

EN BANC

[G.R. NO. 169777, April 20, 2006]

SENATE OF THE PHILIPPINES, REPRESENTED BY FRANKLIN M. DRILON, IN HIS CAPACITY AS SENATE PRESIDENT, JUAN M. FLAVIER, IN HIS CAPACITY AS SENATE PRESIDENT PRO TEMPORE, FRANCIS N. PANGILINAN, IN HIS CAPACITY AS MAJORITY LEADER, AQUILINO Q. PIMENTEL, JR., IN HIS CAPACITY AS MINORITY LEADER, SENATORS RODOLFO G. BIAZON, "COMPANERA" PIA S. CAYETANO, JINGGOY EJERCITO ESTRADA, LUISA "LOI" EJERCITO ESTRADA, JUAN PONCE ENRILE, RICHARD J. GORDON, PANFILO M. LACSON, ALFREDO S. LIM, M. A. MADRIGAL, SERGIO OSMENA III, RALPH G. RECTO, AND MAR ROXAS, PETITIONERS, VS. EDUARDO R. ERMITA, IN HIS CAPACITY AS EXECUTIVE SECRETARY AND ALTER-EGO OF PRESIDENT GLORIA MACAPAGAL-ARROYO, AND ANYONE ACTING IN HIS STEAD AND IN BEHALF OF THE PRESIDENT OF THE PHILIPPINES, RESPONDENTS.

[G.R.NO. 169659]

BAYAN MUNA REPRESENTED BY DR. REYNALDO LESACA, JR., REP. SATUR OCAMPO, REP. CRISPIN BELTRAN, REP. RAFAEL MARIANO, REP. LIZA MAZA, REP. TEODORO CASINO, REP. JOEL VIRADOR, COURAGE REPRESENTED BY FERDINAND GAITE, AND COUNSELS FOR THE DEFENSE OF LIBERTIES (CODAL) REPRESENTED BY ATTY. REMEDIOS BALBIN, PETITIONERS, VS. EDUARDO ERMITA, IN HIS CAPACITY AS EXECUTIVE SECRETARY AND ALTER-EGO OF PRESIDENT GLORIA MACAPAGAL-ARROYO, RESPONDENT.

[G.R.NO.169660]

FRANCISCO I. CHAVEZ, PETITIONER, VS. EDUARDO R. ERMITA, IN HIS CAPACITY AS EXECUTIVE SECRETARY, AVELINO J. CRUZ, JR., IN HIS CAPACITY AS SECRETARY OF DEFENSE, AND GENEROSO S. SENG, IN HIS CAPACITY AS AFP CHIEF OF STAFF, RESPONDENTS.

[G.R.NO. 169667]

ALTERNATIVE LAW GROUPS, INC. (ALG), PETITIONER, VS. HON. EDUARDO R. ERMITA, IN HIS CAPACITY AS EXECUTIVE SECRETARY, RESPONDENT.

[G.R.NO. 169834]

**PDP-LABAN, PETITIONER, VS. EXECUTIVE SECRETARY EDUARDO
R. ERMITA, RESPONDENT.**

[G.R.NO. 171246]

**JOSE ANSELMO I. CADIZ, FELICIANO M. BAUTISTA, ROMULO R.
RIVERA, JOSE AMOR AMORANDO, ALICIA A. RISOS-VIDAL,
FILEMON C. ABELITA III, MANUEL P. LEGASPI, J. B. JOVY C.
BERNABE, BERNARD L. DAGCUTA, ROGELIO V. GARCIA, AND THE
INTEGRATED BAR FOR THE PHILIPPINES, PETITIONERS, VS.
HON. EXECUTIVE SECRETARY EDUARDO R. ERMITA,
RESPONDENT.**

D E C I S I O N

CARPIO MORALES, J.:

A transparent government is one of the hallmarks of a truly republican state. Even in the early history of republican thought, however, it has been recognized that the head of government may keep certain information confidential in pursuit of the public interest. Explaining the reason for vesting executive power in only one magistrate, a distinguished delegate to the U.S. Constitutional Convention said: "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."^[1]

History has been witness, however, to the fact that the power to withhold information lends itself to abuse, hence, the necessity to guard it zealously.

The present consolidated petitions for certiorari and prohibition proffer that the President has abused such power by issuing Executive Order No. 464 (E.O. 464) last September 28, 2005. They thus pray for its declaration as null and void for being unconstitutional.

In resolving the controversy, this Court shall proceed with the recognition that the issuance under review has come from a co-equal branch of government, which thus entitles it to a strong presumption of constitutionality. Once the challenged order is found to be indeed violative of the Constitution, it is duty-bound to declare it so. For the Constitution, being the highest expression of the sovereign will of the Filipino people, must prevail over any issuance of the government that contravenes its mandates.

In the exercise of its legislative power, the Senate of the Philippines, through its various Senate Committees, conducts inquiries or investigations in aid of legislation which call for, *inter alia*, the attendance of officials and employees of the executive department, bureaus, and offices including those employed in Government Owned and Controlled Corporations, the Armed Forces of the Philippines (AFP), and the Philippine National Police (PNP).

On September 21 to 23, 2005, the Committee of the Senate as a whole issued invitations to various officials of the Executive Department for them to appear on

September 29, 2005 as resource speakers in a public hearing on the railway project of the North Luzon Railways Corporation with the China National Machinery and Equipment Group (hereinafter North Rail Project). The public hearing was sparked by a privilege speech of Senator Juan Ponce Enrile urging the Senate to investigate the alleged overpricing and other unlawful provisions of the contract covering the North Rail Project.

The Senate Committee on National Defense and Security likewise issued invitations^[2] dated September 22, 2005 to the following officials of the AFP: the Commanding General of the Philippine Army, 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; Chief of the Intelligence Service of the AFP Brig. Gen. Marlu Q. Quevedo; Assistant Superintendent of the Philippine Military Academy (PMA) Brig. Gen. Francisco V. Gudani; and Assistant Commandant, Corps of Cadets of the PMA, Col. Alexander F. Balutan, for them to attend as resource persons in a public hearing scheduled on September 28, 2005 on the following: (1) Privilege Speech of Senator Aquilino Q. Pimentel Jr., delivered on June 6, 2005 entitled "Bunye has Provided Smoking Gun or has Opened a Can of Worms that Show Massive Electoral Fraud in the Presidential Election of May 2005"; (2) Privilege Speech of Senator Jinggoy E. Estrada delivered on July 26, 2005 entitled "The Philippines as the Wire-Tapping Capital of the World"; (3) Privilege Speech of Senator Rodolfo Biazon delivered on August 1, 2005 entitled "Clear and Present Danger"; (4) Senate Resolution No. 285 filed by Senator Maria Ana Consuelo Madrigal - Resolution Directing the 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"; and (5) Senate Resolution No. 295 filed by Senator Biazon - Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry, in Aid of Legislation, on the Wire-Tapping of the President of the Philippines.

Also invited to the above-said hearing scheduled on September 28 2005 was the AFP Chief of Staff, General Generoso S. Senga who, by letter^[3] dated September 27, 2005, requested for its postponement "due to a pressing operational situation that demands [his] utmost personal attention" while "some of the invited AFP officers are currently attending to other urgent operational matters."

On September 28, 2005, Senate President Franklin M. Drilon received from Executive Secretary Eduardo R. Ermita a letter^[4] dated September 27, 2005 "respectfully request[ing] for the postponement of the hearing [regarding the NorthRail project] to which various officials of the Executive Department have been invited" in order to "afford said officials ample time and opportunity to study and prepare for the various issues so that they may better enlighten the Senate Committee on its investigation."

Senate President Drilon, however, wrote^[5] Executive Secretary Ermita that the Senators "are unable to accede to [his request]" as it "was sent belatedly" and "[a]ll preparations and arrangements as well as notices to all resource persons were completed [the previous] week."

Senate President Drilon likewise received on September 28, 2005 a letter^[6] from the President of the North Luzon Railways Corporation Jose L. Cortes, Jr. requesting

that the hearing on the NorthRail project be postponed or cancelled until a copy of the report of the UP Law Center on the contract agreements relative to the project had been secured.

On September 28, 2005, the President issued E.O. 464, "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation Under the Constitution, and For Other Purposes,"^[7] which, pursuant to Section 6 thereof, took effect immediately. The salient provisions of the Order are as follows:

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

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

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

(a) Nature and Scope. - The rule of confidentiality based on executive privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995). Further, Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees provides that Public Officials and Employees shall not use or divulge confidential or classified information officially known to them by reason of their office and not made available to the public to prejudice the public interest.

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

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

- iv. Discussion in close-door Cabinet meetings (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998);
- v. Matters affecting national security and public order (*Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002).

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

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

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

Also on September 28, 2005, Senate President Drilon received from Executive Secretary Ermita a copy of E.O. 464, and another letter^[8] informing him "that officials of the Executive Department invited to appear at the meeting [regarding the NorthRail project] will not be able to attend the same without the consent of the President, pursuant to [E.O. 464]" and that "said officials have not secured the required consent from the President." On even date which was also the scheduled date of the hearing on the alleged wiretapping, Gen. Senga sent a letter^[9] to Senator Biazon, Chairperson of the Committee on National Defense and Security, informing him "that per instruction of [President Arroyo], thru the Secretary of National Defense, no officer of the [AFP] is authorized to appear before any Senate or Congressional hearings without seeking a written approval from the President" and "that no approval has been granted by the President to any AFP officer to appear before the public hearing of the Senate Committee on National Defense and Security scheduled [on] 28 September 2005."

Despite the communications received from Executive Secretary Ermita and Gen. Senga, the investigation scheduled by the Committee on National Defense and Security pushed through, with only Col. Balutan and Brig. Gen. Gudani among all the AFP officials invited attending.

For defying President Arroyo's order barring military personnel from testifying before legislative inquiries without her approval, Brig. Gen. Gudani and Col. Balutan were