Examining Executive Privilege in Light of E.O. 464: A Comment on Senate of the Philippines, et al. v. Eduardo Ermita, et al.

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I. INTRODUCTION

In the midst of several controversial matters hounding the Executive Branch, President Gloria Macapagal-Arroyo issued Executive Order No. 464 (hereinafter E.O. 464), declaring specific members of the executive branch must seek consent from her office prior to appearing before either House of the inquisitive Congress. Declaring the executive order null and void, the Supreme Court pronounced that it provided for an *implied claim of privilege*, without stating reasons for making such a claim as required by jurisprudence. This case comment, however, for the sake of legal disquisition, presents a different theory in approaching the case—that what existed was p*resumptive privilege* rather than an *implied claim of privilege*. Upon this theory, there would be no *actual controversy* as yet in the present case, and further, E.O. 464

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should be declared valid in its entirety. This is based on the principle of separation of powers and due respect for co-equal branches of government.

The principle of separation of powers has been with the Philippines at the very least since the effectivity of the 1935 Constitution.[1] Essentially, what separation of powers provides is that each branch of government is to exercise only a particular power granted to it—legislation to the legislative branch, execution to the executive branch, and judgment to the judiciary. Each branch of government is not allowed to enter into the realm of powers of the other branch.[2] This ensures that no particular group or branch of government abuses its position as each essentially requires the concurrence of the other branches.[3] This paves the way for a system of checks and balances, "the net effect of which being that, in general, no one department is able to act without the cooperation of at least one of the other departments."[4] Father Joaquin G. Bernas, S.J., a renowned constitutionalist and law professor provides, thus:

> [t]he purpose of separation of powers and "checks and balances" is to prevent concentration of powers in one department and thereby to avoid tyranny. But the price paid for the insurance against tyranny is the risk of a degree of inefficiency and even the danger of gridlock. As Justice Brandeis put it, "the doctrine of separation of powers was adopted... not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among the three departments, to save the people from autocracy."
>
> The danger of tyranny arising from the concentration of powers in one man was realized during the dark days of martial law. But the danger of inefficiency and gridlock can also be intense when the holders of power are driven by self-interest.[5]

Many would indeed not doubt the presence of inefficiency and gridlock in the Philippines' system of government. Many a time, the legislative branch has been uncooperative with the plans and agenda of the executive branch, and vice-versa.[6] The present case to be studied and analyzed by this

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1. JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 655 (2003 ed.).
2. *Id.* at 656.
3. *Id.*
4. *Id.*
5. *Id.* at 655 (citing Myers v. United States, 272 U.S. 52, 293 (1926)).
6. *See* Veronica Uy, *Drilon closes door to 2006 budget,* PHIL. DAILY INQUIRER, June 22, 2006, http://news.inq7.net/breaking/index.php?index=1&story_id=80036 (last accessed July 13, 2006); *see also* Michael Lim Tubac & TJ Burgonio, *It's back to '05 budget as talks collapse,* PHIL. DAILY INQUIRER, June 09, 2006,

comment is only one of the many instances where there has been a lack of cooperation between the aforesaid branches of government. This comment aims to determine the merits of each side of the fence, and more particularly, the soundness of the decision made by the third branch of government that frequently mediates between the other two branches.

II. FACTS OF THE CASE

The present controversy arose from several privilege speeches delivered by members of the Senate touching on various controversial issues, prompting the Senate to conduct investigations in aid of legislation. One such speech was delivered by Senator Juan Ponce Enrile, wherein he questioned the alleged overpricing of the North Rail Project of President Gloria Macapagal-Arroyo. Other privilege speeches were delivered by Senators Aquilino Q. Pimentel, Jr., Jinggoy E. Estrada, and Rodolfo Biazon, all in relation to the *Gloriagate Scandal*. The *Gloriagate Scandal* pertained to publicly circulated tapes supposedly containing a wiretapped conversation between President Gloria Macapagal-Arroyo and COMELEC Commissioner Virgilio Garcilliano—allegedly indicating massive fraud in the 2004 Presidential Election.[7] Senate Resolutions sponsored by Senator Maria Ana Consuelo Madrigal and Senator Rodolfo Biazon were passed, directing the Senate Committee on National Defense and Security to conduct an inquiry "in aid of legislation, and in the National Interest, on the Role of the Military in the So-called *Gloriagate Scandal*"[8] and on the Wire-tapping of the President of the Philippines.

In light of these privilege speeches and resolutions, the Senate invited several officials of the executive department as resource speakers in public hearings. Among those invited were North Luzon Railways Corporation President Jose L. Cortes, Jr.; Armed Forces of the Philippines Chief of Staff

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http://news.inq7.net/nation/index.php?index=1&story_id=78548 (last accessed July 13, 2006); *see also* Carlito Pablo, *No budget approval, no P35-M pork barrel,* PHIL. DAILY INQUIRER, Nov. 23, 2004, http://news.inq7.net/nation/index.php?index=1&story_id=18989 (last accessed July 13, 2006).

7. *See* Christine O. Avendaño & Gil C. Cabacungan Jr., *Palace releases 2 CDs of "bugged" phone call of President,* PHIL. DAILY INQUIRER, June 7, 2005, http://news.inq7.net/nation/index.php?index=1&story_id=39468#other_stories (last accessed July 13, 2006); *see also* Beting Dolor, *Arroyo mutters "sorry," opposition unmoved,* *at* http://www.philippinenews.com/news/view_article.html?article_id=648e0cd616df1f17b20d13934a124017 (last accessed July 13, 2006); *see also* Michael Lim Ubac & Philip C. Tubeza, *Garcillano affidavit clears President; foes decry diversion,* PHIL. DAILY INQUIRER, July 7, 2005, http://news.inq7.net/nation/index.php?index=1&story_id=42609 (last accessed July 13, 2006).

8. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 6.

General Generoso S. Senga; Philippine Army Commanding General Lt. Gen. Hermogenes C. Esperon; Inspector General of the AFP Vice Admiral Mateo M. Mayuga; Deputy Chief of Staff for Intelligence of the AFP Rear Admiral Tirso R. Danga; and Chief of the Intelligence Service of the AFP Brig. Gen. Marlu Q. Quevado. The public hearing for the North Rail Project was set on 29 September 2005, while the public hearing for the Gloriagate Scandal related issues was set on 28 September 2005.[9]

On 28 September 2005 though, Senate President Franklin M. Drilon received from Executive Secretary Eduardo R. Ermita a letter dated 27 September 2005, asking for the postponement of the public hearings in order to afford the invited officials of the executive department "ample time and opportunity to study and prepare for the various issues [to be heard] so that they may better enlighten the Senate Committee on its investigation."[10] A similar letter was sent by Jose L. Cortes, Jr.[11]

The present controversy began when on even date, the President issued Executive Order 464, entitled "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials in Legislative Inquiries in Aid of Legislation under the Constitution, and for other purposes." The said Executive Order took effect immediately, pursuant to its Section 6.[12] The executive order essentially directed various officials of the executive department to secure permission from the President prior to appearing before either House of Congress. In Section 1 thereof, the Heads of Departments were required to secure consent from the President before appearing in either the House of Representatives or the Senate pursuant to Section 22 of Article VI of the 1987 Constitution.[13] Section 2 provides for

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9. *Id.* at 5.
10. *Id.* at 7.
11. *Id.* at 7.
12. *Id.* at 8.
13. Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and For Other Purposes [E.O. 464]. Section 1 of this executive order provides, thus:

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

the nature, scope and coverage of the executive order. The said section provides for the policy of the executive order, as well as enumerates the kind of information that are considered confidential or classified as between the President and the public officers covered. Paragraph b of the same section enumerates which officials are to be considered as covered by the executive order.[14] Finally, section 3 of the said executive order requires the officials

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

Id. at § 1.

14. The full text of Section 2 of E.O. 464 provides, thus:

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

(a) Nature and Scope. – The rule of confidentiality based on executive privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution (*Almonte v. Vasquez*, G.R. No. 95 367, May 23, 1995). Further, Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees provides that Public Officials are Employees shall not use or divulge confidential or classified information officially known to them by reason of their office and not made available to the public to prejudice the public interest.

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

i. Conversations and correspondence between the President and the public official covered by this executive order (*Almonte v. Vasquez*, G.R. No. 95367, May 23, 1995; *Chavez v. Public Estates Authority*, G.R. No. 133250, July 9, 2002);

ii. Military, diplomatic and other national security matters which in the interest of national security should not be divulged (*Almonte v. Vasquez*, G.R. No. 95367, May 23, 1995; *Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, Dec. 9, 1998).

iii. Information between inter-government agencies prior to the conclusion of treaties and executive agreements (*Chavez v. Presidential Commission on Good Government*, G.R. No 130716, Dec. 9, 1998).

iv. Discussion in close-door Cabinet meetings (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, Dec. 9, 1998).

v. Matters affecting national security and public order (*Chavez v. Public Estates Authority*, G.R. No. 133250, July 9, 2002).

enumerated under Section 2(b) to secure consent from the President prior to appearing before either House of Congress.[15]

Based on E.O. 464, Executive Secretary Eduardo Ermita, and General Senga sent letters of regret to the Senate President, informing him that consent has not been obtained from the President, and that until such consent is obtained, the invited members of the executive department will not be able to attend the scheduled public hearings. As such, the Senate, as well as some members of the House of Representatives, certain citizens, and organizations of lawyers, including the Integrated Bar of the Philippines, filed petitions with the High Court, challenging the constitutionality of E.O. 464, and praying for the issuance of a Temporary Restraining Order.

Issues

The Supreme Court dealt with the procedural issues of *locus standi* and presence of an actual controversy before delving into the substantive issues. The substantive issues were synthesized by the Court into the following:

1. Whether E.O. 464 contravenes the Power of Inquiry vested in Congress;

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

i. Senior officials of executive departments who in the judgment of the department heads are covered by the executive privilege;

ii. Generals and flag officers of the Armed Forces of the Philippines and such other officers who in the judgment of the Chief of Staff are covered by the executive privilege;

iii. Philippine National Police (PNP) officers with rank of chief superintendent or higher and such other officers who in the judgment of the Chief of the PNP are covered by the Executive Privilege;

iv. Senior national security officials who in the judgment of the National Security Adviser are covered by the executive privilege; and

v. Such other officers as may be determined by the President.

15. Section 3 of E.O. 464 provides, thus:

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

2. Whether E.O. 464 violates the right of the people to information on matters of public concern; and
3. Whether respondents have committed grave abuse of discretion when they implemented E.O. 464 prior to its publication in a newspaper of general circulation.[16]

This case comment will focus on the first issue resolved by the Court, taken together with the presence of an actual controversy.

III. SURVEY OF LAWS AND CASES

A. Power of Inquiry

The instant case deals mainly with the Power of Inquiry of Congress in aid of legislation, as provided for by Section 21 of the Constitution, in relation to executive privilege. Section 21 traces its roots from the case of *Arnault v. Nazareno*,[17] a case decided in 1950. *Arnault* provided for the power of inquiry of Congress prior to the 1973 Constitution as the 1935 Constitution contained no provision on the said power.[18] *Arnault* provides, thus:

> Although there is no provision in the Constitution expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative functions advisedly and effectively, such power is so far incidental to the legislative function as to be implied. In other words, the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information with respect to the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which is not infrequently true—recourse must be had to others who do possess it. Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion is essential to obtain what is needed. The fact that the Constitution expressly gives to Congress the power to punish its Members for disorderly behaviour, does not by necessary implication exclude the power to punish for contempt any other person.[19]

Arnault emphasized that the inquiry must be material and necessary to the exercise of a power granted by the Constitution, such as the power to

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16. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 19.
17. Arnault v. Nazareno, 87 Phil. 29 (1950).
18. BERNAS, *supra* note 1 at 737 (citing Arnault v. Nazareno, 87 Phil. 29 (1950)).
19. *Arnault*, 87 Phil. at 45 (citing McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319 (1927) and Anderson v. Dunn, 6 Wheaton 204; 5 L. ed. 242 (1821)).

legislate. Otherwise, the legislative body would be acting in excess of its jurisdiction.[20]

The decision in *Arnault* was based on the United States of America case *McGrain v. Daugherty*.[21] In *McGrain*, the United States Supreme Court, through Mr. Justice Van Devanter, provided that the power of inquiry, including the power to enforce it, is an inherent power of Congress. It held that this has been recognized even before the American Constitution was framed and ratified.[22] Without this power, Congress would not be able to legislate wisely, as more often than not, Congress does not have all the data that it needs.[23]

"What was implicit under the 1935 Constitution, as influenced by American jurisprudence, became explicit under the 1973 Constitution and under the 1987."[24] It must be stressed however that, because of the broad power of inquiry of Congress, such power is open to abuse. It has therefore been tempered by the Supreme Court in *Bengzon, Jr. v. Senate Blue Ribbon Committee*.[25] *Bengzon, Jr.* held that the power of Congress to conduct

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20. *Id.* at 48.

> The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject of the inquiry of investigation.

21. McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319 (1927).

22. *Id.* at 174.

> We are of the opinion that the power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American Legislatures before the [American] Constitution was framed and ratified. Both houses [of the American] Congress took this view of it early in their history-the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the [American] Constitution gives special significance to their action-and both houses have employed the power accordingly up to the present time.

23. *Id.* at 175.

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information-which not infrequently is true-recourse must be had to others who do possess it.

24. BERNAS, *supra* note 1 at 737.

25. Bengzon, Jr. v. Senate Blue Ribbon Committee, 203 SCRA 767 (1991).

inquiries is not absolute or unlimited, such that the inquiry must be in aid of legislation, must be in accordance with the duly published rules of procedure of Congress, and must be respectful of the rights of the persons affected.[26] It further states that "[a]s held in *Jean L. Arnault v. Leon Nazareno, et al.*, the inquiry, to be within the jurisdiction of the legislative body making it, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate or to expel a member."[27]

In the said case, the inquiry of the Senate Blue Ribbon Committee was found not to have been in aid of legislation. The Senate could not therefore compel the petitioners to appear before it. The *Power of Inquiry* of Congress was thereby limited and pointed out to be not of an absolute character. Nevertheless, said power still exists when it is in aid of legislation. This power however is still subject to certain exceptions, such as executive privilege.

B. Executive Privilege

The leading case on Executive Privilege in the Philippines is *Almonte v. Vasquez*.[28] In this case, based on an anonymous letter the Ombudsman received, it conducted an investigation on the Economic Intelligence and Investigation Bureau (hereinafter EIIB), issuing a subpoena *duces tecum* in relation thereto. The letter was purportedly written by an employee of the EIIB alleging certain anomalies in the funds disbursement of the said bureau. Petitioners, including Jose T. Almonte, moved to quash the sub poena *duces tecum*, on the ground that the information or documents requested by the Ombudsman were classified and privileged.[29] Given the opportunity, the Supreme Court proceeded to discuss Executive Privilege, to wit:

> [a]t common law a governmental privilege against disclosure is recognized with respect to state secrets bearing on military, diplomatic and similar matters. This privilege is based upon public interest of such paramount

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26. *Id.* at 777.

> The power of both houses of Congress to conduct inquiries in aid of legislation is not, therefore, absolute or unlimited. Its exercise is circumscribed by [Section 21] of the Constitution. Thus, as provided therein, the investigation must be 'in aid of legislation in accordance with its duly published rules of procedure' and that 'the rights of persons appearing in or affected by such inquiries shall be respected.' It follows then that the rights of persons under the Bill of Rights must be respected, including the right to due process and the right not to be compelled to testify against one's self.

27. *Id.* at 778 (citing Arnault v. Nazareno, 87 Phil. 29 (1950)).

28. Almonte v. Vasquez, 244 SCRA 286 (1995).

29. *Id.*

> importance as in and of itself transcending the individual interests of a private citizen, even though, as a consequence thereof, the plaintiff cannot enforce his legal rights.[30]

The Court then cites the United States Supreme Court in the case of *United States v. Nixon*[31] wherein the conversations and correspondence of the President where likened to "the claim of confidentiality of judicial deliberations."[32] *Nixon* not only explained the importance of executive privilege, but also provided for considerations justifying a presumptive privilege, thus:

> The expectation of a President to the confidentiality of his conversations and correspondence, *like the claim of confidentiality of judicial deliberations*, for example, has all the values to which we accord deference for the privacy of all citizens and, *added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making.* A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a *presumptive privilege* for Presidential communications. *The privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution*...[33]

Almonte attempted to balance the use of executive privilege. It explained that executive officers may not capriciously invoke privilege, but neither may the courts require automatic disclosure.[34] The Supreme Court however

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30. *Id.* at 295.

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

32. *Almonte*, 244 SCRA at 295.

33. *Id.* (emphasis supplied). The Court further provides:

> "[t]he confidentiality of judicial deliberations" mentioned in the opinion of the Court referred to the fact that Justices of the U.S. Supreme Court and judges of lower federal courts have traditionally treated their working papers and judicial notes as private property.

Id. at 295-96.

34. *Id.* at 296-97.

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an

provided that where the claim does not rest on these matters but on a general public interest, the President will not be entitled to a claim of absolute privilege.[35]

The Supreme Court declared the subpoena *duces tecum* of the Ombudsman valid, stating that "the need for the documents… outweigh the claim of confidentiality of the petitioners. However, the Supreme Court ordered that the examination of the said documents be conducted *in camera*."[36]

This idea of governmental privilege as espoused in *Almonte* was again recognized in the case of *Chavez v. Presidential Commission on Good Government*[37] with regard to the right to information. The Supreme Court states that while the "information" and "transactions" referred to in the Constitution[38] have no definite scope and extent and as there are no specific laws which prescribe exact limitations, the following are some of the recognized restrictions: (1) national security matters and intelligence information, (2) trade secrets and banking transactions, (3) criminal matters,

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> examination of the evidence, even by the judge alone in chambers… In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail.

35. *Id.* at 297.

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

36. *Id.* at 300 (emphasis supplied).

37. Chavez v. Presidential Commission on Good Government, 299 SCRA 745 (1998).

38. *See* PHIL CONST. art III, § 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.

and (4) other confidential information.[39] While there are recognized restrictions, when "there is no need to protect such state secrets, the privilege may not be invoked to withhold documents and other information, provided they are examined 'in strict confidence' and given 'scrupulous protection.'"[40]

As can be gleaned from the cases of *Almonte* and *Chavez*, the Philippines has adopted the doctrine of executive privilege. Now, as the case of *Almonte* is partly based on the United States case of *U.S. v. Nixon*, it is worth examining it further. In *Nixon*, the Special Prosecutor filed a motion for a subpoena *duces tecum* for the production of certain tapes and documents prior to trial with regard to alleged violations of federal statutes by certain staff members and political supporters of then President Richard Nixon. The said tapes and documents contained records of the President's conversations and meetings with his aides and advisers. President Nixon claimed executive privilege, which the United States District Court for the District of Columbia rejected.[41]

Essentially, the United States Supreme Court held that in order for the President to be able to make a valid claim of absolute privilege, he or she must state the reasons for making such a claim—particularly, whether such claim of privilege is based on the need to protect military, diplomatic, or sensitive national security secrets, the disclosure of which could cause injury to public interest. Absent such basis for laying the claim of privilege, other values of greater importance may arise and be given preference.[42] Anent the argument on separation of powers, the Court stated that, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates

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39. *Chavez*, 299 SCRA at 763-64.

40. *Id.*

41. U.S. v. Nixon, 418 U.S. 683, 687-88 (1974).

42. *Id.*

> However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

that practice will integrate the dispersed powers in a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[43]

The United States Supreme Court further discussed the presumptive privilege of Presidential communications. It points out that the President enjoys the right to privacy in the same way an ordinary citizen does.[44] The Court further states that "Freedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure… Government … needs open but protected channels for the kind of plain talk that is essential to the quality of functioning."[45] However, the Court also points out that such presumptive privilege must be weighed out in light of criminal justice. It emphasized that such presumptive privilege is not applicable when the issues raised involves criminal justice as such privilege cannot be used to suppress evidence in the interest of justice and fair play.[46]

The case of *Nixon* was tackled in the recent case of *Cheney v. U.S. District Court.*[47] *Cheney* pronounced that the *Nixon* case applies only to criminal proceedings. The same Court stressed that there is a greater need for information in criminal cases so that "guilt shall not escape or innocence suffer,"[48] such that

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43. *Id.* (citing Youngtown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

44. *Id.* (citing Nixon v. Sirica, 159 U.S.App.D.C. 58, 487 F.2d 700 (1973)).

> The expectation of a President to the confidentiality of his conversations, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. In *Nixon v. Sirica* the Court of Appeals held that such Presidential communications are "presumptively privileged," and this position is accepted by both parties in the present litigation.

45. *Id.* at 708 (1974) (citing Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325 (DC. 1966)).

46. *Id.* at 711.

47. Cheney v. U.S. District Court, 542 U.S. 367 (2004).

48. *Id.* at 384 (citing U.S. v. Nixon, 418 U.S. 683 (1974)).

> [w]ithholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks conflict[s] with the function of the courts under Art. III. *Such an impairment of the essential functions of [another] branch, is impermissible.*[49]

Cheney essentially provided that withholding information in a criminal case on the basis of executive privilege would be violative of the essential functions granted to the judicial branch of government. However, such is inexistent in civil cases as these do not involve *essential functions* of the judiciary. Civil cases do not involve the same amount of urgency as criminal cases. This being so, a high respect must be accorded to the executive branch of government in civil matters.[50]

IV. THE DECISION OF THE SUPREME COURT

Returning to *Senate of the Philippines, et al. v. Eduardo Ermita, et al.*, the Supreme Court disposed of preliminary matters first, such as the standing of the parties to bring the case and the ripeness of the controversy, before going into the merits of the case. In the decision penned by Justice Conchita Carpio-Morales, the Court resolved the constitutionality of E.O. 464 in light of the Power of Inquiry of Congress, Executive Privilege, and the Right to Information. Finally, the decision also tackled the issue of the proprietary of the implementation of E.O. 464 prior to its publication.

A. Standing

The Court did not doubt the standing of the legislators to bring suit against E.O. 464. The Senate has the right to question an act which may infringe or infringes on their prerogatives as legislators. [51]

Similar, if not the same reasons were also given by the Court as regards the standing of party-list representatives Satur Ocampo, Teodoro Casino,

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49. *Id.* at 384 (emphasis supplied).

50. *Id.* at 385.

51. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 22.

> That the Senate of the Philippines has a fundamental right essential not only for intelligent public decision-making in a democratic system, but more specifically for sound legislation is not disputed. … Verily, the Senate, including its individual members has a substantial and direct interest over the outcome of the controversy and *is the proper party to assail the constitutionality of E.O. 464*. Indeed, legislators have standing to maintain inviolate the prerogative, powers, and privileges, vested by the Constitution in their office and are allowed to sue to question the validity of any official action which they claim infringes their prerogatives as legislators.

Joel Virador, Crispin Beltran, Rafael Mariano, Liza Maza,[52] and national political party-list Bayan Muna.[53]

Likewise, Francisco Chavez was deemed to have standing as "when suing as a citizen, the interest of the petitioner in assailing the constitutionality of laws, presidential decrees, orders, and other regulations, must be direct and personal."[54] It has been held by the High Court in a previous case that "when the proceeding involves the assertion of a public right, the mere fact that he is a citizen satisfies the requirement of personal interest."[55]

Petitioner *Partido ng Demokratikong Pilipino* (PDP)-Laban was considered not to have standing to bring suit since it was not able to show that there was a lack of a party with a more direct and specific interest in bringing the case. Further, the Court provided that PDP-Laban's allegation that E.O. 464 hampers its legislative agenda is "vague and uncertain, and at best is only a 'generalized interest' which it shares with the rest of the political parties."[56]

B. Actual Case or Controversy

As for the presence of an actual case or controversy, the Supreme Court ruled that "as the implementation of the challenged order has already resulted in the absence of officials invited to the hearings of petitioner Senate of the Philippines, it would make no sense to wait for any further event before considering the present case ripe for adjudication."[57] Despite the fact that the President has not withheld her consent in the appearance of officials insofar as E.O. 464 was concerned, there was already an actual controversy, "*[f]or E.O. 464 does not require either a deliberate withholding of consent or an express prohibition issuing from the President in order to bar officials from appearing before Congress.*"[58] These pronouncements of the Supreme Court will be discussed further in the analysis chapter of this comment.

C. Constitutionality of E.O. 464

After determining the propriety of judicial review, the Court then proceeded to resolve the main issues of the case.

52. *Id.*

53. *Id.* at 22-23.

54. *Id.*

55. *Id.*

56. *Id.*

57. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 26.

58. *Id.* (emphasis supplied by the Supreme Court).

1. The *Power of Inquiry*

The Court began with a discussion on the Power of Inquiry. It stated that although the current Constitution explicitly provides for the *Power of Inquiry*, such was not found in the 1935 Constitution. Despite its absence in the 1935 Constitution, it has been recognized as an inherent power of Congress as highlighted in the 1950 case of *Arnault v. Nazareno*.[59] It has been recognized as a power of Congress inherent in its power to legislate[60] such that the power of inquiry is grounded on the necessity of information in the legislative process.[61]

The Court however admitted that this power of Congress is susceptible to abuse. Although the Constitution has established safeguards to prevent the abuse of this power, it is not unheard of.[62] Such abuses may be remedied before the courts, and in instances wherein there is a clear pattern of abuse by the legislative power of inquiry resulting in the rights of members of the executive department being violated, "attempts by the Executive Branch to forestall these abuses may be accorded judicial sanction."[63]

Nevertheless, there are still recognized exemptions to the power of inquiry of Congress, and these exemptions fall under what is known as executive privilege. The Court proceeded to discuss executive privilege as "this term figures prominently in the challenged order, it being mentioned in its provisions, its preambular clauses, and in its very title."[64]

2. Executive Privilege

The Supreme Court began its discussion with a brief background on executive privilege. It provided that the concept of Executive Privilege is of American origin. This being so, "it is best understood in light of how it has been defined and used in the legal literature of the United States."[65] The

59. Arnault v. Nazareno, 87 Phil. 29 (1950).

60. *Senate of the Philippines, et al.*, G.R. No. 169659 at 27.

61. *Id.* at 29 (citing Arnault v. Nazareno, 87 Phil. 29 (1950)).

> As discussed in *Arnault*, the power of inquiry, 'with process to enforce it,' is grounded on the necessity of information in the legislative process. If the information possessed by executive officials on the operation of their offices is necessary for wise legislation on that subject, by parity of reasoning, Congress has the right to that information and the power to compel the disclosure thereof.

62. *Id.* at 30-31.

63. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006.

64. *Id.* at 31.

65. *Id.*

Court cited different American authors in defining executive privilege, such as Mark J. Rozell,[66] who defined executive privilege as "the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public."[67]

Taking from American writers and the American courts, the Supreme Court then discussed three different considerations by which executive privilege may be asserted in the context of either judicial or legislative investigations, namely: (1) state secret privilege or privilege based on the fact that "the information is of such nature that its disclosure would subvert crucial military or diplomatic objectives;" (2) informer's privilege or "the privilege of the Government not to disclose the identity of persons who furnish information of violations of law to officers charged with the enforcement of that law;" and (3) generic privilege or privilege for internal deliberations which "has been said to attach to intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[68] However, it is further mentioned by the Court that:

> [just because] a type of information is recognized as privileged does not, however, necessarily mean that it would be considered privileged in all instances. For in determining the validity of a claim of privilege, the question that must be asked is not only whether the requested information falls within one of the traditional privileges, but also whether that privilege should be honored in a given procedural setting.[69]

The Court then proceeded to discuss the case of *United States v. Nixon*,[70] a leading case on executive privilege in the United States, which states that, "the privilege must be balanced against the public interest in the fair administration of criminal justice. Notably, the Court was careful to clarify that it was not there addressing the issue of claims of privilege in a civil litigation or against congressional demands for information."[71]

As shown in the previous chapter, in the Philippines, the doctrine of executive privilege was recognized by the Supreme Court in the case of

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66. *Id.*

67. *Id.* at 31 (citing MARK J. ROZELL, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069 (1999)).

68. *Id.*

69. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 33-34 (citing I LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 771 (3d ed. 2000)).

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

71. *Senate of the Philippines, et al.*, G.R. No. 169659 at 34.

Almonte v. Vasquez,[72] followed by the cases of *Chavez v. PCGG*,[73] and *Chavez v. Public Estates Authority*.[74] The Court discussed these cases, highlighting the fact that executive privilege is recognized here in the Philippines, and that the Court has recognized "that there are certain types of information which the government may withhold from the public,"[75] and that there is a "governmental privilege against public disclosure with respect to state secrets regarding military, diplomatic, and other national security matters."[76]

In fine, the Court had the following to say:

> Executive privilege, whether asserted against Congress, the courts, or the public, is recognized only in relation to *certain types of information of a sensitive character*. While executive privilege is a constitutional concept, a *claim* thereof may be valid or not depending on the ground invoked to justify it and the context in which it is made. Noticeably absent is any recognition that executive officials are exempt from the duty to disclose information by there mere fact of being executive officials. Indeed, *the extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure*.[77]

3. Validity of E.O. 464

The Supreme Court tackled the validity of Section 1 of E.O. 464 separately from the validity of Sections 2 and 3. Section 1 applies only to department heads[78] making Section 22 of Article VI of the 1987 Constitution as its basis.[79]

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72. Almonte v. Vasquez, 244 SCRA 286 (1995).
73. Chavez v. Presidential Commission on Good Government, 299 SCRA 744 (1998).
74. Chavez v. Public Estates Authority, 384 SCRA 152 (2002).
75. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 36.
76. *Id.*
77. *Id.* at 37 (emphasis supplied by the Supreme Court).
78. *Id.* at 38.

> Section 1 specifically applies to department heads. It does not, unlike Section 3, require a prior determination by any official whether they are covered by E.O. 464. The President herself has, through the challenged order, made the determination that they are. Further, unlike also Section 3, the coverage of department heads under Section 1 is not made to depend on the department heads' possession of any information which might be covered by executive privilege. In fact, in marked contrast to Section 3 vis-à-vis Section 2, there is no reference to executive privilege at all. Rather, the required prior consent under

In tackling the validity of Section 1 in relation to Article VI, Section 22 of the 1987 Constitution, the High Court made a distinction between Section 22, and Section 21 of the same Article by examining the records of the Constitutional Commission,[80] in which it was seen that the aforesaid provisions pertain to different types of inquiries. The former relates to voluntary appearances of department heads in Congress for its oversight functions, while the latter relates to mandatory attendance for investigations in aid of legislation.[81] The Supreme Court declared Section 1 of E.O. 464 valid.

> Section 1 is grounded on Article VI, Section 22 of the Constitution on what has been referred to as the question hour.

79. *Id.*

80. *Id.* at 42-43.

> In the context of a parliamentary system of government, the "question hour" has a definite meaning. It is a period of confrontation initiated by Parliament to hold the Prime Minister and the other ministers accountable for their acts and the operation of the government, corresponding to what is known in Britain as the question period. There was a specific provision for a question hour in the 1973 Constitution which made the appearance of ministers mandatory. The same perfectly conformed to the parliamentary system established by that Constitution, where the ministers are also members of the legislature and are directly accountable to it.
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> The framers of the 1987 Constitution removed the mandatory nature of such appearance during the question hour in the present Constitution so as to conform more fully to a system of separation of powers. ... That department heads may not be required to appear in a question hour does not, however, mean that the legislature is rendered powerless to elicit information from them in all circumstances. In fact, in light of the absence of a mandatory question period, the need to enforce Congress' right to executive information in the performance of its legislative function becomes more imperative.

81. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 44-45.

> When Congress merely seeks to be informed on how department heads are implementing the statutes which it has issued, its right to such information is not as imperative as that of the President to whom, as Chief Executive, such department heads must give a report of their performance as a matter or duty. In such instances, Section 22, in keeping with the separation of powers, states that Congress may only request their appearance. Nonetheless, when the inquiry in which Congress requires their appearance is 'in aid of legislation' under Section 21, the appearance is *mandatory*...

Sections 2 and 3 of E.O. 464 carried a different story however. Section 3 must be read in connection with Section 2. Section 2(b) made an enumeration of officers who are covered by E.O. 464. Section 3 then provided that those covered under Section 2(b) must first obtain the consent of the President prior to appearing before either House of Congress.[82] The enumeration provided by Section 2(b) however is not a simple list of officials who are covered by the disputed order, but rather involved discretion on the part of certain high ranking officials such as but not limited to, department heads, the Chief of Staff, and the National Security Adviser.

The Supreme Court highlighted that executive privilege does not belong to a person, but rather refers to the information. "Executive privilege… is properly invoked in relation to specific categories of information and not to categories of persons."[83] In relation to E.O. 464, the Court ratiocinated that such an order "may be read as an abbreviated way of saying that the person is in possession of information which is, in the judgment of the head of office concerned, privileged…"[84] Further, as officials invoked E.O. 464 and their need to secure consent from the President, the Court concluded that such invocation may be construed as a declaration that the requested information is privileged. This the Court described as an "implied claim of privilege," thus:

> Such declaration, however, even without mentioning the term 'executive privilege,' amounts to an implied claim that the information is being withheld by the executive branch, by authority of the President, on the basis of executive privilege. Verily, there is an *implied claim of privilege*.[85]

As, according to the Court, there was an "implied claim of privilege," Section 3 together with Section 2(b) were invalidated on the basis that "the implied claim authorized by Section 3 of E.O. 464 is *not accompanied* by any specific allegation of the basis thereof (for instance, whether the information demanded involves military or diplomatic secrets, closed-door Cabinet

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> *When Congress exercises its power of inquiry, the only way for department heads to exempt themselves therefrom is by a valid claim of privilege. They are not exempt by the mere fact that they are department heads.* Only one executive official may be exempted from this power – the President on whom executive power is vested, hence, beyond the reach of Congress except through the power of impeachment. It is based on her being the highest official of the executive branch, and the due respect accorded to a co-equal branch of government which is sanctioned by a long-standing custom (emphasis supplied by Supreme Court).

82. E.O. 464, § 2 ¶ b & § 3.

83. *Senate of the Philippines, et al.,* G.R. No. 169659 at 47.

84. *Id.*

85. *Id.* at 48.

meetings, etc.)"[86] The Court further provided that "[c]ertainly, *Congress has the right to know why the executive considers the requested information privileged.* It does not suffice to merely declare that the President, or an authorized head of office, has determined that it is so, and that the President has not overturned that determination."[87] The Court further provides that this "severely frustrates the power of inquiry of Congress."[88]

4. Right to Information

The Court briefly discussed the issue on the Right to Information. Citing *Valmonte v. Belmonte,*[89] the Court provided that:

> 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...[90]

5. Implementation of E.O. 464 prior to its publication

The Court also briefly discussed the implementation of E.O. 464 prior to its publication. It cited in the landmark case of *Tañada v. Tuvera*[91] and provided that "logic dictates that the challenged order must be covered." Such being so, due process is required before the implementation of the said order.

6. Conclusion and Dispositive

In closing, the Supreme Court stated that Congress cannot be deprived of its power of inquiry in aid of legislation. "Congress undoubtedly has a right to information from the executive branch whenever it is sought in aid of legislation."[92] It finally stated that E.O. 464, particularly Sections 2(b) and 3

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86. *Id.* (emphasis supplied by the Supreme Court).

87. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 51.

> Such declaration leaves Congress in the dark on how the requested information could be classified as privileged. That the message is couched in terms that, on first impression, do not seem like a claim of privilege only makes it more pernicious. It threatens to make Congress doubly blind to the question of why the executive branch is not providing it with the information that it has requested.

88. *Id.* at 55.

89. Valmonte v. Belmonte, 170 SCRA 256 (1989).

90. *Senate of the Philippines, et al.,* G.R. No. 169659 (citing Valmonte v. Belmonte, 170 SCRA 256 (1989)).

91. Tañada v. Tuvera, 146 SCRA 446 (1986).

92. *Senate of the Philippines, et al.,* G.R. No. 169659 at 61.

thereof frustrated the *Power of Inquiry* of Congress. The Court partly granted the motion and declared Sections 2(b) and 3 of E.O. 464 as void, but retained the validity of Sections 1 and 2(a).

V. ANALYSIS

A. Preliminaries

As a whole, the decision of the Supreme Court seems to be in keeping with logic, law, and jurisprudence. However, in order to elucidate further, a few matters will be discussed below, propounding other thoughts and possibilities in relation to the issues in the case at hand.

There can be no question as to the standing of the Senate to bring the present action. Indeed, the present case was brought about by the refusal of members of the executive branch to appear before the Senate, invoking E.O. 464. More than merely offending the Senate, they stand to be injured as they will be unable to conduct their investigations in aid of legislation. Thus, no further discussion on this matter is necessary.

There is also indeed no question as to the validity of Section 1 of E.O. 464. Such section is based on a constitutionally granted prerogative as provided by Section 22 of Article VI of the Constitution. This being so, again, no further discussion is necessary on this part.

Coming now to the matter of the presence of an actual controversy taken together with the power of inquiry of Congress and executive privilege invoked by the executive branch, some concerns come to mind. To begin, the Supreme Court observed in bold letters that an actual controversy exists in the instant case, stating that it is immaterial that consent is withheld or an express prohibition is made, "[f]or E.O. 464 does not require either a deliberate withholding of consent or an express prohibition issuing from the President in order to bar officials from appearing before Congress."[93] It is enough that E.O. 464 prevents members of the Executive Branch from appearing before Congress for an actual controversy to exist, says the Court. Indeed, an actual controversy may exist. One must keep in mind, however, that the main controversy surrounding E.O. 464 involved executive privilege, as claimed by Sections 2 and 3 of E.O. 464. Section 2(a) of the said executive order explicitly refers to executive privilege as its basis. Necessarily, the presence of an actual controversy needs to be discussed in relation to executive privilege, and not separately as the Supreme Court did. The main contention challenges the validity of E.O. 464 and its use of executive privilege. The presence or absence of a controversy therefore lies on the issue of executive privilege. Further, this need to discuss actual

93. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 26.

controversy in relation to executive privilege is based on the ground of presumptive privilege, as espoused by the case of *Nixon*—which is often cited on the matter of executive privilege.

As the matter of actual controversy was not thoroughly discussed by the Supreme Court, and as the main issue—as tackled by the Supreme Court—revolved around the validity of Sections 2(b) and 3 of E.O. 464 in light of executive privilege and the power of inquiry, it is also necessary to pursue a discussion on the said matter, particularly on the power of inquiry of Congress.

B. Actual Controversy, Executive Privilege, and Presumptive Privilege

An actual controversy may indeed exist in the present case, for a case is ripe for adjudication when the act being challenged may cause injury or may have a negative effect on another. "A constitutional question is ripe for adjudication when the governmental act being challenged has had a direct adverse effect on the individual challenging it."[94] In the present case, E.O. 464 has had an adverse effect on the Senate as it was not able to conduct its public hearings on its scheduled dates in September of 2005. However, there may yet still be a question of ripeness, for another way of looking at the picture is that the Senate was simply being impatient and could not wait to conduct its public hearings. It must be borne in mind that the scheduled public hearings were on the 28th and 29th of September 2005, while the petitions for certiorari and prohibition were filed on 03 October 2005—a mere four or five days later.[95] The significance of this is that Section 3 of E.O. 464 requires those enumerated in Section 2(b) thereof to secure consent or ask for permission from the President if they can appear before either House of Congress. The President never had the opportunity to give or deny her consent or permission as the petitions were filed a mere four or five days later. Quite possibly, and not surprisingly, the President might have had a hectic schedule that interfered with her capability of acting on the requested consents immediately. The Supreme Court however stated that an actual controversy already existed as the mere absence of officials invited to hearings already adversely affected the Senate. It further posited that when an official invokes E.O. 464 to justify his failure to attend a Senate hearing, there was an *implied claim of privilege*.[96] Such interpretation though may not be in keeping with the exact purpose of the order as provided for in Section 2(a) thereof.

It is a basic tenet of statutory construction that "a provision of a statute should be so construed as not to nullify or render nugatory another provision

94. BERNAS, *supra* note 1 at 938.

95. *Senate of the Philippines, et al.*, G.R. No. 169659 at 48.

96. Emphasis supplied.

of the same statute"[97]—embodied in the maxim *Interpretatio fienda est ut res magis valeat quam pereat*—A law should be interpreted with a view of upholding rather than destroying it.[98] What E.O. 464 merely required was consent or permission from the President. There was no implied claim of privilege as there has as yet been no claim of privilege. Section 3 of E.O. 464 precisely provides for the reason for securing permission from the President, which is "to ensure the observance of the principle of separation of powers, adherence to the rule on executive privilege and respect for the rights of public officials appearing in inquiries in aid of legislation."[99] The case is not ripe for adjudication as the President has yet to prohibit an official from appearing before Congress, nor has she made a claim of privilege. Rather, there was a mere deferral by the officials of the executive branch of appearing before Congress in order to seek permission. The Supreme Court yielded to the impatience of the Senate to conduct their hearings immediately, by theorizing that E.O. 464 actually contained an implied claim of privilege. Such theory was not in keeping with the intent of E.O. 464 as enunciated in Section 2(a) and 3 thereof.

This deferral of appearance by members of the executive branch should be taken in line with presumptive privilege. The Supreme Court cited the case of *Almonte* which in turn takes its cue from *U.S. v. Nixon*. This being so, it would not be amiss to involve *Nixon* in the present discussion. It must be noted at the outset that the case of *Nixon* applies only to criminal cases.[100] More importantly, however, the case of *Nixon* provides for a presumptive privilege for Presidential communications that, "*[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution*."[101]

As can be seen, *Nixon* accords a presumptive privilege for Presidential communications in order to preserve the right to privacy granted even to the President himself or herself, and also to allow greater efficiency in Presidential decision-making. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."[102]

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97. RUBEN E. AGPALO, STATUTORY CONSTRUCTION 256 (2003 ed.).

98. *Id.*

99. E.O. 464, § 3.

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

101. *Id.* (emphasis supplied).

102. *Id.* at 705-06.

> Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be

It must be pointed out that such presumptive privilege for Presidential communications would be rendered nugatory if the privilege is granted only to the President, excluding those people around him. Communications and correspondence are, more often than not, two-way. This being so, executive privilege would be useless if only the President can assert it, but not those he or she communicates with. E.O. 464 was precisely made so that correspondence and communication between the President and those under the executive branch are kept privileged when they need to be so. The function of E.O. 464 is to ensure such privilege. The reasoning given was that in order to ensure that executive privilege will not be violated which is tantamount to violating the principle of separation of power, consent from the President is required. This requirement would mean that whether executive privilege would be invoked or not will utterly depend on the President. Consent, as defined, is the "voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another."[103] With regard to dealings of the executive branch, the President is the best person to discern whether a document or correspondence should be covered by executive privilege. She is the one who can make an *intelligent choice*—subject of course to review by the Courts if such discretion was gravely abused.

Only after the President has given her consent, or denied an official from appearing before Congress, using an invalid claim of privilege, will an actual controversy arise. An actual controversy does not arise in the instant case as at the time of the filing of the petition, the President could have still given her consent for the invited officials to appear before the Senate, or could have given a valid claim of executive privilege. Further, the President was not given ample time to give or deny her consent, as the petition was filed a mere five days after E.O. 464 was issued. It might have had been a different matter if the Supreme Court was deciding on the matter of E.O. 464 on a petition raised after a reasonable time was given to the President to grant or deny the public officials' appearance before the Senate. In *Abakada Guro Party List v. Ermita*,[104] the Court held that it "will not engage in a legal joust where premises are what ifs, arguments, theoretical and facts, uncertain. Any disquisition by the Court on this point will only be, as Shakespeare describes life in Macbeth, full of sound and fury, signifying nothing."[105]

> said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

103. BLACK'S LAW DICTIONARY 276 (5th ed.).

104. Abakada Guro Party List v. Ermita, 469 SCRA 1 (2005).

105. *Id.* at 139.

The Supreme Court further argued—as a corollary to an *implied claim of privilege*—that the reference of Section 2(b) of E.O. 464 to persons covered by executive privilege "may be read as an abbreviated way of saying that the person is in possession of information which is, in the judgment of the head of office concerned, privileged as defined in Section 2(a)."[106]

It is true that executive privilege must refer to information rather than persons.[107] Contrary however to the argument of the Supreme Court, the fact that Section 2(b) enumerated persons rather than information bolsters the fact that E.O. 464 was not meant to claim executive privilege—or make an implied claim thereof—but rather, merely to ensure that executive privilege may be invoked by the President when necessary. E.O. 464 intends to accomplish this by ordering officials—who in the discretion of department heads (believing that said officials might be in possession of information covered by Section 2(a) thereof) should be covered—to ask permission first from the President, lest executive privilege and separation of powers be disregarded.

In line with the above discussion, the Supreme Court's *implied claim of privilege* must be juxtaposed with *presumptive privilege*. From thereon, it can be observed that *implied claim of privilege* is antithetical to *presumptive privilege*. What exists in E.O. 464 is presumptive privilege on the part of the executive branch, and not an implied claim of privilege. This being so, no actual controversy may be considered to have been existing—the matter was not yet ripe for adjudication, given that the petition attacking E.O. 464 was filed only five days after the said order was issued, the President has not had the opportunity yet to grant or deny consent and therefore make a valid or invalid claim of privilege, and because what was present in the instant case was presumptive privilege rather than an implied claim of privilege.

C. Validity of Sections 2(b) and 3

Based on the line of reasoning in the preceding section, it may also necessarily follow that Sections 2(b) and 3 of E.O. 464 should have been declared as valid, as what exists is presumptive privilege and not an implied claim of privilege. The said sections do not purport to make a claim of privilege—implied or otherwise. The said sections merely enumerate who should ask permission from the President, order said persons to ask permission from the President, and state the reason for asking permission.

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106. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 47.

107. Almonte v. Vasquez, 244 SCRA 286 (1995); Chavez v. Presidential Commission on Good Government, 299 SCRA 744 (1998); Chavez v. Public Estates Authority, 384 SCRA 152 (2002).

There being no claim or privilege—implied or otherwise—Sections 2(b) and 3 cannot be declared invalid and void.

The Supreme Court provided that the disputed sections provide for an implied claim of privilege. This being so, the said Court states that:

> Section 3 of E.O. 464 in relation to Section 2(b) is thus invalid per se. [The claim of privilege] is not asserted. It is merely implied. Instead of providing precise and certain reasons for the claim, it merely invokes E.O. 464, coupled with an announcement that the President has not given her consent.[108]

However, as already discussed, the petition was filed only five days after the disputed order was issued. The President never had the opportunity to give or withhold her consent. There could be no implied claim of privilege as there was no claim of privilege. Rather, what Sections 2(b) and 3 of E.O. 464 provided was presumptive privilege. It might be more conceivable for an implied claim of privilege to exist if the President refuses to act on the request for consent after a reasonable amount of time. In the authors opinion, five days is not a reasonable amount of time. Necessarily, it did not matter whether or not the President gave a reason for claiming privilege via E.O. 464 as there was no claim of privilege in the first place. The cases cited by the Supreme Court (that is, *U.S. v. Article of Drug*,[109] *Black v. Sheraton Corp. of America*,[110] and *McPhaul v. U.S.*[111]) are not applicable to the instant case as those cases involve an actual and express claim of executive privilege. In the present case, there was neither an express or implied claim or privilege, nor was there a valid or invalid claim of privilege, as there was no claim of privilege.

It further puzzles the author that the Supreme Court made the following statement, thus:

> It follows, therefore, that when an official is being summoned by Congress on a matter which, in his own judgment, might be covered by executive privilege, he must be afforded reasonable time to inform the President or the Executive Secretary of the possible need for invoking the privilege. This is necessary in order to provide the President or the Executive Secretary with fair opportunity to consider whether the matter indeed calls for a claim of privilege. If, after the lapse of that reasonable time, neither the President nor the Executive Secretary invokes the privilege, Congress is no longer bound to respect the failure of the official to appear before

108. *Senate of the Philippines, et al.*, G.R. No. 169659 at 55 (emphasis supplied by the Supreme Court).

109. U.S. v. Article of Drug, 43 F.R.D. 181 (D. Del. 1967).

110. Black v. Sheraton Corp. of America, 371 F.Supp. 97 (D. DC 1974).

111. McPhaul v. U.S., 364 U.S. 372, 81 S. Ct. 138 (1960).

> Congress and may then opt to avail of the necessary legal means to compel his appearance.[112]

The objective of E.O. 464 is precisely what the above cited statement hopes to accomplish. E.O. 464 merely codified the above statement.

In light of the foregoing discussion, Sections 2(b) and 3 of E.O. 464 should have been declared as valid.

D. Power of Inquiry

Delving into the matter of power of inquiry, it is not and cannot be denied that Congress indeed has the power of inquiry in order for this institution to accomplish its constitutional mandate of making laws. Inclusive in their power of inquiry, is the power to compel the appearance of people and the production of documents, particularly when the inquiry is in aid of legislation. Granting that there is indeed an implied claim of privilege, or assuming that a claim of executive privilege was indeed made, Congress cannot be denied their Constitutional mandate to legislate, and, as a necessary tool to legislate, their power of inquiry. As held by the case of *Cheney v. U.S. District Court*, citing the case of *U.S. v. Nixon*,

> Withholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks "conflicts with the function of the courts under Art. III." *Such an impairment of the "essential functions of [another] branch" is impermissible.*[113]

In the Philippines, it is the duty of the legislative department to make laws. The Constitution thus provides:

> The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.[114]

Such power is therefore an essential function of the legislative branch. Any impairment of such power, as provided by *Cheney*, is impermissible. Thus, granting that there is indeed an implied claim of privilege, or assuming that a claim of executive privilege was indeed made, such claim of privilege must be validly made. Otherwise, an essential function of the legislative branch would be impaired—its function of making laws, and corollary to this function, the power of inquiry.

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112. Senate of the Philippines, et al. v. Eduardo R. Ermita, et al., G.R. No. 169659, Apr. 20, 2006 at 57.

113. Cheney v. U.S District Court, 542 U.S. 367, 384 (2004) (citing U.S. v. Nixon 418 U.S. 683, 707 (1974)) (emphasis supplied).

114. PHIL. CONST. art. VI, § 1.

VI. CONCLUSION

In fine, it is not being claimed by this case comment that the executive branch and any of its officials could simply refuse to attend a Congressional hearing in the exercise of its *Power of Inquiry*. Rather, justice and fair play must be accorded to co-equal branches of government. The Executive branch has been given the privilege of refusing to appear before Congress on meritorious reasons. Being accorded such privilege, they must be given the opportunity to claim that privilege when they feel that the need arises. This is in keeping with the doctrine of separation of powers between co-equal branches of government.

Although this case comment questions the pronouncements of the Supreme Court in its decision in *Senate of the Philippines, et al. v. Eduardo R. Ermita, et al.*, the author accords respect to the decision of the Supreme Court to theorize that E.O. 464 provides for an *implied claim of privilege.* However, in an effort to titillate the minds of the members of the legal profession, another theory is presented—that E.O. 464 merely provides for a presumptive privilege. This being so, the logical flow of the presence of an actual controversy, and thereafter, the invalidity of Sections 2(b) and 3 of the disputed order must fail.