

Universalist Constitutionalism in the Philippines: Restricting Executive Particularism in the Form of Executive Privilege

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Can the doctrine of executive privilege – as recently and repeatedly invoked by the President of the Republic of the Philippines to justify withholding information on public transactions such as national infrastructure projects – survive the scrutiny of universalist constitutionalism under the postcolonial and post-dictatorship 1987 Philippine Constitution?

The answer calls for a reexamination of the normative space of the 1987 Constitution, which, as I have discussed elsewhere,¹ bears a uniquely-universalist ideological history, design, orientation, and philosophy. By ‘universalism’, I refer to Armin von Bogdandy and Sergio Dellavalle’s descriptive international law paradigm that “order can in principle be extended all over the world, i.e. to all humans and all polities not only in their internal relations – as contended by supporters of the particularistic paradigm – but also in their interaction beyond the borders of the single polities. In this understanding there are rights and values which are universal because they are shared by all individuals and peoples. They are enshrined in the set of rules which build the core of international public law.”² The polar counterpart to universalism is ‘particularism’, which is the ethical orientation resting on two fundamental assumptions: 1) order is possible “only within the *particular* polity; it cannot extend to humankind as a whole”; and 2) a polity is “viable only if *particular*: its internal cohesion depends upon something that is exclusively shared by all members.”

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¹ *Desierto, Diane A.*, A Universalist History of the 1987 Philippine Constitution, *Historia Constitucional*, Volume 10 (“Reflections of Universalism: Ideological Currents and the Historical Genesis of Universalist Conceptions in the 1987 Constitution”), and Volume 11 (“Universalism Constitutionalized: Design, Orientation, Philosophy, and Modes of Entry”) (forthcoming).

² See *v. Bogdandy, Armin and Dellavalle, Sergio*, “Universalism and Particularism as Paradigms of International Law”, IILJ Working Paper 2008/3, New York University School of Law, at p. 36; See Wolfrum, Rüdiger (ed.), *Strengthening the world order: universalism v. regionalism (Risks and Opportunities of Regionalization)*, Papers from Symposium held on the occasion of the 75th Anniversary of the Institute of International Law Kiel, May 17 to 20, 1989), 1989.

Particularism supplies an ontological foundation for prioritizing state-centered interests in the name of preserving public order.

I propose that the translation of universalism to Philippine constitutional lexicon and praxis presents a viable theoretical platform with which to comprehend and maximize the use of international law in the Philippine constitutional system. Universalist constitutionalism advances difficult, but not uncontainable, standards that could usefully guide our communities of judgment towards realizing the fullest rights-respecting, liberal, democratic, and internationalist political-social structures that our constitutional forefathers envisioned. Considering the landmark mechanisms in the 1987 Constitution (exemplified by the grant of vastly-expanded judicial review powers to the Philippine Supreme Court, as well as the broadly-pacifist and purposely-internationalist Incorporation Clause),³ I am of the view that Philippine judges have long had the conceptual tools to recognize the presence of universalist international legal norms in the Philippine constitutional system. The challenge lies in application.

Using a universalism-sensitive reading of the 1987 Constitution, this Article offers a sample deconstruction⁴ of executive privilege, a fictive doctrine that the Philippine President has invoked in recent controversies and legislative investigations involving high-level corruption allegations in relation to government transactions. Executive privilege is an interesting test case for universalist constitutional reading, since the use of the doctrine typifies an assertion of executive power that is inimitably fraught with particularist discretion. Under this doctrine, the President deliberately withholds information in opposition to the public's right to information. In making the judgment to withhold such information, the President usually depends solely on his or her own discretion, which by constitutional fiction on executive power, is supposed to be representative of the 'rationality' of the State. Presumably, the President's non-disclosure of information is made in the best interests of the very same public clamoring for disclosure. Thus, when the President invokes the doctrine of executive privilege, he/she indubitably asserts the supremacy of his/her judgment in a sphere of public reasoning, and ultimately seeks deference from the Judicial Branch against compelled disclosure.⁵ This assertion of executive particularism creates inevitable tensions with universalist rights to information and access to government data that have been expressly-textualized in the 1987 Constitution.⁶

³ Const. (Phil.), art. II, sec. 2: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

⁴ See *Balkin, J.M.*, "Tradition, Betrayal, and the Politics of DeConstruction", pp. 190-206.

⁵ See Articles 19 and 21, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); Article 19, International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

⁶ Const., art. III, sec. 7: "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts,

As this Article contends, closer scrutiny of the particularist defense of ‘executive privilege’ reveals that it is not an immutable legal fiction that could stand in the way of universalist constitutional ethics in political decision-making, given the postcolonial and post-dictatorship structure and ideology of the 1987 Constitution. I theorize that judicial sensitivity to the universalist ideology, design, orientation, and philosophy of the 1987 Constitution, along with a more cogent appreciation of how international law enters the Philippine constitutional system (and how foreign sources should be consistently used) would spell the difference between enforcing the President’s public accountability to the Philippine constituency, instead of judicially tolerating an excess of executive particularism through the misuse of the doctrine of executive privilege.

A. The Constitutionalization of Universalist Rights to Information and Access to Government Data

The Philippine Supreme Court *en banc* unanimously declared the constitutional rights to information and access to government data to be “self-executory” in the 2007 case of *Bantay Republic Act or BA-RA 7941 et al. v. Commission on Elections et al.*⁷ In *Bantay Republic*, the Court characterized the right to information as a “public right, where the real parties in interest are [Filipino] citizens”. Obstruction of a citizen’s right to information entitles him/her to seek its enforcement by mandamus, with “objections on ground of *locus standi*...ordinarily unavailing.” The people’s right to know, according to the Court, is “limited to matters of public concern” and to “transactions involving public interest”, and could also be circumscribed by Congressional legislation. Even if the terms “public concern” and “public interest” elude precise definition, the Court understood them to encompass “a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally whet the interest of an ordinary citizen.” Ultimately, however, the Court reserved to the judicial branch the power to “determine, on a case to case basis, whether or not an issue is of interest or importance to the public”.

The framers of the 1987 Constitution purposely entrusted the limitations on the public’s right to information to two (2) out of the three (3) branches of government: 1) to the Legislature, which is constitutionally-authorized to provide for limitations to the “*right to information on matters of public concern*”, as well as to prescribe the “*reasonable condi-*

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.” Const., art. II, sec. 28: “Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.”

⁷ Bantay Republic Act or BA-RA 7941, et al. v. Commission on Elections et al., G.R. Nos. 177271 and 177314, May 4, 2007 (en banc). See also Teodoro Berdin et al. v. Hon. Eufracio A. Mascariñas, Municipal Mayor, G.R. No. 135928, July 6, 2007; Kilusang Mayo Uno et al. v. The Director General, National Economic Development Authority, et al., G.R. Nos. 167798 and 167930, April 19, 2006 (en banc).

tions” that qualify and/or define the State’s policy of full public disclosure of all “*transactions involving public interest*”; and 2) to the Judiciary, which assesses, on a case to case basis, whether non-disclosure of information is “*of interest or importance to the public*”.

Under the present constitutional regime, however, the Philippine President has problematically sought to interpose the doctrine of executive privilege as a third limitation to the universalist right to information.⁸ It should be clarified that the doctrine of executive privilege exists in the Philippines through judicial recognition of the doctrine’s implied nexus to executive power and the doctrine of separation of powers. Judicial recognition in this sphere of constitutionally-unspecified executive power inevitably augurs delicate problems of definition and scope. This became manifest in a series of controversies between the Executive and Legislative branches that were recently brought to the Philippine Supreme Court. On 28 September 2005, President Gloria Macapagal-Arroyo issued Executive Order No. 464, which, for the first time under the 1987 Constitution, expressed the Executive’s categorical position on the parameters of the doctrine of executive privilege.⁹

⁸ See Commissioner Jose T. Almonte et al. v. Hon. Conrado M. Vasquez et al., G.R. No. 95367, May 23, 1995 (en banc); Francisco I. Chavez v. Presidential Commission on Good Government et al., G.R. No. 130716, December 9, 1998.

⁹ Executive order no. 464: 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 Art. VI, Sec. 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 v. 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:

i. Conversations and correspondence between the President and the public official covered by this executive order (Almonte v. 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, supra; Chavez v. PCGG, G.R. No. 130716, 9 December 1998)

At the time of E.O. 464's issuance, the Philippine Senate was in the process of conducting investigations in aid of legislation, and had issued several subpoenae *ad testificandum* on various executive officials, after controversial reports surfaced on the alleged bribery and fraudulent execution of public infrastructure/procurement contracts with foreign contractors under exceedingly-onerous foreign loan financing arrangements.¹⁰ Challenges to the constitutionality of E.O. 464 were later brought before the Philippine Supreme Court, which, in the landmark case of *Senate of the Philippines et al. v. Eduardo R. Ermita, in his capacity as Executive Secretary and alter-ego, et al.*,¹¹ unanimously resolved to declare only part of E.O. 464 unconstitutional. Upon its promulgation, *Senate of the Philippines et al. v. Eduardo R. Ermita* contained the Court's most comprehensive discussion of the nature and extent of the scope of the doctrine of executive privilege in the Philippines.

Nearly two (2) years later, however, another controversial government procurement contract (again with a foreign contractor under a similar foreign loan financing agreement) sparked another Senate joint committee investigation. In the course of the testimony of the Secretary of the National Economic Development Authority (NEDA) Romulo Neri, the latter revealed that he was offered a bribe to favorably endorse the contract. When Senators put forward questions in relation to the President's involvement in insisting approval of the contract, Neri invoked executive privilege in relation to E.O. 464. After the Senate ordered

iii. Information between inter-government agencies prior to the conclusion of treaties and executive agreements (Chavez v. PCGG, supra.)

iv. Discussion in closed-door Cabinet meetings (Chavez v. PCGG)

v. Matters affecting national security and public order (Chavez v. PCGG)

(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 (AFP) and such other officers who in the judgment of the AFP 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."

¹⁰ See *Cabacungan Jr., Gil C.*, "Senate May Reopen Northrail Probe", Philippine Daily Inquirer, November 13, 2007, *full text available at* http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=100560 (last visited 5 July 2008).

¹¹ *Senate of the Philippines et al. v. Eduardo R. Ermita, in his capacity as Executive Secretary and alter-ego, et al.*, G.R. Nos. 1697777, 169659, 169660, 169667, 169834, and 171246, April 20, 2006 (en banc).

his arrest for refusing to answer its questions, Neri filed a petition with the Philippine Supreme Court invoking the protection of executive privilege. Voting 9-6, the narrow Philippine Supreme Court majority upheld the claim of executive privilege in its March 25, 2008 decision in *Romulo L. Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al.* (hereafter, '*Neri v. Senate*'),¹² which appeared to hold more expansive views of the doctrine. NEDA Secretary Romulo L. Neri has since left the NEDA, but has insisted that 'executive privilege will stay' with him.¹³

Many trees have been felled in the brilliant critiques by Philippine constitutional law luminaries against the Court majority's position in *Neri v. Senate*, most prominent of which are the comprehensive dissenting opinions of Chief Justice Reynato Puno and Associate Justice Antonio T. Carpio.¹⁴ Hardly any other critique can be added to the careful dissection of legislative authority vis-à-vis executive privilege, especially on the historical development of both doctrines in Philippine constitutional law. I refer to E.O. 464, *Senate v. Ermita* and *Neri v. Senate* only to problematize two (2) aspects of judicial reasoning on executive particularist discretion exercised through the doctrine of executive privilege: 1) how the Court majority in *Neri v. Senate* unjustifiably expanded the doctrine of executive privilege in ways that are inconsistent with international normative practice – failing to give due regard to the issue of relative normativity between textualized universalist rights and judicial recognition; and 2) how the majority decision in *Neri v. Senate* presents a stark case of mayhem in the use of foreign sources – reminiscent of former Supreme Court Associate Justice Gregorio Perfecto's classic postwar objections to the misuse of international

¹² Romulo L. Neri v. Senate Committee on Accountability of Public Officers and Investigations, Senate Committee on Trade and Commerce, and Senate Committee on National Defense and Security, G.R. No. 180643, March 25, 2008 (en banc). Reconsideration was denied in Romulo L. Neri v. Senate Committee on Accountability of Public Officers and Investigations, Senate Committee on Trade and Commerce, and Senate Committee on National Defense and Security, G.R. No. 180643, September 4, 2008.

¹³ *Dalangin-Fernandez, Lira*, "Neri: 'Executive Privilege will stay'", 10 July 2008, Philippine Daily Inquirer, available at <http://newsinfo.inquirer.net/breakingnews/nation/view/20080710-147641/Neri-Executive-privilege-will-stay> (last visited 10 July 2008).

¹⁴ Id. at note 11, (Puno, C.J., dissenting opinion; Carpio, J., dissenting opinion.); See also *Panganiban, Artemio V.* (former Chief Justice of the Supreme Court), "Arroyo Supreme Court?", 30 March 2008, Philippine Daily Inquirer, available at <http://opinion.inquirer.net/inquireropinion/columns/view/20080330-127265/Arroyo-Supreme-Court> (last visited 5 July 2008); *Pangalangan, Raul*, "A Democracy of Kept Secrets", 28 March 2008, Philippine Daily Inquirer available at http://opinion.inquirer.net/inquireropinion/columns/view_article.php?article_id=126881 (last visited 5 July 2008); *Bernas, Fr. Joaquin G.*, "An Invitation to Court Greatness", 14 April 2008, Philippine Daily Inquirer, available at http://opinion.inquirer.net/inquireropinion/columns/view_article.php?article_id=130175 (last visited 5 July 2008); *Bernas, Fr. Joaquin G.*, "The limits of 'executive privilege'", 17 February 2008, Philippine Daily Inquirer, available at <http://opinion.inquirer.net/inquireropinion/columns/view/20080217-119534/The-limits-of-executive-privilege> (last visited 10 July 2008).

law.¹⁵ Before doing so, however, I will briefly reconstruct the doctrine of executive privilege from Philippine jurisprudence before E.O. 464, *Senate v. Ermita*, and *Neri v. Senate*, paying attention to the foreign sources that the Court relied upon in describing the contours of executive privilege from pre-E.O. 464 jurisprudence. I then present a synthesis of the unanimous Court's development of the doctrine under *Senate v. Ermita*, and contrast this with the Court majority's re-reading of the doctrine in *Neri v. Senate* – again noting the foreign sources used in these developments. Finally, I show that international law favors a restrictive reading of executive privilege when pitted against the claims of universalist rights (the right to information, freedom of expression, and the right to access to all forms of ideas vital to democratic public reasoning), and that the Court majority in *Neri v. Senate* failed to address issues of constitutional nexus and relative normativity, especially with its apparently subjective, incoherent, and ultimately dangerous use of foreign sources.

B. Governmental Secrecy and the Prerogative to Withhold Information: Pre-E.O. 464 jurisprudence

The issue of government's possession of information, and the validity of government refusal to make such information public, has long antedated the 1987 Constitution. The Philippine Supreme Court confronted this issue in the landmark case of *In the Matter of the Petition for Habeas Corpus of Teodosio Lansang et al. v. Brigadier-General Eduardo M. Garcia et al.*¹⁶, decided under the 1973 Constitution. The petitions in this case were filed after former President Ferdinand Marcos suspended the privilege of the writ of *habeas corpus* shortly after the August 1971 Plaza Miranda bombing. Citing national security threats posed by a resurgent Communist movement, Marcos issued Proclamation No. 889 to suspend the privilege of the writ for "persons presently detained, as well as others who may be hereafter similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed by them or in furtherance thereof, or incident thereto, or in connection therewith." Proclamation No. 889 was amended to refer only to lawless elements' actual commission of acts of rebellion and insurrection, and later, to lift the suspension of the privilege of the writ of *habeas corpus* in some areas.

The petitioners in *Lansang* questioned the legality of their arrest and detention, arguing Proclamation No. 889's unconstitutionality due to the government's arbitrary characteriza-

¹⁵ George L. Tubb et al. v. Thomas E. Griess, G.R. No. L-1325, April 7, 1947 (en banc). Justice Perfecto penned two (2) other dissenting opinions castigating the Court's use and application of international law espousing similar doubt over the structural integrity and Constitutional meaning of the Incorporation Clause. Godofredo Dizon v. The Commanding General of the Philippine Ryukus Command, United States Army, G.R. No. L-2110, July 22, 1948 (dissenting opinion, Perfecto, J.); Co Cham v. Eusebio Valdez et al., G.R. No. L-5, September 17, 1945 (en banc), See (dissenting opinion, Perfecto, J.)

¹⁶ *In the Matter of the Petition for Habeas Corpus of Teodosio Lansang et al. v. Brigadier-General Eduardo M. Garcia et al.*, G.R. Nos. L-33964, L-33965, L-33973, L-33982, L-34004, L-34013, L-34039, L-34265, L-34339, December 11, 1971 (en banc).

tion of the national security situation that comprised the factual basis for suspension of the privilege of the writ of *habeas corpus*. In their defense, government respondents invoked governmental secrecy, stating that in issuing Proclamation No. 889, “*the President of the Philippines acted on relevant facts gathered thru the coordinated efforts of the various intelligence agents of our government, but which the Chief Executive could not at the moment give a full account and disclosure without risking revelation of highly classified state secrets vital to its safety and security; and that the determination thus made by the President is ‘final and conclusive upon the courts and upon all other persons, and partakes of the nature of political questions which cannot be the subject of judicial inquiry.’*”¹⁷

Then-Chief Justice Roberto Concepcion, writing on behalf of the overwhelming Court majority,¹⁸ met the claim of government secrecy with the Court’s (unanimous) finding that it had the “authority to inquire into the existence of factual basis [to suspend the writ] in order to determine constitutional sufficiency.” The Court justified its authority from the primordial character of the fundamental freedoms and rights involved, and the Court’s duty to adjudicate purported “exceptions” thereto:

“Indeed the grant of power to suspend the privilege is neither absolute nor unqualified. The authority conferred by the Constitution, both under the Bill of Rights and under the Executive Department, is limited and conditional. *The precept in the Bill of Rights establishes a general rule*, as well as an exception thereto.

Much less may the assumption be indulged in when we bear in mind that our political system is essentially democratic and republican in character and that the suspension of the privilege *affects the most fundamental element of that system, namely individual freedom*. Indeed, such freedom includes and connotes, as well as demands, the *right of every single member of our citizenry to freely discuss and dissent from, as well as criticize and denounce, the views the policies and the practices of the government and the party in power* that he deems unwise, improper, or inimical to the commonweal, regardless of whether his own opinion is objectively correct or not. The untrammelled enjoyment and exercise of such right – which, under certain conditions, may be a civic duty of the highest order, is vital to the democratic system and essential to its successful operation and wholesome growth and development.”¹⁹

The *Lansang* Court refused to accept, at face value, the government’s claim of ‘privileged information’ as the Chief Executive’s justification for exercising power opposed to basic freedoms in the Bill of Rights. Executive Department and Armed Forces officials were

¹⁷ Id. Italics supplied.

¹⁸ The lone concurring and dissenting opinion came from then Associate (later Chief) Justice Enrique Fernando.

¹⁹ Id. at note 16.

ordered to present such information to the Court during *in camera* proceedings.²⁰ Notably, *Lansang* became the first case that juxtaposed government invocation of secrecy with apparent infringement of constitutionally-guaranteed civil liberties. Operating without the benefit of expanded judicial review powers under the 1973 Constitution (unlike successor Courts in the 1987 Constitution), the *Lansang* Court still actively exercised judicial authority, and did not permit itself to be restrained by the political question when the constitutional issue involved governmental assertion of power at the expense of individual rights.

The Philippine Supreme Court's first opportunity under the 1987 Constitution to revisit the issue of governmental secrecy and the state's prerogative to withhold information arose from *Commissioner Jose T. Almonte et al. v. Honorable Conrado M. Vasquez et al.*²¹ This case involved a petition to annul subpoenas *duces tecum* and other orders of the Ombudsman²², which had required officials of the Economic Intelligence and Investigation Bureau (EIIB) to "produce all documents relating to Personal Services Funds for the year 1988 and all evidence such as vouchers (salary) for the whole plantilla of EIIB for 1998." EIIB Commissioner Jose Almonte opposed disclosure due to important "state secrets". Writing on behalf of the overwhelming Court majority (with only one dissent), Associate Justice Vicente Mendoza immediately clarified that this was not a case of conflict between individual right and governmental power, but rather, the assertion of competing governmental powers between the Office of the Ombudsman and the EIIB:

"To put this case in perspective it should be stated at the outset that it does not concern a demand by a citizen for information under the freedom of information guarantee of the Constitution. Rather, it concerns the power of the Office of the Ombudsman to obtain evidence in connection with an investigation conducted by it vis-à-vis the claim of privilege of an agency of the Government."

The above clarification is significant, because it sets the limited context in which the Court defined the governmental privilege against disclosure of information. Citing an excerpt from *United States v. Nixon*,²³ the Court denominated executive privilege as a "presumptive privilege":

"The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all

²⁰ Following the disclosure, the Court ultimately held that the President did not act arbitrarily in issuing Proclamation No. 889.

²¹ *Commissioner Jose T. Almonte et al. v. Honorable Conrado M. Vasquez et al.*, G.R. No. 95367, May 23, 1995 (en banc).

²² The Office of the Ombudsman is a high Constitutional office designated as "protector of people", and tasked, among others, to investigate and prosecute government officials for corruption, anti-graft and other similar offenses. See Art. XI, CONST. (Phil.).

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

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 considerations justifying a *presumptive privilege for Presidential communications*. *The privilege is fundamental* to the operation of the government and inextricably rooted in the separation of powers under the Constitution.”²⁴

The Court went on to identify other sources of executive privilege in American statutes and jurisprudence, illustrating that secrecy and dispatch interests necessitate entrusting certain information solely to the President. The Court’s discussion of foreign sources showed that the “presumed” delegation of authority to the Executive for withholding information is based on very particular circumstances or contingencies where decision-making appears too sensitive or time-bound (e.g. military matters in *United States v. Reynolds*,²⁵ which involved a military aircraft crash while on a secret mission).

Most importantly, the *Almonte* Court resolved the petition by upholding the constitutional powers of the Ombudsman over the EIIB’s claim of confidentiality. The Court rejected the EIIB’s classification of the information as “state secrets”, since there was no legislative enactment or statute that made such classification. The Court then admitted a greatly-circumscribed *arguendo* discussion on executive privilege, stating that “[e]ven if the documents are treated as presumptively privileged...this Decision would only justify ordering their inspection *in camera* but not their non-production. However, as concession to the nature and functions of the EIIB and just to be sure that no information of a confidential character is disclosed, the examination of records in this case should be made in strict confidence by the Ombudsman himself [citing past Supreme Court practices in *Lansang v. Garcia* and *Marcos v. Manglapus*].”²⁶

Almonte reveals the Court’s highly-restrictive acceptance of executive privilege. The *Almonte* Court chose to exercise its discretion to draw the parameters of executive privilege in a more independent and discretionary manner than the formulation of the doctrine in *United States v. Nixon*. The Court made it clear that it would not immediately accept the government’s classification of information as “confidential”, unless such classification was made by the Legislature through a statute. Even assuming that the information could be classified, the privilege would not extend to absolute non-production of information, but rather, towards *in camera* production of information to the government office (e.g. the Ombudsman) exercising constitutional powers to elicit such information. Finally, *Almonte*

²⁴ Id.

²⁵ 345 U.S. 1 (1953).

²⁶ Commissioner Jose T. Almonte et al. v. Honorable Conrado M. Vasquez et al., G.R. No. 95367, May 23, 1995 (en banc).

did not present any opportunity to pit individual's rights under the Constitution's Bill of Rights against the government claim of privilege.

From *Almonte* up to E.O. 464, the Court did not have any further occasion to squarely rule on the parameters of executive privilege. Instead, it adjudicated two (2) landmark cases – *Francisco I. Chavez v. Presidential Commission on Good Government*²⁷ and *Francisco I. Chavez v. Public Estates Authority et al.*²⁸ – both of which defined the scope of the right to information under the 1987 Constitution but did not strictly involve a claim of presidential or executive privilege. *Francisco I. Chavez v. Presidential Commission on Good Government (PCGG)* was a petition filed to compel the PCGG to “make public all negotiations and agreement/s between the PCGG and the heirs of Ferdinand E. Marcos”, in relation to any ‘settlement’ of the government’s claims of ill-gotten wealth against the Marcoses. Then Associate (later Chief) Justice Artemio Panganiban, writing on behalf of the unanimous First Division of the Court, drew authoritative sources for restrictions on these rights from records of the 1986 Constitutional Commission, Philippine jurisprudence and statutes, to determine the scope of “information” and “public transactions” referred to in Article III, Section 7 and Article II, Section 28 of the 1987 Constitution. While Justice Panganiban acknowledged that there was no Philippine statute that expressly prescribed limitations to individuals’ constitutional rights to information and governmental disclosure of public transactions, he noted that there were some ‘recognized restrictions’ to governmental disclosure, such as “(1) national security matters and intelligence information, (2) trade secrets and banking transactions, (3) criminal matters, and (4) other confidential information”. Justice Panganiban’s *ponencia* did not include any admission of ‘executive privilege’ as wholly-formulated in American jurisprudence. When the unanimous Court exercised judicial discretion to define “limitations” to the constitutional rights to information and governmental disclosure of public transactions, it did so not in deference to American doctrine but rather to the intent of the framers of the 1987 Constitution and the Philippines’ own jurisprudential tradition.²⁹

²⁷ *Francisco I. Chavez v. Presidential Commission on Good Government et al.*, G.R. No. 130716, December 9, 1998.

²⁸ *Francisco I. Chavez v. Public Estates Authority and Amari Coastal Bay Development Corporation*, G.R. No. 133250, July 9, 2002 (en banc).

²⁹ Id.: “Considering the intent of the framers of the Constitution, we believe that it is incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they have decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, though, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the stage when common assertions are still in the process of being formulated or are in the ‘exploratory’ stage. There is a need, of course, to observe the same restrictions on disclosure of information in general, as discussed earlier – such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.” (Italics in the original.)

The same limitations above would be cited in the Court's unanimous *en banc* decision in *Francisco I. Chavez v. Public Estates Authority et al.* The petition in this case sought to compel the Public Estates Authority (PEA) to "disclose all facts on PEA's then on-going renegotiations with Amari Coastal Bay and Development Corporation (AMARI) to reclaim portions of Manila Bay". Writing for the unanimous Court, Associate Justice Antonio T. Carpio wrote a thorough discussion of the scope of the constitutional rights to information and governmental disclosure of public transactions. Distinguishing between information disclosure required by statute and information disclosure to which individuals were entitled pursuant to their constitutional rights in Article III, Section 7 and Article 2, Section 28 of the 1987 Constitution, Justice Carpio significantly referenced *Almonte* in classifying 'privileged information':

"These twin provisions of the Constitution seek to promote transparency in policy-making and in the operations of the government, as well as to provide the people sufficient information to exercise effectively other constitutional rights. These twin provisions are essential to the exercise of freedom of expression. If the government does not disclose its official acts, transactions and decisions to citizens, whatever citizens say, even if expressed without any restraint, will be speculative and amount to nothing. These twin provisions are also essential to hold public officials "at all times...accountable to the people", for unless citizens have the proper information, they cannot hold public officials accountable for anything. Armed with the right information, citizens can participate in public discussions leading to the formulation of government policies and their effective implementation. An informed citizenry is essential to the existence and proper functioning of any democracy...

...The right covers three categories of information which are '*matters of public concern*', namely: 1) official records; 2) documents and papers pertaining to official acts, transactions and decisions; and 3) government research data used in formulating policies. The first category refers to any document that is part of the public records in the custody of government agencies or officials. The second category refers to documents and papers recording, evidencing, establishing, confirming, supporting, justifying or explaining official acts, transactions or decisions of government agencies or officials. The third category refers to research data, whether raw, collated, or processed, owned by the government and used in formulating government policies.

[...] The right to information, however, does not extend to matters recognized as privileged information under separation of powers. [*citing Almonte v. Vasquez*] The right does not also apply to information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law enforcement agencies before the prosecution of the accused, which courts have long

recognized as confidential. [citing *Chavez v. PCGG*] The right may also be subject to other limitations that Congress may impose by law.”³⁰

Both *Chavez* cases, therefore, were occasions for the Court to define the parameters of the constitutional rights to information and governmental disclosure of public transactions, but not in direct opposition to the doctrine of executive privilege. When the Court briefly mentions “privileged information rooted in separation of powers” in *Chavez v. Public Estates Authority et al.*, it did so in relation to the decision of the Court in *Almonte v. Vasquez*, and not to any wholesale importation of the doctrine under *United States v. Nixon*. At this juncture in jurisprudence under the 1987 Constitution, the Court had not yet had the occasion to evaluate the relative assertions of presidential prerogative in the form of secrecy and individual constitutional rights, as it did in *Lansang*. In the carefully-qualified language of *Almonte*, whatever ‘acceptance’ the Court made of the doctrine of executive privilege was greatly restricted. It would not prevent the Court from: 1) determining the correctness of the Executive’s classification of the *nature* of the information (e.g. whether ‘state secret’ or otherwise); and 2) holding, in *arguendo*, that any such ‘presumptive privilege’ would not permit non-production of information, but rather, call for *in camera* inspection.

C. The Direct Clash Between Presidential Prerogative to Withhold Information and Individuals’ Constitutionalized (Universalist) Rights: E.O. 464, *Senate v. Ermita*, and *Neri v. Senate*

E.O. 464 thus became the litmus test for the Court to describe the boundaries of executive privilege in relation to individuals’ constitutionalized (universalist) rights to information and governmental disclosure of public transactions. Issued during pending Senate investigations³¹ on bribery allegations from the Executive’s conclusion of government procurement/infrastructure contracts with foreign contractors, Section 2 of E.O. 464³² cited the *Almonte* and *Chavez* cases to define the nature of information covered by executive privilege as “confidential or classified information between the President and the public officers covered by this executive order.” E.O. 464 generalizes five (5) types of information allegedly rooted in *Almonte* and *Chavez*: 1) conversations and correspondence between the President and the public official covered by E.O. 464; 2) military, diplomatic, and other national security matters which in the interest of national security should not be divulged; 3) information between inter-government agencies prior to the conclusion of treaties and executive agreements; 4) discussion in closed-door Cabinet meetings; and 5) matters affecting national security and public order.

³⁰ *Id.*

³¹ CONST., art. VI, sec. 21: “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.”

³² *Id.*

Senate v. Ermita resolved the constitutionality of E.O. 464's definition and classification of persons and information covered by executive privilege.³³ Constitutional challenges of various petitioner-groups (the Philippine Senate, public interest groups, and individuals) could be dichotomized between grounds of *legislative prerogative* and *individual rights*: 1) the usurpation or encroachment of legislative power of inquiry (*Art. VI, Sec. 1*³⁴ and *Art. VI, Sec. 21*,³⁵) and the separate and distinct legislative authority to conduct "question hour" with Cabinet members (*Art. VI, Sec. 22*);³⁶ and 2) the violation of constitutional rights to information and governmental disclosure of public transactions, in relation to the constitutional policies of transparency in public office and participation in public reasoning (*Art. II, Sec. 28*; *Art. III, Secs. 4 and 7*; *Art. XI, Sec. 1*; *Art. XIII, Sec. 16*).³⁷

E.O. 464 was held "partially" unconstitutional. The Court treated the above-enumerated five (5) categories of information in Section 2(a) of E.O. 464 to be the President's "mere expression of opinion" regarding the nature and scope of executive privilege. Section 1 of E.O. 464 (requiring all heads of department to secure Presidential consent prior to appearances before either House of Congress) was held consistent with the President's constitutional prerogative to control appearances of her Cabinet members during the Legislature's "question hour". The Court then nullified E.O. 464's Section 2(b) (enumerating officials covered by executive privilege under E.O. 464) and Section 3 (requiring the enumerated officials in Section 2(b) to secure Presidential consent before appearing in either House of

³³ Id. at note 11.

³⁴ CONST., art. VI, sec. 1: "The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum."

³⁵ CONST., art. VI, sec. 21: "The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected."

³⁶ CONST., art. VI, sec. 22: "The heads of departments may upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the State or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session."

³⁷ Id. at pp. 254-255. See CONST., art. III, sec. 4: "No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."; CONST., art. XI, sec. 1: "Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives"; CONST., art. XIII, sec. 16: "The right of the people and their organizations to effective and reasonable participation at all levels of social, political and economic decision-making shall not be abridged. The State, shall by law, facilitate the establishment of adequate consultation mechanisms."

Congress) for being mere ‘implied claims of privilege’ that did not provide precise reasons for invoking executive privilege. According to the Court, this omission failed to abide by the jurisprudential parameters of the doctrine of executive privilege. Writing for the unanimous Court, Associate Justice Conchita Carpio-Morales authoritatively described the contours of the doctrine for the first time, and definitively reconciled the doctrine as seen from foreign (primarily American) sources with the state of Philippine jurisprudence on the doctrine.³⁸

The Court’s comprehensive discussion of the doctrine of executive privilege in *Senate v. Ermita* clearly emphasized its restrictive, contingent, and evidence-dependent character as a presumption. For this reason, the use of executive privilege should be viewed circum-

³⁸ Id. [emphasis, italics, and underscoring in the original]: “The phrase ‘executive privilege’ is not new in this jurisdiction. It has been used even prior to the promulgation of the 1986 Constitution. Being of American origin, it is best understood in light of how it has been defined and used in the legal literature of the United States. Schwartz defines executive privilege as ‘the power of the Government to withhold information from the public, the courts, and the Congress’.

Executive privilege is, nonetheless, not a clear or unitary concept. It has encompassed claims of varying kinds. Tribe, in fact, comments that while it is customary to employ the phrase ‘executive privilege’, it may be more accurate to speak of executive *privileges* ‘since presidential refusals to furnish information may be actuated by any of at least three distinct kinds of considerations, and may be asserted, with differing degrees of success, in the context of either judicial or legislative investigations.’

One variety of the privilege, Tribe explains, is the state secrets privilege invoked by U.S. Presidents, beginning with Washington, on the ground that the information is of such nature that its disclosure would subvert crucial military or diplomatic objectives. Another variety is the informer’s privilege, or the privilege of the Government not to disclose the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law. Finally, a generic privilege for internal deliberations has been said to attach to intragovernmental documents, reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. [*Here the Court proceeds to cite a US Supreme Court decision, In re Sealed Case, 121 F. 3d 729, 326 U.S. App. D.C. 276; and Black’s Law Dictionary.*]

That a type of information is recognized as privileged does not, however, necessarily mean that it would be considered privileged in all instances. For in determining the validity of a claim of privilege, the question that must be asked is not only whether the requested information falls within one of the traditional privileges, but also whether that privilege should be honored in a given procedural setting. [*The Court then proceeds to summarize the doctrine in relation to United States v. Nixon, Almonte v. Vasquez, Chavez v. PCGG, and Chavez v. PEA.*]

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

spectly, since it creates an exemption from the constitutional policies favoring and mandating disclosure of information.³⁹

Finally, *Senate v. Ermita* was also resolved on the finding that E.O. 464 did impair the people's constitutional right to information. While the Court was careful to distinguish between the Congressional right to information pursuant to its power of inquiry, it nonetheless acknowledged that E.O. 464, at least in a 'highly qualified sense', facially violated individuals' Constitutional rights to information and governmental disclosure of public transactions.⁴⁰

³⁹ Id: "Section 2(b) in relation to Section 3 virtually provides that, once the head of office determines that a certain information is privileged, such determination is presumed to bear the President's authority and has the effect of prohibiting the official from appearing before Congress, subject only to the express pronouncement of the President that it is allowing the appearance of such official. These provisions thus allow the President to authorize claims of privilege by mere silence. Such presumptive authorization, however, is contrary to the exceptional nature of the privilege. Executive privilege, as already discussed, is recognized with respect to information the confidential nature of which is crucial to the fulfilment of the unique role and responsibilities of the executive branch, or in those instances where exemption from disclosure is necessary to the discharge of highly important executive responsibilities. The doctrine of executive privilege is thus premised on the fact that certain information must, as a matter of necessity, be kept confidential in pursuit of the public interest. The privilege being, by definition, an exemption from the obligation to disclose information, in this case to Congress, the necessity must be of such high degree as to outweigh the public interest in enforcing that obligation in a particular case. In light of this highly exceptional nature of the privilege, the Court finds it essential to limit to the President the power to invoke the privilege. She may of course authorize the Executive Secretary to invoke the privilege on her behalf, in which case the Executive Secretary must state that the authority is 'By order of the President', which means that he personally consulted with her. The privilege being an extraordinary power, it must be wielded only by the highest official in the executive hierarchy. In other words, the President may not authorize her subordinates to exercise such power. There is even less reason to uphold such authorization in the instant case where the authorization is not explicit but by mere silence. Section 3, in relation to Section 2(b), is further invalid on this score."

⁴⁰ Id.: "E.O. 464 is concerned only with the demands of Congress for the appearance of executive officials in the hearings conducted by it, and not with the demands of citizens for information pursuant to their right to information on matters of public concern. Petitioners are not amiss in claiming, however, that what is involved in the present controversy is not merely the legislative power of inquiry, but the right of the people to information.

There are, it bears noting, clear distinctions between the right of Congress to information which underlies the power of inquiry and the right of the people to information on matters of public concern. For one, the demand of a citizen for the production of documents pursuant to this right to information does not have the same obligatory force as a subpoena duces tecum issued by Congress. Neither does the right to information grant a citizen the power to exact testimony from government officials. These powers belong only to Congress and not to an individual citizen.

Thus, while Congress is composed of representatives elected by the people, it does not follow, except in a highly qualified sense, that in every exercise of its power of inquiry, the people are exercising their right to information.

To the extent that investigations in aid of legislation are generally conducted in public, however, any executive issuance tending to unduly limit disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid

Senate v. Ermita emphasizes that the unanimous Court maintained the restrictive acceptance of the doctrine of executive privilege as determined in *Almonte*. To elicit the content of the doctrine as applicable to Philippine jurisdiction, the Court appeared remarkably transparent in its method for using foreign sources, referring to the American origins of the doctrine but also noting the limited transmission of the doctrine under the existing line of Philippine jurisprudence on the government's right to withhold information. With this objective methodology, the Court arrived at its finding that Sections 2(b) and 3 of E.O. 464 were unconstitutionally indiscriminate, by affording a blanket invocation of the privilege by executive officials, regardless of the nature of the information sought, and consequently resulting in the impairment of legislative power as well as constitutional rights to information. By so doing, the Court raised the conceptual threshold for the permitted use of executive privilege.

In March 2008, Philippine President Gloria Macapagal-Arroyo revoked E.O. 464.⁴¹ The revocation came on the heels of massive public protests against the President in late 2007, this time, on allegations of bribery and corruption when, without public bidding, a company from the People's Republic of China (ZTE Corporation) was awarded the lucrative contract to set up a "National Broadband Network" (NBN) for all Philippine government offices. Three (3) Senate committees then commenced a joint investigation of the circumstances surrounding the execution and financing of the NBN contract. When then-NEDA Secretary Romulo L. Neri was called upon to testify, he openly disclosed that the Chairman of the Commission on Elections had offered him a bribe to favorably endorse the NBN contract. Neri also confirmed that he had informed the President about the bribe offer. The disclosure prompted Senators to ask three (3) questions (*e.g. whether President Arroyo followed up the NBN project with Neri; whether she directed Neri to prioritize it; and whether she Arroyo directed Neri to approve the project*), to all of which Neri invoked executive privilege. Neri would thereafter refuse to attend any further Senate hearings. The Office of the President, through Executive Secretary Eduardo Ermita, later submitted a letter to the Senate, asserting executive privilege for Neri to protect presidential communications that could impair diplomatic and economic relations with China.⁴²

of legislation, is presumed to be a matter of public concern. The citizens are thereby denied access to information which they can use in formulating their own opinions on the matter before Congress – opinions which they can then communicate to their representatives and other government officials through the various legal means allowed by their freedom of expression.

The impairment of the right of the people to information as a consequence of E.O. 464, is, therefore, in the sense explained above, just as direct as its violation of the legislature's power of inquiry."

⁴¹ See Memorandum Circular Nos. 151 and 108, March 6, 2008.

⁴² "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 will

The Senate disputed the claim of privilege and ordered Neri's arrest. Neri petitioned the Philippine Supreme Court to enjoin his arrest. Writing on behalf of the narrow Court majority (9 votes against 6), Associate Justice Teresita De Castro declared that Neri was entitled to the claim of executive privilege in its thirty-five page decision in *Neri v. Senate*.⁴³ The *Neri* majority heavily drew from an astonishing array of foreign sources (specifically, pre-war and postwar US Supreme Court decisions) to expand the content of the doctrine of executive privilege, with the sudden conclusion that the "majority of the[se] jurisprudence have found their way in our jurisdiction", and without even discussing the comparability of the fact-situations in these foreign cases to Neri's petition.⁴⁴

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."

43 Id.

44 Id.: "At this juncture, it must be stressed that the revocation of E.O. 464 does not in any way diminish our concept of executive privilege. This is because this concept has Constitutional underpinnings. Unlike the United States which has further accorded the concept with statutory status by enacting the *Freedom of Information Act* and the *Federal Advisory Committee Act*, the Philippines has retained its Constitutional origination, occasionally interpreted by this Court in various cases. The most recent of these is the case of *Senate v. Ermita* where this Court declared unconstitutional substantial portions of E.O. 464. In this regard, it is worthy to note that Executive Ermita's Letter dated November 15, 2007 limits its bases for the claim of executive privilege to *Senate v. Ermita*, *Almonte v. Vasquez*, and *Chavez v. PEA*. There was never a mention of E.O. 464.

While these cases, especially *Senate v. Ermita*, have comprehensively discussed the concept of executive privilege, we deem it imperative to explore it once more in view of the clamor for this Court to clearly define the communications covered by executive privilege.

The *Nixon* and *post-Watergate* cases established the broad contours of the presidential communications privilege. In *United States v. Nixon*, the U.S. Court recognized a great public interest in preserving 'the confidentiality of conversations that take place in the President's performance of his official duties'. It thus considered presidential communications as 'presumptively privileged'. Apparently, the presumption is founded on the 'President's generalized interest in confidentiality'. The privilege is said to be necessary to guarantee the candor of presidential advisors and to provide "the President and those who assist him...with freedom 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."

In *In Re: Sealed Case*, the US Court of Appeals delved deeper. It ruled that there are two (2) kinds of executive privilege: one is the presidential communications privilege, and the other is the deliberative process privilege. The former pertains to 'communications, documents, or other materials that reflect presidential decision-making and deliberations that the President believes should remain confidential'. The latter includes 'advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated'.

Accordingly, they are characterized by marked distinctions. Presidential communications privilege applies to decision-making of the President while the deliberative process privilege, to decision-making of executive officials. The first is rooted in the Constitutional principle of separation of powers and the President's unique Constitutional role; the second on common law privilege.

The *Neri* majority's definition of 'elements' of presidential communications privilege are direct transplants from United States jurisprudence, having no presence whatsoever in *Almonte's* limited definition of executive privilege. (Contrary to the Court majority's citation in *Neri*, the *Chavez* cases did not even involve a claim of presidential or executive privilege.) Without offering any justification for importing the 'test' of presidential communications privilege from American jurisprudence, the *Neri* majority departed from the thorough, nuanced, and settled methodology of the unanimous Court in *Senate v. Ermita* which declared a restrictive reading of executive privilege. Citing a plethora of American jurisprudence without showing their applicability to the fact-situation in *Neri* or the normative space of executive privilege as defined in 1987 Constitution-jurisprudence, the *Neri* majority applied this synthetic 'test' to characterize the three (3) questions to *Neri* as embraced by the 'presidential communications privilege'.⁴⁵

[The Court majority proceeds to cite other American cases such as In Re: Sealed Case, Judicial Watch Inc. v. Department of Justice, United States v. Reynolds, Chicago Airlines Inc. v. Waterman Steamship Corporation, Totten v. United States, Roviaro v. United States, Friedman v. Bache Halsey Stuart Shields Inc., United States v. Curtiss-Wright Export Corp. – without discussing the factual situations in any of these cases, much less the constitutional design and the structure of Presidential powers under the US Constitution.]

Majority of the above jurisprudence have found their way in our jurisdiction. In *Chavez v. PCGG*, this Court held that there is a 'governmental privilege against public disclosure with respect to state secrets regarding military, diplomatic, and other security matters'. In *Chavez v. PEA*, there is also a recognition of the confidentiality of Presidential conversations, correspondences, and discussions in closed-door Cabinet meetings. In *Senate v. Ermita*, the concept of presidential communications privilege is fully discussed.

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

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

1) The protected communication must relate to a 'quintessential and non-delegable presidential power'.

2) The communication must be authored or 'solicited and received' by a close advisor of the President or the President himself. The judicial test is that an advisor must be in 'operational proximity' with the President.

3) The presidential communications privilege remains a qualified privilege that may be overcome by a showing of adequate need, such that the information sought 'likely contains important evidence' and by the unavailability of the information elsewhere by an appropriate investigating authority."

⁴⁵ Id.: "Using the above elements, we are convinced that, indeed the communications elicited by the three (3) questions are covered by the presidential communications privilege. First, the communications relate to a 'quintessential and non-delegable power' of the President, i.e. the power to enter into an executive agreement with other countries. This authority of the President to enter into executive agreements without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence. Second, the communications are 'received' by a close advisor of the

What appears readily observable from the *Neri* majority's application of an American-derived 'test' for the validity of executive privilege, is the summary characterization of the nature of the information sought (e.g. answers to the questions of *whether President Arroyo followed up the NBN project with Neri; whether President Arroyo directed Neri to prioritize it; and whether President Arroyo directed Neri to approve the project*) as somehow tied up with the President's foreign relations power to enter into an executive agreement. This characterization is belied by no less than the Office of the President's own 21 April 2007 press release, which states that the President had "stood as witness to the signing of five economic and trade agreements between the Philippine government and China. One of these agreements is on the national broadband network (NBN) project with the Zhong Xing Telecommunication Equipment Company Limited (ZTE)".⁴⁶ Clearly, the NEDA Secretary's endorsement of the NBN contract (and any information in relation thereto) was not a precondition for the President to be able to execute an executive agreement with the People's Republic of China. By her Office's own admission, the President had already executed the executive agreement, and as such, her foreign policy powers could not at all be implicated in the questions the Senate asked of Neri. Contrary to the Court's methodology in *Almonte* and *Lansang*, it thus appeared that the *Neri* majority simply accepted the Executive's characterization of the nature of the information sought, without at all discussing the factual (much less normative) basis for such characterization.

The *Neri* majority's incoherence in using foreign sources (e.g. American jurisprudence) is also seen in asymmetries within the decision. For example, while the *Neri* majority fully relied on *United States v. Nixon* to establish the 'test' or elements for a valid claim of 'presidential communications privilege', they would later (selectively) declare that a further pronouncement in *Nixon* ('*a demonstrated, specific need for evidence in a pending criminal trial...outweighs the President's generalized interest in confidentiality*') was 'inappli-

President. Under the 'operational proximity' test, petitioner can be considered a close advisor, being a member of President Arroyo's cabinet. And third, there is no adequate showing of a compelling need that would justify the limitation of the privilege and of the unavailability of the information elsewhere by an appropriate investigating authority.

The third element deserves a lengthy discussion.

United States v. Nixon held that a claim of executive privilege is subject to balancing against other interest. In other words, confidentiality in executive privilege is not absolutely protected by the Constitution.

The foregoing is consistent with the earlier case of *Nixon v. Sirica* where it was held that presidential communications are presumptively privileged and that the presumption can be overcome only by mere showing of public need by the branch seeking access to conversations. The courts are enjoined to resolve the competing interests of the political branches of the government 'in the manner that preserves the essential functions of each Branch'. Here, the record is bereft of any categorical explanation from respondent [Senate] Committees to show a compelling or critical need for the answers to the three (3) questions in the enactment of a law."

⁴⁶ See "Timeline: Exposing the ZTE Overprice", 7 February 2008, Newsbreak, available at http://newsbreak.com.ph/index.php?option=com_content&task=view&id=4155&Itemid=88889296 (last visited 5 July 2008).

cable' because the facts in *Nixon* were admittedly different. The *Neri* majority did not only disregard the well-publicized fact that there was a pending criminal investigation by the Office of the Ombudsman on the NBN project,⁴⁷ but it conceded that *Nixon's* reading of executive privilege involved factual and legal circumstances patently different from *Neri*. It is thus baffling that the *Neri* majority could afford to import a 'test' (e.g. the validity of a claim of presidential communications privilege) wholesale from an American case already admitted to have different factual and legal contours.

Finally, what stands glaring from the *Neri* majority's profuse citation of American jurisprudence is the absence of any comparison on the nature of presidencies under the 1787 United States Constitution vis-a-vis the 1987 Philippine Constitution. Loosely citing both prewar and postwar American cases, the *Neri* majority overlooked the 1787 United States Constitution's design favoring a strong Chief Executive, with express and implied presidential powers having taken on corresponding common law developments in American constitutional history. This American design was not wholly-replicated in the the post-colonial, post-dictatorship, and universalist 1987 Constitution's vision of Philippine presidential powers. Wary of the strong executive rule experienced under Marcos in the 1973 Constitution, the 1986 Constitutional Commissioners sedulously diluted many of the Philippine president's powers in the 1987 Constitution with legislative or judicial checks that do not have counterpart provisions in the United States 1787 Constitution. These include, among others: 1) Congressional authority to revoke the President's proclamation of martial law or suspension of writ of habeas corpus, "which revocation shall not be set aside by the President"; 2) the Supreme Court's authority to "review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof"; 3) the requirement of prior Monetary Board concurrence before the President can contract or guarantee foreign loans; and 4) the requirement of concurrence by at least two-thirds of the Senate before any treaty or international agreement could be valid and effective.⁴⁸

For the *Neri* majority to simply lift doctrinal extracts from American cases in order to set up the definitive test for a valid claim of 'presidential communications privilege' – which had hitherto never existed under the *Almonte* Court's and *Senate v. Ermita* Court's restrictive acceptance of executive privilege – was plainly an exercise in judicial ideology. It is an exercise all the more troubling with the *Neri* majority's lack of discussion on the methodology used for citing foreign sources. This starkly contrasts with *Senate v. Ermita*, where the unanimous Court more rigorously reconciled and located foreign sources alongside the existing line of Philippine jurisprudence from *Almonte* onwards. *Senate v. Ermita* attests that the unanimous Court was able to trace the contours of the doctrine of executive

⁴⁷ See "FG Arroyo attends Ombud probe on NBN mess", 5 March 2008, Sun Star Online, available at <http://www.sunstar.com.ph/static/net/2008/03/05/fg.arroyo.attends.ombud.probe.on.nbn.mess.html> (last visited 5 July 2008).

⁴⁸ CONST. (Phil), art. VII, secs. 18, 20, and 21.

privilege as specifically applicable to Philippine jurisdiction. The regrettably loose and opaque judicial methodology of the *Neri* majority, on the other hand, provides the opening for Kissinger's (in)famous criticism that we are moving from the "tyranny of governments...to the tyranny of courts."⁴⁹

D. The Universalist Right to Information and Meaningful Democratic Participation: *Neri v. Senate* and International Practice

The *Neri* majority had the unique opportunity to directly adjudicate the relative 'weight' of executive privilege (as a derivation from the constitutional doctrine of separation of powers) as opposed to (constitutionally-textualized) individual rights to information and governmental disclosure of public transactions. Instead, they chose to bypass the claim of constitutional right by stating that the Senate could not invoke it on behalf of their (national) constituents.⁵⁰ The *Neri* majority glossed over the careful language of the unanimous Court in *Senate v. Ermita*, which already admitted that E.O. 464 violated the constitutional right to information "as a consequence", even if in a "highly qualified sense". (Interestingly, the *Neri* majority's refusal to accept the Senate's invocation of the right to information in their private capacities, and/or on behalf of their national constituents,⁵¹ also departed from the Court's analogously liberal position permitting any member of the legislature to sue for "*derivative but nonetheless substantial injury*" caused by acts of the Executive.⁵²) It was well within the discretion of the *Neri* majority, considering the Court's oft-repeated description of its role as "guardians of the constitution and individuals' fundamental rights",⁵³ to directly adjudicate the claimed violation of individuals' constitutional rights to information and governmental disclosure of public transactions, especially since it had already done so under a similar factual setting in *Senate v. Ermita*.

⁴⁹ Kissinger, Henry A., "The Pitfalls of Universal Jurisdiction", *Foreign Affairs*, July/August 2001.

⁵⁰ Id.: "More than anything else, though, the right of Congress or any of its Committees to obtain information in aid of legislation cannot be equated with the people's right to public information. The former cannot claim that every legislative inquiry is an exercise of the people's right to information. The distinction between such rights is laid down in *Senate v. Ermita*. [...] The members of respondent Committees should not invoke as justification in their exercise of power a right properly belonging to the people in general. This is because when they discharge their power, they do so as public officials and members of Congress. Be that as it may, the right to information must be balanced with and should give way, in appropriate cases, to Constitutional precepts particularly those pertaining to delicate interplay of executive-legislative powers and privileges which is the subject of careful review by numerous decided cases."

⁵¹ Philippine Senators are elected nationally by popular vote. See CONST., art. VI, sec. 2.

⁵² See *Philippine Constitution Association et al. v. Hon. Salvador Enriquez as Secretary of Budget and Management*, G.R. Nos. 113105, 113174, 113766, 113888, August 19, 1994 (en banc).

⁵³ See *Integrated Bar of the Philippines v. Hon. Ronaldo B. Zamora, et al.*, G.R. No. 141284, August 15, 2000 (en banc); See also Puno, J., concurring opinion.

The *Neri* majority neglected to consider the constitutional importance of the rights to information and governmental disclosure of public transactions. Not only are these rights purposely enshrined in Constitutional text (as opposed to the doctrine of executive privilege which exists only through judicial recognition of its presumed 'derivation' from the doctrine of separation of powers), but these rights are also comparable with international rights conceptions, particularly in the Universal Declaration of Human Rights (UDHR), which includes the basic right to receive and have access to information held by government authorities. Arguably, these conceptions under the UDHR attained an important quality of legality in Philippine jurisdiction when the Court ruled that the UDHR is deemed 'incorporated as part of the law of the land'.⁵⁴ Moreover, the right to information is an international legal standard similarly contained in state obligations under the United Nations Charter, the major human rights treaties, regional human rights instruments, and corresponding international practice.⁵⁵ Contemporary international normative practice disfavors states' arbitrary withholding of information, in view of the fundamental importance of the individual's access to such information to fully and meaningfully participate in democratic processes and public reasoning.⁵⁶

The persuasiveness of *Neri v. Senate* thus suffers from paucity of discussion on the critical issue of relative normativity. The *Neri* majority neglected to take into consideration the undisputed constitutional status of the universalist rights to information and access to government information on public transactions such as the NBN project.⁵⁷ This is distinct from the authoritative basis for executive privilege, which, as the *Almonte* Court emphasized, existed as a judicially-contrived derivative of the doctrine of separation of powers. It is precisely because of the precarious nature of the authoritative basis for the doctrine of executive privilege that the unanimous Court in *Senate v. Ermita* accepted the doctrine only restrictively as a "presumptive privilege". Without establishing the constitutional nexus of the doctrine of executive privilege, the *Neri* majority simply imported a 'test' – entirely-culled from American jurisprudence at that – to determine that the information sought from *Neri* was covered by 'presidential communications privilege'. Why this American 'test' was even at all persuasive or binding, as against the explicit claims of constitutionalized univer-

⁵⁴ Boris Mejoff v. The Director of Prisons, G.R. No. L-4254, September 26, 1951 (en banc); Victor Borovsky v. The Commissioner of Immigration and the Director of Prisons, G.R. No. L04352, September 28, 1951; Government of Hongkong Special Administrative Region v. Hon. Felixberto T. Olalia Jr. and Juan Antonio Muñoz, G.R. No. 153675, April 19, 2007 (en banc).

⁵⁵ Hoffman, Geoffrey A., "In Search of An International Human Right to Receive Information", 25 Loy. L.A. Int'l & Comp. L. Rev. 165 (Spring 2003); See also Roberts, Alasdair, "National Security and Open Government", 9 Geo. Pub. Pol'y Rev. 69 (Spring 2004).

⁵⁶ See Perriett, Jr., Henry H. and Lhulier, Christopher J., "Information Access Rights Based on International Human Rights Law", 45 Buff. L. Rev. 899 (Fall 1997).

⁵⁷ Given the terms of the foreign financing structure for the NBN project, Filipino taxpayers' debt burden would significantly increase over the next decade.

salist rights to information and governmental disclosure of public transactions, was left unexplained by the *Neri* majority.

A final argument against the *Neri* majority's decided expansion of executive privilege is its frontal contradiction with the universalist design, orientation, and philosophy of the 1987 Constitution. The 1987 Constitution was deliberately written by the 1986 Constitutional Commissioners under terms emphatic of individual rationality over state prerogative, and more so, especially skeptical of government assertion of power that could not be subjected to the open scrutiny of public reasoning and fundamental human dignity values. The 'strong president' model of the Philippines' 1935 Constitution gave way to the 1987 Constitution's more diffuse system of moderated public power – one that transparently operates under various institutions that safeguard popular sovereignty and individual participation in democratic processes. This universalist constitutional design cannot be in any way compatible with the broad 'test' of 'presidential communications privilege' under American jurisprudence, which was designed to contemplate inordinately-vast presidential powers under the 1787 United States Constitution. Unlike her American counterpart, the Philippine President purposely does not enjoy a plenitude of unchecked and politically-uncontrollable powers under the 1987 Constitution.

The 1987 Constitution itself entrenches the singular importance of the rights to information and government disclosure of public information by vesting only one (1) institution with the authority to regulate and limit this right: the *Legislature*. While the *Neri* majority identified various statutory regulations on the right to information,⁵⁸ it merely concluded, without any explanation, that the information sought from *Neri* "belong[s] to such kind". How information on whether the President "*followed up the NBN project*", "*directed [Neri] to prioritize it*", or "*directed [Neri] to approve it*", suddenly amounted to the 'official' information contemplated by the Legislature in its statutes is again another ideological leap that the *Neri* majority omitted to explain. The *Neri* majority could not have assumed the authority to (indirectly) create its own limitation to the rights to information and governmental disclosure of public transactions, by expanding the doctrine of 'executive privilege' – with such an expansion based on no less than inapplicable American jurisprudence that originated under a much-stronger presidential model than the Philippine presidency under

⁵⁸ The Court majority cited the following: 1) Sec. 7 of Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officers and Employees ("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..."); 2) Art. 229 of the Revised Penal Code (the crime of revelation of secrets by an officer); 3) Sec. 3(k) of Republic Act No. 3019, or the Anti-Graft and Corrupt Practices Act (penalizing as a corrupt practice the act of divulging valuable information of a confidential character); and 4) Sec. 24(e), Rule 130 of the Revised Rules of Evidence (privileged communications made in official confidence when the Court finds that the public interest would suffer by the disclosure).

the 1987 Constitution.⁵⁹ Perhaps what is ultimately most disturbing about *Neri v. Senate* is how it obliquely left the door open for further entrenchment of executive particularist discretion. When the *Neri* majority effectively declared that “[w]hat our Constitution considers as belonging to the larger concept of executive privilege” operates as a limitation to the constitutionalized universalist rights to information and governmental disclosure of public transactions, the narrow *Neri* majority appeared to engage in open-ended judicial policy-making in abandonment of our universalist 1987 Constitution.

Executive privilege, as broadly vindicated by the *Neri* majority, is an especially dangerous form of executive particularist discretion. Unlike executive immunity that only imperils after-the-fact accountability for the executive’s potential human rights violations, executive privilege is an automatic shield that permits the executive to wield public power that is, by and large, unseen and unheard. It is the ultimate displacement of individual rationality, since executive privilege vests the President with a sphere where her rationality governs entirely and her discretion fully reigns supreme.

⁵⁹ As an aside, it might also be quaint for the *Neri* majority – so reliant on the scope and status of executive privilege under American jurisprudence – to note that American legal scholars have long pointed out the deteriorating viability of the executive privilege doctrine in American Constitutional law. See Kitrosser, Heidi, “Secrecy and Separated Powers: Executive Privilege Revisited”, 92 Iowa L. Rev. 489 (February 2007). Kitrosser theorizes that the traditional ‘judicial balancing test’ in *United States v. Nixon* (and its succeeding progeny of executive privilege cases) is an ‘inappropriate’ response to the issue of governmental secrecy, since it tends to overlook the ‘special Constitutional significance’ of information access in the United States Constitution. Kitrosser contends that the structure and history of the US Constitution supports an application of the privilege only for “shallow and politically checkable secrecy” that still meets legislative openness requirements, as where the “apparatus for information control between [government] branches should be such as to funnel information, to the extent possible, into a state of minimal to very shallow secrecy and away from a state of minimal to very deep secrecy”. (A very shallow secret is defined as a “secret, the existence and basic nature of which are known, even if the precise information that comprises the secret itself is not disclosed.” Minimally shallow or minimally deep secrecy are “states of affair in which the existence of at least some secrets is not known or easily discoverable, but in which the policy of secrecy is itself known”. Very deep secrecy is “one in which even secrecy policies are generally unknown”). In support of her argument, Kitrosser revisits the concept of openness as the “presumptive Constitutional norm in inter-branch and government-populace relations”, showing that US Constitutional history ‘evolved...toward direct, rather than indirect, popular sovereignty’, emphasizing public dialogue with only an ‘occasional need for secrecy’. US Constitutional structure and history situates acceptance only of shallow and politically-checkable secrecy, which is manifested in the Legislature’s access to such information:

“The statutory process is the most intuitive means to subject presidential secrecy to a public process of political questioning and consideration. As discussed earlier, the legislative process is designed to ensure relative openness and deliberation among the political branches and between those branches and the people. The legislative process thus places the parameters of openness mandates and debate about them in the sunlight, even as the policies themselves permit some secrecy. Yet it remains important to deem statutory access requirements the final word in the face of executive privilege claims because constitutional principles demand it, and, more concretely, because such status allows for the creation of a comprehensive and reliable framework to keep executive secrecy shallow and politically checkable.”

The expansive reading of executive privilege in *Neri v. Senate* thus transforms our political “communities of judgment” to a ‘community’ of one. In practical terms, this means that the President’s involvement in the implementation of a government procurement contract with a foreign contractor can never be examined, and Filipinos are never to know what political powers, if any, were brought to bear in the approval of a contract already disclosed to have been seriously tainted with corruption and illegality. Neither are Filipinos supposed to know what the President said or did when informed that the multi-billion dollar foreign-financed contract was being ‘mediated’ by public officers peddling bribes. Effectively, the *Neri* majority yielded Filipinos’ sphere of political judgment-making – ground that has long been hallowed in our Bill of Rights and liberal democratic order – over to a presumed supremacy of Presidential discretion. In more general terms, the *Neri* majority subordinated the direct claims of popular sovereignty, through expressly-constitutionalized universalist rights, to nothing more than a legal fiction (“executive privilege”) that was only supposed to be exercised in the public interest.⁶⁰ What “public interest” could be served through non-disclosure of information as to whether the President “followed up the NBN project”, “directed [Neri] to prioritize it”, or “directed [Neri] to approve it” – is the final ideological leap that *Neri* majority chose not to explain.

The *Neri* majority’s insistence on ungovernable secrecy for the governor, through “[w]hat our Constitution considers as belonging to the larger concept of executive privilege”, suggests that the Philippine constitutional system still retains a space where there is a ‘disjunction’ between the value of individual freedom and the shaping of the sociopolitical realm through public order. This illusory point of separation between individual liberties and public order should not be countenanced under our universalist 1987 Constitution.⁶¹

⁶⁰ Breckenridge, Adam Carlyle, *The Executive Privilege: Presidential Control Over Information*, University of Nebraska Press, 1974 ed., pp. 23-70.

⁶¹ See Shmueli, Efraim, “The Right to Self-Realization and Its Predicaments”, in Alan S. Rosenbaum (ed.), *The Philosophy of Human Rights: International Perspectives*, Greenwood Press, 1980, pp. 151-165 (1980 ed., Greenwood Press): “Liberties are compromises between the conditioning interests of individuals and groups in the sociopolitical marketplace, and the radical, ‘pure’ ideas conceived as legitimate timeless postulates. Liberties bear the scars of this struggle both in the history of their development and in their actual performances. They were born on the crossroads and carry within themselves the inconvenience of mediators closely bound to a variety of interests, thus bowing to private and public necessities, but also lifting their eyes to brighter and more universal and independent claims. Liberties express precisely the precarious, transitory equilibrium that can always be overrun by radical demands in the name of unconditioned freedom, or decreased, or even be totally abolished, in the name of inevitable necessities. As participants of the two worlds, they represent the experience of the risks of complex sociopolitical structures and the transitory stabilities of public Constellations. They derive their pathos from the claims of radical freedom and their sobriety from the prosaic necessities of compromise.”