

COMMISSIONER JOSE T. ALMONTE, VILLAMOR C. PEREZ, NERIO ROGADO, AND ELISA RIVERA, PETITIONERS, VS. HONORABLE CONRADO M. VASQUEZ AND CONCERNED CITIZENS, RESPONDENTS.

G.R. No. 95367. May 23, 1995

Ponente: MENDOZA, J.

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MENDOZA, J.:

This is a petition for certiorari, prohibition, and mandamus to annul the subpoena duces tecum and orders issued by respondent Ombudsman, requiring petitioners Nerio Rogado and Elisa Rivera, as chief accountant and record custodian, respectively, of the Economic Intelligence and Investigation Bureau (EIIB) to produce "all documents relating to Personal Services Funds for the year 1988 and all evidence, such as vouchers (salary) for the whole plantilla of EIIB for 1988" and to enjoin him from enforcing his orders.

Petitioner Jose T. Almonte was formerly Commissioner of the EIIB, while Villamor C. Perez is Chief of the EIIB's Budget and Fiscal Management Division. The subpoena duces tecum was issued by the Ombudsman in connection with his investigation of an anonymous letter alleging that funds representing savings from unfilled positions in the EIIB had been illegally disbursed. The letter, purporting to have been written by an employee of the EIIB and a concerned citizen, was addressed to the Secretary of Finance, with copies furnished several government offices, including the Office of the Ombudsman.

The letter reads in pertinent parts:

- These are the things that I have been observing. During the implementation of E.O. 127 on May 1, 1988, one hundred ninety (190) personnel were dismissed. Before that implementation, we had a monthly savings of P500,000.00 from unfilled plantilla position plus the implementation of RA 6683 wherein seventy (70) regular employees availed a total amount of P1,400,000.00 was saved from the government monthly. The question is, how do they used or disbursed this savings? The EIIB has a syndicate headed by the Chief of Budget Division who is manipulating funds and also the brain of the so called "ghost agents" or the "Emergency Intelligence Agents" (EIA). The Commissioner of EIIB has a biggest share on this. Among his activities are:

a)

Supporting RAM wherein he is involved. He gives big amount especially during the Dec. Failed coup.

b)

Payment for thirty five (30) mini UZI's.

c)

Payment for the purchased of Maxima '87 for personal used of the Commissioner.

d)

Another observation was the agents under the Director of NCR EIIB is the sole operating unit within Metro Manila which was approved by no less than the Commissioner due to anomalous activities of almost all agents assigned at the central office directly under the Commissioner. Retired Brig. Gen. Almonte as one of the Anti-Graft board member of the Department of Finance should not tolerate this. However, the Commissioner did not investigate his own men instead, he placed them under the 15-30 payroll.

e)

Many more which are personal.

- Sir, my question is this. Can your good office investigate Ell intelligence funds particularly Personal Services (01) Funds? I wonder why the Dep't of Budget & Mgmt. cannot compel EllB to submit an actual filled up position because almost half of it are vacant and still they are releasing it. Are EIIB plantilla position classified? It is included in the Personal Services Itemization (PSI) and I believe it is not classified and a ruling from Civil Service Commission that EIIB is not exempted from Civil Service. Another info, when we had salary differential last Oct `88 all money for the whole plantilla were released and from that alone, Millions were saved and converted to ghost agents of EIA.

- Another thing that I have observed was the Chief Budget Division possesses high caliber firearms such as a mini UZI, Armalite rifle and two (2) 45 cal. pistol issued to him by the Assistant Commissioner wherein he is not an agent of EIIB and authorized as such according to memorandum order number 283 signed by the President of the Republic of the Philippines effective 9 Jan. 1990.

Another observation was when EIIB agents apprehended a certain civilian who possesses numerous assorted high powered firearms. Agents plus one personnel from the legal proclaimed only five (5) firearms and the remaining was pilfered by them.

Another observation is almost all EIIB agents collects payroll from the big time smuggler syndicate monthly and brokers every week for them not to be apprehended.

Another observation is the commissioner allocates funds coming from the intelligence funds to the media to sustain their good image of the bureau.

In his comment[1] on the letter-complaint, petitioner Almonte denied that as a result of the separation of personnel, the EIIB had made some savings. He averred that the only funds released to his agency by the Department of Budget and Management (DBM) were those corresponding to 947 plantilla positions which were filled. He also denied that there were "ghost agents" in the EIIB and claimed that disbursements for "open" (i.e., "overt" personnel) and "closed" (i.e., "covert" personnel) plantillas of the agency had been cleared by the Commission on Audit (COA); that the case of the 30 Uzis had already been investigated by Congress, where it was shown that it was not the EIIB but an agent who had spent for the firearms and they were only loaned to the EIIB pending appropriation by Congress; that, contrary to the charge that a Maxima car had been purchased for his use, he was using a government issued car from the NICA; that it was his prerogative as Commissioner to "ground" agents in the EIIB main office so that they could be given reorientation and retraining; that the allegation that the EIIB operatives pilfered smuggled firearms was without factual basis because the firearms were the subject of seizure proceedings before the Collector of Customs, Port of Manila; that the EIIB had been uncompromising toward employees found involved in anomalous activities; and that intelligence funds had not been used for media propaganda and if media people went to the EIIB it was because of newsworthy stories. Petitioner asked that the complaint be dismissed and the case considered closed.

Similarly petitioner Perez, budget chief of the EIIB, denied in his comment[2] dated April 3, 1990 that savings

had been realized from the implementation of E.O. No. 127, since the DBM provided allocations for only the remaining 947 personnel. He said that the disbursement of funds for the plantilla positions for "overt" and "covert" personnel had been cleared by the COA and that the high-powered firearms had been issued for the protection of EIIB personnel attending court hearings and the Finance Officer in withdrawing funds from the banks.

The Graft Investigation Officer of the Ombudsman's office, Jose F. Saño, found the comments unsatisfactory, being "unverified and plying only on generalizations without meeting specifically the points raised by complainant as constitutive of the alleged anomalies." [3] He, therefore, asked for authority to conduct a preliminary investigation. Anticipating the grant of his request, he issued a subpoena [4] to petitioners Almonte and Perez, requiring them to submit their counter-affidavits and the affidavits of their witnesses, as well as a subpoena duces tecum [5] to the Chief of the EIIB's Accounting Division ordering him to bring "all documents relating to Personal Services Funds for the year 1988 and all evidence, such as vouchers (salary) for the whole plantilla of EIIB for 1988."

Petitioners Almonte and Perez moved to quash the subpoena and the subpoena duces tecum. In his Order dated June 15, 1990, [6] respondent Ombudsman granted the motion to quash the subpoena in view of the fact that there were no affidavits filed against petitioners. But he denied their motion to quash the subpoena duces tecum. He ruled that petitioners were not being forced to produce evidence against themselves, since the subpoena duces tecum was directed to the Chief Accountant, petitioner Nerio Rogado. In addition the Ombudsman ordered the Chief of the Records Section of the EIIB, petitioner Elisa Rivera, to produce before the investigator "all documents relating to Personnel Service Funds, for the year 1988, and all documents, salary vouchers for the whole plantilla of the EIIB for 1988, within ten (10) days from receipt hereof."

Petitioners Almonte and Perez moved for a reconsideration, arguing that Rogado and Rivera were EIIB employees under their supervision and that the Ombudsman was doing indirectly what he could not do directly, i.e., compelling them (petitioners Almonte and Perez) to produce evidence against themselves.

Petitioners' motion was denied in respondent Ombudsman's order dated August 6, 1990. Hence, this petition which questions the orders of June 15, 1990 and August 6, 1990 of respondent Ombudsman.

To put this case in perspective it should be stated at the outset that it does not concern a demand by a citizen for information under the freedom of information guarantee of the Constitution. [7] Rather it concerns the power of the Office of the Ombudsman to obtain evidence in connection with an investigation conducted by it vis-a-vis the claim of privilege of an agency of the Government. Thus petitioners raise the following issues: [8]

- WHETHER OR NOT A CASE BROUGHT ABOUT BY AN UNSIGNED AND UNVERIFIED LETTER COMPLAINT IS AN "APPROPRIATE CASE" WITHIN THE CONCEPT OF THE CONSTITUTION IN WHICH PUBLIC RESPONDENT CAN OBLIGE PETITIONERS BY VIRTUE OF HIS SUBPOENA DUCES TECUM TO PRODUCE TO HIM "ALL DOCUMENTS RELATING TO PERSONAL SERVICES FUNDS FOR THE YEAR 1988 AND ALL EVIDENCES, SUCH AS VOUCHERS (SALARY) FOR THE WHOLE PLANTILLA OF EIIB FOR 1988."

- WHETHER OR NOT "ALL DOCUMENTS RELATING TO PERSONAL SERVICES FUNDS FOR THE YEAR 1988 AND ALL EVIDENCES, SUCH AS VOUCHERS (SALARY) FOR THE WHOLE PLANTILLA OF EIIB FOR 1988" ARE CLASSIFIED AND, THEREFORE, BEYOND THE REACH OF PUBLIC RESPONDENT'S SUBPOENA DUCES TECUM.

I.

There are several subsidiary issues raised by petitioners, but the principal ones revolve on the question whether petitioners can be ordered to produce documents relating to personal services and salary vouchers of EIIB employees on the plea that such documents are classified. Disclosure of the documents in question is resisted on the ground that "knowledge of EIIB's documents relative to its Personal Services Funds and its plantilla . . . will necessarily [lead to] knowledge of its operations, movements, targets, strategies, and tactics and the whole of its being" and this could "destroy the EIIB." [9]

Petitioners do not question the power of the Ombudsman to issue a subpoena duces tecum nor the relevancy or materiality of the documents required to be produced, to the pending investigation in the Ombudsman's office. Accordingly, the focus of discussion should be on the Government's claim of privilege.

A.

At common law a governmental privilege against disclosure is recognized with respect to state secrets bearing on military, diplomatic and similar matters. This privilege is based upon public interest of such paramount importance as in and of itself transcending the individual interests of a private citizen, even though, as a consequence thereof, the plaintiff cannot enforce his legal rights. [10]

In addition, in the litigation over the Watergate tape subpoena in 1973, the U.S. Supreme Court recognized the right of the President to the confidentiality of his conversations and correspondence, which it likened to "the claim of confidentiality of judicial deliberations." Said the Court in *United States v. Nixon*: [11]

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

Thus, the Court for the first time gave executive privilege a constitutional status and a new name, although not necessarily a new birth. [12]

"The confidentiality of judicial deliberations" mentioned in the opinion of the Court referred to the fact that Justices of the U.S. Supreme Court and judges of lower federal courts have traditionally treated their working papers and judicial notes as private property. A 1977 proposal in the U.S. Congress that Justices and judges of lower federal courts "should be encouraged to make such arrangements as will assure the preservation and eventual availability of their personal papers, especially the deposit of their papers in the same depository they select for [their] Public Papers" [13] was rebuffed by the Justices who, in a letter to the Chairman of the Subcommittee on Regulation and Government Information of the U.S. Senate, referred to "difficult concerns respecting the appropriate separation that must be maintained between the legislative branch and this Court." [14]

There are, in addition to such privileges, statutorily-created ones such as the Government's privilege to withhold the identity of persons who furnish information of violations of laws. [15]

With respect to the privilege based on state secret, the rule was stated by the U.S. Supreme Court as follows:

Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers. . . In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.[16]

On the other hand, where the claim of confidentiality does not rest on the need to protect military, diplomatic or other national security secrets but on a general public interest in the confidentiality of his conversations, courts have declined to find in the Constitution an absolute privilege of the President against a subpoena considered essential to the enforcement of criminal laws.[17]

B.

In the case at bar, there is no claim that military or diplomatic secrets will be disclosed by the production of records pertaining to the personnel of the EIIB. Indeed, EIIB's function is the gathering and evaluation of intelligence reports and information regarding "illegal activities affecting the national economy, such as, but not limited to, economic sabotage, smuggling, tax evasion, dollar salting." [18] Consequently, while in cases which involve state secrets it may be sufficient to determine from the circumstances of the case that there is reasonable danger that compulsion of the evidence will expose military matters without compelling production, [19] no similar excuse can be made for a privilege resting on other considerations.

Nor has our attention been called to any law or regulation which considers personnel records of the EIIB as classified information. To the contrary, COA Circular No. 88-293, which petitioners invoke to support their contention that there is adequate safeguard against misuse of public funds, provides that the "only item of expenditure which should be treated strictly confidential" is that which refers to the "purchase of information and payment of rewards." Thus, part V, No. 7 of the Circular read:

The only item of expenditure which should be treated as strictly confidential because it falls under the category of classified information is that relating to purchase of information and payment of rewards. However, reasonable records should be maintained and kept for inspection of the Chairman, Commission on Audit or his duly authorized representative. All other expenditures are to be considered unclassified supported by invoices, receipts and other documents, and, therefore, subject to reasonable inquiry by the Chairman or his duly authorized representative. [20]

It should be noted that the regulation requires that "reasonable records" be kept justifying the confidential or privileged character of the information relating to informers. There are no such reasonable records in this case to substitute for the records claimed to be confidential.

The other statutes and regulations [21] invoked by petitioners in support of their contention that the documents sought in the subpoena duces tecum of the Ombudsman are classified merely indicate the confidential nature of the EIIB's functions, but they do not exempt the EIIB from the duty to account for its funds to the proper authorities. Indeed by denying that there were savings made from certain items in the agency and alleging that the

DBM had released to the EIIB only the allocations needed for the 947 personnel retained after its reorganization, petitioners in effect invited inquiry into the veracity of their claim. If, as petitioners claim, the subpoenaed records have been examined by the COA and found by it to be regular in all respects, there is no reason why they cannot be shown to another agency of the government which by constitutional mandate is required to look into any complaint concerning public office.

On the other hand, the Ombudsman is investigating a complaint that several items in the EIIB were filled by fictitious persons and that the allotments for these items in 1988 were used for illegal purposes. The plantilla and other personnel records are relevant to his investigation. He and his Deputies are designated by the Constitution "protectors of the people" and as such they are required by it "to act promptly on complaints in any form or manner against public officials or employees of the Government, or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporation." [22]

His need for the documents thus outweighs the claim of confidentiality of petitioners. What is more, while there might have been compelling reasons for the claim of privilege in 1988 when it was asserted by petitioners, now, seven years later, these reasons may have been attenuated, if they have not in fact ceased. The agents whose identities could not then be, revealed may have ceased from the service of the EIIB, while the covert missions to which they might have been deployed might either have been accomplished or abandoned. On the other hand, the Ombudsman's duty to investigate the complaint that there were in 1988 unfilled positions in the EIIB for which continued funding was received by its officials and put to illegal use, remains.

Above all, even if the subpoenaed documents are treated as presumptively privileged, this decision would only justify ordering their inspection in camera but not their nonproduction. However, as concession to the nature of the functions of the EIIB and just to be sure no information of a confidential character is disclosed, the examination of records in this case should be made in strict confidence by the Ombudsman himself. Reference may be made to the documents in any decision or order which the Ombudsman may render or issue but only to the extent that it will not reveal covert activities of the agency. Above all, there must be a scrupulous protection of the documents delivered.

With these safeguards outlined, it is believed that a satisfactory resolution of the conflicting claims of the parties is achieved. It is not amiss to state that even matters of national security have been inquired into in appropriate in camera proceedings by the courts. In *Lansang v. Garcia* [23] this Court held closed door sessions, with only the immediate parties and their counsel present, to determine claims that because of subversion there was imminent danger to public safety warranting the suspension of the writ of habeas corpus in 1971. Again in *Marcos v. Manglapus* [24] the Court met behind closed doors to receive military briefings on the threat posed to national security by the return to the country of the former President and his family. In the United States, a similar inquiry into the danger to national security as a result of the publication of classified documents on the Vietnam war was upheld by the U.S. Supreme Court. [25] We see no reason why similar safeguards cannot be made to enable an agency of the Government, like the Office of the Ombudsman, to carry out its constitutional duty to protect public interests [26] while insuring the confidentiality of classified documents.

C.

Petitioners contend that under Art. XI, § 13(4) the Ombudsman can act only "in any appropriate case, and subject to such limitations as may be provided by law" and that because the complaint in this case is unsigned and unverified, the case is not an appropriate one. This contention lacks merit. As already stated, the Constitution expressly enjoins the Ombudsman to act on any complaint filed "in any form or manner" concerning official acts or omissions. Thus, Art. XI, § 12 provides:

The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against public officials or employees of the Government, or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations and shall in appropriate cases, notify the complainants of the action taken and the result thereof. (Emphasis added)

Similarly, the Ombudsman Act of 1989 (Rep. Act No. 6770) provides in § 26(2):

The Office of the Ombudsman shall receive complaints from any source in whatever form concerning an official act or omission. It shall act on the complaint immediately and if it finds the same entirely baseless, it shall dismiss the same and inform the complainant of such dismissal citing the reasons therefor. If it finds a reasonable ground to investigate further, it shall first furnish the respondent public officer or employee with a summary of the complaint and require him to submit a written answer within seventy-two hours from receipt thereof. If the answer is found satisfactory, it shall dismiss the case. (Italics added)

Accordingly, in *Diaz v. Sandiganbayan*[27] the Court held that testimony given at a fact-finding investigation and charges made in a pleading in a case in court constituted a sufficient basis for the Ombudsman to commence investigation, because a formal complaint was really not necessary.

Rather than referring to the form of complaints, therefore, the phrase "in an appropriate case" in Art, XI, § 12 means any case concerning official act or omission which is alleged to be "illegal, unjust, improper, or inefficient." [28] The phrase "subject to such limitations as may be provided by law" refers to such limitations as may be provided by Congress or, in the absence thereof, to such limitations as may be imposed by the courts. Such limitations may well include a requirement that the investigation be conducted in camera, with the public excluded, as exception to the general nature of the proceedings in the Office of the Ombudsman. [29] A reconciliation is thereby made between the demands of national security and the requirement of accountability enshrined in the Constitution. [30]

What has been said above disposes of petitioners' contention that the anonymous letter-complaint against them is nothing but a vexatious prosecution. It only remains to say that the general investigation in the Ombudsman's office is precisely for the purpose of protecting those against whom a complaint is filed against hasty, malicious, and oppressive prosecution as much as securing the State from useless and expensive trials. There may also be benefit resulting from such limited in camera inspection in terms of increased public confidence that the privilege is not being abused and increased likelihood that no abuse is in fact occurring.

II.

Nor is there violation of petitioners' right to the equal protection of the laws. Petitioners complain that "in all forum and tribunals . . . the aggrieved parties . . . can only hale respondents via their verified complaints or sworn statements with their identities fully disclosed," while in proceedings before the Office of the Ombudsman anonymous letters suffice to start an investigation. In the first place, there can be no objection to this procedure because it is provided in the Constitution itself. In the second place, it is apparent that in permitting the filing of complaints "in any form and in a manner," the framers of the Constitution took into account the well-known reticence of the people which keep them from complaining against official wrongdoings. As this Court had occasion to point out, the Office of the Ombudsman is different from the other investigatory and prosecutory agencies of the government because those subject to its jurisdiction are public officials who, through official pressure and influence, can quash, delay or dismiss investigations held against them. [31] On the other hand complainants are more often than not poor and simple folk who cannot afford to hire lawyers. [32]

III.

Finally, it is contended that the issuance of the subpoena duces tecum would violate petitioners' right against self-incrimination. It is enough to state that the documents required to be produced in this case are public records and those to whom the subpoena duces tecum is directed are government officials in whose possession or custody the documents are. Moreover, if, as petitioners claim the disbursement by the EIIB of funds for personal service has already been cleared by the COA, there is no reason why they should object to the examination of the documents by respondent Ombudsman.

WHEREFORE, the petition is DISMISSED, but it is directed that the inspection of subpoenaed documents be made personally in camera by the Ombudsman, and with all the safeguards outlined in this decision.

SO ORDERED.

Narvasa, C.J., Feliciano, Padilla, Regalado, Davide, Jr., Romero, Bellosillo, Melo, Quason, Puno, and Vitug, JJ., concur.

Kapunan, J., see dissenting opinion.

Francisco, J., on leave.

[1] Rollo, pp. 36-37.

[2] Id., p. 38.

[3] Id., p. 39.

[4] Id., p. 41.

[5] Id., p. 42.

[6] Id., pp. 53-54.

[7] Art. §7 provides: "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, 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."

[8] Petitioners' Memorandum, p. 6.

[9] Petitioners' Memorandum, p. 27.

[10] Anno., Government Privilege Against Disclosure of Official Information, 95 L.Ed. §§3-4 and 7, pp. 427-29, 434.

[11] 418 U.S. 683, 708-9, 41 L.Ed.2d 1039, 1061-4 (1973).

[12] Freund, The Supreme Court 1973 Term-Foreword: On Presidential Privilege, 88 HARV. L. REV. 13, 18-35 (1974).

[13] Final Report of the National Study Commission on Records and Documents of Federal Officials (March 31, 1977), quoted in BLOCH & KRATTENMAKER, SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES 677-87 (1994).

[14] Letter of Chief Justice William H. Rehnquist dated June 7, 1993 to Sen. Joseph I. Lieberman, Chairman,

Subcommittee on Regulation and Government Information, U.S. Senate, quoted in BLOCH & KRATTENMAKER, id., at 687-8.

[15] COA Circular No. 88-293.

[16] *United States v. Reynolds*, 345 U.S. 1, 10-11, 97 L.Ed. 727, 734-35 (1953). In this case the U.S. Supreme Court reversed a lower court order requiring the government to produce documents relating to the crash of a military aircraft which had been engaged in a secret mission to test electronic equipment. The fact conceded by the respondents, that the aircraft was on a secret military mission, justified nonproduction of the report of the accident. It was apparent the report contained state secrets which in the interest of national security could not be divulged even in the chambers of the judge or in camera. There was "a reasonable danger that the investigation report would contain references to the secret electronic equipment which was the primary concern of the mission."

[17] In *United States v. Nixon*, 418 U.S. 683, 41 L.Ed.2d 1039 (1974), the Court, while acknowledging that the President's need "for complete candor and objectivity from advisers calls for great deference from the courts," nonetheless held that such generalized claim of confidentiality could not prevail over the "specific need for evidence in a pending criminal trial." Accordingly the Court ordered the tapes of conversations of President Nixon to be turned over to the trial judge for in camera inspection to determine whether they were relevant and admissible apart from being privileged. Similarly in *Nixon v. Administrator of General Services*, 433 U.S. 425, 53 L.Ed.2d 867 (1977) it was held that the mere screening of tapes and other records of President Nixon's conversations with employees of the Federal Government, to be done by professional archivists for the purpose of "legitimate historical and governmental purpose," constituted "a very limited intrusion . . . into executive confidentiality comparable to those held to justify in camera inspection." 433 U.S. at 451-52, 53 L.Ed.2d. at 896-97. Accordingly the validity of the law, entitled "Presidential Recordings and Materials Preservation Act," was upheld against the claim that "the Presidential privilege shields the records from archival scrutiny."

[18] E.O. No. 127.

[19] *United States v. Reynolds*, supra note 16.

[20] Quoted in Petitioners' Memorandum, p. 27.

[21] Petitioners cite in their Memorandum, at p. 19, the following:

§ 19. Release of Intelligence and Confidential Funds. -Intelligence and confidential funds provided for in the budgets of departments, bureaus, offices or other agencies of the national government, including amounts from savings authorized by Special Provisions to be used for intelligence and counter-intelligence activities, shall be released only upon approval of the President of the Philippines. (RA 6642-GAA for CY 1988)

Effective immediately, all requests for the allocation or release of intelligence funds shall indicate in full detail the specific purposes for which said funds shall be spent and shall explain the circumstances giving rise to the necessity for the expenditure and the particular aims to be accomplished. (Letter of Instructions No. 1282 dated January 12, 1983).

Any disbursement of intelligence funds should not be allowed in audit, unless it is in strict compliance with the provisions of Letters of Instruction No. XXX and 1282. Any officer or employee who violates the provisions of the aforementioned Letter of Instruction shall be dealt with administratively without prejudice to any criminal action that may be warranted. (Memorandum Circular No. 1290 of the Office of the President dated August 19, 1985).

[22] Art. XI, §12.

[23] 42 SCRA 448 (1971).**[24] 117 SCRA 668 (1989).**

[25] New York Times Co. v. United States [The Pentagon Papers Case], 403 U.S 713, 29 L.Ed. 2d 822 (1971).

[26] Art. XI, § 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

(1) Investigate on its own, or on complaint by any person, 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.

(2) Direct, upon complaint or at its own instance, any public official or employee of the Government, or any subdivision, agency or instrumentality thereof, as well as of any government-owned or controlled corporation with original charter, to perform and expedite any act or duty required by law, or to stop, prevent and correct any abuse or impropriety in the performance of duties.

(3) Direct the officer concerned to take appropriate action against a public official or employee at fault, and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure compliance therewith.

(4) Direct the officer concerned, in any appropriate case, and subject to such limitations as may be provided by law, to furnish it with copies of documents relating to contracts or transactions entered into by his office involving the disbursement or use of public funds or properties, and report any irregularity to the Commission on Audit for appropriate action.

(5) Request any government agency for assistance and information necessary in the discharge of its responsibilities, and to examine, if necessary, pertinent records and documents.

...

(7) Determine the causes of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations or their elimination and the observance of high standards of ethics and efficiency.

In the performance of his functions the Ombudsman is given under Rep. Act No. 6770, § 15(8) the power to issue subpoena and subpoena duces tecum.

[27] 219 SCRA 675 (1993).

[28] Art. XI, § 13(1).

[29] Art. XI, § 13(6) requires the Office of the Ombudsman to "publicize matters covered by its investigation when circumstances so warrant and with due prudence."

[30] Art. XI, § 1 provides: "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."

[31] Deloso v. Domingo, 191 SCRA 545, 551 (1990).

[32] 2 RECORD OF THE CONSTITUTIONAL COMMISSION, pp. 369-370.

DISSENTING OPINION

KAPUNAN, J.:

The well-written ponencia of Mr. Justice Mendoza would postulate that the Economic Intelligence and Investigation Bureau (EIIB) documents relating to the Personal Services Funds for the year 1988 and all documentary evidence, including salary vouchers for the whole plantilla of the EIIB for 1988 be produced before the Ombudsman over the objections of the EIIB Commissioner on the ground that the documents contain highly confidential matters, apart from the fact that the expenditures had been cleared in audit by the Commission on Audit (COA). The reasons relied upon in the ponencia are a) that the EIIB documents at issue are not classified under COA (Commission on Audit) Circular No. 88-293, Part V No. 7 which limits such matters exclusively to expenditures relating to the purchase of information and payment of rewards; and b) the documents relating to disbursement and expenditures of the EIIB for personal funds had already been previously examined by the Commission on Audit when such outlay had been passed upon in audit in the said Office, such that there is no confidentiality privilege to protect.

With due respect, I beg to disagree.

Disclosure of the documents as required by the Ombudsman would necessarily defeat the legal mandate of the EIIB as the intelligence arm of the executive branch of government relating to matters affecting the economy of the nation. As such, EIIB's functions are related to matters affecting national security. In the performance of its function in relation with the gathering of intelligence information executive privilege could as well be invoked by the EIIB, especially in relation to its covert operations.

The determination, by the executive branch, through its appropriate agencies, of a question as affecting the national security is a policy decision for which this Court has neither the competence nor the mandate to infringe upon. In the absence of a clear showing a grave abuse of discretion on the part of the Executive, acting through its (national security) agencies, I am of the opinion that we cannot interfere with a determination, properly made, on a question affecting economic security lest we are prepared to ride roughshod over certain prerogatives of our political branches. In an area obviously affecting the national security, disclosure of confidential information on the promptings of some dissatisfied employees would potentially disturb a number of carefully laid-out operations dependent on secrecy and I am not prepared to do this. The characterization of the documents as classified information is not a shield for wrongdoing but a barrier against the burdensome requests for information which necessarily interfere with the proper performance of their duties. To give in, at every turn, to such requests would be greatly disruptive of governmental functions. More so in this case, since expenditures of the EIIB for personal funds had already been previously examined and passed upon in audit by the Commission on Audit. There has been no allegation of any irregularity in the COA's earlier examination, and in the absence of substantiated allegations, the previous determination ought to be accorded our respect unless we want to encourage unnecessary and tiresome forays and investigations into government activities which would not only end up nowhere but which would also disrupt or derail such activities.

The confidentiality privilege invoked by petitioners attaches in the exercise of the functions of the EIIB, as presidential immunity is bestowed by reason of the political functions of the Chief Executive, as a separate and co-equal branch of government. By the same parity of reasoning, the disclosure of the EIIB documents required to be examined by the Ombudsman even in camera proceedings will under the pretext of ascertaining the proper disbursements of the EIIB funds will unnecessarily impair the performance by the EIIB of its functions especially those affecting national security.

The constitutional right allowing disclosure of governmental documents, i.e., the right to information on matters

of public concern is not absolute. While access to official records may not be prohibited, it may be regulated.[1] Regulation includes appropriate authority to determine what documents are of public concern, the manner of access to information contained in such documents and to withhold information under certain circumstances, particularly, as in this case, those circumstances affecting the national security.[2]

Besides, as I emphasized earlier, the determination of the legality of EIIB's disbursements of funds allocated to it are properly within the competence of the Commission on Audit, which as the ponencia of Justice Mendoza finds, has been cleared in audit. The Commission on Audit had adopted, as in the past, measures to protect "classified information" pertaining to examination of expenditures of intelligence agencies. In the present case, disclosure of information to any other agency would unnecessarily expose the covert operations of EIIB, as a government agency charged with national security functions.

I, therefore, vote to give due course to the petition.

[1] BERNAS, I THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, 265 (1987).

[2] See *id.*, at 267.

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