVIDE: This is just a paragraph of that section that will follow what had earlier been approved. It reads: 'OF THE SENATORS ELECTED IN THE ELECTION IN 1992, THE FIRST TWELVE OBTAINING THE HIGHEST NUMBER OF VOTES SHALL SERVE FOR SIX YEARS AND THE REMAINING TWELVE FOR THREE YEARS.'

"This is to start the staggering of the Senate to conform with the idea of a continuing Senate.

"THE PRESIDING OFFICER (Mr. Rodrigo): What does the committee say?

"MR. SUAREZ: The committee accepts the Davide proposal, Mr. Presiding Officer.

"THE PRESIDING OFFICER (Mr. Rodrigo): Is there any objection? (Silence) The Chair hears none; the proposed amendment is approved.

"MR. SUAREZ: May we submit that to a vote?

VOTING

"THE PRESIDING OFFICER (Mr. Rodrigo): As many as are in favor of the Davide amendment, please raise their hand. (Several Members raised their hand.)

"As many as are abstaining, please raise their hand. (No Member raised his hand.)

"The results show 25 votes in favor and none against; the proposed amendment is approved." [14] (emphasis supplied)

The above deliberations show that the nature of the Senate as a continuing body hinged on the staggering of terms of the Senators, such that the term of one-half or twelve of the Senators ("remaining Senators") would subsist and continue into the succeeding Congress, while the term of the other half or twelve Senators ("outgoing Senators") would expire in the present Congress. As pointed out by Commissioner Gregorio J. Tingson, this arrangement whereby half of the Senate's membership continues into the next Congress is designed to help ensure "stability of governmental policies."

The structure of the Philippine Senate being evidently patterned after the U.S. Senate,[15] it reflects the latter's rationale for staggering senatorial terms and constituting the Senate as a continuing body.[16] Much can be

gleaned from The Federalist Papers in ascertaining the rationale of the Senate's design. The Federalist Papers was written by three "Founding Fathers" of the United States, namely, James Madison, Alexander Hamilton and John Jay. Madison subsequently became President of the U.S., while John Jay became the first Chief Justice of the U.S. Supreme Court. The Federalist Papers is a collection of 85 essays that were written and first published in various New York newspapers in 1787-1788 to explain the U.S. Constitution and urge the people of New York to ratify it. As Madison and Hamilton were both members of the Federal Convention of 1787, The Federalist Papers is largely used as an authority to interpret the intent of the framers of the U.S. Constitution.[17]

James Madison urged that the Senate be so constituted as to have permanency and stability.[18] With their staggered terms and longer tenure, Senators are expected to bring stability and wisdom to legislative measures.[19] Indeed, the framers of the U.S. Constitution considered stability and consistency of law to be fundamental to liberty itself.

In The Federalist Nos. 62 and 63, the Senate was extensively discussed. Madison elaborated in The Federalist No. 62, the injurious effects of instability to a nation. Instability "forfeits the respect and confidence of other nations," and the latter would not want to "connect their fortunes" with that nation. He also explained that the domestic effects of mutability are calamitous. "It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow."

Another evil of instability, Madison adds, is the "unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any way affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens." An unstable government "damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements." Madison asks, "(w)hat prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy."

Madison then concludes that above all, the deplorable effect of instability "is that diminution of attachment and reverence which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability."

In The Federalist No. 63 written by Madison or Hamilton, it was noted that the "objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be

accomplished in less than half a dozen years. Nor is it possible for the people to estimate the SHARE of influence which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult to preserve a personal responsibility in the members of a NUMEROUS body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents." Madison or Hamilton then suggests that "(t)he proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects."

Alexander Hamilton also stated in the debate during the New York ratification convention that "the main design of the Convention, in creating the Senate, was to prevent fluctuations and cabals." [20] Madison agreed with Hamilton's assessment, writing: "Nothing is more certain than that the tenure of the Senate was meant as an obstacle to the instability, which not only history, but the experience of our country, had shown to be the besetting infirmity of popular governments." [21] "In order to form some balance, the departments of government were separated, and as a necessary check, the legislative body was composed of two branches. Steadiness and wisdom are better insured when there is a second branch, to balance and check the first. The stability of the laws will be greater when the popular branch, which might be influenced by local views, or the violence of a party, is checked by another, whose longer continuance in office will render them more experienced, more temperate, and more competent to decide rightly." [22]

John Jay's explanation was along the same lines as the thoughts of Madison and Hamilton, that the Senate elections were staggered, so that "uniformity and order, as well as a constant succession of official information will be preserved." [23]

In the deliberations on the U.S. Constitution by the Federal Convention of 1787, one of the considerations stated for a proposed staggering of nine-year senatorial terms in three divisions was to give other countries "confidence in the stability or efficacy" [24] of the American government, the lack of which has prevented Great Britain from entering into a commercial treaty with the U.S. [25] "Permanency and safety to those who are to be governed" [26] were also cited as goals for creating the Senate.

In *McGrain v. Daugherty*, [27] the U.S. Supreme Court confirmed the view that the Senate is a "continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation." [28] In that case, the investigation by a Senate committee was ordered during the Sixty-eighth Congress, which expired on March 4, 1925. The Senate, however, amended the resolution authorizing the investigation to allow the committee to sit at such times and places as it might deem advisable or necessary. In addressing the question of whether the investigation may be continued after the expiration of the Sixty-eighth Congress, the U.S. High Court, citing Mr. Hinds in his collection of precedents, held that the Senate as a continuing body, may give authority to its committees to continue through the recess following the expiration of a Congress. The Court ruled that a Senate committee established in the Sixty-eighth Congress could be "continued or revived" by motion after such expiration and, if continued or revived, would have all its original powers. [29]

The Philippine Supreme Court cited *McGrain* in *Arnault v. Nazareno*. [30] The issue in *Arnault*, however, was the validity of the exercise of the contempt power of the Senate after the expiration of the first regular session (of the Second Congress) in which the Senate resolved that petitioner Jean Arnault be arraigned for contempt, and not after the termination of the Second Congress. Nonetheless, in upholding the continuing contempt power of the Senate, the Court held, viz:

"Like the Senate of the United States, the Senate of the Philippines is a continuing body whose members are

elected for a term of six years and so divided that the seats of only one-third become vacant every two years, two-thirds always continuing into the next Congress save as vacancies may occur thru death or resignation. Members of the House of Representatives are all elected for a term of four years; so that the term of every Congress is four years. The Second Congress of the Philippines was constituted on December 30, 1949, and will expire on December 30, 1953. The resolution of the Senate committing the Petitioner was adopted during the first session of the Second Congress, which began on the fourth Monday of January and ended on May 18, 1950.

"... We find no sound reason to limit the power of the legislative body to punish for contempt to the end of every session and not to the end of the last session terminating the existence of that body. The very reason for the exercise of the power to punish for contempt is to enable the legislative body to perform its constitutional function without impediment or obstruction. Legislative functions may be and in practice are performed during recess by duly constituted committees charged with the duty of performing investigations or conducting hearing relative to any proposed legislation. To deny to such committees the power of inquiry with process to enforce it would be to defeat the very purpose for which that power is recognized in the legislative body as an essential and appropriate auxiliary to its legislative function. It is but logical to say that the power of self-preservation is coexistent with the life to be preserved.

"But the resolution of commitment here in question was adopted by the Senate, which is a continuing body and which does not cease to exist upon the periodical dissolution of the Congress or of the House of Representatives. There is no limit as to time to the Senate's power to punish for contempt in cases where that power may constitutionally be exerted as in the present case.

"Mere reflection upon the situation at hand convinces us of the soundness of this proposition. The Senate has ordered an investigation of the Buenavista and Tambobong estates deal, which we have found it is within its competence to make. That investigation has not been completed because of the refusal of the petitioner as a witness to answer certain questions pertinent to the subject of the inquiry. The Senate has empowered the committee to continue the investigation during the recess. By refusing to answer the questions, the witness has obstructed the performance by the Senate of its legislative function, and the Senate has the power to remove the obstruction by compelling the witness to answer the questions thru restraint of his liberty until he shall have answered them. That power subsists as long as the Senate, which is a continuing body, persists in performing the particular legislative function involved. To hold that it may punish the witness for contempt only during the session in which investigation was begun, would be to recognize the right of the Senate to perform its function but at the same time to deny to it an essential and appropriate means for its performance. Aside from this, if we should hold that the power to punish for contempt terminates upon the adjournment of the session, the Senate would have to resume the investigation at the next and succeeding sessions and repeat the contempt proceedings against the witness until the investigation is completed -- an absurd, unnecessary, and vexatious procedure, which should be avoided." [31]

The Resolution of the majority, the petitioner and the OSG make much of the fact, however, that two-thirds of the membership of the Senate continued into the next Congress under the 1935 Constitution when Arnault was decided, and only half of the Senate membership now continues into the next Congress under the 1987 Constitution. They contend that since both the 1935 and the 1987 Constitutions provide that a "majority of each House shall constitute a quorum to do business," [32] the Senate under the 1987 Constitution has lost its continuing nature, as it no longer has a continuing quorum to do business when half of its membership's term expires at the end of every Congress. [33] Even following their contention that the satisfaction of the quorum to do business is based on the number of "remaining Senators," a textual reading of the provisions on legislative functions under the 1935 Constitution would show that even the continuing two-thirds membership of the Senate (or sixteen Senators) cannot perform all the legislative functions of the Senate. A three-fourths (or eighteen Senators) vote is necessary to override the veto of the President with respect to "appropriation bills which

appropriate a sum in excess of ten per centum of the total amount voted in the appropriation bill for the general expenses of the Government for the preceding year, or if it should refer to a bill authorizing an increase of the public debt." [34]

More importantly, the reasoning of the Resolution of the majority, the petitioner and the OSG -- that the continuing nature of the Senate depends on the presence of a quorum, counting the number of "remaining Senators" -- falls under its own weight when we take a hard look at the Constitutional provision on the term of Senators.

Article VI, Section 4 of the 1987 Constitution, provides that, "(t)he term of office of the Senators shall be six years and shall commence, unless otherwise provided by law, at noon on the thirtieth day of June next following their election." (emphasis supplied) Pursuant to this provision, the term of office of a Senator expires before noon on the thirtieth day of June, six years from commencement of his term. Thus, upon expiration of the term of the twelve "outgoing Senators" on June 30, the term of the twelve "new Senators" will commence.[35] The Senators-elect take their oath of office upon commencement of their term and begin to exercise their functions;[36] the collective oath-taking of the Senators upon the opening of Congress is normally but a tradition and a formality.[37] In the Fourteenth Congress, for example, newly elected Senator Loren B. Legarda filed Senate Bill No. 225, entitled "An Act Providing for the Establishment of Barangay Drugstores, Otherwise Known as 'Botica Sa Barangay' and for other Purposes," on June 30, 2007, the day her term commenced and before the opening of the Fourteenth Congress on July 23, 2007. Likewise, on the same day, newly re-elected Senator Francis N. Pangilinan filed Senate Bill No. 138, entitled "An Act Providing for a Magna Carta for Students."

Contrary to the contention of the Resolution of the majority, petitioner and the OSG, at no point from one Congress to the next is there a lack of quorum based on the terms of office of the "remaining Senators" and "new Senators." Under the 1987 Constitution, on the opening of a Congress on the fourth Monday of July,[38] the quorum is based on the number of both the "remaining Senators" and the "new Senators" whose terms have already commenced on June 30. A similar situation obtained under the 1935 Constitution, in which three sets of eight Senators had staggered six-year terms. Article VI, Section 3 of the 1935 Constitution provides: "The term of office of Senators shall be six years and shall begin on the thirtieth day of December next following their election."

Thus, the Senate under both the 1935[39] and the 1987[40] Constitutions counted the quorum based on the number of "remaining Senators" and "new Senators" upon opening of every Congress. This unbroken practice of the Senate of counting the quorum at the start of every new Congress based on both the "remaining Senators" and "new Senators," and not only on the two-thirds or one-half "remaining Senators," is not something to be lightly cast aside in ascertaining the nature of the Senate as a continuing body.[41] In the U.S., the Senate of the 18<sup>th</sup> century[42] and the present day upper chamber[43] have also counted their quorum based on the number of both the "remaining Senators" and "new Senators" upon the opening of every Congress.

It is worth noting that in the June 25 and 26, 1787 debates of the Federal Convention of 1787 on the staggering of terms of office of Senate members -- whether the term under consideration was nine years or six years with triennial staggering -- the quorum requirement was not mentioned as a consideration to maintain continuity in the Senate.[44] Conversely, neither was the staggering of terms considered when the quorum requirement was taken up by the Convention two months later on August 10, 1787.[45] When the quorum requirement was being set by the Federal Convention, there were proposals to peg it at the majority or less than the majority of the members of the Senate; or to leave it to the legislature to set the quorum requirement, considering the secession of some States that would not send delegates to the Senate and the inconvenience of not reaching a quorum.[46] There was also a proposal to fix the quorum at two-thirds of the members of the Senate.[47] In setting the quorum requirement, the

balance being struck was between the inconvenience of not being able to muster a quorum if it was set too high and the insufficiency in representation of the interests of the people if it was set too low.[48] The continuity of the Senate, considering the staggered terms of its members, was apparently not part of the equation.

It may be argued that under the 1987 Constitution, some "outgoing Senators" might resign prior to the termination of their terms on June 30 to run for election in May,[49] thus, possibly diminishing the number of Senators to only twelve or less than the quorum requirement. However, the argument also holds true under the 1935 Constitution. It could happen that four of the sixteen "remaining Senators" would resign or die, such that there would be only twelve Senators left, or less than the quorum requirement under the 1935 Constitution. (Even Arnault acknowledged this eventuality; hence, as afore-quoted, it ruled that "the Senate of the Philippines is a continuing body whose members are elected for a term of six years and so divided that the seats of only one-third become vacant every two years, two-thirds always continuing into the next Congress save as vacancies may occur thru death or resignation.") The point of the illustration is that the nature of the Senate as a continuing body under both the 1935 and the 1987 Constitutions cannot be made to depend on the actual presence of a quorum which, in turn, depends on the tenure of the Senators.

In sum, it is the staggering of the terms of the 24 Senators and allowing the terms of office of a portion of the Senate membership to continue into the succeeding Congress - whether two-thirds under the 1935 Constitution or one-half under the 1987 Constitution - that provides the stability indispensable to an effective government, and makes the Senate a continuing body as intended by the framers of both the 1935 (as amended) and the 1987 Constitutions.

Part of the stability provided by a continuing Senate is the existence of rules of proceedings adopted pursuant to the power granted by the U.S. Constitution,[50] rules that continue to be in effect from one Congress to the next until such rules are repealed or amended, but with the process for repeal and amendment also being governed by the subsisting rules. U.S. Senator Francis Warren cautions that a Senate that is not continuing, but instead new in each Congress, opens all rules to debate as a new matter; the Senate will be totally and wholly without rules as it proceeds "at sea without rudder or compass regarding rules." [51] Thus, in the U.S., the Senate rules of proceedings provide that "(t)he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." [52] These rules, adopted on January 11, 1884 and made effective on January 21, 1884, continue to be in effect to this day [53] alongside the continuing membership of the Senate. [54]

Patterned after the U.S. Constitution, the 1987 Constitution also provides under Article VI, Section 16(3) that "(e)ach House may determine the rules of its proceedings..." As in the U.S. Senate, the Senate Rules (of proceedings) adopted by the Philippine Senate have a continued effect from one Congress to the next as shown by the following provisions of the Philippine Senate Rules:

"Rule LII (Date of Taking Effect), Section 137: These Rules shall take effect on the date of their adoption and shall remain in force until they are amended or repealed."

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"Rule LI (Amendments to, Or revisions Of, The Rules), Section 136: At the start of each session in which the Senators elected in the preceding elections shall begin their term of office, the President may endorse the Rules to the appropriate committee for amendment or revision.

"The Rules may also be amended by means of a motion which should be presented at least one day before its consideration, and the vote of the majority of the Senators present in the session shall be required for its approval." (emphasis supplied)

It is obvious that the above rules do not provide for the expiration of the Senate Rules at the termination of every

Congress. On the contrary, Rule LI provides that at the opening of every Congress, the Senate President may endorse the Senate Rules to the appropriate committee for amendment or revision, which connotes that the Senate Rules must be subsisting for them to be subject to amendment or revision. If the Senate were not a continuing body, the Senate Rules governing its proceedings would not be given continuing effect from one Congress to the next.

The earlier Senate Rules adopted in 1950 under the 1935 Constitution also evince the same intent of the Senate to make its rules continuing, in conformity with its continuous nature as a legislative body. Chapter LII (Amendments to or Revisions of the Rules), Section 121 of the 1950 Rules, provides, viz:

"Sec. 121. At the beginning of each session in which the Senators elected in the last or preceding elections shall begin their term of office, and as soon as the Committee on Rules shall have been organized, the President of the Senate shall endorse the Rules to said Committee for amendment or revision.

"An amendment to the Rules, may, however, be presented by means of a motion containing the proposed amendment.

"This should be presented at least one day before its consideration, and the vote of a majority of the Senators present in the session shall be required for its approval." (emphasis supplied)

While the present Senate Rules provide under Rule XLIV (Unfinished Business), Section 123 that "(a)ll pending matters and proceedings shall terminate upon the expiration of one (1) Congress," between the expiration of a Congress and the opening of the succeeding Congress, some functions of the Senate continue during such recess. Aside from the administrative functions performed by Senate employees for the continued operation of the Senate as an institution, legislative functions continue to be exercised. The offices of the "remaining Senators" continue their legislative work in preparation for the succeeding Congress. These continuing functions require continuing effectivity of the Senate Rules. An example of a provision of the Senate Rules applicable to these continuing activities is Rule XXII (Filing and Consideration of Bills and Resolutions), Section 61, which provides that "(a)ll bills and resolutions shall be filed with the Office of the Secretary whether the Senate is in session or not."

To illustrate, in the current Fourteenth Congress, Senate Bill No. 1 entitled, "An Act Exempting the Purchase of Medicine by Senior Citizens from the Coverage of the Value Added Tax, and Amending Section 109 (1) of the National Internal Revenue Code, as Amended" was filed by Senator Jinggoy E. Estrada on June 30, 2007 after the adjournment of the third or final regular session<sup>[55]</sup> of the Thirteenth Congress and before the opening of the Fourteenth Congress.<sup>[56]</sup> On the same date, Senator Rodolfo G. Biazon filed Senate Bill No. 32 entitled, "An Act Providing for the National Defense and Security of the Republic of the Philippines, and for Other Purposes." Both bills were taken up on first reading and referred to the proper Senate Committees in the Senate session on July 24, 2007, a day after the Fourteenth Congress opened on July 23, 2007, when the Senate was organized with the election of its officers, and President Gloria Macapagal-Arroyo delivered her State of the Nation Address.<sup>[57]</sup>

It should be noted that the termination of unfinished business upon expiration of one Congress is sanctioned by Rule XLIV, Section 123 of the Senate Rules. The Senate Rules, may, however, be amended under Rule LI, Section 36. It remains to be seen whether by amendment of the Senate Rules, the Senate would allow a Senate Committee conducting an investigation, for example, to continue its proceedings after the expiration of a Congress as in the afore-discussed case, *McGrain v. Daugherty*.

Prescinding from the continuing nature of the Senate and the continuing effectivity of the Senate Rules (of proceedings), it is my considered view that the Rules of Procedure Governing Inquiries adopted by the Senate of the Tenth Congress on August 21, 1995 should likewise be recognized to have continuing force and effect after being "duly published" in two newspapers of general circulation on August 24, 1995.

Deference to the legislative department  
in interpreting its rule-making power

The power of each House of Congress to adopt its own rules of proceedings under Article VI, Section 16[58] of the 1987 Constitution is so obvious that the 1986 Constitutional Commission hardly deliberated on the matter. Even the framers of the U.S. Constitution, from which our own provision on rules of proceedings was adopted, did not prescribe standards for the promulgation of internal procedural rules and spent no time debating this power of each House of Congress; they conferred essentially open-ended discretion on each chamber to regulate its own internal proceedings.[59] In the 1787 Federal Convention, it was not a controversial principle that each chamber should have the ability to adopt rules binding on its members. "The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." [60]

It cannot be gainsaid that rules of proceedings are a necessity in preserving order, decency and regularity in a dignified public body. These rules are weapons of the weaker party to defend themselves from irregularities and abuses "which the wantonness of power is but too often apt to suggest to large and successful majorities." [61] Thomas Jefferson stated in the opening of his widely used, *A Manual of Parliamentary Practice*, viz:

"Mr. Onslow, the ablest among the Speakers of the House of Commons, used to say, 'It was a maxim he had often heard when he was a young man, from old and experienced members, that nothing tended more to throw power into the hands of the administration and those who acted with the majority of the House of Commons, than in neglect of, or departure from, the rules of proceeding; that these forms, as instituted by our ancestors, operated as a check, and control, on the actions of the majority; and that they were, in many instances, a shelter and protection to the minority, against the attempts of power.'" [62] (emphasis supplied)

Still and all, the rule-making power of the legislature is not absolute. The outer limit of a legislative rule is reached when it collides with a constitutional proscription. The case in which the U.S. Supreme Court made its most extensive analysis of the nature and limitations of the congressional rule-making power was *United States v. Ballin*, [63] a late nineteenth-century case that involved the constitutional quorum requirement. [64]

The origin of *Ballin* was a quorum-busting technique used by both the Republicans and the Democrats in that era to halt business in the House of Representatives. Under the rules of the House at that time, the Speaker established the presence of a quorum by counting the voting members. In the 1888 elections, the Republicans won the majority for the first time in fourteen years. The new Speaker of the Fifty-first Congress, Thomas B. Reed of Maine, found himself in the position of having 166 Republican members, the exact number needed to meet the quorum requirement. [65] Democrats could thus stop business in the House by merely refusing to vote and requiring the Republicans to establish a quorum with their members alone. On January 29, 1890, Democrats halted business on a contested election case by remaining silent to defeat the quorum requirement. [66] Speaker Reed retaliated by announcing the names of members "present and refusing to vote," thereby establishing that a majority of the House was present and the House was thereby able to conduct business. [67] Speaker Reed's famous interpretation of the quorum rule became "Rule XV" [68] in the Fifty-first Congress, the constitutionality of which became the central issue in *Ballin*. [69]

*Ballin* involved a tariff law passed by the House in 1890 under Speaker Reed's new quorum-counting rule. [70] The plaintiff was a New York merchant who had imported worsted wool fabrics subject to that law. The enactment passed the House by a vote of 138 to none, with the Speaker noting, in accordance with the new Rule XV, that 74 members were in the chamber but not voting, bringing the total number of lawmakers present to 212 -- a figure well above the 166 members needed to make a quorum. [71] The merchant challenged the legality of the tariff, arguing that the law had not legitimately passed the House, because a quorum had not been present to

do business.[72]

In ruling that the tariff law validly passed the House, the Ballin Court upheld the action of the Speaker, viz:

"The action taken was in direct compliance with this rule. [Rule 15 provides, viz: `... (3) On the demand of any member, or at the suggestion of the speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business.' H. J. 230, Feb. 14, 1890.] The question, therefore, is as to the validity of this rule, and not what methods the speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the speaker or clerk may of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

"The constitution provides that `a majority of each [house] shall constitute a quorum to do business.' In other words, when a majority are present, the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and when that majority are present, the power of the house arises.

"But how shall the presence of a majority be determined? The constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count, as the sole test; or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact; and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question, and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the house is in a condition to transact business."[73] (emphasis supplied)

In *Defensor-Santiago v. Guingona, Jr.*, [74] which involved an interpretation of the rules of the Senate but not private rights, the Court emphasized the respect due a co-equal branch of government in the determination of its internal affairs, viz:

"On grounds of respect for the basic concept of separation of powers, courts may not intervene in the internal affairs of the legislature; it is not within the province of courts to direct Congress how to do its work.

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"...Constitutional respect and a becoming regard for the sovereign acts of a coequal branch prevents this Court from prying into the internal workings of the Senate. To repeat, this Court will be neither a tyrant nor a wimp; rather, it will remain steadfast and judicious in upholding the rule and majesty of the law."[75] (footnote omitted, ital. in original)

Following the principles of Ballin and Santiago, I submit that the Court ought to take a deferential stance in interpreting the rule-making power of the Senate as a co-equal branch of government, so long as rights of private parties are not infringed.[76] The Rules of Procedure Governing Inquiries is akin to the Senate Rules (of proceeding) in that the former governs the internal workings of the Senate and its committees, although admittedly different in some respects from the Senate Rules because it affects rights of parties not members of the Senate and, hence, requires publication. To the extent that the Rules of Procedure Governing Inquiries does not transgress the requirement of due process as its outer limit, the Senate should be given room to interpret the duration of its effectivity from one Congress to the next.

Similar to Ballin, there is no standard set by Article VI, Section 21 of the 1987 Constitution, as to the manner and frequency of publication of the Rules of Procedure Governing Inquiries. It is within the competency of the Senate to prescribe a method that shall reasonably conform to the due-process purpose of publication, and the Senate has validly provided the method of one-time publication of its Rules of Procedure Governing Inquiries in two newspapers of general circulation, in line with the ruling in Tañada.

The unbroken practice of the Senate of not adopting Rules of Procedure Governing Inquiries and publishing the same in every Congress, owing to its nature as a continuing body, is not something to be lightly brushed aside,[77] especially considering the grave consequences of cutting this continuity. Holding itself to be a continuing body, the Senate has dispensed with the adoption not only of Rules of Procedure Governing Inquiries, but also of Senate rules (of proceedings) at the start of every Congress in the last ten years.[78] As a consequence of the absence of rules if the Senate is held to be not a continuing body, its acts during these Congresses may be put into question. A mathematical calculation of a quorum in view of the staggered terms of the Senate membership cannot simply subvert the deeply-entrenched thought-out rationale for the design of a continuing and stable Senate, shown to be necessary in promoting effective government and protecting liberties.

Where rights are not violated, the Court ought not like lightning strike down a valid rule and practice of a co-equal branch of government, lest the walls delineating powers be burned.

I vote to grant the Motion for Reconsideration.

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[1] Bruhl, A., "If the Judicial Confirmation Process is Broken, Can a Statute Fix It?" 85 Nebraska Law Review 960 (2007).

[2] Motion for Reconsideration, pp. 4-6.

[3] 220 Phil. 422 (1985); Resolution of Motion for Reconsideration, 230 Phil. 528 (1986).

[4] 1935 Phil. Const., Art. III, §6 provides, viz:

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law.

[5] Tañada v. Tuvera, 230 Phil. 528, 533-535 (1986); The Veterans Federation of the Philippines v. Reyes, G.R. No. 155027, February 28, 2006, 483 SCRA 526; Umali v. Estanislao, G.R. No. 104037, May 29, 1992, 209 SCRA 446.

[6] National Association of Electricity Consumers for Reforms v. Energy Regulatory Commission, G.R. No. 163935, February 2, 2006, 481 SCRA 480; Pilipinas Kao, Inc. v. Court of Appeals, G.R. No. 105014, December 18, 2001, 372 SCRA 548; Cawaling, Jr. v. COMELEC, G.R. No. 146319, October 26, 2001, 368 SCRA 453.

[7] 1 Records of the Senate 541 (1995), 10[th] Cong., 1[st] Reg. Sess., August 21, 1995.

[8] An erratum was published in both The Philippine Star and the Philippine Daily Inquirer on December 5, 2006, stating that the following statements were inadvertently omitted from the publication of the Rules of Procedure Governing Inquiries on December 1, 2006, viz:

- "Adopted August 21, 1995; published in the August 24, 1995 issues of Malaya and Philippine Star; the Rules of Procedure Governing Inquiries in Aid of Legislation can also be accessed at the Senate website: [www.senate.gov.ph](http://www.senate.gov.ph)"

- "No amendments have been made in the Rules since its adoption."

[9] Motion for Reconsideration, p. 87.

[10] Dissenting and Concurring Opinion of Justice Antonio T. Carpio.

[11] Motion for Reconsideration, pp. 87-88.

[12] 2 Records of the Constitutional Commission, pp. 47-48.

[13] Id. at 208.

[14] 5 Records of the Constitutional Commission, pp. 433-434.

[15] U.S. Const., Art. 1, §3 provides in relevant part, viz:

The Senate of the United States shall be composed of two Senators from each State, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year...(emphasis supplied)

[16] Keefe, W. & Ogul, M., The American Legislative Process 45 (4[th] ed. 1977).

[17] The Federalist (J. Cooke ed., 1961).

[18] Gold, M. & Gupta, D., "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," 28 Harvard Journal of Law and Public Policy 205, 243-244 (2004), citing 86 Cong. Rec. 117, 151 (1959), citing (statement of Sen. Talmadge) (quoting The Federalist No. 39 [James Madison]).

[19] Seitz, V. & Guerra, J., "A Constitutional Defense of 'Entrenched' Senate Rules Governing Debate," Journal of Law and Politics, 1, 21 (2004), citing 2 The Records of the Federal Convention of 1787 at 6 "(the Senate was to 'check the 1st. branch, to give more wisdom, system, & stability to the Govt.');" The Federalist No. 63 (James Madison) (the Senate facilitates democracy by providing stability, a measure for gradual change, and a sense of national character); see also Cynthia R. Farina, "The Consent of the Governed: Against Simple Rules for a Complex World," 72 Chicago-Kent Law Review 987, 1016 n. 122 (1997) (the staggered election of Senators 'increases institutional stability by rendering the Senate an effectively continuous body in contrast to the House, which must fully reconstitute itself every two years') (citing The Federalist No. 63 [James Madison])." Id. (emphasis supplied)

[20] Seitz, V. & Guerra, J., "A Constitutional Defense of 'Entrenched' Senate Rules Governing Debate," Journal of Law and Politics, 1, 21 (2004), citing 3 The Records of the Federal Convention of 1787 at 337 (M. Farrand ed.,

rev. ed. 1966).

[21] *Id.*, citing 3 The Records of the Federal Convention of 1787 at 538.

[22] *Id.*, citing 3 The Records of the Federal Convention of 1787 at 340 (citing Mr. Davie's debate in the North Carolina ratification convention).

[23] Gold, M. & Gupta, D., "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," 28 Harvard Journal of Law and Public Policy, 205, 244 (2004), citing 86 Cong. Rec. 117, 152 (1959) (statement of Sen. Talmadge) (quoting The Federalist No. 64 [John Jay]).

[24] 1 The Records of the Federal Convention of 1787 at 426 (M. Farrand ed.).

[25] *Id.*

[26] *Id.* at 431.

**[27] 273 U.S. 135 (1927).**

[28] *Id.* at 181.

[29] *Id.*

[30] 87 Phil. 29 (1950).

[31] *Id.* at 61-63.

[32] 1935 Phil. Const., Art. VI, §10(2) and 1987 Phil. Const., Art. VI, §16(2) provide, viz.:

.. A majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day and may compel the attendance of absent Members in such manner and under such penalties as such House may provide.

[33] The Dissenting and Concurring Opinion of Justice Carpio, cited by the Resolution and the Comments of the petitioner and the OSG, contended that the Senate under the 1987 Constitution had lost its continuing nature because less than a quorum or majority continue into the subsequent Congress. This contention cites, as support, Attorney General Ex. Rel. Werts v. Rogers, et al., 56 N.J.L. 480, 652 (1844), and quotes the relevant portions of said case as "the Supreme Court of New Jersey declared." With due respect, the following portions of the Werts case quoted by the Dissenting and Concurring Opinion of Justice Carpio were statements made not by the Supreme Court of New Jersey, but by Justice Abbett in his Dissenting Opinion in that case, viz: "(T)he vitality of the body depends upon the existence of a quorum capable of doing business. That quorum constitutes a senate. Its action is the expression of the will of the senate, and no authority can be found which states any other conclusion. All difficulty and confusion in constitutional construction is avoided by applying the rule x x x that the continuity of the body depends upon the fact that in the senate a majority constitutes a quorum, and, as there is always more than a quorum of qualified senators holding seats in that body, its organic existence is necessarily continuous. x x x The senate of the United States remains a continuous body because two-thirds of its members are always, in contemplation of the constitution, in existence."

As stated in the Dissent of Justice Abbett, the New Jersey Senate is composed of 21 senators, divided as equally as possible into three classes. Their term of office was three years. The seats of the senators of the first class were vacated at the expiration of the first year, of the second class at the expiration of the second year, and of the third class at the expiration of the third year, so that, following the New Jersey constitution, one class may be elected every year.

At the November 1893 election, eight senators were elected to replace the senators whose terms of office would expire on January 8, 1894. On January 9, 1894, the day designated for commencing the annual session of the legislature, there were thirteen "remaining senators," and eight senators-elect. Nine of the "remaining senators" met in the senate chamber and elected one of them as their presiding officer, and thereafter claimed to have elected him president of the senate on the assertion that the four other "remaining senators" were actually or constructively present at the time of his election.

In addressing the issue of whether the president of the senate was validly elected, Justice Abbett contended that he was not. With a 21-member senate of New Jersey, the quorum was eleven and there were only nine of the "remaining senators" who met on January 9, 1894, two senators short of a quorum. He opined that for purposes of satisfying the quorum requirement, only the thirteen "remaining senators," and not the newly elected senators, could be counted as the "senate is a continuous body... consisting of the thirteen senators composing the two classes whose terms of office had not then expired."

This was the context of the above quote from the Dissent of Justice Abbett in the Dissenting and Concurring Opinion of Justice Carpio. Clearly, this finds no application in the Philippines where both the "remaining senators" and newly elected senators present are counted for purposes of satisfying the majority quorum requirement as will be subsequently shown.

[34] 1935 Phil. Const., Art. VI, §20(2) provides, viz:

(2) The President shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object. When a provision of an appropriation bill affects one or more items of the same, the President cannot veto the provision without at the same time, vetoing the particular item or items to which it relates. The item or items objected to shall not take effect except in the manner heretofore provided as to bills returned to the Congress without the approval of the President. If the veto refers to a bill or any item of an appropriation bill which appropriates a sum in excess of ten per centum of the total amount voted in the appropriation bill for the general expenses of the Government for the preceding year, or if it should refer to a bill authorizing an increase of the public debt, the same shall not become a law unless approved by three-fourths of all the Members of each House. (emphasis supplied)

[35] *Defensor-Santiago v. Ramos*, 323 Phil. 665 (1996).

[36] 1 Journal of the Phil. Senate, 14th Congress, 1st Reg. Sess., July 23 & 24, 2007.

[37] 1 Records of the Senate, 11th Congress, 1st Reg. Sess., July 27, 1998, pp. 3-4. The following exchanges in the Senate upon opening of the 11th Congress are relevant, viz:

"Senator Tatad. Mr. President, Article VI, Section 4 of the Constitution, as just read by the Secretary, provides that 'The term of office of the Senators shall be six years and shall commence, unless otherwise provided by law, at noon on the thirtieth day of June next following their election.'

I am not aware of any law that has modified this, and to the best of my knowledge, all the 12 new Senators entered into the performance of their duties on the 30[th] day of June this year. This means that they all have already taken their oath of office.

To require them to take their oaths of office anew, 27 days after they have done so, might not only be a superfluity, it might also be interpreted by the public as trifling with the office of the senator.

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The Presiding Officer (Sen. J. Osmeña). The Acting Majority Leader will please respond.

Senator Drilon. There is no question, Mr. President, that indeed, the terms of office of the new Senators took effect in accordance with the Constitution. If they are going to take their oaths now, it is a matter of tradition and formality, and should not in any way affect their respective terms of office."

[38] 1987 Phil. Const., Art. VI, §15 provides, viz:

Section 15. The Congress shall convene once every year on the fourth Monday of July for its regular session, unless a different date is fixed by law, and shall continue to be in session for such number of days as it may determine until thirty days before the opening of its next regular session, exclusive of Saturdays, Sundays, and legal holidays. The President may call a special session at any time.

[39] 1 RECORDS OF THE SENATE, 4th Cong., 1st Reg. Sess., January 27, 1958, pp. 1-2; 1 RECORDS OF THE SENATE, 3rd Cong., 1st Reg. Sess., January 25, 1954, pp. 1-2.

[40] 1 RECORDS OF THE SENATE, 14th Cong., 1st Reg. Sess., July 23, 2007, p. 3; 1 RECORDS OF THE SENATE, 13th Cong., 1st Reg. Sess., July 26, 2004, p. 6; 1 RECORDS OF THE SENATE, 12th Cong., 1st Reg. Sess., July 23, 2001 p. 3; 1 RECORDS OF THE SENATE, 11th Cong., 1st Reg. Sess., July 27, 1998, pp. 4-5; 1 RECORDS OF THE SENATE, 10th Cong., 1st Reg. Sess., July 24, 1995, p. 3; 1 RECORDS OF THE SENATE, 9th Cong., 1st Reg. Sess., July 27, 1992, p. 3.

[41] McGinnis, J. & Rappaport, M., "The Constitutionality of Legislative Supermajority Requirements: A Defense," 105 Yale Law Journal 483 (1995), citing *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

[42] JOURNAL OF THE U.S. SENATE, 2d Cong., 1st Sess., October 24, 1791, pp. 821-824.

[43] U.S. CONGRESSIONAL RECORD, PROCEEDINGS AND DEBATES OF THE 110[th] Congress (Senate), 1st Sess., January 4, 2007, pp. 4-5.

[44] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 395-435 (M. Farrand ed.).

[45] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 251-253 (M. Farrand ed.); Williams, J., "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," 48 William and Mary Law Review 1025 (2006).

[46] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 251-253 (M. Farrand ed.).

[47] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 549 (M. Farrand ed.).

[48] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 251-253 (M. Farrand ed.).

[49] Prior to its repeal by Republic Act No. 9006 in 2001, Section 67 of Batas Pambansa Blg. 881 provided, viz: "Any elective official, whether national or local, running for any office other than the one which he is holding in a permanent capacity, except for President and Vice-President, shall be considered ipso facto resigned from his office upon the filing of his certificate of candidacy." (*Fariñas v. The Executive Secretary*, 463 Phil. 179 [2003])

[50] U.S. CONST., Art. I, §5 provides, viz:

Each House may determine the Rules of its Proceedings...

[51] Gold, M. & Gupta, D., "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster," 28 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 205, 225 (2004).

**[52] STANDING RULES OF THE U.S. SENATE, RULE V.**

**[53] WALKER, H., THE LEGISLATIVE PROCESS 195 (1948).**

[54] Dunn, C., "Playing by the Rules: The Need for Constitutions to Define the Boundaries of the Legislative Game with a One-Subject Rule," 35 UNIVERSITY OF WEST LOS ANGELES LAW REVIEW 129, 133 (2002-2003).

[55] 1987 PHIL. CONST., Art. VI, §15 provides, viz:

Section 15. The Congress shall convene once every year on the fourth Monday of July for its regular session, unless a different date is fixed by law, and shall continue to be in session for such number of days as it may determine until thirty days before the opening of its next regular session, exclusive of Saturdays, Sundays, and legal holidays. The President may call a special session at any time.

[56] Id.

[57] 1 JOURNAL OF THE PHIL. SENATE, 14th Cong., 1st Reg. Sess., July 23 & 24, 2007.

[58] 1987 PHIL. CONST., Art. VI, §16(3) provides, viz:

(3) Each House may determine the rules of its proceedings...

[59] Seitz, V. & Guerra, J., "A Constitutional Defense of 'Entrenched' Senate Rules Governing Debate," JOURNAL OF LAW AND POLITICS 1, 19 (2004), citing Miller, M., Comment, "The Justiciability of Legislative Rules and the 'Political' Political Question Doctrine," 78 CALIFORNIA LAW REVIEW 1341, 1358 (1990) (explaining that the Rules of Proceedings Clause did not appear in any of the draft Constitutions presented in Philadelphia and made its first appearance only in the Committee of Detail, where it apparently was adopted without discussion); Dunn, C., "Playing by the Rules: The Need for Constitutions to Define the Boundaries of the Legislative Game with a One-Subject Rule," 35 UNIVERSITY OF WEST LOS ANGELES LAW REVIEW 129 (2002-2003), citing 1-5 FARRAND, M., THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1998); and R. Luce, LEGISLATIVE PROBLEMS 185 (1935).

[60] Williams, J., "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," 48 WILLIAM AND MARY LAW REVIEW 1025, 1068 (2006), citing 3 Story, J., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 298 (1987 ed.) (1833).

[61] Dunn, C., "Playing by the Rules: The Need for Constitutions to Define the Boundaries of the Legislative Game with a One-Subject Rule," 35 UNIVERSITY OF WEST LOS ANGELES LAW REVIEW 129 (2002-2003).

[62] Id., citing JEFFERSON, T., A MANUAL OF PARLIAMENTARY PRACTICE 13 (1873).

[63] 144 U.S. 1 (1892); Taylor, P., "Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation," 54 SYRACUSE LAW REVIEW 435 (2004).

[64] Williams, J., "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," 48 WILLIAM AND MARY LAW REVIEW 1025, 1069 (2006).

[65] Id. at 1069-1070, citing Cannon, J., "Dramatic Scenes in My Career in Congress. II - When Reed Counted a Quorum," 140 HARPER'S MAGAZINE 433, 434 (1920).

[66] Id.

[67] Williams, J., "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," 48 WILLIAM AND MARY LAW REVIEW 1025, 1070 (2006), citing 21 Cong. Rec. 949-51 (1890).

[68] Rule XV provides, viz: "... (3) On the demand of any member, or at the suggestion of the speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business." House Journal 230, Feb. 14, 1890, cited in *United States v. Ballin*, 144 U.S. 1, 5 (1892).

[69] Williams, J., "How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress," 48 WILLIAM AND MARY LAW REVIEW 1025, 1070 (2006).

[70] *United States v. Ballin*, 144 U.S. 1 (1892).

[71] *Id.* at 3-4.

[72] *Id.* at 3.

[73] *Id.* at 5-6.

[74] 359 Phil. 276 (1998).

[75] *Id.* at 300-301.

[76] Dunn, C., "Playing by the Rules: The Need for Constitutions to Define the Boundaries of the Legislative Game with a One-Subject Rule," 35 UNIVERSITY OF WEST LOS ANGELES LAW REVIEW 129, 140 (2002-2003), citing *Jagt v. O'Neill*, 699 F.2d 1166, 1172 (D.C. 1983).

[77] McGinnis, J. & Rappaport, M., "The Constitutionality of Legislative Supermajority Requirements: A Defense," 105 YALE LAW JOURNAL 483 (1995), citing *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

[78] 1 RECORDS OF THE SENATE, 14th Cong., 1st Reg. Sess., July 23, 2007; 1 RECORDS OF THE SENATE, 13th Cong., 1st Reg. Sess., July 26, 2004; 1 RECORDS OF THE SENATE, 12th Cong., 1st Reg. Sess., July 23, 2001; 1 RECORDS OF THE SENATE, 11th Cong., 1st Reg. Sess., July 27, 1998.

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#### SEPARATE OPINION

#### ON THE MOTION FOR RECONSIDERATION

#### **QUISUMBING, J.:**

The instant motion filed by the respondents Senate Committees on Accountability of Public Officers and Investigations, Trade and Commerce, and National Defense and Security, seeks a reconsideration of the Court's March 25, 2008 Decision, which granted petitioner Romulo Neri's petition for certiorari. The Court nullified the Order dated January 30, 2008, of the Senate Committees citing petitioner in contempt and directing his arrest and detention. In said Decision, I concurred in the result.

For as long as the requirement of due process is paramount in proceedings involving life and liberty, the instant motion for reconsideration, which merely reiterates arguments that have been adequately threshed out in the Decision,[1] must emphatically be denied. With due respect, we find that in Neri's case, respondents had neglected to observe elements of due process on more than one occasion in their proceedings, and thereby committed grave abuse of discretion which is proscribed by the present fundamental law.[2]

Worth stressing at the outset, the Senate is constitutionally required to publish its rules of procedure on the conduct of legislative inquiries in aid of legislation. Section 21 of Article VI of the 1987 Constitution states:

The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

Dwelling on this provision, *Senate of the Philippines v. Ermita*[3] declared:

Section 21, Article VI likewise establishes crucial safeguards that proscribe the legislative power of inquiry. The provision requires that the inquiry be done in accordance with the Senate or House's duly published rules of procedure, necessarily implying the constitutional infirmity of an inquiry conducted without duly published rules of procedure.[4]

Also on this matter, the eminent constitutionalist Fr. Joaquin G. Bernas, amply commented:

The significance of the second limitation on the investigatory power - that the inquiry be "in accordance with its duly published rules of procedure" - can, perhaps, be appreciated by considering it side by side with the control Congress has over its rules when they affect merely matters internal to it. As already seen in *Osmeña, Jr. v. Pendatun*, where Congress suspended the operation of a House rule which could have protected Congressman Osmeña, the Supreme Court accepted the view that parliamentary rules "may be waived or disregarded by the legislative body." This view can be accepted as applicable when private rights are not affected. When, however, the private rights of witnesses in an investigation are involved, Section 21 now prescribes that Congress and its committees must follow the "duly published rules of procedure." Moreover, Section 21 may also be read as requiring that Congress must have "duly published rules of procedure" for legislative investigations. Violation of these rules would be an offense against due process.

The third limitation on legislative investigatory power is that "the rights of persons appearing in or affected by such inquiries shall be respected." This is just another way of saying that legislative investigations must be "subject to the limitations placed by the Constitution on governmental action." And since all governmental action must be exercised subject to constitutional limitations, principally found in the Bill of Rights, this third limitation really creates no new constitutional right. But it emphasizes such fundamentals as the right against self-incrimination and unreasonable searches and seizures and the right to demand, under due process, that Congress observe its own rules.[5]

Justice Isagani A. Cruz, in his book *Philippine Political Law*, offers a verifiable observation:

The reason is that in the past this power was much abused by some legislators who used it for illegitimate ends or to browbeat or intimidate witnesses, usually for grandstanding purposes only. There were also times when the subject of the inquiry was purely private in nature and therefore outside the scope of the powers of the Congress.

To correct these excesses, it is now provided that the legislative inquiry must be in aid of legislation, whether it be under consideration already or still to be drafted. Furthermore, the conduct of the investigation must be strictly in conformity with the rules of procedure that must have been published in advance for the information and protection of the witnesses.[6]

Hence, it is indispensable that the Senate Rules of Procedure during the current 14<sup>th</sup> Congress must be duly published. The problem is, the rules have not been published in the Official Gazette or newspaper of general circulation as required by *Tañada v. Tuvera*.<sup>[7]</sup> Publication in either of these forms is mandatory to comply with the due process requirement. Due process requires that fair notice be given to those concerned before the rules that put their liberty at risk take effect.<sup>[8]</sup> The rationale of this requirement was enunciated in *Tañada* as follows:

Laws must come out in the open in the clear light of the sun instead of skulking in the shadows with their dark,

deep secrets. Mysterious pronouncements and rumored rules cannot be recognized as binding unless their existence and contents are confirmed by a valid publication intended to make full disclosure and give proper notice to the people. The furtive law is like a scabbarded saber that cannot feint, parry or cut unless the naked blade is drawn.[9]

Fr. Bernas also said that there can be no such thing as a law that is effective immediately, even if the law is not penal in nature. The underlying reason for this rule is that due process, which is a rule of fairness, requires that those who must obey a command must first know the command.[10]

Hence, the current Senate cannot in good conscience neglect to publish its Rules of Procedure. Nor could its Committee ignore the Rules, specially those on quorum. In the absence of a published rule of procedure on a matter which is the subject of legislative inquiry, any action which affects substantial rights of persons would be anathema, and risks unconstitutionality. Even if there is such a rule or statute duly published, if it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ in its application, the rule or statute would be repugnant to the Constitution in two respects: it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of what conduct to avoid; and, it leaves the law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle.[11] How much more in this case where there is a patent lack of publication and proper notice of the applicable rules. Or where the rules are misread and misapplied resulting in lack of quorum.[12]

Beyond debate, the fundamental law prohibits deprivation of liberty without due process of law. Comparatively speaking, the Court has on many occasions required judges to comply strictly with the due process requirements on issuing warrants of arrest, failure of which has resulted in the voiding of the warrants. The denial of a person's fundamental right to due process amounts to the illegality of the proceedings against him. The doctrine consistently adhered to by the Supreme Court is that a denial of due process suffices to cast on the official act taken by whichever branch of the government the impress of nullity, the fundamental right to due process being a cornerstone of our legal system.[13] The right to due process is a cardinal and primary right which must be respected in all proceedings.[14]

Even granting arguendo that the rules had been published, the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee do not state that respondent Committees have the power to issue an order of arrest. The rules only authorize the Committees to detain a witness found guilty of contempt. The Committees cannot go outside the clear ambit of its rules of procedure, as due process demands proper obedience to them.[15]

Moreover, it is also glaring that respondents did not consider petitioner's request for an advance copy of the questions that would be asked of him, as it was not unreasonable and difficult to comply with. In a letter dated November 29, 2007 to the Blue Ribbon Committee, petitioner requested that if there were new matters not yet taken up during the September 26, 2007 hearing, he be furnished questions in advance as to those matters he needed to clarify so that he may adequately prepare himself as a resource person. This request was further reiterated in another letter sent by his counsel, Atty. Antonio R. Bautista. Unfortunately, respondents did not grant this valid request, and instead precipitately issued the contempt and arrest order against petitioner.

Further, in our considered view, Neri was entitled to a ruling on his claim of executive privilege. For initially, both sides had agreed in open court to allow more exhaustive inquiry in the Senate on this matter. But as respondents themselves admitted, they did not rule on the claim of executive privilege, but instead sanctioned Neri for contempt.

The very recent case of *Aquino v. Ng*[16] is instructive on the subject of contempt, as far as court procedures are concerned. It held:

Moreover, the RTC failed to observe the standards of due process when it first cited petitioner for contempt of

court. It must be stressed that indirect contempt proceedings partake of the nature of a criminal prosecution; hence, strict rules that govern criminal prosecutions also apply to a prosecution for criminal contempt; the accused is to be afforded many of the protections provided in regular criminal cases; and proceedings under statutes governing them are to be strictly construed.

The records do not bear any indication that petitioner was afforded an opportunity to rebut the charges against him when he was first charged by respondent with contempt. While petitioner was able to oppose respondent's motion, inasmuch as an indirect contempt charge partakes of the nature of a criminal charge, conviction cannot be had merely on the basis of written pleadings. There is no question that petitioner's disobedience to the RTC's lawful order constitutes indirect contempt of court. This, however, was not a license for the RTC to disregard petitioner's rights. It should have held a hearing in order to provide petitioner with the opportunity to state his defense and explain his side. A hearing affords the contemner the opportunity to adduce before the court documentary or testimonial evidence in his behalf. The hearing will also allow the court more thorough evaluation of the defense of the contemner, including the chance to observe the accused present his side in open court and subject his defense to interrogation from the complainants or the court itself.[17]

Also, *Commissioner Rodriguez v. Judge Bonifacio*[18] held:

Contempt of court has been distinctly described as an offense against the State and not against the judge personally. To reiterate, a judge must always remember that the power of the court to punish for contempt should be exercised for purposes that are not personal, because that power is intended as a safeguard, not for judges as persons, but for the functions they exercise.

Viewed vis-à-vis the foregoing circumscription of a court's power to punish for contempt, it bears stressing that the court must exercise the power of contempt judiciously and sparingly with utmost self-restraint with the end in view of utilizing the same for correction and preservation of the dignity of the court, not for retaliation or vindication.[19]

Comparatively, the subjective nature of respondents' action in the present case is patent if not glaring. This is in contrast with the legitimate purpose of the inquiry in the case of *Sabio v. Gordon*,[20] where the petitioners therein were invited to the Senate's public hearing on Senate Resolution No. 455, particularly "on the anomalous losses incurred by the Philippine Overseas Telecommunications Corporation, Philippine Communications Satellite Corporation, and Philcomsat Holdings Corporations due to the alleged improprieties in the operations by their respective board of directors." The inquiry focused on therein petitioners' acts committed in the discharge of their duties as officers and directors of said corporations where the government has interest.[21]

Here, in the instant controversy, the least respondents could have done, after browbeating the petitioner Neri (who was sick at that time) with a barrage of questions was to have granted his request for a copy of the questions for the next hearing. It is a well-settled principle in law that what due process contemplates is freedom from arbitrariness; what it requires is fairness and justice; substance, rather than form, being paramount.[22] It is essential that the contemner be granted an opportunity to meet the charges against him and to be heard in his defense, as contempt of court proceedings are commonly treated as criminal in nature.[23] A finding of guilt for an offense, no matter how light, for which one is not properly charged and tried cannot be countenanced without violating the rudimentary principle of due process.[24]

The case of *Cañas v. Castigador*[25] held:

[T]he salutary rule is that the power to punish for contempt must be exercised on the preservative not vindictive principle, and on the corrective not retaliatory idea of punishment. The courts and other tribunals vested with the power of contempt must exercise the power for contempt for purposes that are impersonal, because that power is intended as a safeguard not for the judges as persons but for the functions that they exercised.

x x x x

Viewed in the light of the foregoing circumscription of a court's power to punish for contempt, it bears stressing that the court must exercise the power of contempt judiciously and sparingly with utmost self-restraint, with the end in view of utilizing the same for correction and preservation of the dignity of the court, not for retaliation or vindication.[26]

All told, in our humble view, the respondents did not observe basic tenets of due process, which we believe is more than enough reason to grant petitioner Neri's petition. Worth stressing again, whenever there is an imminent threat to the life and liberty of the person in any proceeding conducted by or under the auspices of the State, his right to due process of law, when demanded, must not be ignored.[27]

In sum, we agree that respondents' Motion for Reconsideration must be denied. This Court did not err in upholding petitioner Neri's constitutional rights, particularly to due process, by granting his petition in the assailed Decision dated March 25, 2008.

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[1] Neri v. Senate, G.R. No. 180643, March 25, 2008.

[2] 1987 Constitution, Article VIII, Sec. 1.

Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[3] G.R. Nos. 169777, 169659, 169660, 169667, 169834 & 171246, April 20, 2006, 488 SCRA 1.

[4] Id. at 44.

[5] J. Bernas, *The Constitution of the Republic of the Philippines: A Commentary*, 740-741 (2003 ed.).

[6] I. Cruz, *Philippine Political Law*, 163-164 (2002 ed.).

[7] No. L-63915, December 29, 1986, 146 SCRA 446.

[8] See *Globe Telecom, Inc. v. National Telecommunications Commission*, G.R. No. 143964, July 26, 2004, 435 SCRA 110, 148, which held that Section 21 of the Public Service Act requires notice and hearing because a fine is a sanction, regulatory and even punitive in character. It also said that the requirement is the essence of due process and its non-observance will, as a rule, invalidate the administrative proceedings.

[9] *Tañada v. Tuvera*, supra note 7 at 456.

[10] Supra note 5 at 130.

[11] Cf *Estrada v. Sandiganbayan*, G.R. No. 148560, November 19, 2001, 369 SCRA 394, 439-440.

[12] See cf "Tatad points out Senate's 'misreading' of its rules." *Manila Bulletin*, July 29, 2008, p. 18.

[13] *Macias v. Macias*, G.R. No. 149617, September 3, 2003, 410 SCRA 365, 371.

[14] *Saya-ang, Sr. v. Commission on Elections*, G.R. No. 155087, November 28, 2003, 416 SCRA 650, 656.

[15] *Ong v. Court of Appeals*, G.R. No. 132839, November 21, 2001, 370 SCRA 48, 54.

[16] G.R. No. 155631, July 27, 2007, 528 SCRA 277.

[17] Id. at 284-285.

[18] 398 Phil. 441 (2000).

[19] Id. at 468.

[20] G.R. Nos. 174340, 174318 & 174177, October 17, 2006, 504 SCRA 704.

[21] Id. at 737.

[22] Long v. Basa, G.R. Nos. 134963-64, 135152-53 & 137135, September 27, 2001, 366 SCRA 113, 129.

[23] Rodriguez v. Bonifacio, A.M. No. RTJ-99-1510, November 6, 2000, 344 SCRA 519, 545-546.

[24] Summary Dismissal Board and the Regional Appellate Board, PNP, Region VI, Iloilo City v. Torcita, 330 SCRA 153, 164.

[25] G.R. No. 139844, December 15, 2000, 348 SCRA 425.

[26] Id. at 433 & 439.

[27] Cf Secretary of Justice v. Lantion, G.R. No. 139465, January 18, 2000, 322 SCRA 160, 204.

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### SEPARATE DISSENTING OPINION

**AZCUNA, J.:**

I fully join Chief Justice Reynato S. Puno in his dissenting opinion.

It was the intent of the Constitutional Commission to preserve the nature of the Senate as a continuing body to provide an institutional memory in the legislature. The deliberations in the Commission, cited by the Chief Justice, clearly bear this out. The Senate, therefore, need not re-publish its Rules with every new Congress.

Furthermore, as I opined in my dissent in the JPEPA case,[1] specific provisions of the present Constitution conferred on Congress an information function, apart from its legislative function, which it may exercise to enable our people to effectively take part in governance. The Senate investigation at issue is, therefore, in order even apart from the power to legislate.

I, therefore, VOTE to GRANT the Senate's Motion for Reconsideration and DISMISS the petition for lack of merit.

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[1] G.R. No. 170516, Akbayan Citizens Action Party ["AKBAYAN"], Pambansang Katipunan Ng Mga Samahan sa Kanayunan ["PKSK"], et al. v. Thomas G. Aquino, in his capacity as Undersecretary of the Department of Trade and Industry [DTI] and Chairman and Chief Delegate of the Philippine Coordinating Committee [PCC] for the Japan-Philippines Economic Partnership Agreement, et al., promulgated July 17, 2008.

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## SEPARATE OPINION

### REYES, R.T., J.:

I AM one of two Justices who only concurred in the result of the majority decision penned by esteemed colleague, Justice Teresita Leonardo-De Castro. I again effectively do so now in the resolution of the motion for reconsideration through this separate opinion. It has become necessary for me to clarify for the record my position on the issues of executive privilege and the contempt and arrest powers of the Senate.

As expected, given the highly-politicized complexion of the case, the Court ruling received a mixed reaction of praise and flak. My kind of concurrence and that of Justice Leonardo A. Quisumbing did not escape criticism. An article[1] erroneously described Our vote as "unclear," casting doubt on the final verdict of the Neri petition. Another item[2] wrongly branded us as mere "straddlers," sitting on both sides of the fence and coming up with a decision only at the last minute.

A sad commentary of the times is when a Justice takes a stand which flatters the political opposition, it is hailed as courageous; when the stand benefits the administration, it is hounded as cowardly. But judicial independence is neither here nor there. For me, it is judicial action that is right and reasonable, taken without fear or favor, unmindful of incidental consequences.

I thus take exceptions to the unfounded criticisms.

For one, a concurrence in the result is not unprecedented. Several justices in this Court's long history had voted in a similar fashion. Then Chief Justice Ramon Aquino voted in the same manner in the 1985 case of *Reformina v. Tomol, Jr.*,[3] a case tackling the proper interest rate in an action for damages for injury to persons and loss of property.

In the 2001 landmark case of *Estrada v. Desierto*,[4] involving the twin issues of the resignation of deposed President Joseph Estrada and the legitimacy of the assumption of President Gloria Macapagal-Arroyo as his successor, Justices Kapunan, Pardo, Buena, Ynares-Santiago and Sandoval-Gutierrez concurred in the result of the decision penned by Chief Justice Reynato S. Puno.[5] In 2006, Chief Justice Panganiban voted similarly in *Republic v. Hong*,[6] a case revisiting the mandatory requirement of a "credible witness" in a naturalization proceeding under Commonwealth Act 473.

For another, there should be no point of confusion. A concurrence in the result is a favorable vote for the decision crafted by the ponente. It simply means that I agreed in the outcome or disposition of the case, but not necessarily on all the grounds given in the ponencia. I concurred with the weightier reasons stated in the majority decision to grant the petition for certiorari and to quash the Senate arrest and contempt order against petitioner, Secretary Neri. However, I did not share some of the reasoning of the ponente.

If an unqualified vote of concurrence is allowed on a majority decision or dissenting opinion, there is no reason why a vote in the result should be treated differently, much less proscribed.

Now, on the merits of respondents' motion for reconsideration which merely restates their arguments against the petition focusing on executive privilege invoked on three (3) questions.[7] For the guidance of the Bench, the Bar and the Academe, I opt to correlate my position with those of the other Justices, with due respect to them. To be sure, Our decision and resolution in this case will continue to be the subject of legal scrutiny, public debate and academic discussion.

## I

The proper basis of executive privilege in the Neri petition is only presidential communication privilege; executive privilege based on diplomacy and foreign relations is not valid for lack of specificity.

Ang tamang batayan ng pribilehiyo ng Pangulo sa petisyon ni Neri ay ang pampangulong pribilehiyo sa komunikasyon; ang pampangulong pribilehiyo sa diplomasya at ugnayang panlabas ay di angkop dahil sa kawalan ng pagtitiyak.

The majority decision sustained executive privilege on two grounds: (a) under the presidential communication privilege; and (2) executive privilege on matters relating to diplomacy or foreign relations.[8]

I agree with the ponente that the three questions are covered by the presidential communication privilege. But I disagree that they are covered by executive privilege on matters affecting diplomacy or foreign relations.

Ako'y sumasang-ayon sa ponente na ang tatlong katanungan ay saklaw ng pampangulong pribilehiyo sa komunikasyon. Subalit hindi ako sang-ayon na ang mga ito ay sakop ng pampangulong pribilehiyo sa diplomasya o ugnayang panlabas.

The distinction between presidential communication privilege and executive privilege based on diplomacy and foreign relations is important because they are two different categories of executive privilege recognized by jurisprudence.[9] The first pertains to those communications between the President and her close advisors relating to official or state matters; the second are those matters that have a direct bearing on the conduct of our external affairs with other nations, in this case the Republic of China.

The two categories of executive privilege have different rationale. Presidential communication privilege is grounded on the paramount need for candor between the President and her close advisors. It gives the President and those assisting her sufficient freedom to interact without fear of undue public scrutiny. On the other hand, executive privilege on matters concerning our diplomatic or foreign relations is akin to state secret privilege which, when divulged, will unduly impair our external relations with other countries.[10]

The distinction is vital because of the need for specificity in claiming the privilege. *Senate of the Philippines v. Ermita*[11] mandates that a claim of privilege must specify the grounds relied upon by the claimant.[12] The degree of specificity required obviously depends on the nature of the information to be disclosed.[13]

As to presidential communication privilege, the requirement of specificity is not difficult to meet. This kind of privilege easily passes the test. As long as the subject matter pertains to a communication between the President and her close advisor concerning official or state matters, the requirement is complied with.

There is no dispute that petitioner Neri is a close advisor of the President, being then the Chairman of the National Economic and Development Authority. The transaction involved the NBN-ZTE broadband deal, a government contract which is an official or state matter. Hence, the conversation between the President and petitioner Neri is covered by the presidential communication privilege.

Of course, there is a presumption that every communication between the President and her close advisor pertains to an official or state matter. The burden is on the party seeking disclosure to prove that the communication is not in an official capacity.

The fact of conversation is the trigger of the presidential communication privilege. There is no need to give specifics or particulars of the contents of the conversation because that will obviously divulge the very matter which the privilege is meant to protect. It will be an illusory privilege if a more stringent standard is required.[14]

In contrast, a relatively higher standard of specificity is required for a claim of executive privilege based on diplomacy or foreign relations. As in state secrets, this type of executive privilege is content based.[15] This means that the claim is dependent on the very content of the information sought to be disclosed. To adequately assess the validity of the claim, there is a need for the court, usually in closed session, to become privy to the information. This will enable the court to sufficiently assess whether or not the information claimed to be privileged will actually impair our diplomatic or foreign relations with other countries. It is the content of the information and its effect that trigger the privilege. To be sure, a generalized claim of privilege will not pass the more stringent test of specificity.

In the case at bar, the letter[16] of Secretary Eduardo Ermita to the Senate dated November 15, 2007 asserting executive privilege contained a mere general allegation that the conversation between the President and petitioner Neri "might" impair our diplomatic relations with the Republic of China. There is no explanation how the contents of the conversation will actually impair our diplomatic relations. Absent sufficient explanation or specifics, We cannot assess the validity of the claim of executive privilege.

Obviously, bare assertion without more will not pass the more stringent test of specificity. It is in this context that I agree with the dissenting justices[17] that the claim of privilege based on diplomacy or foreign relations must be struck down as devoid of basis.

It may be noted that Justice Tinga is not also persuaded by the claim of executive privilege based on diplomacy or foreign relations. He said:

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 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 the 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.[18]

There is qualified presumption  
of presidential communication privilege.

Mayroong kwalipikadong pagpapalagay sa pampangulong pribilehiyo sa komunikasyon.

American jurisprudence[19] bestows a qualified presumption in favor of presidential communication privilege. This means that the initial point is against disclosure of the contents of the communication between the President and her close advisors. The burden of proof is on the agency or body seeking disclosure to show compelling reasons to overcome the presumption.

Respondent Senate Committees, however, insist that there should be no presumption in favor of presidential communication privilege. It banks on this Court's statement in *Senate of the Philippines v. Ermita*[20] that "the extraordinary character of the exemption (executive privilege) indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure." [21] It is argued that the dicta in *Ermita* is contrary and even antithetical[22] to the qualified presumption under American jurisprudence. Respondents likewise cite several provisions of the 1987 Philippine Constitution favoring public disclosure over secrecy[23] in its attempt to reverse the presumption.

I cannot agree with respondents. The Court's statement in *Ermita* must be read in its proper context. It is merely a general statement in favor of public disclosure and against government secrecy. To be sure, transparency of government actions is a laudable virtue of a republican system of government such as ours. After all, a public office is a public trust. A well informed citizenry is essential in a democratic and republican government.

But not all privileges or those that prevent disclosure of government actions are objectionable. Executive privilege is not an evil that should be thwarted and waylaid at every turn. Common sense and public policy require a certain degree of secrecy of some essential government actions. Presidential communication privilege is one of them. The President and her

close advisor should be given enough leeway to candidly discuss official and state matters without fear of undue public scrutiny. The President cannot effectively govern in a fishbowl where her every action is dissected and scrutinized. Even the Senate itself enjoys the same privilege in the discharge of its constitutional functions. Internal workings of the Senate Committees, which include deliberations between the Senators and their staffs in crafting a bill, are generally beyond judicial scrutiny.

The Court's dicta in *Senate of the Philippines v. Ermita* should not be unduly emasculated as basis for a general argument in favor of full disclosure of all governmental actions, much less as foundation for a presumption against presidential communication privilege. To my mind, it was not the intention of this Court to reverse the qualified presumption of presidential communication under American jurisprudence. Quite the contrary, the Court in *Ermita*, by citing the case of *Almonte v. Vasquez*, adopted the qualified presumption of presidential communication privilege. *Almonte* quoted several American cases which favored the qualified presumption of presidential communication privilege.[24] As discussed by Chief Justice Reynato Puno in his dissenting opinion:

A hard look at *Senate v. Ermita* ought to yield the conclusion that it bestowed a qualified presumption in favor of the presidential communications privilege. As shown in the previous discussion, *U.S. v. Nixon*, as well as the other related Nixon cases *Sirica* and *Senate Select Committee on Presidential Campaign Activities, et al. v. Nixon* in the D.C. Court of Appeals, as well as subsequent cases, all recognize that there is a presumptive privilege in favor of presidential communications. The *Almonte* case quoted *U.S. v. Nixon* and recognized a presumption in favor of confidentiality of presidential communications.

The statement in *Senate v. Ermita* that the "extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure" must therefore be read to mean that there is a general disfavor of government privileges as held in *In Re Subpoena for Nixon*, especially considering the bias of the 1987 Philippine Constitution towards full public disclosure and transparency in government. In fine, *Senate v. Ermita* recognized the presidential communications privilege in *U.S. v. Nixon* and the qualified presumptive status that the U.S. High Court gave that privilege. Thus, respondent Senate Committees' argument that the burden is on petitioner to overcome a presumption against executive privilege cannot be sustained.[25]

At any rate, it is now settled that there is a qualified presumption in favor of presidential communication privilege. The majority decision[26] expressly recognized the presumption. Even Justices Ynares-Santiago[27] and Carpio,[28] in their separate dissenting opinions, agree that the presumption exists. Justice Carpio Morales[29]

presented a different formulation of the privilege, but she nevertheless acknowledges the presumption. In other words, the three questions directed to petitioner are presumptively privileged because they pertain to the contents of his conversation with the President. Sa madaling salita, ang tatlong tanong sa petisyoner ay ipinapalagay na may angking pribilehiyo dahil ito'y tungkol sa usapan nila ng Pangulo.

Presidential communication  
privilege is not absolute;  
it is rebuttable.

Ang pampangulong pribilehiyo sa komunikasyon ay hindi ganap; ito'y maaaring salungatin.

The fact that presidential communication is privileged is not the end of the matter. It is merely the starting point of the inquiry. In *Senate of the Philippines v. Ermita*, this Court stated:

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.[30]

All Justices[31] agree that the presumption in favor of presidential communication privilege is rebuttable. The agency or body seeking disclosure must present compelling reasons to overcome the presumption. Justice Nachura stated the delicate balancing test in this manner:

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 the privilege against the public interest that would be served by disclosure in a particular case." While a "demonstrated specific need" for material may prevail over a generalized assertion of privilege, whoever seeks the disclosure must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender.[32]

The Senate power of investigation in  
aid of legislation is different from its  
oversight function.

Ang kapangyarihan ng Senado na magsiyasat kaakibat ng tungkulin sa paggawa ng batas ay kaiba sa gawain nito ng pagsubaybay.

The context or procedural setting in which executive privilege is claimed is vital in the courts' assessment of the privilege. Since executive privilege has constitutional underpinnings, the degree of proof required to overcome the presumption must likewise have constitutional support. Here, the context or setting of the executive privilege is a joint Senate Committee[33] investigation in aid of legislation.

There is a statement in the majority decision that respondent Senate Committees were exercising their oversight function,[34] instead of their legislative powers[35] in asking the three questions to Secretary Neri.[36] The characterization of the Senate power as one in the exercise of its oversight, instead of legislative, function has severe repercussions because of this Court's dicta in *Ermita* that the Senate's oversight function "may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation." In exercising its oversight function, the Senate may only request the appearance of a public official. In contrast, it may compel appearance when it is exercising its power of investigation in aid of legislation.

On this score, I part way with the majority decision. To be sure, it is difficult to draw a line between the oversight

function and the legislative function of the Senate. Nonetheless, there is sufficient evidence on record that the Senate Committees were actually exercising their legislative power rather than their oversight function in conducting the NBN-ZTE investigation. Various resolutions,[37] privilege speeches[38] and bills[39] were filed in the Senate in connection with the NBN-ZTE contract. Petitioner's counsel, Atty. Antonio Bautista, even concedes that the investigation conducted by the Senate Committees were in aid of legislation.[40]

While there is a perception in some quarters that respondents' investigation is being carried too far or for some other motives, We cannot but accord respondents the benefit of the doubt.

The principle of separation of powers requires that We give due respect to the Senate assertion that it was exercising its legislative power in conducting the NBN-ZTE investigation. It is not for this Court to challenge, much less second guess, the purpose of the NBN-ZTE investigation or the motives of the Senators in probing the NBN-ZTE deal. We must presume a legislative purpose from the investigation because of the various pending bills filed in the Senate. At any rate, it is settled that the improper motives of some Senators, if any, will not vitiate the Senate's investigation as long as the presumed legislative purpose is being served by the work of the Senate Committees.[41]

Rebutting the presumption: executive privilege is honored in civil, but not in criminal proceedings.

Ang pribilehiyo ay iginagalang sa kasong sibil, ngunit hindi sa kasong kriminal.

Given that a claim of presidential communication privilege was invoked by Secretary Neri in a Senate investigation in aid of legislation, it is necessary to examine how a similar claim of executive privilege fared in other contexts, particularly in criminal and civil proceedings, in order to gain insight on the evidence needed to rebut the qualified presumption.

There is a consensus among the Justices of this Court that a claim of executive privilege cannot succeed in a criminal proceeding. The reason is simple. The right of the accused to due process of law requires nothing less than full disclosure. When vital information that may exculpate the accused from a crime is withheld from the courts, the wheels of justice will be stymied and the constitutional right of the accused to due process of law becomes illusory. It is the crucial need for the information covered by the privilege and the dire consequences of nondisclosure on the discharge of an essential judicial function which trumps executive privilege.

The leading case on executive privilege in a criminal proceeding is *U.S. v. Nixon*.<sup>[42]</sup> It involved a subpoena duces tecum to then United States President Richard Nixon and his staff to produce tape recordings and documents in connection with the Watergate scandal. Ruling that executive privilege cannot prevail in a criminal proceeding, the Supreme Court of the United States stated:

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. 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.[43]

I hasten to point out, however, that in this case, there is yet no criminal proceeding, hence, the vital ruling on Nixon does not square with Neri.

Again, in contrast, executive privilege is generally honored in a civil proceeding. The need for information in a civil case is not as significant or

does not have the same stakes as in a criminal trial. Unlike the accused in a criminal trial, the defendant in a civil case will not lose his life or liberty when information covered by executive privilege is left undisclosed to the courts. Moreover, there is the exacting duty of the courts to prove the guilt of the accused beyond reasonable doubt. But mere preponderance of evidence is required in a civil case to deliver a verdict for either party. That burden may be hurdled even without a full disclosure of information covered by the executive privilege.

The leading case on executive privilege in a civil proceeding is *Cheney v. US District Court of the District of Columbia*.<sup>[44]</sup> It involved discovery orders against Vice President Cheney and other federal officials and members of the National Energy Policy Development Group. Differentiating the earlier case of *Nixon*, the Supreme Court of the United States in *Cheney* held that the claim of executive privilege will be honored in a civil proceeding because it does not share the same "constitutional dimension" as in a criminal trial, thus:

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- 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 or 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."<sup>[45]</sup>

*Nixon* and *Cheney* present a stark contrast in the court's assessment of executive privilege in two different procedural settings. While the privilege was honored in a civil proceeding, it was held unavailing in a criminal trial. It is arguable that in both cases, there is a compelling need for the information covered by the privilege. After all, the courts may be unable to deliver a fair verdict without access to the information covered by the privilege.

I submit that the distinction lies on the effect of non-disclosure on the efficient discharge of the court's judicial

function. The court may not adjudge the guilt of the accused beyond reasonable doubt in a criminal trial without the information covered by the privilege. The information may, in fact, exculpate the accused from the crime. In contrast, the court may render judgment in a civil case even absent the information covered by the privilege. The required burden of proof may still be hurdled even without access to the information.

In short, if the body or agency seeking disclosure may efficiently discharge its constitutional duty even without access to the information, the privilege will be honored. If, on the other hand, the privilege substantially impairs the performance of that body or agency's constitutional duty, the information covered by the privilege will be disclosed to enable that agency to comply with its constitutional duty.

There are two significant tests for  
rebutting the qualified presumption  
of presidential communication privilege.

May dalawang makahulugang panukat sa pagsalungat ng kwalipikadong pagpapalagay sa pampangulong pribilehiyo sa komunikasyon.

The majority decision ruled that the qualified presumption of presidential communication privilege may be overturned only by a showing of public need by the branch seeking access to conversation.[46]

Chief Justice Puno opines that the test must center on the efficient discharge of the constitutional functions of the President vis-à-vis the Senate. Using the "function impairment test," the Court weighs how the disclosure of the withheld information would impair the President's ability to perform her constitutional duties more than nondisclosure would impair the other branch's ability to perform its constitutional functions.[47] The test entails an initial assessment of the strength of the qualified presumption which shall then be weighed against the adverse effects of non-disclosure on the constitutional function of the agency seeking the information.

Justice Carpio Morales agrees that the proper test must focus on the effect of non-disclosure on the discharge of the Senate's constitutional duty of enacting laws, thus:

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 presidential conversations, or to testimony pertaining thereto, is vital to the responsible performance of that agency's official functions.[48]

In his separate concurring opinion, Justice Tinga highlights that the "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. He simplifies the issue in this manner: would the divulgence of the sought-after information impede or prevent the Senate from enacting legislation?[49]

Justice Nachura tersely puts it that to hurdle the presumption the Senate must show "how and why the desired information "is demonstrably critical to the responsible fulfillment of the Committees' functions." [50]

Justice Consuelo Ynares-Santiago, on the other hand, asserts that the proper test should not only be confined to the consequences of disclosure or non-disclosure on the constitutional functions of the President and the Senate, but must involve a holistic assessment of "public interest." She notes that "grave implications on public accountability and government transparency" are factors that must be taken into account in resolving a claim of executive privilege.[51]

The seemingly different tests submitted by the concurring and dissenting justices are but motions of the same type of balancing act which this Court must undertake in resolving the issue of executive privilege. The "public interest" test propounded by Justice Ynares-Santiago emphasizes the general basis in resolving the issue, which is

public interest. The "balancing test" espoused by the majority justices and Justice Carpio Morales, and the "function impairment test" of Chief Justice Puno, on the other hand, underscore the main factor in resolving the conflict, which is to assess the consequence of non-disclosure on the effective discharge of the constitutional function of the branch or agency seeking the information.

The "balancing test" and the "function impairment test" approximate the test applied by the Supreme Court of the United States in *Nixon* and *Cheney*. An analysis of *Nixon* and *Cheney* reveals that the test must be anchored on two points. One, the compelling need for the information covered by the privilege by the body or agency seeking disclosure. Two, the effect of non-disclosure on the efficient discharge of the constitutional function of the body or agency seeking the information.

Both requisites must concur although the two may overlap. If there is a compelling need for the information, it is more likely that the agency seeking disclosure cannot effectively discharge its constitutional function without the required information. Disclosure is precisely sought by that agency in order for it to effectively discharge its constitutional duty. But it may also be true that there is a compelling need for the information but the agency or body seeking disclosure may still effectively discharge its constitutional duty even without the information. The presence of alternatives or adequate substitutes for the information may render disclosure of the information unnecessary.

The starting point is against disclosure of the contents of the communication between the President and her close advisors because of the qualified presumption of presidential communication privilege. The burden is on the party seeking disclosure to prove a compelling need for the information. But mere compelling need is insufficient. The branch or agency seeking the information must also show that it cannot effectively discharge its constitutional function without access to the information covered by the privilege.

The degree of impairment of the constitutional function of the agency seeking disclosure must be significant or substantial as to render it unable to efficiently discharge its constitutional duty. In *Nixon*, the harm occasioned by non-disclosure was held to "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." In contrast, the harm in a civil proceeding was held to be only minor or insignificant, which rendered disclosure unnecessary.

Application of the twin tests -  
paglalapat ng kambal na panukat

Applying the same dual tests, the qualified presumption of the presidential communication privilege may be rebutted only upon showing by the Senate of a compelling need for the contents of the conversation between the President and Secretary Neri. The Senate must also prove that it cannot effectively discharge its legislative function without the information covered by the privilege.

The presidential communication privilege was invoked in a joint Senate investigation in aid of legislation. The main purpose of the NBN-ZTE investigation is to aid the Senators in crafting pertinent legislation. The constitutional duty involved in this case is the lawmaking function of the Senate.

Using the function impairment test, Chief Justice Puno concludes that the Senate had adequately shown a compelling need for the contents of the conversation between the President and Secretary Neri. The Chief Justice points out that there is no effective substitute for the information because it provides the factual basis "in crafting specific legislation pertaining to procurement and concurring in executive agreements." [52]

Justice Carpio Morales also observes that the Senate had adequately presented a compelling need for the information because it is "apparently unavailable anywhere else." [53] Justice Carpio Morales holds "it would be

unreasonable to expect respondent Committees to merely hypothesize on the alternative responses and come up with legislation on that basis." [54]

I take a different view. To my mind, the Senate failed to present a case of compelling need for the information covered by the privilege. It must be borne in mind that Secretary Neri is only one of the many witnesses in the NBN-ZTE investigation. In fact, he had already testified lengthily for eleven (11) hours. Numerous resource persons and witnesses have testified before and after him. The list includes Rodolfo "Jun" Lozada, Jr., Jose De Venecia IV, Chairman Benjamin Abalos, technical consultants Leo San Miguel and Dante Madriaga. To date, the Senate Committees had conducted a total of twelve hearings on the NBN-ZTE investigation.

Given the sheer abundance of information, both consistent and conflicting, I find that the Senate Committees have more than enough inputs and insights which would enable its members to craft proper legislation in connection with its investigation on the NBN-ZTE deal. I do not see how the contents of the conversation between Secretary Neri and the President, which is presumptively privileged, could possibly add more light to the law-making capability of the Senate. At the most, the conversation will only bolster what had been stated by some witnesses during the Senate investigation.

I do not share the opinion that the entire talk between the President and Secretary Neri is essential because it provides the factual backdrop in crafting amendments to the procurement laws. The testimony of numerous witnesses and resource persons is already sufficient to provide a glimpse, if not a fair picture, of the whole NBN-ZTE contract. The Senators may even

assume, rightly or wrongly, based on the numerous testimonies, that there was an anomaly on the NBN ZTE contract and craft the necessary remedial legislation.

Unlike in a criminal trial, this is not a case where a precise reconstruction of past events is essential to the efficient discharge of a constitutional duty. The Senate is not a court or a prosecutorial agency where a meticulous or painstaking recollection of events is essential to determine the precise culpability of an accused. The Senate may still enact laws even without access to the contents of the conversation between the President and Secretary Neri. As correctly noted by Justice Nachura, "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events" and that "it is not uncommon for some legislative measures to be fashioned on the strength of certain assumptions that may have no solid factual precedents." [55]

Even granting that the Senate had presented a case of compelling need for the information covered by the executive privilege, the Senate nonetheless failed to prove the second element of "substantial impairment" of its constitutional lawmaking function. It is hard to imagine how an affirmative or negative answer to the three questions posed to petitioner Neri would hinder the Senate from crafting a law amending the Build Operate and Transfer (BOT) Law or the Official Development and Assistance (ODA) Act. The Senate may also cobble a law subjecting executive agreements to Senate concurrence even without access to the conversation between the President and Secretary Neri.

In fine, the qualified presumption in favor of presidential communication privilege was not successfully rebutted. First, the Senate

failed to prove a compelling need for the information covered by the privilege. Second, the constitutional function of the Senate to enact laws will not be substantially impaired if the information covered by the privilege is left undisclosed. For these twin reasons, I concur with the ponente's decision honoring presidential communication privilege in the NBN-ZTE Senate investigation.

Gamit ang panukat ng "balancing test" at "function impairment test," matibay ang aking pasiya na hindi

matagumpay na nasalungat ang kwalipikadong pagpapalagay (qualified presumption) sa pampangulong pribilehiyo sa komunikasyon.

Executive privilege and crime -  
pampangulong pribilehiyo at krimen

The Senate also asserts that executive privilege cannot be used to conceal a crime. It is claimed that the conversation between the President and Secretary Neri pertained to an attempted bribery by then COMELEC chairman Benjamin Abalos to Secretary Neri. The alleged crime committed by Chairman Abalos will be shielded and concealed if the content of the conversation between the President and Secretary Neri is left undisclosed. It is also claimed that the President herself and his husband may have been complicit in the commission of a crime in approving the NBN-ZTE contract.

That executive privilege cannot be invoked to conceal a crime is well-settled. All Justices of this Court agree on that basic postulate. The privilege covers only the official acts of the President. It is not within the sworn duty of the President to hide or conceal a crime.[56] Hence, the privilege is unavailing to cover up an offense.

But We cannot lightly assume a criminal conduct. In the same manner that We give due respect to the Senate when it asserts that it is conducting an investigation in aid of legislation, so too must We accord the same level of courtesy to the President when she asserts her presidential communication privilege.

It must be stressed that the Senate is conducting the NBN-ZTE investigation only in aid of legislation. Its main goal is to gain insights on how to better craft pertinent laws. Its investigation is not, ought not to be, a fishing expedition to incriminate the President or for other purpose.

The Senate is not a prosecutorial agency. That duty belongs to the Ombudsman and the Department of Justice. Or the House of Representatives if impeachment is desired. That the concerned Senators or other sectors do not trust these institutions is altogether another matter. But the Court should not be pressured or faulted if it declines to deviate from the more specific norm ordained by the Constitution and the rule of law.

Much has been said about the need to ferret out the truth in the reported anomaly on the aborted NBN-ZTE broadband deal. But can the truth be fairly ascertained in a Senate investigation where there is no rule of evidence? Where even double hearsay testimony is allowed and chronicled by media? Where highly partisan politics come into play? May not the true facts be unveiled through other resource persons, including a namesake (Ruben Caesar Reyes)?

## II

On the contempt and arrest order -  
ang order ng pagsuway at pag-aresto

On the second issue, the majority decision invalidated the arrest and contempt order against petitioner Neri on five (5) counts, namely: (a) valid invocation of executive privilege; (b) lack of publication of the Senate Rules of Procedure; (c) failure to furnish petitioner Neri with advance list of questions and proposed statutes which prompted its investigation; (d) lack of majority vote to cite for contempt; and (e) arbitrary and precipitate issuance of the contempt order. The first and the last are interrelated.

I concur with the majority decision but on a single ground: valid invocation of executive privilege.

A. Because of valid invocation of  
executive privilege, the Senate

order of contempt and arrest is baseless, hence, invalid.

Dahil sa pasiya ng nakakarami sa Hukuman na balido ang imbokasyon ni Neri ng pampangulong pribilehiyo, ang order ng Senado sa kanyang pagsuway at pag-aresto ay walang batayan kaya hindi balido.

The Senate declared petitioner Neri in contempt because he refused to divulge the full contents of his conversation with the President. It is his refusal to answer the three questions covered by the presidential communication privilege which led to the issuance of the contempt and later the arrest order against him.

I note that the Senate order of contempt against Secretary Neri stated as its basis his failure to appear in four slated hearings, namely: September 18, 2007, September 20, 2007, October 25, 2007 and November 20, 2007.[57] But Secretary Neri attended the Senate hearing on September 26, 2007 where he was grilled for more than eleven (11) hours. The October 25, 2007 hearing was moved to November 20, 2007 when the Senate issued a subpoena ad testificandum to Secretary Neri to further testify on the NBN-ZTE deal.

Before the slated November 20 hearing, Secretary Ermita wrote to the Senate requesting it to dispense with the testimony of Secretary Neri on the ground of executive privilege. The Senate did not act on the request of Secretary Ermita. Secretary Neri did not attend the November 20, 2007 hearing.

The Senate erroneously cited Secretary Neri for contempt for failing to appear on the September 18 and 20, 2007 hearings. His failure to attend the two hearings is already a non-issue because he did attend and testified in the September 26, 2007 hearing. If the Senate wanted to cite him for contempt for his absence during the two previous hearings, it could have done so on September 26, 2007, when he testified in the Senate. The Senate cannot use his absence in the September 18 and 20 hearings as basis for citing Secretary Neri in contempt.

The main reason for the contempt and arrest order against Secretary Neri is his failure to divulge his conversation with the President. As earlier discussed, We ruled that Secretary Neri correctly invoked presidential communication privilege. Since he cannot be compelled by the Senate to divulge part of his conversation with the President which included the three questions subject of the petition for certiorari, the contempt and arrest order against him must be declared invalid as it is baseless. Petitioner, however, may still be compelled by the Senate to testify on other matters not covered by the presidential communication privilege.

B. The Senate does not need to republish its Rules of Procedure Governing Inquiries in Aid of Legislation.

Hindi kailangan na muling ipalathala ng Senado ang Tuntunin sa Prosidyur sa Pagsisiyasat Tulong sa Paggawa ng Batas.

Justice Leonardo-De Castro sustained the position of the Office of the Solicitor General that non-publication of the Senate Rules of Procedure is fatal to the contempt and arrest order against Secretary Neri, thus:

We find merit in the argument of the OSG that respondent Committees likewise violated Section 21 of Article VI of the Constitution, requiring that the inquiry be in accordance with the "duly published rules of procedure." We quote the OSG's explanation:

"The phrase 'duly published rules of procedure' requires the Senate of every Congress to publish its rules of procedure governing inquiries in aid of legislation because every Senate is distinct from the one before it or after it. Since Senatorial elections are held every three (3) years for one-half of the Senate's membership, the composition of the Senate also changes by the end of each term. Each Senate may thus enact a different set of

rules as it may deem fit. Not having published its Rules of Procedure, the subject hearings in aid of legislation conducted by the 14[th] Senate, are therefore, procedurally infirm."[58]

Justice Carpio agreed with Justice Leonardo-De Castro. In his separate opinion, Justice Carpio held that the Senate is not a continuing body under the 1987 Constitution because only half of its members continue to the next Congress, hence, it does not have a quorum to do business, thus:

The Constitution requires that the Legislature publish its rules of procedure on the conduct of legislative inquiries in aid of legislation. There is no dispute that the last publication of the Rules of Procedure of the Senate Governing the Inquiries in Aid of Legislation was on 1 December 2006 in the Philippine Star and Philippine Daily Inquirer during the 13[th] Congress. There is also no dispute that the Rules of Procedure have not been published in newspapers of general circulation during the current 14[th] Congress. However, the Rules of Procedure have been published continuously in the website of the Senate since at least the 13[th] Congress. In addition, the Senate makes the Rules of Procedure available to the public in pamphlet form.

In *Arnault v. Nazareno*, decided under the 1935 Constitution, this Court ruled that "the Senate of the Philippines is a continuing body whose members are elected for a term of six years and so divided that the seats of only one-third become vacant every two years, two-thirds always continuing into the next Congress save as vacancies may occur thru death or resignation." To act as a legislative body, the Senate must have a quorum, which is a majority of its membership. Since the Senate under the 1935 Constitution always had two-thirds of its membership filled up except for vacancies arising from death or resignation, the Senate always maintained a quorum to act as a legislative body. Thus, the Senate under the 1935 Constitution continued to act as a legislative body even after the expiry of the term of one-third of its members. This is the rationale in holding that the Senate under the 1935 Constitution was a continuing legislative body.

The present Senate under the 1987 Constitution is no longer a continuing legislative body. The present Senate has twenty-four members, twelve of whom are elected every three years for a term of six years each. Thus, the term of twelve Senators expires every three years, leaving less than a majority of Senators to continue into the next Congress. The 1987 Constitution, like the 1935 Constitution, requires a majority of Senators to "constitute a quorum to do business." Applying the same reasoning in *Arnault v. Nazareno*, the Senate under the 1987 Constitution is not a continuing body because less than majority of the Senators continue into the next Congress. The consequence is that the Rules of Procedure must be republished by the Senate after every expiry of the term of twelve Senators.

The publication of the Rules of Procedure in the website of the Senate, or in pamphlet form available at the Senate, is not sufficient under the *Tañada v. Tuvera* ruling which requires publication either in the Official Gazette or in a newspaper of general circulation. The Rules of Procedure even provide that the rules "shall take effect seven (7) days after publication in two (2) newspapers of general circulation," precluding any other form of publication. Publication in accordance with *Tañada* is mandatory to comply with the due process requirement because the Rules of Procedure put a person's liberty at risk. A person who violates the Rules of Procedure could be arrested and detained by the Senate.

Due process requires that "fair notice" be given to citizens before rules that put their liberty at risk take effect. The failure of the Senate to publish its Rules of Procedure as required in Section 22, Article VI of the Constitution renders the Rules of Procedure void. Thus, the Senate cannot enforce its Rules of Procedure.[59]

Chief Justice Puno, on the other hand, points out that the Senate has been considered a continuing body by custom, tradition and practice. The Chief Justice cautions on the far-reaching implication of the Senate Rules of Procedure being declared invalid and unenforceable. He says:

The Senate Rules of Procedure Governing Inquiries in Aid of Legislation is assailed as invalid allegedly for failure to be re-published. It is contended that the said rules should be re-published as the Senate is not a continuing body, its membership changing every three years. The assumption is that there is a new Senate after

every such election and it should not be bound by the rules of the old. We need not grapple with this contentious issue which has far-reaching consequences to the Senate. The precedents and practice of the Senate should instead guide the Court in resolving the issue. For one, the Senators have traditionally considered the Senate as a continuing body despite the change of a part of its membership after an election. It is for this reason that the Senate does not cease its labor during the period of such election. Its various Committees continue their work as its officials and employees. For another, the Rules of the Senate is silent on the matter of re-publication. Section 135, Rule L of the Rules of the Senate provides that, "if there is no Rule applicable to a specific case, the precedents of the Legislative Department of the Philippines shall be resorted to x x x." It appears that by tradition, custom and practice, the Senate does not re-publish its rules especially when the same has not undergone any material change. In other words, existing rules which have already undergone publication should be deemed adopted and continued by the Senate regardless of the election of some new members. Their re-publication is thus an unnecessary ritual. We are dealing with internal rules of a co-equal branch of government and unless they clearly violate the Constitution, prudence dictates we should be wary of striking them down. The consequences of striking down the rules involved in the case at bar may spawn serious and unintended problems for the Senate.[60]

True it is that, as the Constitution mandates, the Senate may only conduct an investigation in aid of legislation pursuant to its duly published rules of procedure. Without publication, the Senate Rules of Procedure Governing Inquiries in Aid of Legislation is ineffective. Thus, unless and until said publication is done, the Senate cannot enforce its own rules of procedure, including its power to cite a witness in contempt under Section 18.

But the Court can take judicial notice that the Senate Rules of Procedure Governing Inquiries in Aid of Legislation was published on August 20 and 21, 1992 in the Philippine Daily Inquirer and Philippine Star during the 9[th] Congress.

The Senate again published its said rules on December 1, 2006 in the Philippine Star and Philippine Daily Inquirer during the 13[th] Congress. That the Senate published its rules of procedure twice more than complied with the Constitutional requirement.

I submit that the Senate remains a continuing body under the 1987 Constitution. That the Senate is a continuing body is premised on the staggered terms of its members, the idea being to ensure stability of governmental policies. This is evident from the deliberations of the framers of the Constitution, thus:

"MR RODRIGO. x x x

I would like to state that in the United States Federal Congress, the term of the members of the Lower House is only two years. We have been used to a term of four years here but I think three years is long enough. But they will be allowed to run for reelection any number of times. In this way, we remedy the too frequent elections every two years. We will have elections every three years under the scheme and we will have a continuing Senate. Every election, 12 of 24 Senators will be elected, so that 12 Senators will remain in the Senate. In other words, we will have a continuing Senate.[61]

x x x x

MR DAVIDE. This is just a paragraph of that section that will follow what has earlier been approved. It reads: "OF THE SENATORS ELECTED IN THE ELECTION IN 1992, THE FIRST TWELVE OBTAINING THE HIGHEST NUMBER OF VOTES SHALL SERVE FOR SIX YEARS AND THE REMAINING TWELVE FOR THREE YEARS."

This is to start the staggering of the Senate to conform to the idea of a continuing Senate.

THE PRESIDING OFFICER (Mr. Rodrigo). What does the Committee say?

MR SUAREZ. The Committee accepts the Davide proposal, Mr. Presiding Officer.[62]

The Senate does not cease to be a continuing body merely because only half of its members continue to the next Congress. To my mind, even a lesser number of Senators continuing into the next Congress will still make the Senate a continuing body. The Senate must be viewed as a collective body. It is an institution quite apart from the Senators composing it. The

Senate as an institution cannot be equated to its present occupants. It is indivisible. It is not the sum total of all sitting Senators at any given time. Senators come and go but the very institution of the Senate remains. It is this indivisible institution which should be viewed as continuing.

The argument that the Senate is not a continuing body because it lacks quorum to do business after every midterm or presidential elections is flawed. It does not take into account that the term of office of a Senator is fixed by the Constitution. There is no vacancy in the office of outgoing Senators during midterm or presidential elections. Article VI, Section 4 of the 1987 Constitution provides:

The term of office of the Senators shall be six years and shall commence, unless otherwise provided by law, at noon on the thirtieth day of June next following their election.

The term of a Senator starts at noon of June 30 next following their election and shall end before noon of June 30 six years after. The constitutional provision aims to prevent a vacuum in the office of an outgoing Senator during elections, which is fixed under the Constitution unless changed by law on the second Monday of May,[63] until June 30 when the Senators-elect assume their office. There is no vacuum created because at the time an outgoing Senator's term ends, the term of a Senator-elect begins.

The same principle holds true for the office of the President. A president-elect does not assume office until noon of June 30 next following a presidential election. An outgoing President does not cease to perform the duties and responsibilities of a President merely because the people had chosen his/her new successor. Until her term expires, an outgoing President

has the constitutional duty to discharge the powers and functions of a President unless restricted[64] by the Constitution.

In fine, the Senate is a continuing body as it continues to have a full or at least majority membership[65] even during elections until the assumption of office of the Senators-elect. The Senate as an institution does not cease to have a quorum to do business even during elections. It is to be noted that the Senate is not in session during an election until the opening of a new Congress for practical reasons. This does not mean, however, that outgoing Senators cease to perform their duties as Senators of the Republic during such elections. When the President proclaims martial law or suspends the writ of habeas corpus, for example, the Congress including the outgoing Senators are required to convene if not in session within 24 hours in accordance with its rules without need of call.[66]

The Constitutional provision requiring publication of Senate rules is contained in Section 21, Article VI of the 1987 Constitution, which reads:

The Senate or the House of Representatives or any of its respective Committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

The above provision only requires a "duly published" rule of procedure for inquiries in aid of legislation. It is silent on republication. There is nothing in the constitutional provision that commands that every new Congress must publish its rules of procedure. Implicitly, republication is necessary only when there is an amendment or

revision to the rules. This is required under the due process clause of the Constitution.

The Senate in the 13[th] Congress caused the publication of the Rules of Procedure Governing Inquiries in Aid of Legislation. The present Senate (14[th] Congress) adopted the same rules of procedure in the NBN-ZTE investigation. It does not need to republish said rules of procedure because it is not shown that a substantial amendment or revision was made since its last publication that would affect the rights of persons appearing before it.

On a more practical note, there is little to be gained in requiring a new Congress to cause the republication of the rules of procedure which has not been amended or revised. The exercise is simply a waste of government funds. Worse, it unduly burdens and hinders the Senate from discharging its constitutional duties. Publication takes time and during the interregnum, it cannot be gainsaid that the Senate is barred or restricted from conducting an investigation in aid of legislation.

I agree with the Chief Justice that this Court must be wary of the far-reaching consequences of a case law invalidating the Senate rules of procedure for lack of republication. Our ruling in this petition will not only affect the NBN-ZTE investigation, but all other Senate investigations conducted under the 10[th], 11[th], 12[th], and the present 14[th] Congress, for which no republication of the rules has been done. These investigations have been the basis of several bills and laws passed in the Senate and the House of Representatives. Putting a doubt on the authority, effectivity and validity of these proceedings is imprudent and unwise. This Court should really be cautious in making a jurisprudential ruling that will unduly strangle the internal workings of a co-equal branch and needlessly burden the discharge of its constitutional duty.

C. The Senate failed to furnish petitioner with a list of possible questions and needed statutes prompting the inquiry. But the lapse was sufficiently cured.

Nagkulang ang Senado na bigyan ang petisyuner ng listahan ng mga itatanong sa kanya at mga panukalang batas na nagtulak sa pagsisiyasat. Subalit ang kakulangan ay nalunasan ng sapat.

In *Senate v. Ermita*,<sup>[67]</sup> the Court issued a guideline to the Senate to furnish a witness, prior to its investigation, an advance list of proposed questions and possible needed statutes which prompted the need for the inquiry. The requirement of prior notice will dispel doubts and speculations on the real nature and purpose of its investigation. Records show the Senate failed to comply with that guideline. It did not furnish petitioner Neri an advance list of the required questions and bills which prompted the NBN-ZTE investigation. Thus, the Senate committed a procedural error.

The majority decision held that the procedural error invalidated the contempt and arrest order against petitioner Neri, thus:

x x x Respondent Committees did not comply with the requirement laid down in *Senate v. Ermita* that the invitations should contain the "possible needed statute which prompted the need for the inquiry," along with "the usual indication of the subject of inquiry and the questions relative to and in furtherance thereof." Compliance with this requirement is imperative, both under Sections 21 and 22 of Article VI of the Constitution. This must be so to ensure that the rights of both persons appearing in or affected by such inquiry are respected as mandated by said Section 21 and by virtue of the express language of Section 22. Unfortunately, despite petitioner's repeated demands, respondent Committees did not send him an advance list of questions.<sup>[68]</sup>

Nevertheless, I disagree with the majority on this point. I do not think that such procedural lapse per se has a substantial effect on the resolution of the validity of the Senate contempt and arrest order. The defect is relatively minor when viewed in light of the serious issues raised in the NBN-ZTE investigation. More importantly, the procedural lapse was sufficiently cured when petitioner was apprised of the context of the investigation and the pending bills in connection with the NBN-ZTE inquiry when he appeared before the respondent Senate committees.

If this were a case of a witness suffering undue prejudice or substantial injury because of unfair questioning during a Senate investigation, I would not hesitate to strike down a contempt and arrest order against a recalcitrant witness. But this is not the situation here. Petitioner neither suffered any undue prejudice nor substantial injury. He was not ambushed by the Senators with a barrage of questions regarding a contract in which he had little or no prior knowledge. Quite the contrary, petitioner knew or ought to know that the Senators will query him on his participation and knowledge of the NBN-ZTE deal. This was clear from the letter of the Senate to petitioner requesting his presence and attendance during its investigation.

At any rate, this case should serve as an eye-opener to the Senate to faithfully comply with Our directive in *Ermita*. To prevent future claims of unfair surprise and questioning, the Senate, in its future investigations, ought to furnish a witness an advance list of questions and the pending bills which prompted its investigation.

D. There was a majority vote under  
Section 18 of the pertinent Senate  
Rules of Procedure.

Nagkaroon ng boto ng nakararami ayon sa Seksiyon 18 ng nauukol na Tuntunin ng Senado.

Section 18 of the Senate Rules Governing Inquiries in Aid of Legislation provides:

Sec. 18. Contempt. - The Committee, by a vote of a majority of all its members, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or 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 witness may be ordered by the Committee to be detained in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself of that contempt.

The majority decision held that the required majority vote under Section 18 of the said Senate Rules of Procedure was not met. In her ponencia, Justice Leonardo-De Castro notes that members of the Senate Committees who were absent during the Senate investigations were made to sign the contempt order. The ponente cites the transcript of records during the Senate investigation where Senator Aquilino Pimentel raised the issue to Senator Alan Peter Cayetano during interpellation, thus:

THE CHAIRMAN (SEN. CAYETANO, A). May I recognize the Minority Leader and give him the floor, Senator Pimentel.

SEN. PIMENTEL. Mr. Chairman, there is no problem, I think, with consulting the other committees. But I am of the opinion that the Blue Ribbon Committee is the lead committee, and therefore, it should have preference in enforcing its own decisions. Meaning to say, it is not something that is subject to consultation with other committees. I am not sure that is the right interpretation. I think that once we decide here, we enforce what we decide, because otherwise, before we know it, our determination is watered down by delay and, you know, the so-called "consultation" that inevitably will have to take place if we follow the premise that has been explained.

So my suggestion, Mr. Chairman, is the Blue Ribbon Committee should not forget it's the lead committee here, and therefore, the will of the lead committee prevails over all the other, you, know reservations that other committees might have who are only secondary or even tertiary committees, Mr. Chairman.

THE CHAIRMAN (SEN. CAYETANO, A.). Thank you very much to the Minority Leader. And I agree with the wisdom of his statements. I was merely mentioning that under Section 6 of the Rules of the Committee and under Section 6, "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."

So the Blue Ribbon Committee is more than willing to take that responsibility. But we only have six members here today, I am the seventh as chair and so we have not met that number. So I am merely stating that, sir, that when we will prepare the documentation, if a majority of all members sign and I am following the *Sabio v. Gordon* rule wherein I do believe, if I am not mistaken, Chairman Gordon prepared the documentation and then either in caucus or in session asked the other members to sign. And once the signatures are obtained, solely for the purpose that Secretary Neri or Mr. Lozada will not be able to legally question our subpoena as being insufficient in accordance with law.[69]

Justice Arturo Brion particularly agrees with the ponente. In his separate concurring opinion, Justice Brion cites the admission of Senators Francis Pangilinan and Rodolfo Biazon during the Oral Argument that the required majority vote under Section 18 was not complied with, thus:

That the Senate committees engaged in shortcuts in ordering the arrest of Neri is evident from the record of the arrest order. The interpellations by Justices Tinga and Velasco of Senators Rodolfo G. Biazon (Chair of the Committee on National Defense and Security) and Francis N. Pangilinan (Senate Majority Leader) yielded the information that none of the participating Committees (National Defense and Security, Blue Ribbon, and Trade and Commerce) registered enough votes to approve the citation of contempt and the arrest order. An examination of the Order dated 30 January 2008 shows that only Senators Alan Peter Cayetano, Aquino III, Legarda, Honasan and Lacson (of 17 regular members) signed for the Blue Ribbon Committee; only Senators Roxas, Pia Cayetano, Escudero and Madrigal for the Trade and Commerce Committee (that has 9 regular members); and only Senators Biazon, and Pimentel signed for the National Defense and Security Committee (that has 19 regular members). Senate President Manny Villar, Senator Aquilino Pimentel as Minority Floor Leader, Senator Francis Pangilinan as Majority Floor Leader, and Senator Jinggoy Ejercito Estrada as Pro Tempore, all signed as ex-officio members of the Senate standing committees but their votes, according to Senator Biazon's testimony, do not count in the approval of committee action.[70]

Chief Justice Puno has a different view. Citing the Certification[71] issued by the Senate's Deputy Secretary for Legislation, the Chief Justice concludes that the required majority vote was sufficiently met. The Chief Justice adds that even if the votes of the ex officio members of the Senate Committee were counted, the majority requirement for each of the respondent Senate Committees was still satisfied.[72]

I share the view of the Chief Justice on this point.

The divergence of opinion between the majority decision and Chief Justice Puno pertains to the voting procedure of the Senate. It involves two issues: (a) whether or not the vote to cite a witness for contempt under Section 18 of the Senate Rules requires actual physical presence during the Senate investigation; and (b) whether or not the votes of the ex officio members of respondent Senate Committees should be counted under Section 18 of the Senate Rules.

The twin issues involve an interpretation of the internal rules of the Senate. It is settled that the internal rules of a co-equal branch are within its sole and exclusive discretion. Section 16, Article VI of the 1987 Constitution provides:

Each House may determine the Rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds of all its members, suspend or expel a member. A penalty of suspension, when imposed, shall not exceed sixty days.

In *Avelino v. Cuenco*,<sup>[73]</sup> this Court by a vote of 6-4 refused to assume jurisdiction over a petition questioning the election of Senator Cuenco as Senate President for lack of quorum. The case cropped up when then Senate President Avelino walked out of the Senate halls followed by nine other Senators, leaving only twelve senators in the session hall. The remaining twelve Senators declared the position of the Senate President vacant and unanimously designated Senator Cuenco as the Acting Senate President. Senator Avelino questioned the election, among others, for lack of quorum. Refusing to assume jurisdiction, this Court held:

The Court will not sally into the legitimate domain of the Senate on the plea that our refusal to intercede might lead into a crisis, even a revolution. No state of things has been proved that might change the temper of the Filipino people as a (sic) peaceful and law-abiding citizens. And we should not allow ourselves to be stampeded into a rash action inconsistent with the claim that should characterize judicial deliberations.<sup>[74]</sup>

The same principle should apply here. We must not lightly intrude into the internal rules of a co-equal branch. The doctrine of separation of powers demands no less than a prudent refusal to interfere with the internal affairs of the Senate. The issues of lack of quorum and the inclusion of the votes of the ex officio members are beyond this Court's judicial review.

Apart from jurisprudence, common sense also requires that We should accord the same privilege and respect to a co-equal branch. If this Court allows Justices who are physically absent from its sessions to cast their vote on a petition, there is no reason to treat the Senators differently. It is also common knowledge that even members of the House of Representatives cast their vote on a bill without taking part in its deliberations and sessions. Certainly, what is sauce for the goose is sauce for the gander. If it is allowed in the House of Representatives, it should be allowed in the Senate. *Kung ito'y pinapayagan sa Mababang Kapulungan, dapat payagan din sa Mataas na Kapulungan.*

*Avelino v. Cuenco* was decided under the 1935 Constitution. Judicial power has been expanded under the present 1987 Constitution.<sup>[75]</sup> Even if We resolve the twin issues under Our expanded jurisdiction, Section 18 of the Senate Rules is sufficiently complied with. The section is silent on proper voting procedure in the Senate. It merely provides that the Senate may cite a witness in contempt by "majority vote of all its members." Clearly, as long as the majority vote is garnered, irrespective of the mode on how it is done, whether by mere signing of the contempt order or otherwise, the requirement is met. Here, it is clear that a majority of the members of the respective Senate Committees voted to cite petitioner Neri in contempt.

The required majority vote under Section 18 was sufficiently met if We include the votes of the ex officio members of the respective Senate Committees. Section 18 does not distinguish between the votes of permanent and ex officio members. Interpreting the Section, the votes of the ex officio members of the respective Committees should be counted in determining the quorum and the required majority votes. *Ubi lex non distinguit nec nos distinguere debemus.* When the law does not distinguish, we must not distinguish. *Kapag ang batas ay di nagtatangi, di tayo dapat magtangi.*

## Conclusion

Summing up, I affirm my stand to grant the petition for certiorari. The Senate cannot compel petitioner Neri to answer the three questions subject of the petition for certiorari or to divulge the contents of his pertinent conversation with the President on the ground of presidential communication privilege.

I also affirm my position to quash the Senate contempt and arrest order against petitioner on the ground of valid invocation of presidential communication privilege, although (a) it is unnecessary to re-publish Senate Rules of Procedure Governing Inquiries in Aid of Legislation, (b) the Senate failure to furnish petitioner with a list of questions was cured, and (c) there was a majority vote.

Sa kabuuan, pinagtitibay ko ang aking paninindigan upang payagan ang petisyon para sa certiorari. Hindi mapipilit ng Senado si petisyuner Neri na sagutin ang tatlong tanong sa petisyon o ibunyag ang laman ng kaugnay na usapan nila ng Pangulo, dahil sa pampangulong pribilehiyo sa komunikasyon.

Pinaninindigan ko rin ang aking posisyon upang pawalang-saysay ang order ng Senado sa pagsuway at pag-aresto sa petisyuner, dahil sa tamang imbokasyon ng nasabing pribilehiyo, bagama't (a) hindi na kailangan ang muling paglalathala ng mga Tuntunin sa Prosidyur ng Senado sa Pagsisiyasat Tulong sa Paggawa ng Batas, (b) nalunasan ang pagkukulang ng Senado na bigyan ang petisyuner ng listahan ng mga tanong, at (c) nagkaroon ng nakararaming boto.

Accordingly, I vote to deny respondents' motion for reconsideration.

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[1] "More critics slam SC on Neri Decision," <http://www.abs-cbnglobal.com/ItoangPinoy/News/PhilippineNews/tabid/140/ArticleID/1296/TargetModuleID/516/Default.aspx>; accessed May 15, 2008.

[2] "Inside story: SC justices had pre-determined votes on Neri case," NewsBreak written by Marites Datunguilan Vitug, April 2, 2008, [http://newsbreak.com.ph/index.php?option=com\\_content&task=view&id=4329&Itemid=88889384](http://newsbreak.com.ph/index.php?option=com_content&task=view&id=4329&Itemid=88889384) accessed April 22, 2008.

[3] G.R. No. L-59096, October 11, 1985, 139 SCRA 260, 267.

[4] G.R. Nos. 146710-15, March 2, 2001, 353 SCRA 452, 531.

[5] J. Kapunan, J. Ynares-Santiago, and J. Sandoval-Gutierrez reserved the right to file separate opinions.

[6] G.R. No. 168877, March 24, 2006, 485 SCRA 405, 423.

[7] The three questions are:

- a) Whether the President followed up the (NBN) project?
- b) Were you dictated to prioritize the ZTE?
- c) Whether the President told you to go ahead and approve the project after being told about the alleged bribe?

[8] Majority decision penned by J. Leonardo-De Castro, pp. 19, 21.

[9] *Senate of the Philippines v. Ermita*, G.R. No. 169777, April 20, 2006, 488 SCRA 1; *Chavez v. Philippine Commission on Good Government*, G.R. No. 130716, December 9, 1998, 299 SCRA 744; *Almonte v. Vasquez*, G.R. No. 95367, May 23, 1995, 244 SCRA 286.

[10] Concurring opinion of J. Tinga, p. 10.

[11] *Supra*.

[12] In *Senate of the Philippines v. Ermita*, this Court stated:

Absent then a statement of the specific basis of a claim of executive privilege, there is no way of determining whether it falls under one of the traditional privileges, or whether, given the circumstances in which it is made, it should be respected. These, in substance, were the same criteria in assessing the claim of privilege asserted

against the Ombudsman in *Almonte v. Vasquez* and, more in point, against a committee of the Senate in *Senate Select Committee on Presidential Campaign Activities v. Nixon*.

[13] In her separate concurring opinion, J. Carpio Morales notes that the two claims of privilege must be assessed separately because they are grounded on different public interest consideration, thus:

The two claims must be assessed separately, they being grounded on different public interest considerations. Underlying the presidential communications privilege is the public interest in enhancing the 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 process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The diplomatic secrets privilege, on the other hand, has a different objective - to preserve our diplomatic relations with other countries. (pp. 8-9)

[14] In *Senate of the Philippines v. Ermita*, the Supreme Court stated:

Congress must not require the executive to state the reasons for the claim with such particularity as to compel disclosure of the information which the privilege is meant to protect.

[15] Separate concurring opinion of J. Tinga, p. 9; dissenting opinion of C.J. Puno, pp. 41-42, 63.

[16] The pertinent portion of the Letter of Executive Secretary Ermita to Senator Cayetano reads:

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 x x x, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

[17] Dissenting opinions of C.J. Puno, pp. 69-70, J. Carpio, p. 24, J. Carpio Morales, p. 21.

[18] Separate Concurring Opinion of Justice Tinga, pp. 9-10.

[19] *US v. Nixon*, 418 US 613 (1974); *Nixon v. Sirica*, 487 F. 2d 700.

[20] *Supra* note 9.

[21] *Senate of the Philippines v. Ermita*, *id.* at 52.

[22] Motion for reconsideration, p. 15.

[23] *Id.* at 14-20.

[24] In her dissenting opinion, J. Ynares-Santiago stated:

Indeed, presidential conversations and correspondences have been recognized as presumptively privileged under case law. (*Almonte v. Vasquez*, 314 Phil. 150 [1995]). (pp. 2-3)

[25] Dissenting opinion of C.J. Puno, pp. 75-77.

[26] Majority decision, pp. 15, 18 & 19.

[27] Dissenting opinion, pp. 2-3.

[28] Dissenting and concurring opinion, p. 15.

[29] J. Carpio Morales stated in her dissenting opinion:

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. (p. 25)

[30] Senate of the Philippines v. Ermita, id. at 47.

[31] Majority decision, p. 20; concurring opinions of J. Nachura, p. 11, J. Tinga, p. 11, J. Brion, p. 8; dissenting opinions of C.J. Puno, p. 58, J. Carpio Morales, p. 9, J. Carpio, p. 12, J. Ynares-Santiago, p. 1.

[32] Concurring opinion of J. Nachura, pp. 2-3.

[33] The NBN-ZTE investigation is a joint committee investigation by the Committee on Accountability of Public Officers and Investigations (Blue Ribbon), Committee on Trade and Commerce and Committee on National Defense and Security.

[34] Constitution (1987), Art. VI, Sec. 22 provides:

The heads of department may upon their own initiative, with the consent of the President, or upon the request of either House, or as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the state or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.

[35] Id., Sec. 21 provides:

The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

[36] The majority decision stated:

The foregoing is consistent with the earlier case of *Nixon v. Sirica*, where it was held that presidential communications are presumptively privileged and that the presumption can be overcome only by mere showing of public need by the branch seeking access to conversations. The courts are enjoined to resolve the competing interests of the political branches of the government "in the manner that preserves the essential functions of each Branch." [36] Here, the record is bereft of any categorical explanation from respondent Committees to show a compelling or critical need for the answers to the three (3) questions in the enactment of a law. Instead, the questions veer more towards the exercise of the legislative oversight function under Section 22 of Article VI rather than Section 21 of the same Article. *Senate v. Ermita* ruled that the "the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation."

[37] The following are the resolutions passed in the Senate in connection with the NBN-ZTE investigation:

- P.S. Res. (Philippine Senate Resolution) No. 127, introduced by Senator Aquilino Q. Pimentel, Jr., entitled:

Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting It Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations.

- P.S. Res. No. 129, introduced by Senator Panfilo M. Lacson, entitled:

Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity.

- P.S. Res. No. 136, introduced by Senator Miriam Defensor Santiago, entitled:

Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government.

- P.S. Res. No. 144, introduced by Senator Manuel Roxas III, entitled:

Resolution Urging Gloria Macapagal-Arroyo to Direct the Cancellation of the ZTE Contract.

[38] The following are the Privilege Speeches delivered in connection with the NBN ZTE investigation:

- Privilege Speech of Senator Panfilo M. Lacson, delivered on September 11, 2007, entitled "Legacy of Corruption."

- Privilege Speech of Senator Miriam Defensor Santiago, delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement."

[39] The following are the pending bills filed in connection with the NBN-ZTE investigation:

- Senate Bill No. 1793, introduced by Senator Manuel Roxas III, entitled:

An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes.

- Senate Bill No. 1794, introduced by Senator Manuel Roxas III, entitled:

An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes.

- Senate Bill No. 1317, introduced by Senator Miriam Defensor Santiago, entitled:

An Act Mandating Concurrence to International Agreements and Executive Agreements.

[40] TSN, March 4, 2008, p. 82.

[41] *Watkins v. United States*, 354 US 178, 1 L. Ed 1273 (1957).

**[42] 418 US 613 (1974).**

[43] *U.S. v. Nixon*, id.

[44] 542 US 367, 124 S. Ct. 2576 (2004).

[45] *Cheney v. US District Court of the District of Columbia*, id.

[46] Majority decision, p. 20.

- [47] Dissenting opinion of C.J. Puno, p. 59.
- [48] Separate dissenting opinion of J. Carpio Morales, p. 25.
- [49] Concurring opinion of J. Tinga, p. 11.
- [50] Concurring opinion of J. Nachura, pp. 10-11.
- [51] Separate dissenting opinion of J. Ynares-Santiago, p. 3.
- [52] Dissenting opinion of C.J. Puno, pp. 96-98.
- [53] Dissenting opinion of J. Carpio Morales, p. 29.
- [54] *Id.* at 27.
- [55] Concurring opinion of J. Nachura, p. 10.
- [56] Concurring opinion of J. Carpio, p. 14.
- [57] Annex "A." Supplemental opinion.
- [58] Majority decision, p. 30.
- [59] Concurring opinion of J. Carpio, pp. 28-31.
- [60] Dissenting opinion of C.J. Puno, pp. 110-111.
- [61] Constitutional Commission Record, July 24, 1986, p. 208.
- [62] Constitutional Commission Record, October 3, 1986, p. 434.
- [63] Constitution (1987), Art. VI, Sec. 8.
- [64] *Id.*, Secs. 14 and 15 provides:

Section 14. Appointments extended by an Acting President shall remain effective, unless revoked by the elected President, within ninety days from his assumption or reassumption of office.

Section 15. Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.

- [65] The Office of a Senator may be vacant for causes such as death or permanent disability.

- [66] Constitution (1987), Art. VII, Sec. 18 provides:

The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. Within forty-eight hours from the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus, the President shall submit a report in person or in writing to the Congress. The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President. Upon the initiative of the President, the Congress may, in the same manner, extend such proclamation or suspension for a period to be determined by the Congress, if the invasion or rebellion shall persist and public safety requires it.

The Congress, if not in session, shall, within twenty-four hours following such proclamation or suspension, convene in accordance with its rules without need of a call.

[67] In *Senate of the Philippines v. Ermita*, this Court stated:

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.

[68] Majority decision, pp. 27-28.

[69] Majority decision, pp. 28-30.

[70] Concurring opinion of J. Brion, pp. 5-6.

[71] 1. Committee on Accountability of Public Officers and Investigations (17 members excluding 3 ex-officio members):

Chairperson:

Cayetano, Alan Peter - signed

Vice-Chairperson:

Members:

Cayetano, Pia - signed

Defensor Santiago, Miriam

Enrile, Juan Ponce

Escudero, Francis - signed

Gordon, Richard

Honasan II, Gregorio Gringo - signed

Zubiri, Juan Miguel

Arroyo, Joker

Revilla, Jr., Ramon

Lapid, Manuel

Aquino III, Benigno - signed

Biazon, Rodolfo - signed

Lacson, Panfilo - signed

Legarda, Loren - signed

Madrigal, M.A. - signed

Trillanes IV, Antonio

Ex-Officio Members:

Ejercito Estrada, Jinggoy - signed

Pangilinan, Francis - signed

Pimentel, Jr., Aquilino - signed

2. Committee on National Defense and Security (19 members excluding 2 ex-officio members):

Chairperson:

Biazon, Rodolfo - signed

Vice-Chairperson:

Members:

Angara, Edgardo

Zubiri, Juan Miguel

Cayetano, Alan Peter - signed

Enrile, Juan Ponce

Gordon, Richard

Cayetano, Pia - signed

Revilla, Jr., Ramon

Honasan II, Gregorio Gringo - signed

Escudero, Francis - signed

Lapid, Manuel

Defensor Santiago, Miriam

Arroyo, Joker

Aquino III, Benigno - signed

Lacson, Panfilo - signed

Legarda, Loren - signed

Madrigal, M.A. - signed

Pimentel, Jr. Aquilino - signed

Trillanes IV, Antonio

Ex-Officio Members:

Ejercito Estrada, Jinggoy - signed

Pangilinan, Francis - signed

3. Committee on Trade and Commerce (9 members excluding 3 ex-officio members):

Chairperson:

Roxas, MAR - signed

Vice-Chairperson:

Members:

Cayetano, Pia - signed

Lapid, Manuel

Revilla, Jr., Ramon

Escudero, Francis - signed

Enrile, Juan Ponce

Gordon, Richard

Biazon, Rodolfo - signed

Madrigal, M.A.- signed

Ex-Officio Members:

Ejercito Estrada, Jinggoy -signed

Pangilinan, Francis - signed

Pimentel, Jr. Aquilino - signed

[72] Dissenting opinion of C.J. Puno, p. 119.

[73] 83 Phil. 17 (1949).

[74] *Avelino v. Cuenco*, id. at 22.

[75] Constitution (1987), Art. VIII, Sec. 1 provides:

Judicial review includes the duty of the Courts of Justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.

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