Article

The Neri Ruling on Executive Privilege: Issues and Challenges for the Accountability of Public Officers and Separation of Powers

H. Harry L. Roque, Jr. *

ABSTRACT

This article examines the legal issues arising from the recent political controversy surrounding the National Broadband Network deal between the Philippine government, and the Zhing Xing Telecommunications Equipment (ZTE) Corporation of China. In the ensuing case of Neri v. Senate Blue Ribbon Committee*, the Philippine Supreme Court was confronted with the issue of whether the principle of executive privilege could prevail over the principles of accountability of public officers and separation of powers. This paper revisits this decision and asks whether the ruling conforms with Philippine and American jurisprudence and theories.*

Keywords: *Accountability, Separation of Powers, Executive Privilege, Executive Powers, Public Officers, Legislative Contempt, Legislative Inquiries*

* Associate Professor, College of Law, University of the Philippines; Director, Institute of International Legal Studies, UP Law Center. E-mail: hroque@roquebutuyan.com.

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I. BACKGROUND

The Philippines was recently rocked by a scandal that nearly toppled the very foundations of the country's constitutional democracy. It has been called the mother of all scams. From the testimony of the son of former Philippine Speaker of the House of Representatives, Jose "Joey" de Venecia and Rodolfo "Jun" Lozada, an obscure figure and minor functionary of a little heard of government office, the Philippines Forest Corporation, we know about improprieties surrounding the awarding of a 329,481,290 USD National Broadband Network project to Zhong Xing Telecommunications Equipment (ZTE) Corporation of China. The transaction was so anomalous that the cost of the project was double what it should be, with half the sum intended for pay-offs. While the allegations of these two men could have been dismissed as the prevarications of political opponents, their testimony was nonetheless bolstered and even given credence by statements made by a member of the President's Cabinet, then Director-General of the National Economic Development Authority, Romulo Neri.

Mr. Neri testified before the Philippine Senate[1] that the President approved the anomalous contract despite her knowledge that pay-offs were offered to him so that his office would approve the contract.[2] The then Chairman of the Commission on Elections, Benjamin Abalos, was identified as the broker for the Chinese proponent.[3] Abalos informed Neri that he "had 200 here."[4] Neri understood that statement to mean that in exchange for approving the project, he would be given 200 million pesos, or roughly four million US dollars. This statement shocked the nation as it was construed as a confirmation of an anomalous government transaction, with the attendant acts constituting the crime of direct bribery.

Upon giving this statement, the Philippine Senate, zeroing on the issue of culpability of the President, then propounded three further specific queries: whether the President followed up the (NBN) project; whether Neri was directed to prioritize the ZTE over competition; and whether the President said to approve the project after being told about the alleged bribe. This time, Neri became uncooperative and refused to answer these three further questions. His grounds? Executive privilege.[5]

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1. Neri appeared in front of the Senate Committee on Accountability of Public Officers and Investigations (Blue Ribbon), Senate Committee on Trade and Commerce, and the Senate Committee on National Defense and Security on September 26, 2007.

2. Committee on Accountability of Public Officers and Investigations (Blue Ribbon), C.R. No. 743, at 30 (2009).

3. *Id.* at 32.

4. *Id*. at 24 (translated from "*Sec, may 200 ka dito.*").

5. Transcript of the Sep. 26, 2007 Hearing of the Respondent Committees at 91-92, 114-15, 276-77, Neri v. Senate Comm. on Accountability of Public Officers and Investigations, G.R. No. 180643 (S.C., Mar. 25, 2008) (Phil.), *available at*

The Senate then ruled that Neri's invocation of executive privilege was improper. Accordingly, the body decided to continue with its hearings despite the invocation of the privilege. Neri, however, refused to attend any of the later hearings, thus prompting the Senate to issue formal summons, and later, to cite him for contempt. After the Senate issued a warrant of arrest, Neri went to the Supreme Court on *certiorari* and demanded that the warrant issued against him be declared null and void.

In his petition, Neri argued that the Senate's contempt orders were issued with grave abuse of discretion amounting to a lack or excess of jurisdiction. He stressed that his conversations with President Arroyo were "candid discussions meant to explore options in making policy decisions." These discussions "dwelt on the impact of the bribery scandal involving high government officials on the country's diplomatic relations and economic and military affairs and the possible loss of confidence of foreign investors and lenders in the Philippines." Neri also emphasized that his claim of executive privilege was at the order of the President and within the parameters laid down in *Senate v. Ermita*[6] and *United States v. Reynolds*.[7] Lastly, he argued that he was precluded from disclosing communications made to him in official confidence under section 7 of the Republic Act (Rep. Act) No. 6713,[8]

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http://sc.judiciary.gov.ph/jurisprudence/2008/march2008/180643.htm.

6. Senate of the Phil. v. Ermita, G.R. No. 169777 (S.C., Apr. 20, 2006) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2006/april2006/G.R.%20No.%20169777.htm.

7. U.S. v. Reynolds, 345 U.S. 1, 7 (1953).

8. [P]rohibited Acts and Transactions. In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful.

(a) Financial and material interest. Public officials and employees shall not, directly or indirectly, have any financial or material interest in any transaction requiring the approval of their office.

(b) Outside employment and other activities related thereto. Public officials and employees during their incumbency shall not:

(1) Own, control, manage or accept employment as officer, employee, consultant, counsel, broker, agent, trustee or nominee in any private enterprise regulated, supervised or licensed by their office unless expressly allowed by law;

(2) Engage in the private practice of their profession unless authorized by the Constitution or law, provided, that such practice will not conflict or tend to conflict with their official functions; or

(3) Recommend any person to any position in a private enterprise which has a regular or pending official transaction with their office.

These prohibitions shall continue to apply for a period of one (1) year after resignation, retirement, or separation from public office, except in the case of subparagraph (b) (2) above, but the professional concerned cannot practice his profession in connection with any matter before the office he used to be with, in which case the one-year prohibition shall likewise apply.

(c) Disclosure and/or misuse of confidential information. Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:

(1) To further their private interests, or give undue advantage to anyone; or

otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees, and section 24 (e) of Rule 130 of the Rules of Court.[9]

The Senate countered Neri's petition, arguing that (1) Neri's testimony was material and pertinent in the investigation conducted in aid of legislation; (2) there was no valid justification for the petitioner to claim executive privilege; (3) it was not an abuse of their authority to order the petitioner's arrest; and (4) the petitioner did not come to court with clean hands.

In a major defeat for the Senate and good governance, the Philippine Supreme Court, in a unanimous decision, granted the petition and declared the Senate warrant of arrest null and void.[10]

II. THE COURT'S RECOGNITION OF TECHNICAL OBSTACLES

In a decision that promises to stifle accountability of public officers and to further strengthen the Executive in a country that is already described as the most corrupt in Southeast Asia, the Court upheld the invocation of executive privilege on the following grounds:

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(2) To prejudice the public interest.

(d) Solicitation or acceptance of gifts. Public officials and employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or anything of monetary value from any person in the course of their official duties or in connection with any operation being regulated by, or any transaction which may be affected by the functions of their office.

As to gifts or grants from foreign governments, the Congress consents to:

(i) The acceptance and retention by a public official or employee of a gift of nominal value tendered and received as a souvenir or mark of courtesy;

(ii) The acceptance by a public official or employee of a gift in the nature of a scholarship or fellowship grant or medical treatment; or

(iii) The acceptance by a public official or employee of travel grants or expenses for travel taking place entirely outside the Philippine (such as allowances, transportation, food, and lodging) of more than nominal value if such acceptance is appropriate or consistent with the interests of the Philippines, and permitted by the head of office, branch or agency to which he belongs.

The Ombudsman shall prescribe such regulations as may be necessary to carry out the purpose of this subsection, including pertinent reporting and disclosure requirements.

Nothing in this Act shall be construed to restrict or prohibit any educational, scientific or cultural exchange programs subject to national security requirements..

Rep. Act No. 6713, § 7 (Feb. 20, 1989) (Phil.).

9. [D]isqualification by reason of privileged communication.—The following persons cannot testify as to matters learned in confidence in the following cases:

. . . .

(e) A public officer cannot be examined during his term of office or afterwards, as to communications made to him in official confidence, when the court finds that the public interest would suffer by the disclosure.

The Rules of Court, Rule 130 § 24 (e) (2000) (Phil.).

10. *Neri*, G.R. No. 180643.

> [F]irst, there being a legitimate claim of executive privilege, the issuance of the contempt Order suffers from constitutional infirmity.
> Second, 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.
> Third, a reading of the transcript of respondent Committees' January 30, 2008 proceeding reveals that only a minority of the members of the Senate Blue Ribbon Committee was present during the deliberation. Section 18 of the Rules of Procedure Governing Inquiries in Aid of Legislation provides that: "The Committee, by a vote of 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 proper questions by the Committee or any of its members."
> Clearly, the needed vote is a majority of all the members of the Committee. Apparently, members who did not actually participate in the deliberation were made to sign the contempt Order. Thus, there is a cloud of doubt as to the validity of the contempt Order dated January 30, 2008.11 (Citations omitted)

In regard to the claim of executive privilege specifically, the court said:

> [A]s may be gleaned from the above discussion, the claim of executive privilege is highly recognized in cases where the subject of inquiry relates to a power textually committed by the Constitution to the President, such as the area of military and foreign relations. Under our Constitution, the President is the repository of the commander-in-chief, appointing, pardoning, and diplomatic powers. Consistent with the doctrine of separation of powers, the information relating to these powers may enjoy greater

11. *Id.* at 132-33.

confidentiality than others.

The above cases, especially, Nixon, In Re Sealed Case and Judicial Watch, somehow provide the elements of presidential communications privilege, to wit:

1) The protected communication must relate to a "quintessential and non-delegable presidential power."
2) The communication must be authored or "solicited and received" by a close advisor of the President or the President himself. The judicial test is that an advisor must be in "operational proximity" with the President.
3) The presidential communications privilege remains a qualified privilege that may be overcome by a showing of adequate need, such that the information sought "likely contains important evidence" and by the unavailability of the information elsewhere by an appropriate investigating authority.

In the case at bar, Executive Secretary Ermita premised his claim of executive privilege on the ground that the communications elicited by the three (3) questions "fall under conversation and correspondence between the President and public officials" necessary in "her executive and policy decision-making process" and, that "the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China." Simply put, the bases are presidential communications privilege and executive privilege on matters relating to diplomacy or foreign relations.

Using the above elements, we are convinced that, indeed, the communications elicited by the three (3) questions are covered by the presidential communications privilege. First, the communications relate to a "quintessential and non-delegable power" of the President, i.e. the power to enter into an executive agreement with other countries. This authority of the President to enter into executive agreements without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence. Second, the communications are "received" by a close advisor of the President. Under the "operational proximity" test, petitioner can be considered a close advisor, being a member of President Arroyo's cabinet. And third, 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.

The third element deserves a lengthy discussion.

United States v. Nixon held that a claim of executive privilege is

subject to balancing against other interest. In other words, confidentiality in executive privilege is not absolutely protected by the Constitution. The U.S. Court held:

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.

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." 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." It is conceded that it is difficult to draw the line between an inquiry in aid of legislation and an inquiry in the exercise of oversight function of Congress. In this regard, much will depend on the content of the questions and the manner the inquiry is conducted.[12] (Citations omitted)

Preliminarily, it is interesting that although the *Neri* decision was supposedly anchored in the *Nixon* cases, the Philippine Supreme Court nonetheless came to a diametrically different result. In *Nixon*, while the existence of the privilege was upheld, the invocation of the privilege was nonetheless denied. In the words of the American Supreme Court, "the privilege is a mere presumption that may be overcome by a showing of a public need". The privilege was rejected because the subject of the inquiry involved possible criminal culpability on the part of the President himself. This was the overwhelming public need. While the same criminal culpability

12. *Id.* at 121-23.

appears to be behind the specific questions posed to *Neri*—that is, whether or not the Philippine President was guilty of complicity in the commission of the crime of direct bribery—a different result was arrived at. The question is why?

The Philippine Supreme Court sought to differentiate the case from *Nixon* as follows:

> [H]owever, the present case's distinction with the *Nixon* case is very evident. In *Nixon*, there is a pending criminal proceeding where the information is requested and it is the demands of due process of law and the fair administration of criminal justice that the information be disclosed. This is the reason why the U.S. Court was quick to "limit the scope of its decision." It stressed that it is "not concerned here with the balance between the President's generalized interest in confidentiality x x x and congressional demands for information." Unlike in *Nixon*, the information here is elicited, not in a criminal proceeding, but in a legislative inquiry. In this regard, *Senate v. Ermita* stressed that the validity of the claim of executive privilege depends not only on the ground invoked but also on the procedural setting or the context in which the claim is made. Furthermore, in *Nixon*, the President did not interpose any claim of need to protect military, diplomatic or sensitive national security secrets. In the present case, Executive Secretary Ermita categorically claims executive privilege on the grounds of presidential communications privilege in relation to her executive and policy decision-making process and diplomatic secrets.
>
> The respondent Committees should cautiously tread into the investigation of matters which may present a conflict of interest that may provide a ground to inhibit the Senators participating in the inquiry if later on an impeachment proceeding is initiated on the same subject matter of the present Senate inquiry. Pertinently, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, it was held that since an impeachment proceeding had been initiated by a House Committee, the Senate Select Committee's immediate oversight need for five presidential tapes should give way to the House Judiciary Committee which has the constitutional authority to inquire into presidential impeachment.[13] (Citations omitted)

13. *Id.* at 124-25.

III. TECHNICAL OBJECTIONS

From the above, it may be said that the Philippine Supreme Court annulled the contempt order of the Senate on both technical grounds and on the basis of privileged information. The technical grounds revolved around two issues: the failure of the Senate to clearly state the legislation in pursuance of which the investigation was being conducted, and the matter of whether the contempt order was signed by a majority of the members of the committee.

The first of the technical grounds cited the case of *Senate v. Ermita.*[14] In *Ermita* the court declared unconstitutional Executive Order No. 464, which forbade members of the Executive from appearing in legislative investigations without the consent of the President. The Court found that the order was tantamount to a *carte blanche* invocation of executive privilege. In that case, the Court distinguished between two types of investigations covered by article VI of the 1987 Constitution: the question hour under section 22,[15] and investigations in aid of legislation under section 21.[16] As for the former type of technical grounds, the court said that no cabinet member may be called by Congress without the written consent of the President. However, the Court declared that in the case of the latter, which was the type of investigation then being conducted by the Senate when it asked Neri the controversial questions, the Executive cannot insist on the personal consent of the President as to do so would infringe on an inherently legislative function of conducting inquiries in aid of legislation:

> [T]he framers of the 1987 Constitution removed the mandatory nature of such appearance during the question hour in the present Constitution so as to conform more fully to a system of separation of powers. To that extent, the question hour, as it is presently

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14 Senate of the Phil. v. Ermita, G.R. No. 169777 (S.C., Apr. 20, 2006) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2006/april2006/G.R.%20No.%20169777.htm.

15. [T]he heads of departments may, upon their own initiative, with the consent of the President, or upon the request of either House, 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.

CONST. (1987), art.VI, sec. 22 (Phil.).

16. [T]he 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.

CONST. (1987), art.VI, sec. 21 (Phil.).

understood in this jurisdiction, departs from the question period of the parliamentary system. That department heads may not be required to appear in a question hour does not, however, mean that the legislature is rendered powerless to elicit information from them in all circumstances. In fact, in light of the absence of a mandatory question period, the need to enforce Congress' right to executive information in the performance of its legislative function becomes more imperative. As Schwartz observes:

> [I]ndeed, if the separation of powers has anything to tell us on the subject under discussion, it is that the Congress has the right to obtain information from any source—even from officials of departments and agencies in the executive branch. In the United States there is, unlike the situation which prevails in a parliamentary system such as that in Britain, a clear separation between the legislative and executive branches. It is this very separation that makes the congressional right to obtain information from the executive so essential, if the functions of the Congress as the elected representatives of the people are adequately to be carried out. The absence of close rapport between the legislative and executive branches in this country, comparable to those which exist under a parliamentary system, and the nonexistence in the Congress of an institution such as the British question period have perforce made reliance by the Congress upon its right to obtain information from the executive essential, if it is intelligently to perform its legislative tasks. Unless the Congress possesses the right to obtain executive information, its power of oversight of administration in a system such as ours becomes a power devoid of most of its practical content, since it depends for its effectiveness solely upon information parceled out ex gratia by the executive.

Sections 21 and 22, therefore, while closely related and complementary to each other, should not be considered as pertaining to the same power of Congress. One specifically relates to the power to conduct inquiries in aid of legislation, the aim of which is to elicit information that may be used for legislation, while the other pertains to the power to conduct a question hour, the objective of which is to obtain information in pursuit of Congress'

> oversight function.
>
> When Congress merely seeks to be informed on how department heads are implementing the statutes which it has issued, its right to such information is not as imperative as that of the President to whom, as Chief Executive, such department heads must give a report of their performance as a matter of duty. In such instances, section 22, in keeping with the separation of powers, states that Congress may only request their appearance. Nonetheless, when the inquiry in which Congress requires their appearance is "in aid of legislation" under section 21, the appearance is mandatory for the same reasons stated in Arnault.
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> In fine, the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation. This is consistent with the intent discerned from the deliberations of the Constitutional Commission.
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> Ultimately, the power of Congress to compel the appearance of executive officials under section 21 and the lack of it under section 22 find their basis in the principle of separation of powers. While the executive branch is a co-equal branch of the legislature, it cannot frustrate the power of Congress to legislate by refusing to comply with its demands for information.
>
> 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 her being the highest official of the executive branch, and the due respect accorded to a co-equal branch of government which is sanctioned by a long-standing custom.[17] (Citations omitted)

Anent the Court's decision that the Senate failed to comply with the directive that it must inform Neri of the particular legislation in pursuance of which the investigation was being conducted, it suffices nonetheless to state that there were at least two pending bills which could justify the legislative inquiry, to wit: (1) Senate Bill (S.B.) No. 1793, 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,

17 *Ermita*, G.R. No. 169777.

Amending for the Purpose Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes; and (2) S.B. No. 1794, An Act Imposing Safeguards in Contracting Loans as Official Development Assistance, Amending for the Purpose Rep. Act No. 8182, as Amended by Rep. Act No. 8555, Otherwise Known as the Official Development Assistance. These bills were filed precisely because of the need to clarify the applicability of Rep. Act No. 9184[18] to foreign funded government infrastructure projects which the Arroyo administration maintained were in the nature of executive agreements and hence, outside the scope of law.

The need for curative legislation is highlighted by the decisions of the Supreme Court in *Abaya v. Executive Secretary*[19] and in *Department of Budget and Management v. Kolonwel Trading*[20]. In the *Abaya* case, the court held that the specific infrastructure project being impugned, the Catanduanes Circumferential Road financed by the Japan Bank for International Development, was not covered by the rule disqualifying bids that exceeded the maximum price ceiling of the project since the law that provided for the said disqualification was not the applicable law at the time the award in question was awarded. Moreover, in construing the penultimate sentence of the procurement law[21], the Court held that: "Even if Rep. Act No. 9184 were to be applied retroactively, the terms of the Exchange of Notes dated December 27, 1999 and Loan Agreement No. PH-P204 would still govern the procurement for the CPI project."[22]

Meanwhile, a month after the Court promulgated its decision and before the said decision could become final, the Court promulgated its decision in *Department of Budget and Management v. Kolonwel Trading*. Here the Supreme Court had yet another occasion to construe the procurement law, answering the issue of whether foreign-funded loans were in the nature of executive agreements and hence exempt from the rule on public bidding. The problem with the second ruling is in the purported source that it quoted in affirming that foreign funded projects were indeed in the nature of executive agreements. While it quoted *Abaya* as precedent, the case never said anything of that sort. In fact, the Court never ruled that all foreign-funded projects were in the nature of executive agreements. What it did say was that

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18. Rep. Act No. 9184 (Jan. 10, 2003) (Phil.).

19. Abaya v. Ebdane, G.R. No. 167919 (S.C., Feb. 14, 2007) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2007/feb2007/167919.htm.

20. Dep't of Budget and Mgmt. Procurement Serv. v. Kolonwel Trading, G.R. No. 175608 (S.C., June 8, 2007) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2007/june2007/175608.htm.

21. Rep. Act No. 9184, § 78 (Jan. 10, 2003) ("*Effectivity Clause.*—This Act shall take effect fifteen (15) days following its publication in the Officials Gazette or in two (2) newspapers of general circulation.").

22. Abaya, G.R. No. 167919.

the "exchange of notes" identifying the impugned project, which was included in the list of projects to be financed by JBIC, was in the nature of an executive agreement.

This was precisely why the Senate convened an investigation into the NBN—ZTE project. For although the Executive asserts the doctrine purportedly laid down by the Court that all foreign-funded projects were outside the purview of the procurement law, the Senate wanted to inquire as to whether there was a need for remedial legislation. This was to correct the erroneous judicial interpretation that all foreign funded procurement projects were not covered by the procurement despite the express language adopted by Congress that the law "shall." It was therefore obviously wrong for the Court to have declared that the matters inquired about to Neri as well as the very conduct of the investigation were not in aid of legislation. In any case, absent a very clear instance of clear abuse of discretion, defined by jurisprudence as clear violation of law or conduct which is both capricious and whimsical, the Court's attribution of grave abuse of discretion on the part of the Senate was patently flawed.

IV. A POLICY FOR IMPUNITY?

There is, however, a more serious objection to the Court's ruling. Executive privilege, as it had been developed, was only a policy tool by which to enable the Executive to make unpopular but correct decisions. "The valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" and that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."[23] In other words, the doctrine of privilege was intended merely as a tool of public administration purportedly to shield the Executive from public scrutiny arising from unpopular but correct policy decisions. However, in upholding privilege as against public accountability, it appears that the *Neri* decision provided a sure recipe for impunity.

There is bribery under Philippine law under the following circumstances:

> [B]ribery
> Art. 210. *Direct bribery.*-Any public officer who shall agree to perform an act constituting a crime, in connection with the performance of this official duties, in consideration of any offer,

23. United States v. Nixon, 418 U.S 683 (1974).

> promise, gift or present received by such officer, personally or through the mediation of another, shall suffer the penalty of prision mayor in its medium and maximum periods and a fine [of not less than the value of the gift and] not less than three times the value of the gift in addition to the penalty corresponding to the crime agreed upon, if the same shall have been committed.
> If the gift was accepted by the officer in consideration of the execution of an act which does not constitute a crime, and the officer executed said act, he shall suffer the same penalty provided in the preceding paragraph; and if said act shall not have been accomplished, the officer shall suffer the penalties of prision correccional, in its medium period and a fine of not less than twice the value of such gift.
> If the object for which the gift was received or promised was to make the public officer refrain from doing something which it was his official duty to do, he shall suffer the penalties of *prision correccional* in its maximum period and a fine [of not less than the value of the gift and] not less than three times the value of such gift.
> In addition to the penalties provided in the preceding paragraphs, the culprit shall suffer the penalty of special temporary disqualification.
> The provisions contained in the preceding paragraphs shall be made applicable to assessors, arbitrators, appraisal and claim commissioners, experts or any other persons performing public duties. (As amended by Batas Pambansa Blg. 872, June 10, 1985).
> Art. 211. *Indirect bribery.*-The penalties of *prision correccional* in its medium and maximum periods, and public censure shall be imposed upon any public officer who shall accept gifts offered to him by reason of his office. (As amended by Batas Pambansa Blg. 872, June 10, 1985).
> Art. 212. *Corruption of public officials.*-The same penalties imposed upon the officer corrupted, except those of disqualification and suspension, shall be imposed upon any person who shall have made the offers or promises or given the gifts or presents as described in the preceding articles.[24]

Clearly, when Abalos offered 200 million in exchange for his approval of the NBN-ZTE project, he was guilty of violating article 212 as the giving of 200 million was an offer of a gift or consideration for the performance of a gift offered for an illegal act. What made the transaction illegal was the

24. Act No. 3815 arts. 210-12 (Dec. 8, 1930) (Phil.).

award of an infrastructure project to a contractor without the requisite public bidding as required by Rep. Act No. 9184 or the government procurement act.[25]

When Neri, informed then President Arroyo about such an illegal offer, the former President in turn violated article 208 of the Revised Penal Code which prohibits the President from committing "[D]ereliction of the duties of his office," such as to "maliciously refrain from instituting prosecution for the punishment of violators of the law, or shall tolerate the commission of offenses."

Former President Arroyo also violated 1 (a) of Presidential Decree 1829, which states that the President may not "knowingly and willfully [obstruct], [impede], or [delay] the apprehension of suspects and investigation of criminal cases by . . . (a) preventing witnesses from reporting the commission of any offense". This is because after being told about the offer, (i) she did not act on the information; (ii) instead she gave her blessing to the project when she personally witnessed the signing of the agreement between her alter ego and the Chinese project proponent; and (iii) she invoked executive privilege when her agent was pressed to shed light on the controversy.

Moreover, the President, by her acts, could also be held liable for violating section 3 (e) of Rep. Act No. 3019[26], which prohibits the President from "causing any undue injury to any party, including the government, or any private party any unwarranted benefits, advantage or preference in the discharge of [her] official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence." This is because she knew about the bribe offer. She must have also known that there were better offers than ZTE's, and that with the offer of a huge bribe the cost of the project must have been overpriced at least by the amount of the bribe, and yet, in evident bad faith or at least inexcusable negligence, she still presided over the signing ceremony of the anomalous project.

The Court belabors the point that *Neri* was different from *Nixon* because the former was a legislative investigation, while the latter was a criminal proceeding. What the Court disregards is that the subject matter of the Senate investigation was in fact also covered by a criminal complaint then pending with the Ombudsman. In fact, the Court should also have known that this criminal investigation was dismissed on grounds of presidential immunity from suits.

In other words, belaboring the difference that *Nixon* was a criminal investigation, the Court upheld the invocation of privilege despite the fact

25. Rep. Act No. 9184, § 10 (Jan. 10, 2003) (Phil.) ("*Competitive Bidding.*—All Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act.").

26. Rep. Act No. 3019, § 3 (e) (Aug. 17, 1960) (Phil.).

that it sanctioned the dismissal of the criminal proceedings that could have compelled Neri to answer the question at issue. Simply said, with a doomed criminal investigation, the Senate was the only forum in which the people could know about what actually transpired in this controversy. The Court's decision in *Neri* ensured both impunity and that the truth will never be known.

The Philippine constitution characterizes public office as a "public trust": "Section 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."[27]

Since public office is a "trust," the Philippine Supreme Court has been repeatedly ruled that public officials must ensure the highest standard of conduct in order to avoid even the appearance of impropriety. The Court has repeatedly ruled that this rule is necessary so that the people will not lose faith in the administration of public service. Hence, this has been the reason why public officers were ordered dismissed for such minor infractions as failure to pay a debt of 5 USD, having extra-marital affairs, being involved with gambling, and of course, being involved in criminal conduct.

What appears to be the primary defect in the Court's reasoning in *Neri* is that despite the fact that the Court has not hesitated to dismiss public officers for even the slightest of infractions in order to preserve the public trust; it has apparently adopted a double standard for the highest and most powerful public officer in the land—the President. The matters inquired upon, when proven, constitute the crime of bribery which is punished under the Revised Penal Code. Under Philippine constitutional law, the President, as chief executive, is in fact mandated to enforce all laws. This is why the Executive, through the Department of Justice, is tasked with the prosecution of all criminal cases before the courts. And yet, despite the fact that this was an issue which when proven may give rise to criminal culpability, the Court did not hesitate to shield the Executive from the oversight function of Congress, which includes the role of ensuring that public funds are not only spent legally, but also prudently.

V. FREEDOM OF INFORMATION AND THE 1987 CONSTITUTION

The right to information is not just a statutory right. It is a constitutional right that was intended to be self-executory. It has been a constitutional right since the 1973 Constitution.[28] It requires no implementing legislation unlike

27. CONST. (1987), art. IX, sec. 1 (Phil.).

28. CONST. (1973), art. IV, sec. 6 (Phil.) ("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

in jurisdictions where its existence is dependent on a statute.

The 1987 Constitution recognizes the right as follows:

> [S]ec. 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 acts, transactions, or decision, as well as to government research data used as basis for policy development shall be afforded the citizenry, subject to such limitations as may be provided by law.[29]

As a constitutional right, the express language of the constitution was intended to overrule earlier jurisprudence where the Court held that the right to information was not guaranteed by the Constitution. In the pre-1973 Constitution case of *Subido v. Ozaeta*[30] the Court said that a denial of a request from the media to examine public land record was not a violation of freedom of the press and could not have violated the right to information which the Court said was not a guaranteed right under the 1973 Constitution.

There have been two cases decided by the Court that pertain to this right of information. Both cases were filed by Francisco I. Chavez, the former Solicitor-General who served under the late President Corazon Aquino.

The first was directed against the Presidential Commission on Good Government, an office created by Mrs. Aquino to recover the ill-gotten wealth of the Marcoses. The suit came about because of a decision of the then Chairman of the Commission, Magtanggol Guniguindo assenting to a compromise agreement with the widow of the late dictator, Imelda Marcos under terms and conditions which the commission declared were "confidential."[31]

In seeking to disclose not only the terms of the agreements but also the terms of negotiation between the PCGG and the heirs of the former President, the Court cited both the proceedings of the Constitutional Commission that provided for the enforceable right as well as previous rulings on the definition of "matters concerning public interest."

Hence, the Court, in ruling that the right includes the duty to disclose not just the final agreement but also negotiations that led to the agreement, cited the following exchange between the sponsor of the constitutional provision, then Commissioner Blas Ople and Mr. Suarez:

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to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law.").

29. CONST. (1987), art. III, sec. 7 (Phil.).

30. Subido v. Ozaeta, G.R. No. L-1631 (S.C., Feb. 27, 1948) (Phil.), *available at* http://www.lawphil.net/judjuris/juri1948/feb1948/gr_l-1631_1948.html.

31. Chavez v. PCGG, G.R. No. 130716 (S.C., Dec. 9, 1998) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/1998/dec1998/130716.htm.

> [M]R. SUAREZ. And when we say "transactions" which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?
> MR. OPLE. The "transactions" used here, I suppose, is generic and, therefore, it can cover both steps leading to a contract, and already a consummated contract, Mr. Presiding Officer.
> MR. SUAREZ. This contemplates inclusion of negotiations leading to the consummation of the transaction?
> MR. OPLE. Yes, subject to reasonable safeguards on the national interest.[32]

Anent the meaning of "matters involving public concerns", the Court said:

> [I]n determining whether or not a particular information is of public concern there is no rigid test which can be applied. "Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.
> Considered a public concern in the above-mentioned case was the "legitimate concern of citizens to ensure that government positions requiring civil service eligibility are occupied only by persons who are eligible." So was the need to give the general public adequate notification of various laws that regulate and affect the actions and conduct of citizens, as held in Tañada. Likewise did the "public nature of the loanable funds of the GSIS and the public office held by the alleged borrowers (members of the defunct Batasang Pambansa)" qualify the information sought in Valmonte as matters of public interest and concern? In *Aquino-Sarmiento v. Morato*, the Court also held that official acts of public officers done in pursuit if their official functions are public in character; hence, the records pertaining to such official acts and decisions are within the ambit of the constitutional right of access to public records.
> Under Republic Act No. 6713, public officials and employees are mandated to "provide information on their policies and procedures

32. *Id.* at 769-70.

> in clear and understandable language, [and] ensure openness of information, public consultations and hearings whenever appropriate . . . .” except when “otherwise provided by law or when required by the public interest.” In particular, the law mandates free public access, at reasonable hours, to the annual performance reports of offices and agencies of government and government-owned or controlled corporations; and the statements of assets, liabilities and financial disclosures of all public officials and employees.
>
> In general, writings coming into the hands of public officers in connection with their official functions must be accessible to the public, consistent with the policy of transparency of governmental affairs. This principle is aimed at affording the people an opportunity to determine whether those to whom they have entrusted the affairs of the government are honesty, faithfully and competently performing their functions as public servants. Undeniably, the essence of democracy lies in the free flow of thought; but thoughts and ideas must be well-informed so that the public would gain a better perspective of vital issues confronting them and, thus, be able to criticize as well as participate in the affairs of the government in a responsible, reasonable and effective manner. Certainly, it is by ensuring an unfettered and uninhibited exchange of ideas among a well-informed public that a government remains responsive to the changes desired by the people.[33] (Citations omitted)

In the subsequent case of *Chavez v. PEA-Amari*,[34] the Court had the opportunity to rule on the importance of the right to information:

> [T]hese twin provisions of the Constitution seek to promote transparency in policy-making and in the operations of the government, as well as provide the people sufficient information to exercise effectively other constitutional rights. These twin provisions are essential to the exercise of freedom of expression. If the government does not disclose its official acts, transactions and decisions to citizens, whatever citizens say, even if expressed without any restraint, will be speculative and amount to nothing. These twin provisions are also essential to hold public officials “at all times x x x accountable to the people,” for unless citizens have

33. *Id.* at 766-67.

34. Chavez v. Public Estate Authority, G.R. No. 133250 (S.C., July 9, 2002) (Phil.), *available at* http://sc.judiciary.gov.ph/jurisprudence/2002/jul2002/133250.htm.

> the proper information, they cannot hold public officials accountable for anything. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning of any democracy.[35] (Citations omitted)

Applying the foregoing to the *Neri* decision, it appears that the Court also infringed the public's right to information on matters involving public concerns. Here, the matter of public concern is the commission of a crime by public officials including the Chairman of the Commission on Elections, Neri himself, who is a cabinet secretary, and the President. Furthermore, it also involves the spending of public funds since the NBN-ZTE, while a loan, will be paid for by public funds. And yet, simply because a mere tool of public administration—executive privilege—was invoked, the Filipino people are now in the dark as to the truth behind this scandal. This is tantamount to a culpable violation of a constitutionally protected right to information which should have been made to prevail over a mere tool of public administration.

Further, Kittrosser[36] concludes in her article that "there is no such thing as a constitutionally based executive privilege, and courts—in the face of executive privilege claims—should order compliance with any statutorily authorized demands for executive branch information."[37]

Kitrosser strengthens her arguments in this manner:

> [F]irst, by demonstrating the very real risks and potential misuses of executive branch secrecy, such attention accentuates the fact that arguments in favor of executive privilege are mere policy judgments, and highly contestable ones at that, not static constitutional truths. Second, by demonstrating the judiciary's tendency to defer to executive privilege or to related pro-secrecy claims, particularly when national security is invoked, it suggests the wisdom of a constitutional structure grounded in the view that self-interested political forces are the best means to guard against tyrannical political secrecy.[38]

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35. *Id.* at 184.

36. Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).

37. *Id*. at 493.

38. *Id*. at 537.

VI. PUSH AND PULL ON SEPARATION OF POWERS

At the institutional level, the case of *Neri v. Senate Blue Ribbon Committee* also pushes the boundaries between the three branches of government in favor of the Executive.

Chaftez[39] considers it unwarranted that the issues involving the separation of powers should be settled in the courts, stating:

> [J]udges are often ill equipped to understand the needs and procedures of the other branches; they are inclined to view the needs of the judiciary as more pressing than those of the other branches; and they are generally incapable of moving quickly enough to satisfy Congress's need for timely information. More distressing, however, is the anti-republican character of such judicial interventions. By asserting a privileged status for the judiciary as the keeper of the Constitution, they implicitly denigrate the political branches, capacity for principled judgment and constitutional deliberation.[40] (citations omitted)

Further, Donohue,[41] notes recent claims for state secret privilege in her research on American jurisprudence:

> [W]hat appears to be different now, at least judging from the instant research project, is that there are many visible cases alleging extreme and possibly criminal behavior, as well as constitutional violations, in which the government seeks to dismiss the case as part of its own defense. The claims are thus different from the more traditional state secrets cases—that is, those centered on tortious conduct or contractual disputes. Instead, the plaintiffs are alleging constitutional violations and criminal activity. The claims are thus different from the more traditional state secrets cases—that is, those centered on tortious conduct or contractual disputes. Instead, the plaintiffs are alleging constitutional violations and criminal activity.[42]

Thus, combining the arguments made by Chaftez and Donohue, to allow ill-equipped judges to decide on matters which involve constitutional

39. Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084 (2011).
40. *Id*. at 1121.
41. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010).
42. *Id*. at 168.

violations and criminal activity and therefore must be fully discussed in the public realm severely weakens the powers of Congress and the public's right to know.

As stated succinctly by Kitrosser:"[T]here can be no checks and balances—public or congressional—against a program that is implemented in secret unless the very fact of the program, including the need for secret implementation, is disclosed and publicly debated."[43]

VII. CONCLUSION

The NBN-ZTE is a classic case study of why countries with democratic constitutional governments like the Philippines continue to experience weak rule of law due primarily to weak institutional checks and balances. From this case, it is apparent that oftentimes it is the courts that are responsible for the weakness of the rule of law. In the *Neri* case, for instance, it would appear that the doctrine of executive privilege, a mere tool for public administration, was made to prevail over the plenary powers of Congress, a co-equal branch of government, such that the Congress could not perform its legislative and oversight functions. In the same vein, *Neri* attests to how judge-made law may infringe even the constitutionally provided right of the people to information.

Perhaps the ultimate conclusion is this: where courts act as political instruments, the Constitution, and the people who gave life to the Constitution, will end up on the losing end.

43. Kitrosser, *supra* note 36, at 542.

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論Neri案與行政特權——公務人員責任與權力分立原則的議題與挑戰

H. Harry L. Roque, Jr.

摘　要

本文檢視日前菲律賓政府與中國中興通訊公司間，關於國家寬頻網路計畫（National Broadband Network, NBN）興建案之政治爭議與其中之法律議題。因前揭爭議而產生的Neri v. Senate Blue Ribbon Committee一案中，菲國最高法院針對行政特權原則得否凌駕於公務人員責任與權力分立原則之上的法律爭議作出決定。本文則以菲律賓及美國之法律原則與理論，重新檢視評析此判決。

關鍵詞：課責性、權力分立、行政特權、行政權、公務人員、藐視國會、立法調查