

**THE DOCTRINE OF EXECUTIVE PRIVILEGE:
A Constitutional Stalemate Among the
Co-Equal Branches of the Government**

Charmaine Joy R. Savellano*

OUTLINE

- I. INTRODUCTION
- II. THE HISTORICAL DEVELOPMENT OF THE DOCTRINE
OF EXECUTIVE PRIVILEGE
The Milestone: The Case of United States v. Nixon
Post-Watergate Assertion of Executive Privilege
- III. THE DYNAMICS OF EXECUTIVE PRIVILEGE
- IV. EXECUTIVE PRIVILEGE: A Legitimate Presidential
Prerogative
- V. EXECUTIVE PRIVILEGE: A Mysterious Concept and
Constitutional Myth
- VI. THE COLLISION COURSE: The Executive-Legislative
Showdown
- VII. JUDICIAL REVIEW: The Judiciary as the Referee
- VIII. PEOPLE'S RIGHT TO INFORMATION *VIS-À-VIS*
EXECUTIVE PRIVILEGE

* '10 LL.B., candidate, University of Santo Tomas Faculty of Civil Law. *Executive Editor*, UST Law Review.

IX. A SURVEY OF PHILIPPINE JURISPRUDENCE ON THE
DOCTRINE OF EXECUTIVE PRIVILEGE

Almonte v. Vasquez

Chavez v. PCGG

Chavez v. Public Estates Authority

Senate v. Ermita

Neri v. Senate

X. DECONSTRUCTING NERI VS. SENATE

In Re: Sealed Cases and Judicial Watch Case

XI. CONCLUSION

*“Once executive privilege is asserted, co-equal branches of
the government are set on a collision course.”
-Justice Anthony Kennedy*

INTRODUCTION

Executive privilege exempts the executive from disclosure requirements applicable to the ordinary citizen or organization where such exemption is necessary to the discharge of highly important executive responsibilities involved in maintaining governmental operations, and extends not only to military and diplomatic secrets but also to documents integral to an appropriate exercise of the executive’s domestic decisional and policy-making function, that is, those documents reflecting frank expression necessary in intra-governmental advisory and deliberative communications.¹

¹ Black’s Law Dictionary, 5th edition, 1983.

Although it remains to be controversial, in the United States (U.S.), executive privilege has gained wide acceptance and considered to be one of the presidential prerogatives.² Executive privilege is controversial in part because some presidents have overreached in exercising this authority.³

In the Philippines, executive privilege has not gained much popularity until the issuance of President Gloria-Macapagal Arroyo of Executive Order 464 (E.O. 464) providing in substance that when certain executive officials are invited as resource persons on any investigations conducted by the Legislative branch, they shall secure prior consent before appearing thereto. E.O. 464, for the first time outlined and provided guidelines for the assertion of executive privilege.

It was, however, observed that the timing for the issuance of E.O. 464 has made eyebrows raised. It must be noted that said executive order, which took effect immediately, was issued in connection with the then ongoing Senate investigation on the alleged anomalies of the North Rail Project, wherein executive officials were invited as resource persons. On the day of the supposed public hearing on September 28, 2005, a letter was received by the then Senate President Franklin Drilon from Executive Secretary Eduardo Ermita informing him “that officials of the Executive Department invited to appear at the meeting [regarding the North Rail project] will not be able to attend the same without the consent of the President, pursuant to [E.O. 464]” and that “said officials have not secured the required consent from the President.” This incident led the Senate and

² Rozell, Mark, Executive Privilege Revived: Secrecy and Conflict During the Bush Administration, Duke Law Journal, Vol. LII at 403.

³ *Id.*

some groups to question the constitutionality of E.O. 464 before the Supreme Court.

Barely two years thereafter, in yet another investigation conducted by the Senate regarding the NBN Project, executive privilege was again invoked by the then National Economic Development Authority (NEDA) Director General Romulo Neri in evading to answer the three questions asked of him, relating to the involvement of President Arroyo and some high-ranking officials of the government to the said project.

These two incidents have sparked the debate on executive privilege in our jurisdiction. In resolving the issues presented before the Court, United States (U.S.) jurisprudence were cited and the rationale and justifications therein for the doctrine of executive privilege were adhered to by the Philippine Supreme Court. It is for these reasons that this essay deems it fitting to walk through the historical exercise and the proper scope and limit of executive privilege both in the United States and in the Philippines.

THE HISTORICAL DEVELOPMENT OF THE DOCTRINE OF EXECUTIVE PRIVILEGE

The doctrine of executive privilege traces its origins in the United States. It has been said that the doctrine of executive privilege has evolved over the years as presidents have claimed it. It has been observed that U.S. presidents have been invoking executive privilege for “as long as there have been presidents”⁴ although it was not yet then labeled as such. Mark Rozell⁵

⁴ Eric Weiner, What is executive privilege, anyway?, <http://www.npr.org/templates/story/story.php?storyId=11527147> (last accessed 26 October 2008).

⁵ A professor of politics in the Catholic University of America Professor and Chair, Department of Politics, The Catholic University of America, Washington, D.C. Ph.D., 1987, University

claims that “in fact, every President since George Washington has exercised some form of what is today called executive privilege, regardless of the words used to describe their actions.”⁶

Executive privilege has been invoked in the U.S. as early as 1792 during President George Washington’s reign when he rebuffed efforts by Congress and the courts to obtain information about a disastrous expedition led by Major General Arthur St. Clair against American Indian tribes along the Ohio River. Washington lost the battle, and he handed over all of the papers that Congress had requested.⁷ Rozell noted that Washington was the first one who addressed the issue of the legitimacy of presidential withholding of information from Congress and concluded that the Constitution allows such an action. Also, Washington set the precedent for use of executive privilege to protect the public interest not the administration’s own political interests.⁸

As the power of the president’s office grew over the nineteenth and twentieth century, presidents have attempted more frequently to use executive privilege to shield themselves and their subordinate officials from investigation.⁹ Successors to the presidential throne have continually invoked the doctrine to block off any such Legislature’s attempt to demand certain information from the Executive branch pursuant to the Congress’ power of investigation in aid of legislation and oversight function.

of Virginia (American Government). This Essay is based on a paper presented at the *Duke Law Journal's* Administrative Law Conference held at the Duke University School of Law on March 29, 2002.

⁶ Rozell, Mark, Executive Privilege and the Modern Presidents: In Nixon’s Shadow, 83 MINN. L. REV. at 1069-1070 (1999).

⁷ Ozerskaya, Irena, Executive Privilege: Historical and constitutional approach, http://newman.baruch.cuny.edu/digital/2000/honors/ozerskya_1999.htm (last accessed 26 July 2008).

⁸ Rozell, Mark, Congressional Testimony, 06 November 2001.

⁹ Law Encyclopedia, <http://www.answers.com/topic/executive-privilege?cat=biz-fin> (last accessed 26 October 2008).

It was not until President Dwight Eisenhower, the 34th U.S. president, that the phrase “executive privilege” was coined. President Eisenhower was said to have made one of the most notable claims in asserting the right of the Executive branch to refuse the surrender of the evidence that Senator McCarthy requested in connection with McCarthy’s investigation into communism.¹⁰

In a study prepared by the Government and General Research Division of the Library of Congress, it commented that:

“President Eisenhower’s May 17, 1954 letter¹¹ brought a new dimension to the interactions between the Legislative and Executive Branches of the Federal government which are part of our separate -but- coordinate system.”¹²

The study further noted that the said letter “became the basis for an extension of the claim of executive privilege far down the administrative line from the President.”¹³ In particular:

“The authority claimed in the said letter was extended throughout the Executive Branch to include agencies administered by persons appointed by the President with the advice and consent of the U.S. Senate. This claim of control over government information is in addition to the power exercised by Presidents to protect their immediate

¹⁰ Ozerskaya, *supra* note 7.

¹¹ The May 17, 1954 letter and its accompanying memorandum purport to contain the list historic examples of Presidential assertion of the right of executive privilege. Further, the letters and the memorandum were involved in a controversy between Senator McCarthy and the United States Army over the propriety of the Senator’s pressure tactics as chairman of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations. During two days of testimony at special hearings called to give McCarthy and the Army a forum for their fight, Army Counsel John Adams mentioned a meeting in the Attorney General’s office attended by top White House staff members. When the Subcommittee members tried to get more information from Adams about what went on at the high-level meeting, Joseph Welch, the Army’s special counsel for the Army-McCarthy hearings, said Adams had been instructed not to testify any further about the meeting. Thereafter, Adams gave the subcommittee the letter of instructions from the President to the Secretary of Defense, accompanied by a memorandum supposedly prepared officially by the Department of Justice, U.S. Congress, Senate Committee on Government Operations, Special Subcommittee on Investigations, at 1059.

¹² The Present Limits of “Executive Privilege”. A study prepared by the Government and General Research Division of the Library of Congress, 28 March 1973.

¹³ *Id.*

White House staff--their personal advisers, in effect, over whose appointment the Congress has no confirming power.”¹⁴

The study recognized the influence of Eisenhower’s May 17, 1954 letter as “the major authority cited for the exercise of executive privilege to refuse information to the Congress...and it established a pattern which the three Presidents after Eisenhower have followed.”¹⁵

Legal scholars observed that during the Eisenhower presidency, executive privilege underwent three major developments. First, in the area of national security; the U.S. Supreme Court ruled in *United States v. Reynolds*,¹⁶ that the military may refuse to divulge requested information when national security is at stake. The second development in the use of executive privilege became known as the **candid interchange doctrine**. The doctrine expanded the scope of executive privilege, by making it available not only to the President but also to the President’s top advisers in the Executive branch. The last one was enunciated in *Kaiser Aluminum & Chemical Corp. v. United States*.¹⁷ The Court ruled herein that it was ultimately up to the courts “to determine executive privilege in litigation.” This case contains the first recorded use of the phrase “executive privilege.”¹⁸

During President John F. Kennedy’s term, it was observed that the assertion of executive privilege was bent far down the administrative line from the President. However, in an exchange of correspondence with Congressman John E. Moss of California, then leading the fight against government secrecy, President Kennedy assured that:

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953)

¹⁷ 157 F. Supp. 939, 141 Ct. Cl. 38 (1958).

¹⁸ *Supra* note 9.

“Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.”¹⁹

During President Lyndon Johnson’s stint, same procedure was done by Congressman Moss. President Johnson reaffirmed the principle that the claim of executive privilege will continue to be made only by the President.²⁰

The same procedure was done during President Richard Nixon’s term. President Nixon issued a memorandum to the heads of all executive departments and agencies stating that “executive privilege will not be used without specific Presidential approval.” Nixon’s memorandum even spelled the procedural steps to govern the invocation of executive privilege.²¹ This was the first time that a step-by-step procedure was set-up for invoking executive privilege.²²

THE MILESTONE: The Case of *United States v. Nixon*

It is said that “the modern exercise of executive privilege reached its peak during the Nixon administration.”²³ Berger observed that instead of being “very narrowly construed”, executive privilege has been expanded in truly extraordinary fashion by President Nixon, and all in the name of well-established precedent.²⁴ Consequently, Nixon’s claims of presidential communications “precedent” has become the cloak for a vastly expanded “privilege” having no relation to confidential communications.²⁵

¹⁹ *Supra* note 12.

²⁰ *Supra* note 12.

²¹ *Id.*

²² *Id.*

²³ Ozerskaya, *supra* note 7.

²⁴ Berger, Raoul Executive Privilege: A Constitutional Myth. Cambridge: Harvard University Press, 1974, at 254.

²⁵ *Id.* at 258.

The *U.S. v. Nixon*²⁶ case had been tagged as a major constitutional landmark. In the said case, decided in 1974, a grand jury returned indictments against seven of President Richard Nixon's closest aides in the Watergate affair. The special prosecutor appointed by Nixon and the defendants sought audio tapes of conversations recorded by Nixon in the Oval Office. Nixon asserted that he was immune from the subpoena claiming "executive privilege," which is the right to withhold information from other government branches to preserve confidential communications within the executive branch or to secure the national interest.²⁷ Nixon argued that all presidential communications enjoy "absolute privilege of confidentiality."

The U.S. Supreme Court, through Chief Justice Warren Burger, denied Nixon's absolute claim of executive privilege. It held that neither the doctrine of separation of powers, nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified, presidential privilege. It granted that there was a limited executive privilege in areas of military or diplomatic affairs, but gave preference to "the fundamental demands of due process of law in the fair administration of justice."²⁸

Nixon anchored his absolute claim of privilege on two grounds: first, the doctrine's importance in policy formulation and decision making process in the Executive branch and, second, that the doctrine emanates from the separation powers as provided in the Constitution. Indeed, the U.S. Supreme Court did not dispute the foregoing grounds for the invocation of the doctrine of executive privilege. In fact, concededly, it recognized that there is a "valid need for the protection of communications between high

²⁶ 418 U.S. 706.

²⁷ http://www.oyez.org/cases/1970-1979/1974/1974_73_1766/ (last accessed 13 September 2008).

²⁸ *Id.*

government officials and those who advise and assist them in the performance of their manifold duties.”²⁹ The decision of the U.S. Supreme Court in this landmark case “confirmed the legitimacy of the doctrine of executive privilege, but only to the extent of confirming that there is a qualified privilege.”³⁰ Nevertheless, it did not sustain Nixon’s absolute claim of executive privilege merely on the grounds of necessity and separation powers. It maintained that:

“Neither 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 President's need for complete candor and objectivity from advisers calls for great deference from the courts.”

To be sure, executive privilege is not without limits. One of the recognized limitations is that executive privilege must be invoked only for the “most compelling reasons” such as the need to protect military, diplomatic, or sensitive national security secrets. Moreover, there is a need to balance other interests which might be affected whenever executive privilege is asserted. The Court stressed that “when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.”³¹

The Court in this case accorded presidential communications as “presumptively privileged.” Thus,

“A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government, and inextricably rooted in the separation of powers under the Constitution.”³²

²⁹ *U.S. v. Nixon*, *supra* note 26.

³⁰ *Supra* note 9.

³¹ *U.S. v. Nixon*, *supra* note 26.

³² *Id.*

Executive privilege, the Court continued, must not be expansively construed for such privilege is in derogation of the search for truth. Thus, a generalized claim of executive privilege on the subpoenaed materials, when placed side by side with the specific need of such materials as evidence in a criminal prosecution, cannot prevail over the latter. Hence, the Court declared that:

“The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the court. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts, a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.”³³

After the U.S. Supreme Court handed down the decision in *U.S. v. Nixon*, scholar Alan Westin boldly made the prediction: “[the Court's] definition of executive privilege promises to be a source of fertile legal and political disputes in the future.” Indeed, to this day, executive privilege remains volatile and controversial.³⁴

POST-WATERGATE ASSERTION OF EXECUTIVE PRIVILEGE

Rozell noted that:

“After the Watergate scandal, several presidents exercised executive privilege either very cautiously or ineffectively. Not until the Clinton administration, did a post-Watergate president make a concerted effort to exercise this presidential power.”³⁵

³³ *Id.*

³⁴ *In re Grand Jury Proceedings: The Semantics of “Presumption” and “Need.”*, AKRON LAW REVIEW Vol. 32:1 1999 citing Alan Westin, *The Case for America*, in *UNITED STATES v. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT* at XI (Leon Friedman ed., 1974).

³⁵ Rozell, *supra* note 6.

In 1998, President William Clinton became the first President, since Nixon, to assert executive privilege and lose in court, when a Federal judge ruled that Clinton aides could be called to testify in the Lewinsky scandal.³⁶ Rozell observed that Clinton like Nixon, concealed wrongdoing or tried to by resorting to executive privilege.³⁷

Later, Clinton exercised a form of ‘negotiated executive privilege’ when he agreed to testify before the grand jury only after negotiating the terms under which he would appear.

The Clinton administration also adopted the very broad view that all White House communications are presumptively privileged and that Congress has a less valid claim to Executive branch information when conducting oversight than when considering legislation.³⁸

George W. Bush’s administration, as Rozell wrote, is making far-reaching efforts to expand the scope of executive privilege. In one such case, the administration has made the claim that Congress can be refused access to documents in the Department of Justice regarding prosecutorial matters even though investigation has been terminated. Bush’s administration issued an executive order³⁹ allowing executive privilege to be vastly expanded to prevent the release of past presidential papers.

THE DYNAMICS OF EXECUTIVE PRIVILEGE

³⁶ Baker, Peter and Schmidt, Susan, President is Denied Executive Privilege, Washington Post, 06 May 1998.

³⁷ Rozell, *supra* note 8.

³⁸ *Id.*

³⁹ Executive Order 13233.

From watching over the developments of the doctrine of executive privilege, an interesting observation on the pattern or cycle for the assertion of executive privilege, thus:

There is an underlying dynamic in most claims of privilege. In the initial stages, the executive has a virtual monopoly of information on the case so a temptation exists to overuse claims of privilege. When controversy persists, however, the administration's advantages wane. The public assumes dark deeds are being covered up. As informants and information slowly accumulate, politics tends to force executive revelations. The presidency loses on the core issue and reveals the requested information, but looks bad in rejecting candor from the beginning. At the same time, the result is often a Pyrrhic victory for Congress or the courts that engenders a loss of public confidence in all political institutions. Aware of this history and politically attuned, both sides usually strive for some reasonable outcome.⁴⁰

EXECUTIVE PRIVILEGE: A Legitimate Presidential Prerogative

Although the doctrine of executive privilege has been invoked throughout the American history, executive privilege has remained to be a contentious controversy and has been a subject of a number of debates between and among political analysts and legal scholars.

The power of the Executive to withhold information from Congress and the courts is not expressly conferred by the United States Constitution and the Philippine Constitution, as well. There are, however, sound bases for the claim of executive privilege. Some argue that executive privilege is inherent in the Executive department, flowing from the constitutional doctrine of separation of powers. United States Senator Sam Ervin, an acknowledged constitutional expert explains:

“Although the Constitution is silent with regard to the existence of executive privilege, its exercise is asserted to be an inherent power of the President. Its constitutional basis allegedly derives from the duty imposed upon the Presidents...to see that the laws are faithfully executed. The President claims the power on the grounds that it is necessary in order to provide the Executive branch with the autonomy needed to

⁴⁰ *Supra* note 9.

discharge its duties properly. Inasmuch as the “President alone and unaided could not execute the laws***” but requires “the assistance of subordinates” (*Myers v. U.S.* 117) (1926), the alleged authority to exercise executive privilege has thereby been extended in practice to the entire Executive Branch.”⁴¹

And as held in the leading case of *U.S. v. Nixon*,⁴² executive privilege is an implied power derived from Article II⁴³ of the United States Constitution.

In favor of the legitimacy of the doctrine are: (1) the need for secrecy in the formulation of certain policies; (2) the need for candid deliberations on non-policy issues; and (3) the widely accepted secrecy practices and privileged relationships like marital privilege, attorney-client privilege, doctor-patient privilege and priest-penitent relationships.⁴⁴

The executive privilege is intended to encourage the free flow of ideas and an uninhibited exchange of views among government decision-makers. What is more, the disclosure’s chilling effect on future communications diminishes the effectiveness of executive decision-making and thus, injuring the public interest.⁴⁵

The case of *Kaiser Aluminum & Chemical Corp. v. United States*,⁴⁶ penned by Justice Reed, bolstered the argument in support of executive privilege:

⁴¹ U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Separation of Powers, Executive Privilege: the Withholding of Information by the Executive, Hearings, 92nd Congress, 1st Session. Washington: U.S. Gov’t. Print. Off. 1971, at 2.

⁴² *U.S. v. Nixon*, *supra* note 26. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Article II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.

⁴³ Article II of the United States Constitution refers to the powers of the Chief Executive.

⁴⁴ Ozerskaya, *supra* note 7.

⁴⁵ Jensen, Kirk, The Reasonable Government Official Test: A Proposal for the treatment of factual information under the Federal Deliberative Process, *Duke Law Journal*, Vol. XLIX at 568.

⁴⁶ 157 F. Supp. 939 (1958).

“Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or the executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.”⁴⁷

In *U.S. v. Nixon*, the U.S. Supreme Court, in fact, agreed to Nixon’s justification in asserting executive privilege that such privilege is indispensable in the performance of Executive functions and duties.⁴⁸ Thus:

“The expectation of a President to the confidentiality of his conversations and correspondences, 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 government and inextricably rooted in the separation of powers under the Constitution.”⁴⁹

Rozell assents that “executive privilege is a constitutional power when exercised under the proper circumstances.”⁵⁰

EXECUTIVE PRIVILEGE: A Mysterious Concept and a Constitutional Myth

The legitimacy of executive privilege is challenged by some legal scholars although, as pointed out earlier, executive privilege has been considered by Presidents as inherent in the Presidency. The innumerable

⁴⁷ Jensen, *supra* note 45, at 567. In writing the above opinion, Justice Reed relied upon the decision of English court in the case of *Duncan v. Cammel Laird & Co.* (1942 App. Cas. 624 (H.L.)).

⁴⁸ *U.S. v. Nixon*, *supra* note 26.

⁴⁹ *Id.*

⁵⁰ Rozell, *supra* note 8.

confrontations between the Executive and Congress and the courts respecting the withholding of certain information by the Executive branch proves beyond reason that indeed, the Presidents, at least, regarded it as one of their prerogatives inherent such in position, flowing from the principle of separation of powers.

However, executive privilege is not a simple concept, not quite. It is rather an intricate concept. Its application can pose myriad of complexities, it is far from being trouble-free. First, because the phrase “executive privilege” is nowhere to be found in the U.S. Constitution and the Philippine Constitution, as well. Second, the public and the other branches have the right to know what is going on in the executive branch. And finally, history would show that Presidents have abused executive privilege to cover-up wrongdoings.⁵¹

The case of *Nixon* is the perfect example of the last mentioned downside of executive privilege. Nixon’s unqualified assertion of executive privilege to impede criminal prosecution gave executive privilege a bad name.⁵²

Raoul Berger, one of the leading critics of executive privilege had been bold enough to forward the idea that executive privilege is nothing but a constitutional myth. As an opening salvo in his book entitled *Executive Privilege: A Constitutional Myth*, he writes:

“Executive privilege -- the President’s claim of constitutional authority to withhold information from Congress -- is a myth. Unlike most myths, the origins of which are lost in the mists of antiquity, executive privilege is a product of the nineteenth century, fashioned by a succession of presidents who created “precedent” to suit the occasion.”⁵³

⁵¹ Ozerskaya, *supra* note 7.

⁵² Rozell, *supra* note 2.

⁵³ Berger, *supra* note 24.

Berger traced the history and development of the doctrine of executive privilege. He laments the fact that executive privilege had evolved as one of the constitutionally conferred powers of the President notwithstanding the absence of such express provision in the Constitution.

He further described executive privilege as tantamount to an “uncontrolled discretion” on the part of the Executive branch in relation to certain information requested by the Legislature leaving the latter and therefore the public, at the mercy of the President.⁵⁴ The Congress, consequently, is deprived from functioning as a truly co-equal branch of the government⁵⁵ and worse, the administration’s claim of uncontrolled discretion might become a shield to executive unaccountability.⁵⁶ Executive privilege had become an iron curtain which shut off crucial information from Congress and the people.⁵⁷

Separation of powers has always been invoked by the Executive branch to justify the withholding of information from Congress. Berger, however, curtly dismissed this idea, thus:

“To rely on the separation of powers is to assume the answer, to postulate that there is a pre-existing exemption which invokes the protection of the separation of powers.”⁵⁸

According to Berger, as a preliminary to the invocation of the separation of powers to which the executive privilege is assumed to have emanated, it must first be established that the executive power to withhold

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*

⁵⁶ *Id.* at vii.

⁵⁷ *Id.* at vii.

⁵⁸ *Id.* at 11.

information is an attribute of executive power.⁵⁹ But even then, it must be emphasized that separation of powers does not create nor grant power; it only protects powers *conferred* by the Constitution.⁶⁰

In comparison with “the power of inquiry, which has been regarded and employed as a necessary and appropriate attribute of the power to legislate, and indeed inhering in it” as held by the U.S. Supreme Court,⁶¹ executive privilege cannot be considered “implied” in the executive power.⁶² This is mainly because of the alleged “precedents” often cited by Presidents in the exercise of their so-called executive privilege, were ‘drawn out of thin air,’ borrowing the language of Berger.

To support his claim that such ‘precedents are merely self-serving assertions,’ Berger scrupulously examined the context in which executive privilege was invoked throughout the American history.

Berger singled out the memorandum issued in 1957 by Deputy Attorney General William P. Rogers referred to by Berger as the “Roger’s memo.” The Rogers memorandum was delivered to U.S. Senate in response to its request, addressed to Rogers, for explanation of the President’s authority to withhold requested information from Congress.⁶³ The Rogers memo presented the case for executive privilege by citing therein historical “precedents going back to the beginning of the Republic.”⁶⁴ Berger criticized Rogers memo as a “farrago of internal contradictions, patently slipshod

⁵⁹ *Id.* at 12.

⁶⁰ *Id.* at 45.

⁶¹ *Mc Grain v. Daugherty*, 273 U.S. 135 (1927) at 175.

⁶² Berger, *supra* note 24, at 12.

⁶³ Berger, *supra* note 24, at 163.

⁶⁴ Kaiser, David, Executive Privilege, <http://www.hnn.us/blogs/entries/41782.html> (last accessed 27 October 2008).

analysis, and untenable inferences.”⁶⁵ This notwithstanding, the Rogers memo has become a “bible for the Executive branch.”⁶⁶

Accordingly, it was found out that the St. Clair expedition and the Jay Treaty have often been cited as “precedents” in substantiating claims of the legitimacy of executive privilege. Berger, however, cautioned of such erroneous appreciation of the mentioned incidents in American history. Thus,

“Executive privilege” was not asserted in either case (referring to the St. Clair expedition and the Jay Treaty); much less was there congressional recognition of such right to withhold. In St. Clair, information was furnished without any mention to Congress of such right; in Jay, information was withheld from the House only, on the ground that it had no constitutional share in treaty making. Washington not only gave information to the Senate but volunteered that he had no disposition to withhold information to which either House had a “right”. At best, these were a disputant’s claims, immediately rejected by the other, hardly a “precedent” binding on either Congress or the courts.”⁶⁷

Berger continued:

Instead Rogers invokes of presidential “precedents” are at best self-serving assertions by one of the claimants in a constitutional boundary dispute, and as such are no more “precedents” than are the claims of one of the parties to a dispute about farm boundaries. Neither branch, as Madison stated, has the “superior right of settling the boundaries between their respective powers.”⁶⁸ Were it possible for the President to create constitutional power by mere assertion, these “precedents” would yet not bear the construction placed upon them.⁶⁹

Moreover, Berger warned that the continued adherence to these “precedents” exhibits cynical reliance on the modern propaganda tenet: “Repeat it often enough and it will be believed.”⁷⁰

⁶⁵ Berger, *supra* note 24, at 164.

⁶⁶ *Id.*

⁶⁷ Berger, *supra* note 24, at 179.

⁶⁸ *Id.* citing Federalist No. 49 at 328, quoting Jefferson.

⁶⁹ *Id.*

⁷⁰ *Id.* at 208.

THE COLLISION COURSE: The Executive and Legislative Showdown

In most instances, the assertion of executive privilege necessarily creates tension between the Executive branch and the Congress. Here is the scenario: On one extreme is the President's need for confidentiality and on the other extreme is the Congress' right to information. Executive privilege, inevitably leads to inter-branch clashes.⁷¹ Quite interestingly, both branches similarly anchor their arguments on the doctrine of separation of powers.

On the part of the Executive branch, though the United States and the Philippine Constitutions make no explicit reference on executive privilege, the U.S. Supreme Court declared in the case of *U.S. v. Nixon*, also adhered to by the Philippine Supreme Court as enunciated in *Neri v. Senate*,⁷² that executive privilege relates to the effective discharge of a President's powers, hence, a constitutionally-based prerogative. Congress, on the other hand, insists on its express constitutional power to conduct investigations in aid of legislation and its oversight function.

Article VI, Section 1 of the Philippine Constitution states that "The legislative power shall be vested in the Congress of the Philippines except to the extent reserved to the people by the provision on initiative and referendum." Significantly, "the power to legislate carries with it the power to investigate."⁷³ It has been observed moreover that "the clash between the Executive and the Legislature over access to information almost always has occurred in connection with a Congressional investigation."

⁷¹ Rozell, *supra* note 8.

⁷² 549 SCRA 77 (2008).

⁷³ *Supra* note 12, citing Library of Congress. Legislative Reference Service, *The Constitution of the United States of America- Analysis and Interpretation*, Washington: U.S. Gov't Print. Off., 1964, at 105.

The case of *Watskin v. United States*⁷⁴ held that the power of the Congress to conduct investigations includes:

1. inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes;
2. surveys of defects in the social, economic, or political system for the purpose of enabling Congress to remedy them;
3. probes into departments of the Government to expose corruption, inefficiency and waste.

In the case of *Arnault v. Nazareno*,⁷⁵ the Philippine Supreme Court held that “the power of inquiry is co-extensive with the power to legislate.”

Further, the Court held in *Senate v. Ermita*⁷⁶ that the Legislature’s power of inquiry is broad enough to cover officials of the Executive branch. Evidently, if the information possessed by executive officials on the operation of their offices is necessary for wise legislation on that subject, by parity of reasoning, Congress has the right to that information and the power to compel the disclosure thereof.

To be sure, our Constitution provides for congressional participation “in the great decisions that spell life and death to the Nation.” Needless to say, meaningful participation is possible only on the basis of full information, without knowledge of the alternatives that have been spread before the President, and withheld from Congress, legislative decision-making stumbles in the dark. When based on full information, the participation of Congress insures that the issues will be aired instead of

⁷⁴ 354 U.S. 178 (1957) at 180-181.

⁷⁵ 87 Phil 29 (1950).

⁷⁶ 488 SCRA 1 (2006).

being decided in a hall of mirrors where courtiers echo the desires of the monarch.”⁷⁷

Berger commented further that the “growing resort by the Executive branch to “uncontrolled discretion” to withhold information robs the country of the benefits which flow from legislative inquiry into executive conduct.”⁷⁸

As noted by Berger, let it not be forgotten that “in balancing the necessities of government, as is essential in weighing conflicting claims of power -- without for a moment conceding that the executive claim has any constitutional validity -- the question is whether the alleged executive desire to improve its performance shall be permitted to outweigh the congressional duty to ferret out inefficiency and corruption, to legislate intelligently. It is a perversion of values to require that Congress stumble in the dark so that executive subordinates can indulge in “candid interchange”.”⁷⁹

Being co-ordinate branches of the government, as to who blinks remains to be an interesting question. As did observed by Rozell, Congress has shown little deference toward presidential secrecy. To break the constitutional stalemate between the Executive branch and Congress, the courts enter into the scene.

JUDICIAL REVIEW: The Judiciary as the Referee

⁷⁷ Berger, *supra* note 24, at 344.

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 248-249.

While executive privilege issues most commonly develop as conflicts between Congress and the executive branch, the judicial branch remains the ultimate arbiter in the context of constitutional inter-branch disputes.

Often, the courts are tasked to balance the competing constitutional values. Essentially, the controversy about executive privilege is a boundary dispute.⁸⁰ Berger underscored the role of an arbiter in the dispute over executive privilege:

Essentially, this is a dispute about the scope of intersecting powers; if one branch has claimed power, the other branch necessarily has not. one branch cannot finally decide the reach of its own power when the result is to curtail that claimed by another. Neither of the two departments, said Madison in Federalist No. 49, “can pretend to an exclusive or superior right of settling the boundaries between their respective powers.” “Some arbiter,” said Justice Jackson, “is almost indispensable when power is x x x balanced between different branches, as the legislative and executive x x x Each unit cannot be left to judge the limit of its own power.”⁸¹

Accordingly, the determination of the validity or existence of executive privilege is left with the courts. Needless to say, “this inquiry places courts in the awkward position of evaluating the Executive’s claims of confidentiality and autonomy, and pushes to the fore the difficult questions of separation of powers and checks and balances.”⁸²

It has been observed that initially, the courts show reluctance to resolve executive privilege disputes between the Congress and the Executive branch, in keeping with the principle of separation of powers. It has been observed, however, that courts acknowledge their duty to balance conflicting claims of co-equal branches upon failure to reach an accommodation.

⁸⁰ Berger, *supra* note 24, at 304.

⁸¹ Berger, *supra* note 24, at 330-331.

⁸² Holding, Reynolds, The Executive Privilege Showdown, *Time*, March 21, 2007.

In other words, court intervention becomes necessary only when the squabble between the legislative and executive branches is not worked out in the spirit of accommodation.⁸³

It must be noted, however, that judicial intervention in executive privilege disputes is not automatic. Hence, it was held in the case of *United States v. AT&T*⁸⁴ that judicial intervention between the political branches is improper unless there has been an honest but unsuccessful attempt to compromise. There is in the Constitution, the Court held, a duty that the executive and Congress attempt to accommodate the needs of each other:

“The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.”⁸⁵

Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.⁸⁶

The judicial branch did not encounter a formal assertion of executive privilege until 1807 in *United States v. Burr*.⁸⁷ The court in *Burr* recognized judicial power to require the president to produce evidence, and it qualified that power by observing that a court is not required “to proceed against the president as against an ordinary individual.” While modern practitioners,

⁸³ Berger, *supra* note 24, at vii.

⁸⁴ 567 F.2d 121 D.C. Cir. (1977).

⁸⁵ *Id.*

⁸⁶ Berger, *supra* note 24, at 127.

⁸⁷ 25 Fed. Cas. 38, no. 14692e C.C.D.Va. 1807.

judges, and scholars have debated the precedent set by *Burr* and other non-judicial “precedents” of executive privilege, the courts did not pass on the issue again until Watergate.

Rozell hinted that executive privilege may well be considered as a relative concept, the validity of its assertion by the Executive branch, to a great extent, depends upon the political situation of the country. Thus,

“Two executive privilege claims that, on the surface, appear equally valid may be treated very differently from one another given different circumstances.” When the political situation is too dangerous for the Supreme Court (e.g., if a ruling against the President is likely to be disobeyed by him or to produce serious reprisals against the Court’s powers or prestige), the Court should find a way to duck the issue or deflect it, leaving its immediate resolution to the larger political process.

But if the political situation is favorable (that is, if a ruling against the President will enjoy broad public and Congressional support and virtually compel presidential compliance), then the Court is free (if the case warrants it) to do the two things most beloved by judges -- uphold the ‘rule of law’ against claims of prerogative or privilege by the executive, and expand still further the discretionary power of the judiciary in the American constitutional system.⁸⁸

THE PEOPLE’S RIGHT TO INFORMATION *VIS-À-VIS* EXECUTIVE PRIVILEGE

*“A popular Government, without popular information, or the means of acquiring it,
is but a prologue to a farce or tragedy; or perhaps both...”*

- James Madison

*“If we advert to the nature of republican government, we shall find that the censorial power is in
the people over the Government, and not in the Government over the people.”*

- James Madison

The 1987 Constitution provides for the right to information in Article III, Section 7:

⁸⁸ Rozell, Mark, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability (1994), at 154.

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.

Justice Potter Stewart said that, when “the people and their representatives are reduced to ignorance, the democratic process is paralyzed.”⁸⁹ A democracy places great stress on open governmental information. Hence, openness should be the rule and secrecy as the exception. Being an exception, the scope of the executive privilege should therefore be narrowly construed.⁹⁰ Moreover, the scope of the privilege should not be extended beyond what is necessary to accomplish its underlying purpose.⁹¹

At any rate, executive privilege should not be used as a vehicle of corruption in the government.⁹² Executive privilege should not be used to cover up illegal activities or to hide embarrassing information.

Berger, however, believed that executive privilege “had become an iron curtain which shuts off crucial information from Congress and the people.” For some critics, executive privilege embodies the evils of the Executive branch for non-disclosure of information.⁹³ He noted further that the system of check and balances embodied in our Constitution is dependent upon information and as a consequence, a Congress kept in ignorance is impotent to “check.”⁹⁴ Berger concluded with a warning that “the steady expansion of executive privilege claims to withhold information from the

⁸⁹ Berger, *supra* note 24, at 344.

⁹⁰ Ozerskaya, *supra* note 7.

⁹¹ Jensen, *supra* note 45, citing *Gomez v. City of Nashua*, 126 F.R.D/ 432,435 (D.N.H. 1989).

⁹² Ozerskaya, *supra* note 7.

⁹³ *Id.*

⁹⁴ Berger, *supra* note 24, at 371.

courts as well as Congress should serve to warn that such uncurbed power imperils our democratic system.”⁹⁵

A SURVEY OF PHILIPPINE JURISPRUDENCE ON THE DOCTRINE OF EXECUTIVE PRIVILEGE

*Almonte v. Vasquez*⁹⁶

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 Economic Intelligence and Investigation Bureau (EIIB) had been illegally disbursed.

Petitioners filed a petition for *certiorari*, prohibition, and *mandamus* to annul the said subpoena *duces tecum* and orders.

The principal issue involved in this case was whether petitioners can be compelled to produce documents relating to personal services and salary vouchers of EIIB employees. 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.”

Before embarking on the principal issue in the case, the Court made a preliminary discussion on executive privilege. Thus:

“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

⁹⁵ *Id.* at 372.

⁹⁶ 244 SCRA 286 (1995).

interests of a private citizen, even though, as a consequence thereof, the plaintiff cannot enforce his legal rights.”

Rejecting the petitioners’ claim of executive privilege on the requested documents, the Court held:

“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." 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, 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*”. (*Emphasis supplied*).

For their part, petitioners argued that the documents in question are ‘presumptively privileged,’ as held in the case of *U.S. v. Nixon*. The Court, however, rebuffed such line of reasoning:

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 non-production.

Chavez v. PCGG⁹⁷

May the government, through the Presidential Commission on Good Government (PCGG), be required to reveal the proposed terms of a compromise agreement with the Marcos heirs as regards their alleged ill-gotten wealth, pursuant the people’s constitutional right to information on matters of public concern? This is the principal question involved in this case.

⁹⁷ 299 SCRA 744 (1998).

The Court held that “There are no specific laws prescribing the exact limitations within which the right (to information) may be exercised or the correlative state duty may be obliged.” The Court then went on to discuss the recognized restrictions on the people’s right to information guaranteed by the Constitution such as (1) national security matters and intelligence information, (2) trade secrets and banking transactions, (3) criminal matters, and (4) other confidential information.

The Court held therein that:

At the very least, this jurisdiction recognizes the common law holding that there is a governmental privilege against public disclosure with respect to state secrets regarding military, diplomatic and other national security matters. But where there is no need to protect such state secrets, the privilege may not be invoked to withhold documents and other information, provided that they are examined "in strict confidence" and given "scrupulous protection."

Likewise, information on inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest.

Chavez v. Public Estates Authority⁹⁸

Similarly, in *Chavez v. Public Estates Authority*, the Court ruled that the right to information does not extend to matters recognized as “privileged information under the separation of powers,” by which the Court meant Presidential conversations, correspondences, and discussions in closed-door Cabinet meetings. It also held that information on military and diplomatic secrets and those affecting national security, and information on investigations of crimes by law enforcement agencies before the prosecution of the accused were exempted from the right to information.

From the above discussion on the meaning and scope of executive privilege, both in the United States and in this jurisdiction, a clear principle

⁹⁸ 403 SCRA 1 (2003).

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

*Senate v. Ermita*⁹⁹

In *Senate v. Ermita*, several invitations were issued to various officials of the Executive department pursuant to the Senate's inquiry in aid of legislation in connection with the alleged irregularities of the North Rail Project. However, a day before the supposed public hearing, President Gloria Macapagal-Arroyo issued E.O. 464,¹⁰⁰ which immediately took effect,

⁹⁹ 488 SCRA 1 (2006).

¹⁰⁰ "ENSURING OBSERVANCE OF THE PRINCIPLE OF SEPARATION OF POWERS, ADHERENCE TO THE RULE ON EXECUTIVE PRIVILEGE AND RESPECT FOR THE RIGHTS OF PUBLIC OFFICIALS APPEARING IN LEGISLATIVE INQUIRIES IN AID OF LEGISLATION UNDER THE CONSTITUTION, AND FOR OTHER PURPOSES"

SECTION 1. *Appearance by Heads of Departments Before Congress.* – In accordance with Article VI, Section 22 of the Constitution and to implement the Constitutional provisions on the separation of powers between co-equal branches of the government, **all heads of departments of the Executive Branch of the government shall secure the consent of the President prior to appearing before either House of Congress.**

When the security of the State or the public interest so requires and the President so states in writing, the appearance shall only be conducted in executive session.

SECTION. 2. *Nature, Scope and Coverage of Executive Privilege.* –

(a) Nature and Scope. - The rule of confidentiality based on executive privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995). Further, Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees provides that 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 to prejudice the public interest.

Executive privilege covers all confidential or classified information between the President and the public officers covered by this executive order, **including:**

directing the executive officials to secure the consent of the President before appearing in any legislative inquiry “to ensure the observance of the principle of separation of powers and adherence on the rule on executive privilege.” Sections 2 and 3 thereof enumerates those who are covered by the executive privilege, including senior officials of the executive departments, officers of the AFP and PNP, all senior national security officials and such other officers as may be determined by the President.

Several petitions challenging the constitutionality of E.O. 464 were

- i. Conversations and correspondence between the President and the public official covered by this executive order (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995; *Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002);
- ii. Military, diplomatic and other national security matters which in the interest of national security should not be divulged (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995; *Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998).
- iii. Information between inter-government agencies prior to the conclusion of treaties and executive agreements (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998);
- iv. Discussion in close-door Cabinet meetings (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998);
- v. Matters affecting national security and public order (*Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002).

(b) **Who are covered.** – The following are covered by this executive order:

- i. Senior officials of executive departments **who in the judgment of the department heads** are covered by the executive privilege;
- ii. Generals and flag officers of the Armed Forces of the Philippines and such other officers **who in the judgment of the Chief of Staff** are covered by the executive privilege;
- iii. Philippine National Police (PNP) officers with rank of chief superintendent or higher and such other officers **who in the judgment of the Chief of the PNP** are covered by the executive privilege;
- iv. Senior national security officials **who in the judgment of the National Security Adviser** are covered by the executive privilege; and
- v. Such other officers **as may be determined by the President.**

SECTION 3. Appearance of Other Public Officials Before Congress. – **All public officials enumerated in Section 2 (b) hereof shall secure prior consent of the President prior to appearing before either House of Congress** to ensure the observance of the principle of separation of powers, adherence to the rule on executive privilege and respect for the rights of public officials appearing in inquiries in aid of legislation. (*Emphasis supplied*)

thereafter filed. The Supreme Court, in this case, recognized the Executive's prerogative to withhold certain privileged information to the Congress, the courts and ultimately to the public. However, the doctrine of executive privilege must be weighed against the Legislature's power of inquiry and the public's right to information. Thus, the Court held:

The Congress' power of inquiry is expressly recognized in Section 21 of Article VI of the Constitution which reads:

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

Citing the case of *Arnault v. Nazareno*,¹⁰¹ the Court held that "this power of inquiry is broad enough to cover officials of the executive branch..." The power of inquiry... is co-extensive with the power to legislate. The matters which may be a proper subject of legislation and those which may be a proper subject of investigation are one. It follows that the operation of government, being a legitimate subject for legislation, is a proper subject for investigation.

Turning the discussion to Section 3 which requires all the public officials enumerated in Section 2(b) to secure the consent of the President prior to appearing before either house of Congress, the Court noted that the enumeration under Section 2 (b) is broad, for it covers all senior officials of Executive departments, all officers of the AFP and the PNP, and all senior national security officials who, in the judgment of the heads of offices designated in the same section (i.e. department heads, Chief of Staff of the AFP, Chief of the PNP, and the National Security Adviser), are "**covered by the executive privilege.**" The enumeration also includes such other officers as may be determined by the President. Hence, the Court ruled:

¹⁰¹ 87 Phil 29 (1950).

The claim of privilege under Section 3 of E.O. 464 in relation to Section 2(b) is thus **invalid** *per se*. It is not asserted. It is merely implied. Instead of providing precise and certain reasons for the claim, it merely invokes E.O. 464, coupled with an announcement that the President has not given her consent. It is woefully insufficient for Congress to determine whether the withholding of information is justified under the circumstances of each case. It **severely** frustrates the power of inquiry of Congress.

In fine, **Section 3 and Section 2(b) of E.O. 464 must be invalidated.**

The Court rejected such “implied claim of privilege” sanctioned by Section 3 in relation to Section 2 (b) of E.O. 464 for reasons quoted below:

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

The Court is also keen in pointing out the misuse of the doctrine of executive privilege in E.O. 464, that executive privilege is invoked in relation to specific categories of information and not to categories of persons.

Neri v. Senate¹⁰²

Barely two years after *Senate v. Ermita*, a controversy spawned involving high-ranking officials of the Government in connection to the contract entered into by the Department of Transportation and Communication (DOTC) with Zhong Xing Telecommunications Equipment (ZTE) for the supply of equipment and services for the National Broadband Network (NBN) Project for an astonishing amount of U.S. \$329 million

¹⁰² 549 SCRA 77 (2008).

dollars. In accordance with the terms of the contract, the NBN Project was to be financed through a foreign loan to be obtained by the Government of the Republic of the Philippines from People's Republic of China.

Invoking Senate's investigatory power in aid of legislation, several resolutions¹⁰³ were introduced seeking to probe on the circumstances leading to the approval of the allegedly anomalous ZTE contract, the key government officials involved.

Senate investigations spearheaded by the Blue Ribbon Committee kicked off. Invitations were sent to certain personalities and cabinet officials involved in the NBN Project. Romulo Neri, then the director-general of National Economic Development Authority (NEDA) was among those invited. He was summoned to appear and testify on four occasions, however, he attended only the September 26 hearing.

¹⁰³ **(1) P.S. Res. No. 127**, introduced by Senator Aquilino Q. Pimentel, Jr., entitled RESOLUTION DIRECTING THE BLUE RIBBON COMMITTEE AND THE COMMITTEE ON TRADE AND INDUSTRY TO INVESTIGATE, IN AID OF LEGISLATION, THE CIRCUMSTANCES LEADING TO THE APPROVAL OF THE BROADBAND CONTRACT WITH ZTE AND THE ROLE PLAYED BY THE OFFICIALS CONCERNED IN GETTING IT CONSUMMATED AND TO MAKE RECOMMENDATIONS TO HALE TO THE COURTS OF LAW THE PERSONS RESPONSIBLE FOR ANY ANOMALY IN CONNECTION THEREWITH AND TO PLUG THE LOOPHOLES, IF ANY IN THE BOT LAW AND OTHER PERTINENT LEGISLATIONS.

(2) P.S. Res. No. 144, introduced by Senator Mar Roxas, entitled A RESOLUTION URGING PRESIDENT GLORIA MACAPAGAL ARROYO TO DIRECT THE CANCELLATION OF THE ZTE CONTRACT

(3) P.S. Res. No. 129, introduced by Senator Panfilo M. Lacson, entitled RESOLUTION DIRECTING THE COMMITTEE ON NATIONAL DEFENSE AND SECURITY TO CONDUCT AN INQUIRY IN AID OF LEGISLATION INTO THE NATIONAL SECURITY IMPLICATIONS OF AWARDING THE NATIONAL BROADBAND NETWORK CONTRACT TO THE CHINESE FIRM ZHONG XING TELECOMMUNICATIONS EQUIPMENT COMPANY LIMITED (ZTE CORPORATION) WITH THE END IN VIEW OF PROVIDING REMEDIAL LEGISLATION THAT WILL PROTECT OUR NATIONAL SOVEREIGNTY, SECURITY AND TERRITORIAL INTEGRITY.

(4) P.S. Res. No. 136, introduced by Senator Miriam Defensor Santiago, entitled RESOLUTION DIRECTING THE PROPER SENATE COMMITTEE TO CONDUCT AN INQUIRY, IN AID OF LEGISLATION, ON THE LEGAL AND ECONOMIC JUSTIFICATION OF THE NATIONAL BROADBAND NETWORK (NBN) PROJECT OF THE NATIONAL GOVERNMENT

In one of the hearings, businessman Jose de Venecia III of the Amsterdam Holdings, one of the bidders in the NBN project testified that several high executive officials and power brokers were using their influence to push the approval of the NBN Project by the NEDA. It appeared that the NBN Project was initially approved as a Build-Operate-Transfer (BOT) project but the NEDA acquiesced to convert it into a government-to-government project, to be financed through a loan from the Chinese Government.

On September 26, 2007, Neri was put on a hot seat for a grilling eleven (11) hours. He disclosed that then Commission on Elections (COMELEC) Chairman Benjamin Abalos offered him ₱200 Million in exchange for his approval of the NBN Project. He further narrated that he informed President Arroyo about the bribery attempt and that she instructed him not to accept the bribe. However, when probed further on what they discussed about the NBN Project, he refused to answer, invoking “executive privilege”. In particular, he refused to answer the questions on (a) whether or not President Arroyo followed up the NBN Project, (b) whether or not she directed him to prioritize it, and (c) whether or not she directed him to approve.

Determined to extract from Neri the answers to the foregoing questions, another *subpoena ad testificandum* was issued to him requiring him to appear and testify on November 20, 2007. However, before he could even comply with the subpoena, Executive Secretary Eduardo R. Ermita sent a letter¹⁰⁴ dated November 15, 2007 to the Senate Committees conducting the

¹⁰⁴ The pertinent portion of the letter reads:

With reference to the *subpoena ad testificandum* issued to Secretary Romulo Neri to appear and testify again on 20 November 2007 before the Joint Committees you chair, it will be recalled that Sec. Neri had already testified and exhaustively discussed the ZTE / NBN project, including his conversation with the President thereon last 26 September 2007.

investigation to dispense with Neri's testimony on the ground of executive privilege. According to Ermita, the assertion of executive privilege is in accord to the Supreme Court's recent decision in the case of *Senate v. Ermita* and that the three questions thrown to Neri fall under conversations and correspondence between the President and public officials which are considered executive privilege citing the earlier jurisprudence of *Almonte v. Vasquez*¹⁰⁵ and *Chavez v. PEA*.¹⁰⁶ The letter further rationalized that:

“Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision making process. The expectation of a President to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.

Asked to elaborate further on his conversation with the President, Sec. Neri asked for time to consult with his superiors in line with the ruling of the Supreme Court in *Senate v. Ermita*, 488 SCRA 1 (2006).

Specifically, Sec. Neri sought guidance on the possible invocation of executive privilege on the following questions, to wit:

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

Following the ruling in *Senate v. Ermita*, the foregoing questions fall under conversations and correspondence between the President and public officials which are considered executive privilege (*Almonte v. Vasquez*, G.R. 95637, 23 May 1995; *Chavez v. PEA*, G.R. 133250, July 9, 2002). Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision making process. The expectation of a President to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

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

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

¹⁰⁵ 244 SCRA 286 (1995).

¹⁰⁶ 384 SCRA 152 (2002).

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.”

Neri was a no show at the September 20 hearing. Consequently, the respondent Senate Committees issued a show cause letter for Neri's failure to appear before the investigative body and requiring him to explain why he should not be cited in contempt. Neri responded that the only remaining questions were those he claimed to be covered by executive privilege, hence, his appearance before the Senate investigative body would serve no purpose.

In the meantime, Respondent Committees found Neri's explanations unsatisfactory. An order¹⁰⁷ was issued forthwith citing him in contempt and ordering his arrest and detention until such time that he would appear and give his testimony. Neri filed before the Supreme Court a petition for *certiorari* assailing the show cause Letter and the contempt order.

He stresses that his conversations with President Arroyo are “**candid discussions meant to explore options in making policy decisions.**” According to him, 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.**”

¹⁰⁷ For failure to appear and testify in the Committee's hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007; and Tuesday, November 20, 2007, despite personal notice and *Subpoenas Ad Testificandum* sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007), herein attached) **ROMULO L. NERI is hereby cited in contempt of this (sic) Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.** The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make return a hereof within twenty four (24) hours from its enforcement. **SO ORDERED.**

He also emphasizes that his claim of executive privilege is upon the order of the President and within the parameters laid down in *Senate v. Ermita*¹⁰⁸ and *United States v. Reynolds*.¹⁰⁹

The crux of the controversy relates to the issue on whether or not the three questions asked of Neri fall within the category of “executive privilege”.

DECONSTRUCTING *NERI v. SENATE*

In resolving the principal issue involved in the case of *Neri v. Senate*, the majority decision penned by Justice Leonardo-de Castro, outlined the elements of presidential communications privilege citing *Judicial Watch, Inc. v. Department of Justice*¹¹⁰ and *In Re: Sealed Case*,¹¹¹ 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 or herself, with the advisor being in operational proximity with the president; and
- (3) The presidential communications privilege is a qualified privilege that may be overcome by a showing of adequate need, such that the information likely contains important evidence that is unavailable elsewhere.

Guided by these elements, the Court then proceeded to evaluate Neri’s presidential communications claim. The Court concluded that all the aforesaid elements were satisfied sustaining Neri’s claim of executive privilege.

¹⁰⁸ 488 SCRA 1 (2006).

¹⁰⁹ 345 U.S. 1 (1953).

¹¹⁰ 337 F. Supp. 2d (2004).

¹¹¹ 141 F.3d (1998).

The majority holds that “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.” The majority, unfortunately, failed to mention what particular ‘executive agreement’ is involved. For many of us, it could hardly be understood why the Court did not delve deeper into this matter. It simply mentioned in passing the core presidential power involved without more.

Lawyer Nepomuceno Malaluan,¹¹² for his part, raised a query as to the Court’s characterization of the subject communications as relating to the power of the president to enter into executive agreements. In an article¹¹³ remarked:

In the entirety of the NBN deal, the president was performing acts relating to various functions, including borrowing and entering into executive agreements with respect to the loan from China, and approval of development projects with respect to the NBN project itself. The exercise of each of these functions may be related more directly or more remotely with the communications involved. *Looking at the questions, it is evident that these relate more closely to the approval of a development project, than to entering into executive agreements. The authority over the approval of development projects is more dispersed, and not as “quintessential and non-delegable” as entering into executive agreements. (Emphasis supplied).*

Fortunately, the seeming gap in the decision was filled by Chief Justice Puno in his dissenting opinion which mentioned in clear and unequivocal terms, that the presidential power therein involved is the power to contract or guarantee foreign loans on behalf on the Government, enshrined in Article VII, Section 20 of the 1987 Constitution, which provides:

The president may contract or guarantee foreign loans on behalf of the Republic of the Philippines *with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law.* The Monetary Board shall, within thirty days from the end of every quarter of the

¹¹² Atty. Nepomuceno Malaluan is a trustee of the Action for Economic Reforms and co-convenor of the Access to Information Network (ATIN).

¹¹³ Malaluan, Nepomuceno, An Absolute Privilege. <http://www.aer.ph/pdf/papers/absolute> (last accessed 29 October 2008)

calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law. (*Emphasis supplied*).

From the above constitutional provision, Chief Justice Puno pointed that the power to contract or guarantee foreign loans, in behalf of the government is not exclusively vested with the President, as the same is shared with the Monetary Board of the Bangko Sentral ng Pilipinas. Without the prior concurrence of the Monetary Board, the so-called core presidential power to contract or to guarantee foreign loans in behalf of the government is reduced to a mere rhetoric.

Chief Justice Puno observed further:

The **more concentrated power is in the President**, the greater the need for confidentiality and the **stronger the presumption**; contrariwise, the more **shared or diffused the power** is with other branches or agencies of government, the **weaker the presumption**. For, indisputably, there is less need for confidentiality considering the likelihood and expectation that the branch or agency of government sharing the power will need the same information to discharge its constitutional duty.¹¹⁴

Indeed, it is truly puzzling why the Court in the case of *Neri v. Senate* upheld the assertion of executive privilege even if there is no apparent justification for the exercise of such power. For one, there are no national security implications to the investigations conducted by the Senate. Secondly, no clear public interest is at stake in preventing Neri to answer the three questions under consideration. Nor the claim of privilege falls into the category of protecting the integrity of ongoing criminal investigations.

¹¹⁴ Dissenting opinion of Puno, C.J. in *Neri v. Senate*, *supra* note 102, at 215.

It could not be gainsaid that the Court's decision in *Neri v. Senate* leaves many of us in a quandary. It is incredulous that the Court accepted such a generalized, if not a frivolous assertion of executive privilege. This is illustrative of the Court's 'accommodating' attitude in relation to the Executive's assertion of executive privilege.

The holdings in this case, as well as the precedents cited have far reaching consequences. For one, once executive privilege, pertaining to presidential communications is asserted, a presumption immediately attaches in favor of the Executive branch and it is incumbent upon Congress to rebut such presumption. The decision of the Court in *Neri* had set a very dangerous precedent. The Congress' power of inquiry in aid of legislation and the people's right to information have been thwarted by the mere assertion of executive privilege.

Intentionally or not, the majority avoided an analysis as to whether the answers to the three questions asked of *Neri* would indeed discourage candid discussions within the Executive branch and thus, undermining the President's ability to perform executive functions. Thus, Jensen's analysis is instructive in this respect:

“Courts do not generally engage in any significant analysis whether this danger (pertaining to the chilling effect of free and open flow of information) is likely to occur.”¹¹⁵

“Instead, courts seem to base their analysis on ‘hunches and intuition’ ‘parrot(ing) the harms suggested by Justice Reed in *Kaiser*, rather than analyzing the possible chilling effect of disclosure on the free flow of information’.”¹¹⁶

¹¹⁵ Jensen, *supra* note 45, citing WEINSTEIN'S FEDERAL EVIDENCE, Section 509.21 (1), at 509-514.

¹¹⁶ Russell L. Weaver & James T.R. Jones, The Deliberative Process Privilege, 54 MINNESOTA. L. REV. at 316; 315-316.

Indeed, the Court readily accepted the ‘apprehensions’ of the Executive branch that the answers to those questions “might impair the country’s diplomatic as well as economic relations with the People’s Republic of China.” It is beyond any stretch of imagination that without even attempting to ferret out the information contained in the supposed answers to the three questions posed upon Neri, our economic and diplomatic relations with China is in the danger of being impaired. As a matter of fact, in the cases¹¹⁷ earlier decided by the Philippine Supreme Court and the U.S. Supreme Court, an *in camera* review of sensitive information was suggested by the courts. Rather than compelling disclosure of information for open court review, the executive may satisfy the court in secret chambers of the need for non-disclosure.

The broad scope of executive privilege is inimical to the public interest inasmuch as it conflicts with a tradition of open government.¹¹⁸ It was further noted that the potential for its abuse outweighs its possible benefits.¹¹⁹

In Re: Sealed Case (Espy) and Judicial Watch Case

The main opinion in the case of *Neri v. Senate* cited two United States cases namely: *In re: Sealed Case*, a 1998 case and the *Judicial Watch v. Department of Justice*, a 2004 case, in upholding the validity of the assertion of executive privilege by the Office of the President to preclude Neri from testifying before the Senate. The CRS Report for Congress entitled *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* maintained that

¹¹⁷ *Almonte v. Vasquez* and *U.S. v. Nixon*.

¹¹⁸ Kohlmeyer, Daniel. Executive Privilege—The Ohio Supreme Court Finds The Existence Of A Qualified Gubernatorial Communications Privilege Amid Separation Of Powers Concerns And A “Particularized Need” Requirement. *State ex rel. Dann v. Taft*, 848 N.E.2d 472 (Ohio 2006). RUTGERS LAW JOURNAL Vol. 38, 2007 at 1405, Justice Pfeifer’s Dissent.

¹¹⁹ *Id.*

the aforementioned decisions “had left important gaps in the law of presidential privilege which have increasingly become focal points, if not the source, of inter-branch confrontations that have made their resolution more difficult.”

The *In re: Sealed Case*, also popularly called the *Espy* case, arose out of an Office of Independent Counsel (OIC) investigation of former Agriculture Secretary Mike Espy. When allegations of improprieties by Espy surfaced in f 1994, President Clinton ordered an investigation to be conducted. A report was made for the President. A subpoena was issued for all documents that were accumulated or used in preparation of the report. The President withheld 84 documents, claiming both the executive and deliberative process privileges for all documents. A motion to compel was resisted on the basis of the claimed privileges.¹²⁰

Judicial Watch involved requests for documents concerning pardon applications and pardon grants reviewed by the Justice Department’s Office of the Pardon Attorney and the Deputy Attorney General for consideration by President Clinton. Some 4,300 documents were withheld on the grounds that they were protected by the presidential communications and deliberative process privileges. The district court held that because the materials sought had been produced for the sole purpose of advising the President on a “quintessential and non-delegable Presidential power”—the exercise of the President’s constitutional pardon authority—the extension of the presidential communications privilege to internal Justice Department documents which had not been “solicited and received” by the President or the Office of the President was warranted. The appeals court reversed, concluding that “internal agency documents that are not solicited and received by the

¹²⁰ Congressional Research Service Report for Congress, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, Updated 26 April 2008.

President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege.”¹²¹

Remarkably, the Report continued, that “among the more significant issues left open included whether the President has to have actually seen or been familiar with the disputed matter; whether the presidential privilege encompasses documents and information developed by, or in the possession of, officers and employees in the departments and agencies of the Executive Branch; whether the privilege encompasses all communications with respect to which the President may be interested or is it confined to presidential decision-making and, if so, is it limited to any particular type of presidential decision-making; and precisely what kind of demonstration of need must be shown to justify release of materials that qualify for the privilege.”

In *Espy*, at the outset, a distinction was drawn between “presidential communications privilege” and the “deliberative process privilege.” Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decision-making. But the deliberative process privilege, that applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and “disappears altogether when there is any reason to believe government misconduct has occurred.”¹²² On the other hand, the presidential communications privilege is rooted in “constitutional separation of powers principles and the President’s unique constitutional role” and applies only to “direct decision-making by the President.” The privilege may be overcome only by a substantial showing that “the subpoenaed materials likely contain important evidence” and that “the evidence is not available with due diligence elsewhere.” The presidential privilege applies to all documents in

¹²¹ *Id.* at 21 citing 365 F.3d (D.C. Cir. 2004).

¹²² CRS, *supra* note 120.

their entirety and covers final and post-decisional materials as well as pre-deliberative ones.

The Report further observed that the holdings in *Espy* and the subsequent reaffirmation of the principles by *Judicial Watch*, “authoritatively addressed each of these issues in a manner that may have drastically altered the future legal playing field in resolving such disputes.”

The *Espy* case relied upon by the Philippine Supreme Court in the case of *Neri v. Senate* spelled out in explicit terms the limitation of the presidential communications privilege to “direct decision making by the President.” This means that the presidential communications privilege encompasses only those functions that form the core of presidential authority, involving what the court characterized as “quintessential and non-delegable Presidential power.”¹²³

The Report identified the so-called “quintessential and non-delegable powers” of the President which include the appointment and removal powers, the commander-in-chief power, the sole authority to receive ambassadors and other public ministers, the power to negotiate treaties, and the power to grant pardons and reprieves. These powers were also referred to as the “core constitutional powers of the President.” On the other hand, decision making vested by statute in the President or agency heads such as rulemaking, environmental policy, consumer protection, workplace safety and labor relations, among others, would not necessarily be covered.

The limitation imposed by *Espy*, according to the Report, is in conformity with “the source and purpose of the presidential communications

¹²³ 121 F.3d at 752.

privilege and its expressed need to confine it as narrowly as possible.” As held in *Espy*, “The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decision making by the President.” Thus, the Report emphasized:

“The limiting safeguard is that the privilege will apply in those instances where the Constitution provides that the President **alone** must make a decision.” (*Emphasis supplied*).

The Report stressed that in *Judicial Watch*, the presidential decision involved is the President’s pardoning power, a core presidential function, the operating officials involved, the Deputy Attorney General and the Pardon Attorney, were deemed to be too remote from the President to be protected. Although functionally, those officials were performing a task directly related to the pardon decision, the functional test was rejected by the court because under such test, there would be no limit to the coverage of the presidential communications privilege.

CONCLUSION

Through the years, the debate on executive privilege over the past generation has shifted significantly. The focus on the debate over executive privilege has shifted from the issue of its legitimacy to the questions about the parameters of this power.¹²⁴ Indeed, few any longer call it a “myth.”

In the modern days, executive privilege has become a widely accepted presidential prerogative. Concerns about its constitutional underpinnings had faded into oblivion. The only relevant question now pertains to the

¹²⁴ Rozell, *supra* note 2, at 420-421.

parameters for the exercise of this power so as to curtail the misuse and abuse of this power.

In response to the need for setting parameters for assertion of executive privilege, some advocate the adoption of a statutory definition of executive privilege, and others express the hope that future court decisions will provide more guidance and specificity over executive privilege.¹²⁵ Rozell, however, maintained that “neither proposed solution is necessary or desirable.”¹²⁶ It is the submission of Rozell that “disputes over executive privilege cannot be resolved with constitutional or statutory exactitude. Such disputes can best be resolved through the normal ebb and flow of politics as provided for in the system of separation of powers.”¹²⁷ Thus:

“The resolution to conflicts over executive privilege resides in the theory of separation of powers as envisioned by the framers of the Constitution. Congress and the courts possess the institutional powers needed to challenge presidential exercises of executive privilege. So long as the other branches vigorously protect their prerogatives, presidential misuses of executive privilege will be curtailed. There is no need for a legislatively or judicially imposed solution to prevent such possible future misuses of executive privilege when these branches already possess the constitutional powers needed to successfully challenge presidents.

Presidents are often constrained in their efforts to expand or overreach their constitutional authority. ..He shows little interest in backing away from battles with Congress over this presidential power. It is thus likely that the debate over executive privilege will continue, as long as Congress still vigorously challenges presidential assertions of that power.”¹²⁸

Rozell underscored that “with regard to legislative-executive disputes over information, the burden is on the President to demonstrate a compelling need for confidentiality and not on those who have legitimate compulsory powers to prove that they need the information.”¹²⁹

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Rozell, *supra* note 8.

Accordingly, courts must begin with a presumption against rather than for secrecy, and put the burden on the government to rebut it, as Berger suggested. Needless to say, “secrecy in the government runs counter to our tradition; time and again it has proved to be an “abomination”; and it is to be admitted only after the government has put to proof it is essential for the good of the nation, not merely for that of a President and his “Plumbers”.¹³⁰

Regrettably, such contention is more of an ideal. In reality, it is quite the reverse. In the case of *U.S. v. Nixon*, the U.S. Supreme Court, accorded presidential communications privilege a status of being ‘presumptively privileged’¹³¹ As a result thereof, once there is a valid claim of executive privilege, it is for the one challenging the validity of such claim, either the Congress or the prosecutor to demonstrate that the requested material or information is essential to the prosecution of a pending criminal case or to a pending legislation.

¹³⁰ Berger, *supra* note 24.

¹³¹ *U.S. v. Nixon*, *supra* note 26.