Sub Judice and Judicial Privilege in the Impeachment

Anthony Edsel Conrad F. Tupaz[*]
Ira Paulo A. Pozon[**]

I. INTRODUCTION 707
II. *SUB JUDICE*.. 709

[*] '10 Advanced Program in International Legal Studies, Stanford Law School; '08 LL.M., Harvard Law School; '03 J.D., *with honors* (St. Thomas More Awardee), Ateneo de Manila University School of Law. The Author served as a private prosecutor for the House of Representatives Prosecution Panel during the Impeachment Trial of Chief Justice Renato C. Corona. He is the Founder and Managing Partner of Tupaz & Associates. The Author teaches subjects on comparative and international law at the De La Salle University-Far Eastern University Master of Business Administration-Juris Doctor Dual Degree Program and at the Philippine Christian University College of Law. He is also a contributor of JURIST and The Huffington Post. He was the Managing Technical Editor of the 22d volume of the *Harvard Human Rights Journal* and is a Fellow at the Harvard Law School Program on the Legal Profession. The Author also taught at the New England School of Law in Boston, Massachusetts. He was previously an Editor and Staff Member of the *Ateneo Law Journal*. His past works published in the *Journal* include: *The Mindanao Question: Constitutional Dialogue in Southern Philippines*, 54 ATENEO L.J. 1 (2009); *Constitutional Courts in Divided Societies: A Call for Scholarship on International Intervention in Constitutional Law and Politics*, 53 ATENEO L.J. 324 (2008); *Deliberative Democracy and Weak Courts: Constitutional Design in Nascent Democracies*, 53 ATENEO L.J. 343 (2008); *Self-Determination as "Defined" Under the United Nations Draft Declaration on the Rights of Indigenous Peoples: Secession or Autonomy?*, 51 ATENEO L.J. 1039 (2007); *Ruiz v. Court of Appeals: A Moral Hazard*, 49 ATENEO L.J. 982 (2004); *A Synthesis on the Colloquium on Indigenous Peoples*, 47 ATENEO L.J. 775 (2002); & *The People Power and the Supreme Court in Estrada v. Arroyo*, 47 ATENEO L.J. 8 (2002). He previously co-wrote *Expatriates and Retirees Coming to the Philippines: Giving Up U.S. Citizenship and the U.S. Exit Tax*, 56 ATENEO L.J. 1 (2011) with Robert L. Wolff.

[**] '09 J.D., Far Eastern University; '08 M.B.A., De La Salle University. The Author serves as Legal Counsel to the Vice President of the Republic of the Philippines, Hon. Jejomar C. Binay. He was also appointed by the Vice President to head the Special Concerns Unit of the Office of the Vice President and to be deputy head of the Vice President's Office for Foreign Affairs (VPFA). He currently teaches at the Pamantasan ng Lungsod ng Maynila College of Law and the Universidad de Manila College of Paralegal Studies. He is also a contributor of JURIST and The Huffington Post.

Cite as 57 ATENEO L.J. 706 (2012).

III. JUDICIAL PRIVILEGE 714
IV. THE VALENTINE'S DAY RESOLUTION 720
V. VIEW OF THE HOUSE PROSECUTION 723
VI. SEPARATION OF POWERS, PRINCIPLE OF COMITY, AND JUDICIAL PRIVILEGE 724
VII. THE POLICY OF FULL PUBLIC DISCLOSURE AND THE RIGHT OF THE PUBLIC TO INFORMATION 727
VIII. MINUTES OF THE RAFFLE AND APPOINTMENT OR ASSIGNMENT OF THE MEMBER-IN-CHARGE 729
IX. CONCLUSION 743

I. INTRODUCTION

The year 2012 was historic for constitutional politics in the Philippines. Since the enactment of the 1987 Constitution, the impeachment trial of Chief Justice Renato C. Corona is the third instance[1] of an official who had been validly impeached, the second case to go to trial,[2] and the first impeachment case actually resolved by the Senate, sitting as an impeachment court, through a decision.[3]

---

1. President Joseph E. Estrada, Ombudsman Merceditas N. Gutierrez, and Chief Justice Renato C. Corona were impeached in November 2000, March 2011, and December 2011, respectively. *See generally* Inquirer Research, *Fast Facts: Estrada Impeachment Trial*, PHIL. DAILY INQ., Jan. 16, 2012, *available at* http://newsinfo.inquirer.net/128607/fast-facts-estrada-impeachment-trial (last accessed Nov. 15, 2012); Rio Rose Ribaya, *House OKs Gutierrez impeach move*, MANILA BULL., Mar. 1, 2011, *available at* http://www.mb.com.ph/node/306933/hou (last accessed Nov. 15, 2012); & Andreo C. Calonzo, Supreme Court Chief Justice Renato Corona impeached, *available at* http://www.gmanetwork.com/news/story/241463/news/nation/supreme-court-chief-justice-renato-corona-impeached (last accessed Nov. 15, 2012).
2. The impeachment of President Estrada and Chief Justice Corona went to trial before the Senate of the Republic of the Philippines sitting as an Impeachment Court. *See generally* Inquirer Research, *supra* note 1 & Jonathan De Santos, *Corona impeachment trial begins*, SUN STAR, Dec. 14, 2011, *available at* http://www.sunstar.com.ph/ breaking-news/2011/12/14/corona-impeachment -trial-begins-195772 (last accessed Nov. 15, 2012).
3. The impeachment trial of President Estrada was aborted due to a public uprising known as EDSA People Power II and his subsequent resignation in 2001. As for the impeachment of Ombudsman Gutierrez, she resigned from her position before trial commenced in the Senate. *See generally* Lawrence de Guzman, *In The Know: The path of impeachment*, PHIL. DAILY INQ., Dec. 13, 2011, *available at* http://newsinfo.inquirer.net/ 110005/ in-the-know-the-path-of-impeachment (last accessed Nov. 15, 2012).

The former Chief Justice was impeached on a number of allegations of partiality and arbitrariness in certain Supreme Court decisions, graft and corruption, and failure to properly disclose his assets, liabilities, and net worth.[4] In the Senate Impeachment Court, eight Articles of Impeachment were filed.[5]

The Lead Author of this Article was a private prosecutor for Article VII of the Articles of Impeachment. In what follows, we wish to show that salient portions of the Supreme Court's 14 February 2012 "Valentine's Day Resolution"[6] is inconsistent with settled constitutional doctrine as discussed in United States (U.S.) and Philippine jurisprudence.

Article VII of the Articles of Impeachment charged the former Chief Justice as having acted with —

> partiality in granting a temporary restraining order (TRO) in favor of the former President Gloria Macapagal-Arroyo [(GMA)] and her husband Jose Miguel [T.] Arroyo [(Mike Arroyo)] in order to give them an opportunity to escape prosecution and to frustrate the ends of justice, and in distorting the Supreme Court decision on the effectivity of the TRO in view of a clear failure to comply with the conditions of the Court's own TRO.[7]

It was in Article VII that the issues of the application of the *sub judice* rule and judicial privilege were raised and discussed in trial.[8] Specifically, these rules and the *corpus* of doctrine surrounding the same were deliberated upon by the prosecution in seeking to justify the allowance of the testimony of then Associate Justice (now Chief Justice) Maria Lourdes A. Sereno on various communications between the Justices of the Court in the decisional dynamics leading to the Court's issuance of the TRO, which aimed to allow the former President and her husband to travel abroad despite the pendency

---

4. In Re: Impeachment of Honorable Chief Justice Renato C. Corona, Impeachment Case No. 002-2011, Verified Complaint for Impeachment (Dec. 12, 2011) [hereinafter CJ Corona Impeachment Complaint].

5. *Id.*

6. In Re: Production of Court Records and Documents and the Attendance of Court officials and employees as witnesses under the subpoenas of February 10, 2012 and the various letters for the Impeachment Prosecution Panel dated January 19 and 25, 2012, Supreme Court *En Banc* Notice of Resolution, Feb. 14, 2012, *available at* http://sc.judiciary.gov.ph/jurisprudence/2012/february 2012/notice.pdf (last accessed Nov. 15, 2012) [hereinafter Valentine's Day Resolution].

7. CJ Corona Impeachment Complaint, art. VII.

8. Jojo Malig, Justices urged to come forward in Corona impeachment, *available at* http://www.abs-cbnnews.com/- depth/02/23/12/justices-urged-come-forward -corona-impeachment (last accessed Nov. 15, 2012).

of electoral sabotage cases[9] against her.[10] We discuss in detail the propriety of these doctrines in impeachment proceedings.

II. *SUB JUDICE*

The rule of *sub judice* essentially bars any person involved in pending litigation from publicly discussing the details of the case.[11] Any violation of this rule is considered as conduct in obstruction of justice which is punishable by indirect contempt pursuant to the Rules of Court. The pertinent provision states —

> Section 3. *Indirect contempt to be punished after charge and hearing.* — After a charge in writing has been filed, and an opportunity given to the respondent to comment thereon ... and to be heard by himself or counsel, a person guilty of any of the following acts may be punished for indirect contempt:
>
> ...
>
> (d) Any *improper conduct* tending, directly or indirectly, to *impede*, *obstruct*, or *degrade* the administration of justice.[12]

Sub judice was first applied in the Philippine setting[13] in *Nestlé Philippines, Inc. v. Sanchez*[14] where the Supreme Court described it as —

> a traditional conviction of civilized society everywhere that courts and juries, in the decision of issues of fact and law[,] should be immune from every extraneous influence; that facts should be decided upon evidence produced in court; and that the determination of such facts should be uninfluenced by bias, prejudice[,] or sympathies.[15]

---

9. *See* National Citizen's Movement for Free Elections (NAMFREL), Election Monitor (An E-Newsletter on Elections), *available at* http://www.namfrel.com.ph/v2/news/enewsletter/NAMFREL%20Election%20Monitor%20Vol.2%20No.24.pdf (last accessed Nov. 15, 2012).

10. Jerome Aning & TJ Burgonio, *Sereno leaves open question of testifying against Corona*, PHIL. DAILY INQ., Mar. 2, 2012, *available at* http://newsinfo.inquirer.net/154593/sereno-leaves-open-question-of-testifying-against-corona (last accessed Nov. 15, 2012).

11. *See generally* An Act Prohibiting Court Orders, Writs and Injunctions which Prevent Media Reports and Commentaries on, or Publication of, Proceedings *Sub Judice*, Except Under Certain Circumstances, S.B. No. 1357, 14th Cong., 1st Reg. Sess. (2007) (citing Nestlé Philippines v. Sanchez, 154 SCRA 542 (1987)).

12. 1997 RULES OF CIVIL PROCEDURE, rule 71, § 3 (d) (emphasis supplied).

13. S.B. No. 1357, explan. n.

14. *Nestlé*, 154 SCRA at 542.

15. *Id.* at 546 (citing In re Stolen, 216 N.W. 127, 128 (Wis. 1927) (U.S.)).

In *Romero II v. Estrada*,[16] the Court took the occasion to apply the rule, defining it as "restrict[ing] comments and disclosures pertaining to judicial proceedings to avoid prejudging the issue, influencing the court, or obstructing the administration of justice. A violation of the *sub judice* rule may render one liable for indirect contempt under Section 4 (d), Rule 71 of the Rules of Court."[17]

As to when a matter is considered *sub judice* or not, *Vda. de Dabao v. Court of Appeals*[18] may be illustrative. Here, the Court declared that a matter is no longer *sub judice* or "before the court or judge for determination"[19] when it is already moot and academic. The Court further explained —

> An issue or a case becomes moot and academic *when it ceases to present a justiciable controversy*, so that a declaration on the issue would be of no practical use and value. In such cases, there is *no actual substantial relief to which petitioners would be entitled to and which would be negated by the dismissal of the petition*.[20]

As a restriction on the provision of comments, *sub judice* is mainly criticized as an impermissible restriction on the constitutional right to free speech.[21] Likewise criticized is the accompanying penalty of indirect contempt, which is effectively a penalty on the use of free speech as applied in *sub judice*. These criticisms were put to rest and the *sub judice* rule upheld in *Vicente v. Majaducon*,[22] where the Court declared that —

> Freedom of [speech] needs on occasion to be adjusted to and accommodated with the requirements of equally important public interests such as *the maintenance of the integrity of courts and orderly functioning of the administration of justice*.[23]

Associate Justice Arturo D. Brion, in his supplemental opinion in *Lejano v. People*,[24] also explained that —

> Courts, both within and outside this jurisdiction, have long grappled with the dilemma of *balancing the public's right to free speech* and *the government's duty to administer fair and impartial justice*. While the *sub judice* rule may be considered as a curtailment of the right to free speech, *it is 'necessary to*

16. Romero II v. Estrada, 583 SCRA 396 (2009).
17. *Id.* at 403.
18. Vda. de Dabao v. Court of Appeals, 426 SCRA 91 (2004).
19. BLACK'S LAW DICTIONARY 1439 (9th ed. 2009).
20. *Vda. de Dabao*, 426 SCRA at 97 (emphasis supplied).
21. S.B. No. 1357, explan. n.
22. Vicente v. Majaducon, 461 SCRA 12 (2005).
23. *Id.* at 24-25 (emphasis supplied).
24. Lejano v. People, 638 SCRA 104 (2010) (J. Brion, supplemental opinion).

> *ensure the proper administration of justice* and *the right of an accused to a fair trial.'*[25]

In the same supplemental opinion, Justice Brion expounded further by saying that —

> Persons facing charges for indirect contempt for violation of the *sub judice* rule *often invoke as defense their right to free speech* and *claim that the citation for contempt constitutes a form of impermissible subsequent punishment.*
>
> We have long recognized in this jurisdiction *that the freedom of speech under Section 4, Article III of the Constitution is not absolute.* A very literal construction of the provision, as espoused by [U.S.] Supreme Court Justice Hugo [L.] Black, *may lead to the disregard of other equally compelling constitutional rights and principles.*[26]

It would appear however that, *sub judice*, primarily due to its purpose of preventing miscarriages of justice, would apply solely against any public or publicized speech, which would tend to disrupt or influence the court on pending cases. A ruling squarely on this issue was likewise discussed in detail in the same supplemental opinion in *Lejano*. Justice Brion writes —

> Before proceeding with this line of thought, however, let me clarify that *the sub judice rule is not imposed on all forms of speech.* In so far as criminal proceedings are concerned, two classes of publicized speech made during the pendency of the proceedings can be considered as contemptuous: *first*, comments on the merits of the case, and *second*, intemperate and unreasonable comments on the conduct of the courts with respect to the case. *Publicized speech should be understood to be limited to those aired or printed in the various forms of media* such as television, radio, newspapers, magazines, and internet, and *excludes discussions*, in public or in private, *between and among ordinary citizens.* The Constitution simply gives the citizens the right to speech, not the right to unrestricted publicized speech.
>
> ...
>
> The *danger posed by this class of speech is the undue influence it may directly exert on the court* in the resolution of the criminal case, *or indirectly through the public opinion it may generate* against the accused and the adverse impact this public opinion may have during the trial.[27]

---

25. *Id.* at 194 (citing Law Reform Commission — New South Wales, Discussion Paper 43 (2000) — Contempt by publication, *available at* http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp43chp02 (last accessed Nov. 15, 2012)) (emphasis supplied).

26. *Lejano*, 638 SCRA at 193 (citing Smith v. California, 361 U.S. 147, 157-59 (1959) (J. Black, concurring opinion)) (emphasis supplied).

27. *Lejano*, 638 SCRA at 194-95 (emphasis supplied & omitted).

Significantly noteworthy are the discussions under the Law Reform Commission where it opined that an *actual* influence upon the court in resolving the case is not necessary for contempt.[28]

While the use of the *sub judice* rule is relatively infrequent in Philippine law application, the U.S. has had numerous opportunities to apply the rule. In *Sheppard v. Maxwell*,[29] the U.S. Supreme Court examined the rights of freedom of the press as outlined in the First Amendment[30] and weighed it against a defendant's right to a fair trial as required by the Sixth Amendment.[31]

In particular, the U.S. Supreme Court sought to determine whether the defendant was denied fair trial for the second-degree murder of his wife, of which he was convicted, "because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive[,] and prejudicial publicity that attended his prosecution."[32]

In ruling against the fairness of the trial conducted upon Sheppard, the U.S. Supreme Court noted that though freedom of expression should be given the widest latitude, it must not veer away from the primary purpose of according the parties the "judicial serenity and calm to which [they are] entitled."[33]

Particularly, the U.S. Supreme Court ruled that —

> The fact is that bedlam reigned at the courthouse during the trial and newsmen took over ... the entire courtroom, hounding most of the participants in the trial, especially Sheppard. ... Having assigned almost all of

---

28. *See* Law Reform Commission — New South Wales, Discussion, *supra* note 25.
29. Sheppard v. Maxwell, 384 U.S. 333 (1966).
30. U.S. CONST. amend. 1. This Amendment states that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1.
31. U.S. CONST. amend. 6. The Sixth Amendment states —

    > In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the [a]ssistance of [c]ounsel for his defen[s]e.

    U.S. CONST. amend. 6.
32. *Sheppard*, 384 U.S. at 355.
33. *Id.* at 355 (citing Estes v. State of Texas, 381 U.S. 532, 536 (1965)).

> the available seats in the courtroom to the news media[,] the judge lost his ability to supervise that environment. ... Moreover, the judge gave the throng of newsmen in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom.[34]

In *Nebraska Free Press Association v. Stuart*,[35] the U.S. Supreme Court held as unconstitutional prior restraints on media coverage during criminal trials.[36] Here, the U.S. Supreme Court considered the constitutionality of strong measures taken by a judge in a closely-followed murder trial in Nebraska — a restrictive order entered against the press preventing them from publishing information concerning the defendant's confession or other facts "strongly implicative" of the accused.[37]

In *Gentile v. State Bar of Nevada*,[38] the U.S. Supreme Court considered whether a criminal defense attorney could be reprimanded by the State Bar for talking about the facts of a case before trial.[39] Here, an attorney by the name of Dominic Gentile was retained to represent a prominent businessman indicted for stealing cocaine and money from a police sting operation.[40] On the day of his client's indictment, Gentile decided to hold a press conference to proclaim his client's innocence and blame the police for the theft.[41] As a result, the State Bar of Nevada filed a disciplinary action against Gentile for his comments which resulted in a reprimand.[42] Reaching the U.S. Supreme Court, it ruled that while a State Supreme Court ruling restricting attorney's speech was void for vagueness,[43] the standard employed by the rule did not violate the First Amendment.[44] Of those deliberating, five Justices[45] agreed that it is constitutionally permissible to impose restrictions on the speech of attorneys that would not be permissible against the press.[46] Four Justices[47] would have insisted that any punishment of an

---

34. *Sheppard*, 384 U.S. at 355.
35. Nebraska Free Press Association v. Stuart, 427 U.S. 539 (1976).
36. *Id.* at 613.
37. *Id.* at 539.
38. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).
39. *Id.* at 1030.
40. *Id.* at 1039-40.
41. *Id.*
42. *Id.* at 1033.
43. *Id.* at 1048.
44. *Gentile*, 501 U.S. at 1063.
45. They were Chief Justice William H. Rehnquist, Justices Byron R. White, Antonin G. Scalia, David H. Souter, and Sandra D. O'Connor. *Id.* at 1032.
46. *See Gentile*, 501 U.S. at 1062-71.

attorney's speech be justified by a very strong state interest and employ closely tailored means.

The Rehnquist majority concluded that attorney's speech is subject to greater regulation because of both an attorney's relationship to the judicial process and the significant dangers that attorney speech poses to the trial process.[48]

III. JUDICIAL PRIVILEGE

Another issue raised under the Article VII[49] case is the possible application of judicial privilege in barring Justice Sereno, a potential star witness for the prosecution, from testifying on the internal discussions and deliberations of the Justices in their decision to issue the TRO.[50]

Unlike executive privilege, judicial privilege has been given little treatment in case law. Prior to the Valentine's Day Resolution,[51] there had been no precedence in Philippine jurisprudence on the question of judicial privilege and only one notable case in U.S. jurisprudence, namely, *In Re: Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit.*[52]

The case involved an investigation by the Judicial Council of the Eleventh Circuit into the possible impeachment proceedings of then U.S. District Court Judge Alcee L. Hastings.[53] In an attempt to quash the subpoenas issued to the staff of the Judge, judicial privilege was invoked.[54]

In resolving the issue of the applicability of judicial privilege, the court determined that while the privilege exists, *the privilege is not absolute and must give way to the need to investigate allegations of misconduct by a federal judge.*[55]

Meanwhile, in the Philippines, Justice Sereno's concurring and dissenting opinion on the Valentine's Day Resolution discussed that judicial privilege applies only to "communications among judges and their others

---

47. They were Justices Anthony M. Kennedy, Thurgood Marshall, Harry A. Blackmun, and John Paul Stevens. *Gentile*, 501 U.S. at 1032.

48. *Id.* at 1054-56.

49. *See* CJ Corona Impeachment Complaint, art. VII.

50. Aning & Burgonio, *supra* note 10.

51. *See* Valentine's Day Resolution.

52. *In Re:* Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the 11th Circuit, 783 F.2d 1488 (11th Cir. 1986) (U.S.).

53. *Id.* at 1492.

54. *Id.* at 1501.

55. *Id.* at 1521-22.

relating to official judicial business such as, for example, the framing and researching of opinions, orders, and rulings."[56]

In its determination of whether a presumptive privilege is applicable, a weighing of the need of the investigating party seeking the information against "the degree of intrusion upon the confidentiality of privileged communications" is required.[57] Measuring the need for access requires consideration of "the importance of the inquiry for which the privileged information is sought; the relevance of that information to [the] inquiry; and the difficulty of obtaining the desired information through alternative means."[58]

The judicial privilege is essentially an analogue to executive privilege, as established in *U.S. v. Nixon*.[59] Executive privilege has further been divided into the *deliberative process privilege* and the *presidential communications privilege* in U.S. jurisprudence.[60]

The *deliberative process privilege* justifies the government's withholding of documents and other information that would disclose "advisory opinions, recommendations[,] and deliberations comprising part of a process by which governmental decisions and policies are formulated."[61] In this vein, case law and law articles examining the executive privilege may provide further insight into evaluating judicial privilege claims.

The deliberative process privilege was first articulated in the U.S. court system in *Kaiser Aluminum & Chemical Corp. v. United States*.[62] In this case, a suit was filed against the U.S. in the Federal Court of Claims.[63] Kaiser sought to acquire documents from the General Services Administration due

56. In Re: Production of Court Records and Documents and the Attendance of Court officials and employees as witnesses under the subpoenas of February 10, 2012 and the various letters for the Impeachment Prosecution Panel dated January 19 and 25, 2012, Supreme Court *En Banc* Notice of Resolution, Feb. 14, 2012 (Justice Sereno Concurring and Dissenting Opinion), *available at* http://sc.judiciary.gov.ph/jurisprudence/2012/february2012/feb.14-notice-sereno.htm#_ftn27 (last accessed Nov. 15, 2012) [hereinafter Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion)].

57. *Id.*

58. *Id.*

59. U.S. v. Nixon, 418 U.S. 683 (1974).

60. *See In re* Sealed Case, 121 F.3d 729 (Col. Ct. App. 1997) (U.S.).

61. *In re Sealed Case*, 121 F.3d at 737 (citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966) (U.S.)).

62. Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958) (U.S.).

63. *Id.* at 939.

to an action for breach of the most favored purchaser clause in a contract for the sale of war aluminum plants to Kaiser.[64]

The Court of Claims held that the production of advisory opinion on intra-office policy in relation to the sale of aluminum plants to him and to another entity was contrary to public interest; thus, the U.S. must be allowed to claim the executive privilege of nondisclosure.[65] The court observed —

> The document ... contains opinions that were rendered to the Liquidator of War Assets by a member of his staff concerning a proposed sale of aluminum plants. Those opinions do not necessarily reflect the views of, or represent the position ultimately taken by, the Liquidator of War Assets. A disclosure of the contents of documents of this nature would tend to discourage the staffs of [g]overnment agencies preparing such papers from giving complete and candid advice and would thereby impede effective administration of the functions of such agencies.[66]

In *Kaiser*, the court justified the deliberative process privilege as such —

> Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected *if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment* properly chargeable to the responsible individual with power to decide and act. *Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen.*
>
> ...
>
> There is a public policy involved in this claim of privilege for this advisory opinion — the policy of open, frank discussion between subordinate and chief concerning administrative action.
>
> ...
>
> Viewing this claim of privilege for the intra-agency advisory opinion in its entirety, we determine that the [g]overnment's claim of privilege for the document is well-founded. It would be definitely contrary to the public interest in our view for such an advisory opinion on governmental course of action to be produced by the [U.S.] under the coercion of a bar against production of any evidence in defense of this suit for contract damages.[67]

Following the issuance of the Valentine's Day Resolution, the House of Representatives prosecution panel was of the view that respondent Chief Justice Corona had not established a presumption of privilege.

---

64. *Id.*

65. *Id.* at 947.

66. *Id.* at 943 n.4.

67. *Id.* at 945-47 (emphasis supplied).

Kirk D. Jensen[68] states that in order for the deliberative process privilege to be invoked, a party must show that the material in question is (1) predecisional; (2) deliberative; (3) the government has maintained confidentiality; (4) the government has a legitimate need for the information; and (5) the government would be impaired in acquiring this type of information absent the protection of the privilege.[69]

For the question of "predecisional," chronology alone is insufficient. Jensen states that —

> Even if material predates a final agency action, it *does not satisfy the predecisional prong if the material did not contribute to that decision.* Materials are predecisional if they are 'designed to assist agency decisionmakers in arriving at their decisions' and contain 'the personal opinions of the writer rather than the policy of the agency.'[70]

By "deliberative" it is meant that it is "a part of the give-and-take process by which decisions are made and policy is formulated."[71]

Jensen defined that the government has maintained confidentiality when it "focuses on whether the government's protection of the information in question has been sufficient to preserve confidentiality, or whether the privilege has been effectively waived. ... [C]lear or explicit incorporation of deliberative material into an agency's final policy will place the material outside the privilege's protection[.]"[72]

Finally, on "impaired flow of information," he states that it is the government which would bear the burden of proving that the "disclosure of information 'would actually inhibit candor in the decision-making process if made available to the public.'"[73]

---

68. Kirk D. Jensen, *The Reasonable Government Official Test*, 49 DUKE L.J. 561 (1999).

69. *Id.* at 571-72.

70. *Id.* at 572 (citing Missouri v. United States Army Corps of Engineers, 147 F.3d 708, 710 (8th Cir. 1998) (U.S.)) (emphasis supplied).

71. Jensen, *supra* note 68, at 573 (citing Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 616 (D.C. Cir. 1997) (U.S.); Maricopa Audubon Society v. U.S. Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997) (U.S.); City of Virginia Beach, Virginia, 995 F.2d 1247, 1253 (4th Cir. 1993) (U.S.); Assembly of State of California v. U.S. Department of Commerce, 968 F.2d 916, 945 (9th Cir. 1992) (U.S.); & Hopkins v. U.S. Department of Housing and Urban Development, 929 F.2d 81, 84-85 (2d Cir. 1991) (U.S.)).

72. Jensen, *supra* note 68, at 574-75 (citing *Tax Analysts*, 117 F.3d at 617).

73. Jensen, *supra* note 68, at 577 (citing Animal Legal Defense Fund v. Department of the Airforce, 44 F.Supp. 2d 295, 300 (D.D.C. 1999) (U.S.)).

Focusing now on the application of the privilege under Philippine laws, there is perhaps no Supreme Court decision as extensive as *Neri v. Senate Committee on Accountability of Public Officers and Investigations.*[74] More importantly, this case deals with the presidential communications privilege, which, owing to the very specific nature of its audience and the attendant privacy and security concerns, has a *higher threshold* to meet before such privilege can be overcome.[75]

Here, the Department of Transportation and Communications (DOTC) entered into a contract with Chinese firm Zhong Xing Telecommunications Equipment (ZTE) for the supply of equipment and services amounting to $329,481,290.00 (₱ 16 billion) for the National Broadband Network (NBN) Project.[76] The NBN project was to be financed by the People's Republic of China.[77] As such, the Senate passed various resolutions relative to the deal.[78]

A statement issued by Jose "Joey" P. De Venecia III stated that several high executive officials and brokers were using their influence to push for the approval by the National Economic Development Authority (NEDA) of the NBN project.[79]

Romulo L. Neri, then NEDA head, was then invited to testify before the Senate Committee on Accountability of Public Officers and Investigations (Senate Blue Ribbon Committee).[80] In one hearing, he was interrogated for 11 hours and during which he admitted that Chairman Benjamin Abalos of the Commission on Elections (COMELEC) attempted to bribe him with ₱ 200 million in exchange for his approval of the NBN project.[81]

---

74. Neri v. Senate Committee on Accountability of Public Officers and Investigations, 564 SCRA 152 (2008).

75. *See generally* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 835-37 (2009 ed.)

76. Gleo Sp. Guerra, *SC Upholds Claim of Executive Privilege in Senate ZTE/NBN Inquiry*, BENCHMARK, Mar. 2008, *available at* http://sc.judiciary.gov.ph/publications/benchmark/2008/03/030802.php (last accessed Nov. 15, 2012).

77. Ver Pacete, *Dealing with China*, SUN STAR BACOLOD, June 8, 2012, *available at* http:// www.sunstar.com.ph/ bacolod/ opinion/2012/ 06/ 08/ pacete-dealing-china-225792 (last accessed Nov. 15, 2012).

78. Guerra, *supra* note 76.

79. *See generally* GMANews.TV, Joey De Venecia recounts NBN-ZTE deal to Sandiganbayan, *available at* http://www.gmanetwork.com/news/story/212 208/news/nation/joey-de-venecia-recounts-nbn-zte-deal-to-sandiganbayan (last accessed Nov. 15, 2012).

80. *Neri*, 564 SCRA at 183.

81. *Id.*

Neri further stated that he informed then President GMA about the bribery attempt and that she instructed him not to accept the bribe.[82] When the Senate probed further on the discussion on the NBN deal between Neri and President GMA, Neri refused to answer, invoking "executive privilege."[83]

Neri specifically refused to answer the following questions:

(1) Whether or not President Arroyo followed up on the NBN project;[84]

(2) Whether or not President Arroyo directed him to prioritize it;[85] and

(3) Whether or not she directed him to approve the NBN project.[86]

Neri later refused to attend the other hearings.[87] The Senate Blue Ribbon Committee cited Neri in contempt.[88] Neri then brought a case for *certiorari* to the Supreme Court assailing the show cause letter and the contempt order issued by the Senate Blue Ribbon Committee.[89]

In the Supreme Court, the primary issue for the Court to decide was whether the three questions sought to be answered by the Senate Blue Ribbon Committee fell under executive privilege.[90]

The Court held that, as the oversight function of Congress may be facilitated by compulsory processes, it is only to the extent that it is performed in pursuit of legislation[91] (which was lacking in the case).

In *Neri*, the communications elicited by the three questions are covered by the presidential communications privilege for the following reasons:[92]

First, the communications were related to a quintessential and non-delegable power of the President, such as the power to enter into an

82. *Id.* at 183-84.

83. *Id.* at 184.

84. *Id.* at 184.

85. *Id.*

86. *Neri*, 564 SCRA at 184.

87. *Id.* at 185.

88. *Id.* at 185-86.

89. *Id.* at 186.

90. *Id.* at 190.

91. *Id.* at 295 (citing Senate of the Philippines v. Ermita, 488 SCRA 1 (2006)).

92. *See generally Neri*, 564 SCRA at 197-202.

executive agreement with other countries.[93] This presidential authority to "enter into executive agreements without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence."[94]

Second, the communications were received by Neri, a cabinet member and close advisor of the President.[95] Hence, citing the operational proximity test, the communications should be protected as these involve things said to the President that direct presidential decision making.[96]

Third, the Court held that there was 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.[97]

Note that in *Neri*, the threshold and balancing factors for the presidential communications privilege are different from the deliberative process privilege.

For one, the Chief Justice does not carry the same quintessential and non-delegable powers similar to that of the President and the operational proximity test is not operative in simple cases of deliberative process privilege. Also, in *Neri*, the Senate was sitting as an investigative body, whereas an impeachment court drawing its powers directly from a constitutional mandate is *sui generis*. Most importantly, and for our purposes, a primary factor in the *Neri* decision was *the availability of the information by other means*.

Thus, while the *Neri* case does not deal closely with issues applicable to the case at hand, the Court did weigh certain parts of the balancing test including the availability of information from other sources and the compelling need to limit the privilege.

IV. THE VALENTINE'S DAY RESOLUTION

When the Court issued the Valentine's Day Resolution,[98] it effectively eliminated the opportunity to present key witnesses in the original witness list by the prosecution under its Article VII case.[99] Salient portions of the

---

93. *Neri*, 564 SCRA at 197.

94. *Id.* at 197-98 (citing Usaffe Veterans Association, Inc. v. Treasurer of the Philippines, et al., 105 Phil. 1030, 1038 (1959) & Comm'r. of Internal Revenue v. John Gotamco & Sons, Inc., 148 SCRA 36, 39 (1987)).

95. *Neri*, 564 SCRA at 200.

96. *Id.* at 200-01.

97. *Id.* at 216.

98. *See* Valentine's Day Resolution.

99. *See* CJ Corona Impeachment Complaint, art. 7.

Resolution, in sum, disallowed production and/or inspection of the following documents and prohibited sitting Justices and personnel of the Court from testifying in the Impeachment Court as follows:

4. Minutes of the Supreme Court Raffle Committee which handled the GMA and Mike Arroyo TRO Petition	Privileged and [c]onfidential because this is a pending case expressly prohibited under the [Internal Rules of the Supreme Court (IRSC)]. The parties, however, may request for a copy of the Minutes, with portions relating to other cases deleted.
5. Appointment or [a]ssignment of the Member-in-Charge of the GMA and Mike Arroyo TRO Petition	Privileged and [c]onfidential because this is a pending case expressly prohibited under the IRSC. The parties, however, may request for a copy of the Minutes, with portions relating to other cases deleted.
7. Logbook or receiving copy showing the time the TRO was issued to the counsel for GMA and Mike Arroyo as well as the date and time the TRO was received by the sheriff for service to the parties	Privileged and [c]onfidential because this is a pending case; expressly prohibited under the IRSC. The parties, however, may request for a copy of this record, with portions relating to other cases deleted.
9. Special Power of Attorney dated 15 November 2011 submitted by GMA and Mike Arroyo in favor of Atty. Ferdinand Topacio appointing him ‘to produce summons or receive documentary evidence’ with official date and time stamp of the Supreme Court	Privilege and [c]onfidential because this a pending case; expressly prohibited under the IRSC. The parties can request for a copy.
11. 15 and 16 November 2011 Sheriff’s Return of Service of the GMA and Mike Arroyo TRO dated 15 November 2011 upon the Department of Justice and the Office of the Solicitor General	Privileged and [c]onfidential because this is a pending case; expressly prohibited under the IRSC. Parties can request for a copy of this record.
12. Certification from the Fiscal Management and Budget Office of the Supreme Court dated 15 November 2011 with the date and time it was received by the Supreme Court Clerk of Court showing it to be 16 November 2011 at 8:55 a.m.	Privileged and [c]onfidential because this is a pending case; expressly prohibited under the IRSC and deliberative process. The requested certification refers to the time the bond was received by the Court.
15. Logbook showing the date and time Justice Sereno’s Dissent to the	Privileged and [c]onfidential because this is a pending case; expressly

22 November 2011 Resolution was received by the Clerk of Court [*en banc*]	prohibited under the IRSC.
16. Dissenting [o]pinion of Justice Sereno in G.R. No. 199034 and 199046 as published on 15 November 2011, 18 November 2011, and 13 December 2011	The [d]issenting [o]pinion refers to the personal opinion of the writer who has the constitutional duty to explain her [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege, cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to issue a certified true copy of this [d]issent, subject to its reservation.
17. Dissenting [o]pinion of Justice Carpio dated 15 November 2011 and 13 December 2011 in G.R. No. 199034 and 199046 as published	The [d]issenting [o]pinion refers to the personal opinion of the writer who has the constitutional duty to explain his [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege, cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to issue a certified true copy of this [d]issent, subject to its reservation.
18. Separate [o]pinion of Justice Velasco dated 13 November 2011 in G.R. No. 199034 and 199046[.]	The [s]eparate [o]pinion refers to the personal opinion of the writer who has the constitutional duty to explain his [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege, cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to issue a certified true copy of this [d]issent, subject to its reservation.
19. Concurring [o]pinion of Justice	The [c]oncurring [o]pinion refers to

Abad dated 13 December 2011 in G.R. No. 199034 and 199046	the personal opinion of the writer who has the constitutional duty to explain his [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege, cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to issue a certified true copy of this [d]issent, subject to its reservation.[100]

V. VIEW OF THE HOUSE PROSECUTION

It was then discussed among House of Representatives prosecutors that a Motion for Reconsideration ought to be filed to question the *Per Curiam* Valentine's Day Resolution[101] insofar as it disallowed the production and/or inspection of non-deliberative documents and non-predecisional documents and in disallowing members and personnel of the Court to testify on non-deliberative documents and processes. In particular, members of the prosecution discussed whether to raise the following arguments, framed as "issues:"

(1) With all due respect, the Honorable Court erred when it prohibited the inspection and/or production of matters which are non-deliberative and non-predecisional in nature in contravention of the constitutional right of the public to information and in derogation of the constitutional mandate of the Honorable Impeachment Court to try impeachable officers.

(2) With all due respect, the Honorable Court erred when it prohibited members and personnel of the Honorable Court from testifying on documents and processes which are non-deliberative and non-predecisional in nature.

The prosecution's reading of the Valentine's Day Resolution was that the Court recognized the standard that in case of doubt in an impeachment case, the standard that should govern is "the need to preserve the structure of

100. Valentine's Day Resolution, at Annex "A."

101. *See generally* Valentine's Day Resolution.

a democratic and republican government, *particularly the check and balance that should prevail.*"[102]

Likewise, the Court recognized that, when there is doubt on how to resolve issues which involve inter-departmental comity and courtesy, it should resort to weighing of the public interests involved.[103] As against guaranteed individual rights and the attendant larger public interests, it is the latter consideration which should ultimately prevail.[104] These foregoing standards, according to the prosecution, should govern in resolving the instant controversy.

The prosecution then took issue as to the aforequoted portions of the Valentine's Day Resolution.

VI. SEPARATION OF POWERS, PRINCIPLE OF COMITY, AND JUDICIAL PRIVILEGE

In the Valentine's Day Resolution, the Court opened its discussion with the principles of the separation of powers underlying a democratic and republican form of government.[105] In the said Resolution, the Court held that under the principle of comity or the practice of voluntary observation of inter-departmental courtesy, the Court held that the courts tread carefully and exercise restraint in appreciating the areas wholly assigned to a particular branch.[106]

The Court also held that, in return, "the two other branches, for their part, may also observe the principle of comity by voluntarily and temporarily refraining from continuing with the acts questioned before the courts."[107]

But, it ought to be argued that to subscribe to this would be to abrogate the constitutional duty vested and bestowed to the Senators of the Republic constituting themselves as the Impeachment Court mandated by the 1987 Philippine Constitution to try cases against impeachable officers.[108]

---

102. Valentine's Day Resolution, at 11.

103. *Id.* at 10.

104. *Id.*

105. *Id.* at 9.

106. *Id.* at 10.

107. *Id.* at 10.

108. PHIL. CONST. art. 11, § 3 (6). This Section provides —

> The Senate shall have the sole power to try and decide all cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not

Likewise, the principle of comity should not be invoked in a strict manner as would hamper the performance of the Impeachment Court of its constitutional duty to try the case at hand. The Impeachment Court is supreme within its own sphere and should not be likened to the Senate as a legislative body which performs legislative functions.[109]

In the landmark case of *U.S. v. Nixon*,[110] the U.S. Supreme Court likened the expectation of a President to the confidentiality of his conversations and correspondence to the claim of confidentiality of judicial deliberations[111] to which Justice Sereno, in her dissenting opinion to the Valentine's Day Resolution, stated that —

> Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. The judiciary, no less than the executive, is supreme within its own area of constitutionally assigned duties. Confidentiality helps protect judges' independent reasoning from improper outside influences. It also safeguards legitimate privacy interests of both judges and litigants.[112]

In *Chavez v. Philippine Estates Authority*[113] (*PEA*), the Court upheld the public's right to information, but expressly excluded access to "privileged information rooted in the separation of powers."[114] These privileged information include "Presidential conversations, correspondence, or discussions during closed-door Cabinet meetings, which, *like the internal deliberations of the Supreme Court* and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential."[115]

Note, however, that *PEA* cites *Aquino-Sarmiento v. Morato*[116] and *Chavez v. Presidential Commission on Good Government*[117] (*PCGG*). As already stated, *Aquino-Sarmiento* cites merely an implementing rule (not a law passed by Congress) in holding that the internal deliberations of the Court are

---

> vote. No person shall be convicted without the concurrence of two-thirds of all the [m]embers of the Senate.

PHIL. CONST. art. 11, § 3 (6).

109. *See generally* Valentine's Day Resolution.

110. *Nixon*, 418 U.S. at 683.

111. *Id.* at 708.

112. Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion).

113. Chavez v. Philippine Estates Authority, 384 SCRA 152 (2002).

114. *Id.* at 188.

115. *Id.* (citing Chavez v. Presidential Commission on Good Government, 299 SCRA 744 (1998) & Aquino-Sarmiento v. Morato, 203 SCRA 515 (1991)) (emphasis supplied).

116. *Aquino-Sarmiento*, 203 SCRA at 515.

117. *PCGG*, 299 SCRA at 744.

confidential.[118] In turn, *PCGG* cites *Legaspi v. Civil Service Commission*,[119] which did not declare the internal deliberations of the Court as confidential, but ruled instead in this wise —

> It is clear from the foregoing pronouncements of this Court that government agencies are without discretion in refusing disclosure of, or access to, information of public concern. This is not to lose sight of the reasonable regulations[,] which may be imposed by said agencies in custody of public records on the manner in which the right to information may be exercised by the public. In the *Subido* case, [w]e recognized the authority of the Register of Deeds to regulate the manner in which persons desiring to do so, may inspect, examine or copy records relating to registered lands. However, the regulations which the Register of Deeds may promulgate are confined to:
>
> '[P]rescribing the manner and hours of examination to the end that damage to or loss of, the records may be avoided, that undue interference with the duties of the custodian of the books and documents and other employees may be prevented, that the right of other persons entitled to make inspection may be insured[.]'
>
> Applying the *Subido* ruling by analogy, [w]e recognized a similar authority in a municipal judge, to regulate the manner of inspection by the public of criminal docket records in the case of *Baldoza v. Dimaano*. Said administrative case was filed against the respondent judge for his alleged refusal to allow examination of the criminal docket records in his sala. Upon a finding by the Investigating Judge that the respondent had allowed the complainant to open and view the subject records, [w]e absolved the respondent. In effect, [w]e have also held that the rules and conditions imposed by him upon the *manner* of examining the public records were reasonable.
>
> In both the *Subido* and the *Baldoza* cases, [w]e were emphatic in [o]ur statement that *the authority to regulate the manner of examining public records does not carry with it the power to prohibit*. A distinction has to be made between the discretion to refuse outright the disclosure of or access to a particular information and the authority to regulate the manner in which the access is to be afforded. *The first is a limitation upon the availability of access to the information sought, which only the [l]egislature may impose.* The second pertains to the government agency charged with the custody of public records. Its authority to regulate access is to be exercised solely to the end that damage to, or loss of, public records may be avoided, undue interference with the duties of said agencies may be prevented, and more importantly, that the exercise of the same constitutional right by other persons shall be assured.
>
> Thus, while the manner of examining public records may be subject to reasonable regulation by the government agency in custody thereof, the

118. *Aquino-Sarmiento*, 203 SCRA at 520.

119. Legaspi v. Civil Service Commission, 150 SCRA 530 (1987).

> duty to disclose the information of public concern, and to afford access to public records cannot be discretionary on the part of said agencies. Certainly, its performance cannot be made contingent upon the discretion of such agencies. Otherwise, the enjoyment of the constitutional right may be rendered nugatory by any whimsical exercise of agency discretion.[120]

The purpose of maintaining the confidentiality of court deliberations and minutes, as declared by the Court in *PEA*, is to ensure the independence of decision-making[121] that is vital in the discharge of their designated roles in government. It further discussed that —

> This kind of information cannot be pried open by a co-equal branch of government. *A frank exchange of exploratory ideas and assessments, free from the glare of publicity and pressure by interested parties, is essential to protect the independence of decision-making* of those tasked to exercise [p]residential, [l]egislative[,] and [j]udicial [p]ower.[122]

It is clear from the foregoing that the purpose of the privilege is to protect the independence of decision-making process from external influences. "Thus, in [U.S.] jurisprudence, *judicial privilege has always been qualified and had been found to exclude any protection for administrative and non-adjudicatory matters in cases where a [m]ember of the judiciary is being investigated for criminal acts or wrongdoing*."[123]

Hence, when what are being requested are non-deliberative or non-predecisional in nature, such as administrative and non-adjudicatory matters, then the same should be made available for public scrutiny, especially that it is a constitutional body, the Impeachment Court, which is seeking for its production and/or inspection in order to ferret out the truth and, once and for all, conclude the proceedings by handing a verdict.

VII. THE POLICY OF FULL PUBLIC DISCLOSURE AND THE RIGHT OF THE PUBLIC TO INFORMATION

The 1987 Constitution, as a general rule, lays down the policy of full public disclosure in all transactions involving public interest and guarantees access to official records, documents, and papers pertaining to official acts, transactions, and decisions, subject to limitations as may be provided by law. The following provisions contain the State's policy of promoting the people's right to access official records or information —

120. *Id.* at 538-39. (citing Subido v. Ozaeta, 80 Phil. 383 (1948) & Baldoza v. Dimaano, 71 SCRA 14 (1976)) (emphasis supplied).

121. *Chavez*, 384 SCRA at 189.

122. *Id.* (emphasis supplied).

123. Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion).

> Section 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.*[124]
>
> Section 7. The right of the people to information on matters of public concern shall be recognized. *Access to official records*, and to *documents*, and *papers pertaining to official acts*, *transactions*, or *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.[125]

In *Valmonte v. Belmonte, Jr.*,[126] the Court held —

> An informed citizenry with access to the diverse currents in political, moral[,] and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon, is vital to the democratic government envisioned under our Constitution. The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. *Denied access to information on the inner workings of government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated.* The postulate of public office as a public trust, institutionalized in the Constitution ... to protect the people from abuse of governmental power, would certainly be mere empty words if access to such information of public concern is denied, except under limitations prescribed by implementing legislation adopted pursuant to the Constitution.
>
> ...
>
> The right of access to information ensures that these freedoms are not rendered nugatory by the government's monopolizing pertinent information. For an essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit.
>
> The right to information is an essential premise of a meaningful right to speech and expression. But this is not to say that the right to information is merely an adjunct of and therefore restricted in application by the exercise of the freedoms of speech and of the press. Far from it. *The right to information goes hand-in-hand with the constitutional policies of full public disclosure and honesty in the public service. It is meant to enhance the widening role of the*

---

124. PHIL. CONST. art 2, § 28 (emphasis supplied).

125. PHIL. CONST. art 3, § 7 (emphasis supplied).

126. Valmonte v. Belmonte, Jr., 170 SCRA 256 (1989).

> *citizenry in governmental decision-making as well as in checking abuse in government.*
>
> Yet, like all the constitutional guarantees, the right to information is not absolute. As stated in *Legaspi*, the people's right to information is limited to '*matters of public concern*,' and is further 'subject to such limitations as may be provided by law.' Similarly, the State's policy of full disclosure is limited to '*transactions involving public interest*,' and is 'subject to reasonable conditions prescribed by law.'[127]

Thus, as a general rule the policy of the State is for full public disclosure and for the general public to have access to government records subject to reasonable limitations, which may be provided by law. As such, the exceptions provided for by law must be construed *strictissimi juris*.

VIII. MINUTES OF THE RAFFLE AND APPOINTMENT OR ASSIGNMENT OF THE MEMBER-IN-CHARGE

Recall that the Valentine's Day Resolution, in part, read:

4. Minutes of the Supreme Court Raffle Committee which handled the GMA and Mike Arroyo TRO Petition	Privileged and [c]onfidential because this is a pending case expressly prohibited under the [Internal Rules of the Supreme Court (IRSC)]. The parties, however, may request for a copy of the Minutes, with portions relating to other cases deleted.
5. Appointment or [a]ssignment of the Member-in-Charge of the GMA and Mike Arroyo TRO Petition	Privileged and [c]onfidential because this is a pending case expressly prohibited under the IRSC. The parties, however, may request for a copy of the Minutes, with portions relating to other cases deleted.[128]

Here, the Court prohibited the production and inspection of the Minutes of the Supreme Court Raffle Committee which handles the TRO Petition of former President GMA and her husband, Mike Arroyo.

But, it ought to be clear that the same cannot be considered as part of the predecisional and deliberative process within the meaning of case law.

Beyond case law, as discussed, no less than the Internal Rules of the Supreme Court (IRSC) have opened the results of the raffle to the parties in the case and their respective counsel, except in cases of (a) bar matters; (b) administrative cases; and (c) criminal cases, where the penalty imposed by the

127. *Id.* at 264-66 (citing *Legaspi*, 150 SCRA at 530) (emphasis supplied).

128. Valentine's Day Resolution, at Annex "A."

lower court is life imprisonment. This is found in Section 3 of the IRSC, this Section provides —

> Section 3. *Raffle Committee Secretariat.* — The Clerk of Court shall serve as the Secretary of the Raffle Committee. He or she shall be assisted by a court attorney, duly designated by the Chief Justice from either the Office of the Chief Justice or the Office of the Clerk of Court, who shall be responsible for (a) recording of the raffle proceedings and (b) submitting the minutes thereon to the Chief Justice. The Clerk of Court *shall make the result available* to the parties and their counsels or to their duly authorized representatives, *except* the raffle of (a) *bar matters*; (b) *administrative cases*; and (c) *criminal cases where the penalty imposed by the lower court is life imprisonment*, and which shall be treated with strict confidentiality.[129]

From the foregoing, the general rule is really disclosure to the parties and their counsels or to their duly-authorized representatives. If the Court really intended a blanket and absolute prohibition on the results of the raffle and the minutes thereof, the Court should have expressly written a provision in its internal rules as absolutely restrictive and merely provided for the exceptions or instances wherein the release of the results of the raffles and its minutes may be allowed.

Surely, in crafting the said provision in its internal rules, there should be no breach on the confidentiality of the deliberative process of the Court by merely informing the parties, their counsels or *third parties they may authorize*, on who the *ponente* is. The evil sought to be protected by the judicial deliberative privilege is remotely possible by mere disclosure of the *ponente* and the minutes of the raffle. Otherwise, the Court should have crafted an *absolutely* confidential provision on the results and minutes of the raffle.

While the deliberative proceedings of the Court are generally confidential,[130] minutes of Court proceedings are not entirely confidential.

---

129. Supreme Court, The Internal Rules of the Supreme Court, Administrative Matter No. 10-4-20-SC [The Internal Rules of the Supreme Court], rule 7, § 3 (May 4, 2010) (emphasis supplied).

130. The Internal Rules of the Supreme Court, rule 10, § 2. The Section states that —

> Court sessions are executive in character, with only the [m]embers of the Court present. *Court deliberations are confidential and shall not be disclosed to outside parties, except as may be provided herein or as authorized by the Court.*
>
> The Chief Justice or the Division Chairperson shall record the action or actions taken in each case for transmittal to the Clerk of Court or Division Clerk of Court after each session. The notes of the Chief Justice and the Division Chairperson, *which the Clerk of Court and the Division Clerks of Court must treat with strict confidentiality, shall be the bases of the minutes of the sessions.*

In fact, it is provided that the Clerk of Court shall quote minutes of the proceedings, or parts thereof, and discuss official court action on cases in its various resolutions. The IRSC provides —

> Section 4. *Preparation of minutes of proceedings.* — ... *Excerpts of the minutes pertaining to a particular case quoted in a letter* of the Clerk of Court or the Division Clerk of Court to the parties, and *extended resolutions showing the actions of the Court on the cases on agenda shall be released to the parties* only after the Chief Justice or the Division Chairperson has approved the minutes in writing.[131]

Under this scenario, where excerpts are allowed, or parts are disclosed or presented in evidence, the entire document may be produced. The Rules on Evidence states that —

> Section 17. *When part of transaction, writing or record given in evidence, the remainder admissible.* — When part of an act, declaration, conversation, writing or record is given in evidence by one party, the whole of the same subject may be inquired into by the other, and when a detached act, declaration, conversation, writing or record is given in evidence, any other act, declaration, conversation, writing[,] or record necessary to its understanding may also be given in evidence.[132]

Further, under the IRSC, it appears that what are kept confidential are merely matters that have not yet been released to the public.

> Section 5. *Confidentiality of minutes prior to release.* — The Offices of the Clerk of Court and of the Division Clerks of Court *are bound by strict confidentiality on the action or actions taken by the Court prior to the release of the resolutions embodying the Court action or actions.*
>
> A resolution is considered officially released once the envelope containing a final copy of it addressed to the parties has been transmitted to the process server for personal service or to the mailing section of the Judicial Records Office. Only after its official release may a resolution be made available to the public.[133]

From the foregoing, a number of prosecutors from the House of Representatives took exception of the Court's view insofar as the Valentine's Day Resolution disallowed the production and/or inspection of the results of the raffle and the Minutes thereof in relation to the TRO Petition of former President GMA and her husband Mike Arroyo.

The evil sought to be avoided, that is, to create a chilling effect on the Justices as would hamper their decision-making process, will not obtain as it

---

Id. (emphasis supplied).

131. *Id.* rule 11, § 4 (emphasis supplied).

132. REVISED RULES ON EVIDENCE, rule 132, § 17.

133. The Internal Rules of the Supreme Court, rule 11, § 5 (emphasis supplied).

is merely the raffle of the case and not the manner by which the case was deliberated and will be decided upon. Nevertheless, it is worth emphasizing that even minutes of the deliberations are not absolutely confidential as adequately discussed above.

On the evidence that would prove the allegation that the Chief Justice extended undue favor to the former President and former First Gentleman in ensuring that they can leave the country, we re-quote the salient portions of the Valentine's Day Resolution:

7. Logbook or receiving copy showing the time the TRO was issued to the counsel for GMA and Mike Arroyo as well as the date and time the TRO was received by the sheriff for service to the parties	Privileged and [c]onfidential because this is a pending case; expressly prohibited under the IRSC. The parties, however, may request for a copy of this record, with portions relating to other cases deleted.
9. Special Power of Attorney dated 15 November 2011 submitted by GMA and Mike Arroyo in favor of Atty. Ferdinand Topacio appointing him 'to produce summons or receive documentary evidence' with official date and time stamp of the Supreme Court	Privilege and [c]onfidential because this a pending case; expressly prohibited under the IRSC. The parties can request for a copy.
11. 15 and 16 November 2011 Sheriff's Return of Service of the GMA and Mike Arroyo TRO dated 15 November 2011 upon the Department of Justice and the Office of the Solicitor General	Privileged and [c]onfidential because this is a pending case; expressly prohibited under the IRSC. Parties can request for a copy of this record.
12. Certification from the Fiscal Management and Budget Office of the Supreme Court dated 15 November 2011 with the date and time it was received by the Supreme Court Clerk of Court showing it to be 16 November 2011 at 8:55 a.m.	Privileged and [c]onfidential because this is a pending case; expressly prohibited under the IRSC and deliberative process. The requested certification refers to the time the bond was received by the Court.[134]

In the prefatory statement of the Valentine's Day Resolution, the Court held —

The Court states at the outset that this Resolution is issued not to favor or prejudice the Chief Justice whose impeachment gave rise to the letters and the subpoenas in consideration, but to simply consider the requests and the

134. Valentine's Day Resolution, at Annex "A."

> subpoenas in light of what the Constitution, the laws, and our rules and polices mandate and allow.[135]

To recap, the abovementioned documents sought to be *subpoenaed* were disallowed production and/or inspection by the Court simply because there is a pending case and is purportedly prohibited under the IRSC.

But, it ought to be clear that these documents and processes are not part of the deliberative and predecisional aspects of the case. These documents and processes are even post-Resolution compliance of the parties and administrative processes of the Court and are public records at the very least, which should not be denied access to the public, much more to the Impeachment Court.

Justice Sereno's concurring and dissenting opinion in the Valentine's Day Resolution expressed the presumption towards public disclosure of information generated or held by the Court in this manner:

> (1) The Supreme Court shall provide maximum responsible disclosure of timely, accurate[,] and relevant information to the public without betraying those aspects of the decision-making process[,] which require utmost confidentiality.
>
> (2) There shall be a presumption in favor of public disclosure of information generated or held by the Supreme Court. The presumption shall be subject to the exceptions to be determined by the Task Force.[136]

The general rule covering court documents and records is disclosure, while confidentiality is the exception. As an exception, it is submitted that confidentiality must be strictly construed.

The filing of the bond and submission of the Special Power of Attorney by former President GMA and former First Gentleman Mike Arroyo, cannot be considered as part of "predecisional" or "deliberative" processes of the Court but are non-adjudicatory and administrative matters which the Impeachment Court has the right to adjudicate to determine whether the Chief Justice, as the *primus inter pares* of the Court, extended undue favor to the former President and her husband.

The most painful path of democracy is the time when the democratic institutions are tested to their limits and the checks and balances come into play. But in the impeachment case, it is merely the Chief Justice and not the Court viewed as an institution or members of the Court *en banc*, who is being tried for his alleged wrongdoings as a public official.

---

135. *Id.* at 9.

136. Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion).

Thus, if the prosecution is prevented from obtaining the documents surrounding the attempted compliance of the former President and her husband to the conditions of the TRO issued on 15 November 2011, it would forestall and hamper not only the House of Representatives but also the Senate in performing their respective constitutional tasks in prosecuting and trying the Chief Justice, respectively.

In *Aquino-Sarmiento*,[137] the Court held that the exercise of right to information cannot be made dependent on the discretion of the body concerned in this wise —

> Being a public right, the exercise thereof cannot be made contingent on the discretion, nay, whim[,] and caprice, of the agency charged with the custody of the official records sought to be examined. The constitutional recognition of the citizen's right of access to official records cannot be made dependent upon the consent of the members of the board concerned, otherwise, the said right would be rendered nugatory. As stated by this Court in *Subido v. Ozaeta*:
>
> 'Except, perhaps when it is clear that the purpose of the examinations is unlawful, or sheer, idle curiosity, we do not believe it is the duty under the law of registration officers to concern themselves with the motives, reasons, and objects of the person seeking access to the records. It is not their prerogative to see that the information which the records contain is not flaunted before public gaze, or that scandal is not made of it. *If it be wrong to publish the contents of the records, it is the legislature and not the officials having custody thereof which is called upon to devise a remedy*.'[138]

Furthermore, the Court declared that —

> [T]his constitutional provision is self-executory and supplies 'the rules by means of which the right to information may be enjoyed by guaranteeing the right and mandating the duty to afford access to sources of information. Hence, the fundamental right therein recognized may be asserted by the people upon the ratification of the [C]onstitution without need for any ancillary act of the [l]egislature. What may be provided for by the [l]egislature are reasonable conditions and limitations upon the access to be afforded which must, of necessity, be consistent with the declared [s]tate [p]olicy of full public disclosure of all transactions involving public interest.'[139]

The logbook or receiving copy showing the time the TRO was issued to the counsel for the former President and her husband as well as the date and time the TRO was received by the sheriff for service of the parties is remote to the deliberative process of the Court. Neither can the 15 and 16 November 2011 Sheriff's Return of Service of the TRO dated 15 November

---

137. *Aquino-Sarmiento*, 203 SCRA at 515.

138. *Id.* at 523 (citing *Subido*, 80 Phil. at 388) (emphasis supplied).

139. *Aquino-Sarmiento*, 203 SCRA at 521-22 (citing *Legaspi*, 150 SCRA at 530).

2011 upon the Department of Justice (DOJ) and the Office of the Solicitor General (OSG) be considered as part of the deliberative or predecisional matters or processes of the Court.[140] These are but administrative matters to know the circumstances of the service of the TRO to the parties.

The fact that the main case is still pending has nothing to do with the information when the TRO was served by the sheriff of the Court. The same is merely to determine whether or not the Chief Justice, being the *primus inter pares* or the Chief Executive of the Supreme Court, unduly ordered the extension of time to ensure service of the TRO to the parties to give effect to the same and allow the former President and her husband to leave the country and escape prosecution. It ought to be argued that one can hardly connect the same as a predecisional matter, which if disclosed, will prejudice the parties or prejudge the main case.

The Special Power of Attorney dated 15 November 2011 submitted by the former President and her husband in favor of Atty. Ferdinand S. Topacio appointing him "to produce summons or receive documentary evidence"[141] with official date and time stamp of the Court cannot be considered as predecisional or deliberative in nature as the same involves post-TRO Resolution compliance by the former President and her husband.

More importantly, a Special Power of Attorney is a public document, having been notarized, a copy of which is also available with the Notary Public who notarized the same. The purpose of its production is likewise to prove in the Impeachment Court that the Chief Justice extended office hours of the Court to receive the conditions of the TRO even very late at night to ensure a coordinated escape of the former President and her husband from the country to avoid prosecution.

Likewise, the Certification from the Fiscal Management and Budget Office of the Supreme Court dated 15 November 2011 with the date and time it was received by the Court Clerk of Court showing it to be 16 November 2011 at 8:55 a.m.[142] cannot be considered to be part of the predecisional or deliberative matters or processes of the Court. The same pertains to non-adjudicatory and administrative matters of the Court and post-resolution compliance. The same has nothing to do with the decision-making process of the Court.

Moreover, the TRO is *fait accompli* already as it has been served but was overtaken by a series of events including the filing of an electoral sabotage

140. *See generally* Valentine's Day Resolution, at Annex "A."

141. *Id.*

142. *Id.*

case against the former President,[143] thus, preventing her from leaving the country.

From the foregoing, the Valentine's Day Resolution should be partially reconsidered insofar as it denied the admission of these documents, which are far from being deliberative and predecisional in nature. These are mere extraneous administrative matters on when the conditions were complied with or when these TRO conditions were to be complied with by the former President and her husband.

The second key issue pertains to the question of whether the Court erred when it prohibited members and personnel of the Supreme Court from testifying on documents and processes which are non-deliberative and non-predecisional in nature.

In the said Resolution, the Court prohibited its Members and personnel from testifying in the Impeachment Court on matters which it held to be privileged and confidential.[144] Particularly, the Court held that members cannot testify on matters, which are prohibited and excluded, particularly matters pending resolution before the Court.[145]

Likewise, the Court held that the Justices cannot testify on the internal deliberations and actions of the Court.[146] The Court also held that Justices and personnel may not be summoned to testify on matters of public record[147] citing Section 44 of Rule 130.[148]

In specifically warning individual Justices, the Supreme Court warned the individual Justices against violation of the deliberative processes in this manner:

16. Dissenting [o]pinion of Justice Sereno in G.R. No. 199034 and 199046 as published on 15 November 2011, 18 November 2011, and 13 December 2011	The [d]issenting [o]pinion refers to the personal opinion of the writer who has the constitutional duty to explain her [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege,

143. NAMFREL, *supra* note 9.

144. *See generally* Valentine's Day Resolution, at 20-21.

145. *Id.*

146. *See* Valentine's Day Resolution, at 21.

147. Valentine's Day Resolution, at 21-22.

148. REVISED RULES ON EVIDENCE, rule 130, § 44. This Section provides that "[e]ntries in official records made in the performance of his duty by a public officer of the Philippines, or by a person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts therein stated." *Id.*

	cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to issue a certified true copy of this [d]issent, subject to its reservation.
17. Dissenting [o]pinion of Justice Carpio dated 15 November 2011 and 13 December 2011 in G.R. No. 199034 and 199046 as published	The [d]issenting [o]pinion refers to the personal opinion of the writer who has the constitutional duty to explain his [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege, cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to issue a certified true copy of this [d]issent, subject to its reservation.
18. Separate [o]pinion of Justice Velasco dated 13 November 2011 in G.R. No. 199034 and 199046	The [s]eparate [o]pinion refers to the personal opinion of the writer who has the constitutional duty to explain his [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege, cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to issue a certified true copy of this [d]issent, subject to its reservation.
19. Concurring [o]pinion of Justice Abad dated 13 December 2011 in G.R. No. 199034 and 199046	The [c]oncurring [o]pinion refers to the personal opinion of the writer who has the constitutional duty to explain his [d]issent, and is a matter of public record after this was published. The Court, however, as the institution entitled to the deliberative process privilege, cannot waive the confidentiality of certain portions of this [d]issent for being part of the privilege. The Court shall allow the witness to

	issue a certified true copy of this [d]issent, subject to its reservation.[149]

Likewise, the production and/or inspection of the logbook showing the date and time when Justice Sereno's Dissent to the 22 November 2011 Resolution was received by the Clerk of Court *en banc*[150] was disallowed since, to the Court, it was allegedly privileged and confidential.

15. Logbook showing the date and time Justice Sereno's Dissent to the 22 November 2011 Resolution was received by the Clerk of Court [*en banc*]	Privileged and [c]onfidential because this is a pending case; expressly prohibited under the IRSC.[151]

But it ought to be argued that since the very matters to be testified by the court personnel whom the prosecutors sought to proffer are matters of public record already, there is no point in invoking the judicial deliberative privilege.

More importantly, preventing Justice Sereno from testifying and expounding her dissent will be to curtail the Impeachment Court's right to try the case and ferret out the truth, as the suspicious circumstances by which her dissent was published will remain undisclosed indefinitely.

It may also be plausibly argued that to deny a Member of the Court, for that matter, to explain his or her dissent would be a violation of the constitutional duty of a Justice of the Supreme Court to explain his or her dissent. The 1987 Constitution provides —

> Section 13. The conclusions of the Supreme Court in any case submitted to it for decision *en banc* or in division shall be reached in consultation before the case is assigned to a Member for the writing of the opinion of the Court. A certification to this effect signed by the Chief Justice shall be issued and a copy thereof attached to the record of the case and served upon the parties. *Any Member who took no part, or dissented, or abstained from a decision or resolution must state the reason therefor.* The same requirements shall be observed by all lower collegiate courts.[152]

As shown in the Records of the 1986 Constitutional Commission, it is explicit that the framers of the present Constitution intended the said provision to be mandatory. In this respect, the Records reveal the intent of the framers in this wise —

149. *See* Valentine's Day Resolution, at Annex "A."

150. Valentine's Day Resolution, at Annex "A."

151. *Id.*

152. PHIL. CONST. art. 8, § 13 (emphasis supplied).

Mr. Maambong: Thank you, Mr. Presiding Officer.

I will proceed to the last sentence which reads:

'Any Member dissenting or abstaining from a decision shall state the reason for his dissent or abstention.'

We are all aware, Mr. Presiding Officer, that there are so many decisions of the Supreme Court mentioned in the Philippine Reports and the Supreme Court Reports, Annotated, wherein a member merely mentions, 'I concur' and sign or 'I abstain' and sign or 'I dissent' and sign.

Before I propose any amendment, I would like to know from the Committee if this last sentence means that a member of the court who dissents or abstains should state, as a matter of a mandatory requirement, the reason for his dissent or abstention, or, could a member who dissents or abstains just do the usual thing and place there, 'I dissent' or 'I abstain,' then sign?

Mr. Regalado: *We will make it mandatory.* May I explain? The line here says: 'Any Member dissenting or abstaining from a decision shall state the reason for his dissent or abstention.' *This is to eliminate the practice of just saying 'no part,' and then, he places therein his initials or comment 'I dissent.'* The Gentleman wants it to be more or less mandatory because of the phrase 'shall state the reason for his dissent or abstention.'

Mr. Maambong: I just would like to know the intention, Mr. Presiding Officer.

Mr. Regalado: *If the Gentleman wants it to be a little stronger and in a more mandatory manner*, I think the Committee will have no objection to *changing the word 'shall' to MUST.*

Mr. Maambong: Then, I so move, Mr. Presiding Officer, to change the word 'shall' to MUST with the following clarification: If it is already acceptable to the Committee that *when a member who dissents or abstains will not indicate his reasons, would that be a nonfeasance in the performance of official duty?*

Mr. Regalado: *That would be a culpable violation, unless he explains why he was not able to indicate his reasons.* In the rules on impeachment, it is not only a violation of the Constitution but a culpable violation thereof. So, if despite this directive which is about the strongest we can use without ruffling the sensibilities of the members of the Supreme Court — the word 'must' is already an indication of the mandatory nature of that requirement — *and they have no reason whatsoever for not complying therewith*[,] *then it is not only a violation, but a culpable violation*, without prejudice to such action as may be taken against him by his own peers in the Supreme Court.

Mr. Maambong: Just one final point, Mr. Presiding Officer. Could a [J]ustice just say on the bottom of the decision, 'I take no part,' then sign it?

> Mr. Regalado: He has to say, for instance, 'I take no part because I am disqualifying myself for the following reasons,' and some of them are the reasons for disqualification from participation.
>
> Mr. Maambong: Thank you.
>
> Mr. Regalado: But if he just says, 'no part,' considering the mandatory nature, that would already be a violation.
>
> Mr. Maambong: Thank you, Mr. Presiding Officer.[153]

Thus, the Valentine's Day Resolution could be read to hamper the performance and fulfillment of the constitutional mandate and duty of the individual member of the Supreme Court to explain his or her vote. It is a curtailment of his prerogative to explain why he or she did not agree with the majority and dissented.

The essence of the said Resolution is to entrench a preemptive system that the opinions and decisions shall first undergo a determination by the majority of any sitting Court *en banc* whether the same contains privileged information.[154]

There is precedent to the effect that the Court narrated what transpired during its internal deliberations, especially involving matters which affect national interest or matters within the consciousness of the public.

In *People v. Caruncho, Jr.*,[155] involving the case of a Mayor mauling a journalist, the Court deliberations and processes were tackled lengthily despite the fact that the case was very short.[156] The *ponencia* of Justice Vicente Abad Santos related the process of assignment of the decision to the Justices prior to and during the writing of the decision.[157] In particular, Justice Abad Santos recalled particular conversations between specific Justices as to the assignment of landmark cases and the complaint of Associate Justice Ameurfina Melencio-Herrera regarding the length of time it took to dispose the case.[158]

Then Chief Justice Enrique M. Fernando also wrote a separate concurring opinion,[159] discussing the manner of assignment of the case and the voting thereon. Justice Melencio-Herrera likewise wrote a separate opinion detailing at length the manner of voting of the Justices on the case

---

153. 1 RECORD OF THE CONSTITUTIONAL COMMISSION 501 (1986) (emphasis supplied).

154. *See* Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion).

155. People v. Caruncho, Jr., 127 SCRA 16 (1984).

156. *Id.* at 26.

157. *Id.* at 25.

158. *Id.* at 33.

159. *See generally Caruncho, Jr.*, 127 SCRA at 34-41.

on different agenda dates, and the Court's and the Chief Justice's actions thereafter.[160]

Of Associate Justice Hugo E. Guttierez, Jr.'s concurring opinion,[161] Justice Sereno explains that, "*Justice Gutierrez remarked that the opening up of the deliberations of the Supreme Court to the public (as when the voting was recited in detail) may be helpful to the general public and do away with unfounded speculations as to how decisions are reached.*"[162]

In *Misolas v. Panga*,[163] Associate Justice Abraham P. Sarmiento, Jr. also revealed how the case "journeyed from *ponente* to *ponente* and opinion to opinion, which, rather than expedited its resolution, had delayed it — at the expense of the petitioner."[164]

Confidentiality of information is strictly imposed by Canon 4 of the New Code of Judicial Conduct, which applies to judges and Justices. The Code states —

> Section 9. Confidential information acquired by judges in their judicial capacity shall not be used or disclosed for any other purpose not related to their judicial duties.[165]

Note, however, that the foregoing is not a rule of prohibition, but merely of limitation on use and disclosure. Thus, confidential information acquired by judges in their judicial capacity may be used or disclosed for as long as the same is related to their judicial duties.

As to court personnel, the Code of Conduct for Court Personnel, provides —

> Section 1. Court personnel shall not disclose to any unauthorized person any confidential information acquired by them while employed in the judiciary, whether such information came from authorized or unauthorized sources.
>
> *Confidential information means information not yet made a matter of public record relating to pending cases, as well as information not yet made public* concerning the work of any [J]ustice or judge relating to pending cases, including

160. *Id.* at 50-66.

161. *Id.* at 46-50.

162. Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion).

163. Misolas v. Panga, 181 SCRA 648 (1990).

164. Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion) (citing *Misolas*, 181 SCRA at 663 (J. Sarmiento, dissenting opinion)).

165. Supreme Court, Re: New Code of Judicial Conduct for the Philippine Judiciary, Administrative Matter No. 03-05-01-SC [New Code of Judicial Conduct], canon 4, § 9 (June 6, 2006).

> notes, drafts, research papers, internal discussions, internal memoranda, records of internal deliberations[,] and similar papers.
>
> The *notes*, *drafts*, *research papers*, *internal discussions*, *internal memoranda*, *records of internal deliberations*[,] and *similar papers* that a [J]ustice or judge uses in preparing a decision, resolution[,] or order *shall remain confidential even after the decision*, *resolution*[,] or *order is made public*.[166]

Notably, the rule on confidentiality is stricter with respect to court personnel than it is with judges or [J]ustices, since court personnel are not allowed to divulge any of the judges' or [J]ustices' internal documents even after the decision, resolution or order relating thereto has been made public.

The only time they may disclose confidential information is if the same is required by statute, court rule or administrative policy to be released to specific persons.

> Section 2. Confidential information available to specific individuals by reason of statute, court rule or administrative policy shall be disclosed only by persons authorized to do so.[167]

Notwithstanding this rule, the Court, in *Mah-Arevalo v. Mape*,[168] absolved a court personnel for disclosing court records — specifically the decision, entry of judgment, and certificate of finality — to the OSG.[169] The Court stated that the records are no longer confidential since the decision had already become final in this manner —

> We do not agree with the investigating judge's findings and recommendations on this point. In the first place, the information the complainant disclosed does not qualify as confidential information, as the term is defined under Section [1], Canon [2] of the Code of Conduct for Court Personnel; [c]onfidential information means '*information not yet made a matter of public record relating to pending cases, as well as information not yet made public concerning the work of any [J]ustice or judge relating to pending cases,* including notes, drafts, research papers, internal discussions, internal memoranda, records of internal deliberations, and similar papers.' As the records indicate, *the decision adverted to has already become final*; in fact, a *certificate of finality has already been issued*, and *an entry of judgment had already been made*.[170]

The Court even went further by ruling that even if the court records disclosed by the court personnel were confidential, the act would not be so

166. Supreme Court, Code of Conduct for Court Personnel, Administrative Matter No. 03-06-13-SC, canon 2, § 1 (June 1, 2004) (emphasis supplied).

167. *Id.* at canon 2, § 2.

168. Mah-Arevalo v. Mape, 584 SCRA 35 (2009).

169. *Id.* at 41.

170. *Id.* at 41-42 (emphasis supplied).

grave as to constitute contempt of court *if the same were made not to further private interests or give undue advantage to anyone.*[171] The Court explained —

> Even if the documents were to be considered as classified, the complainant still cannot be held liable for unauthorized disclosure of classified information under the Revised Uniform Rules on Administrative Cases in the Civil Service, Rule [4], Section 52, B (23) which provides:
>
> 'Disclosing or misusing confidential or classified information officially known to him by reason of his office and not made available to the public, to further his private interests or give undue advantage to anyone, or to prejudice the public interests.'
>
> We do not see from the records any indication that the complainant made the disclosure '*to further (his) private interests or give undue advantage to anyone, or to prejudice the public interests*.' The [OSG], too, to which the copies were sent, represented a party to the case and, hence, has the right to access these records.
>
> At best, the complainant was only guilty of releasing information without observance of the internal procedures of the court, and for undertaking the dissemination of the copies of the documents disclosed without being the staff member authorized to do so. These infractions may have been the reasons for Judge Mantua's strong reaction to the release of documents by the complainant. To be sure, the complainant's action must be discouraged. We cannot accept, however, that her act was grave or contemptuous, and that it should be classified as a less grave offense under Rule [4], Section 52, B (23) of the Revised Uniform Rules on Administrative Cases in the Civil Service. The complainant's lapse should merit only the warning that a repetition of the same or a similar offense in the future shall not go unpunished.[172]

IX. CONCLUSION

From the foregoing, with due respect to the respect, worthiness, and legitimacy of the judiciary, we think salient portions of the Valentine's Day Resolution[173] are inconsistent with settled constitutional doctrine as discussed in case law in the U.S. and in the Philippines.

We think that portions of this Resolution are infirm insofar as it disallowed Justices and personnel to testify with regard to documents which are of public records.

Again, these documents are well within the public realm and have been accessed already by the public through various means; it serves no purpose to

171. *Id.* at 42.

172. *Id.* at 42-43 (emphasis supplied).

173. *See generally* Valentine's Day Resolution.

prohibit Justices and personnel from testifying to court documents which are already public thereby having lost its privileged nature.

During the 22 and 23 February 2012 hearing at the Impeachment Court,[174] it was repeatedly discussed by the prosecution, the defense, and the Senator-jurors alike that the testimony of DOJ Secretary Leila M. De Lima on the dissenting opinion of Justice Sereno is admissible only as to prove that the said dissenting opinion exists but as to the truth thereof, Secretary De Lima's testimony is hearsay. It may have been unfair to perfunctorily deny Justice Sereno the opportunity to expound her side on what really transpired in relation to the non-promulgation and non-publication of her dissenting opinion.[175]

The veiled threat and prohibition against Justices is clearly an unmitigated overexpansion of the rule of judicial privilege that does not appear to be aimed at protecting judicial independence and even treads dangerously on close censorship[176] and curtailment of the constitutional duty of the minority.[177]

Whatever is contained in these opinions are decidedly public records, which any impeachment prosecutor ought to depend on to support his or her case.

Ultimately, and at any rate, the prerogative lies with the Impeachment Court on how to appreciate their contents. Has the Valentine's Day Resolution allowed the Supreme Court to clip the wings of an Impeachment Court by preventing members of the Court from testifying against a fellow member who is the subject of an impeachment trial?[178]

It remains to be seen how the said Resolution will be well-received in forthcoming jurisprudence. In times of heated constitutional moments such

---

174. *See generally* Senate of the Republic of the Philippines, Records of the Senate Sitting as an Impeachment Court, Feb. 22, 2012, *available at* http://www.gov.ph/downloads/2012/02feb/20120222-Official-TSN.pdf (last accessed Nov. 15, 2012) & Senate of the Republic of the Philippines, Records of the Senate Sitting as an Impeachment Court, Feb. 23, 2012, *available at* http://www.gov.ph/ downloads/2012/02feb/20120223-Official-TSN.pdf (last accessed Nov. 15, 2012).

175. *See generally* Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion).

176. *See* PHIL. CONST. art. 3, § 4. This Section provides that "[n]o law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people to peaceably assemble and petition the Government for redress of grievances." PHIL. CONST. art. 3, § 4.

177. *See* PHIL. CONST. art. 8, § 13.

178. *See generally* Valentine's Day Resolution (J. Sereno, concurring and dissenting opinion).

as the impeachment trial, future Justices may decide to entrench constitutional discourse otherwise inapplicable in ordinary times or they may not. One could well say that the impeachment trial itself of a Supreme Court Justice, if not the very Chief Justice, can be an outcome determinative of all judicial discourse on impeachment jurisprudence.