

EN BANC

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 of the Impeachment Prosecution Panel dated January 19 and 25, 2012.

Promulgated:

FEBRUARY 14, 2012



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SEPARATE OPINION

CARPIO, J.:

I concur with the Resolution of 14 February 2012 (Resolution), subject to certain important clarifications and reservations.

1. On Judicial Privilege

Judicial Privilege, or the right of the Judiciary to confidentiality of certain information, is *implied* from Judicial Power. Similarly, Executive Privilege, or the right of the Executive to confidentiality of certain information, is *implied* from Executive Power. This Court has explained the rationale for Judicial Privilege, Executive Privilege, as well as Legislative Privilege, as follows:



[I]nformation x x x like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential. 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 Presidential, Legislative and Judicial power.** x x x<sup>1</sup> (Emphasis supplied)

However, there are clear limits to Judicial Privilege, as there are clear limits to Executive and Legislative Privilege. One overriding limitation on Judicial Privilege is that it can be invoked **only if the information arose from the performance of *official adjudicatory functions* of Members of the Judiciary.** As succinctly stated in the Resolution, Judicial Privilege refers only to “**matters that are part of the internal deliberations and actions of the Court in the exercise of the(ir) *adjudicatory functions and duties*” of Justices.** The Resolution further states that the matter must refer to “**the performance of the(ir) *official functions of adjudication*” of Justices.**

Thus, information relating to the commission of crimes or misconduct, or violations of the Code of Judicial Conduct,<sup>2</sup> or any violation of a law or regulation for that matter, is not confidential because **the commission of crimes or misconduct is not part of the official functions or duties of Justices.** Moreover, information that are outside the adjudicatory functions of Justices, such as financial, budgetary, personnel and similar administrative matters relating to the operations of the Judiciary, are not confidential. The adjudicatory functions of Justices refer to their power to decide cases in the exercise of Judicial Power, as distinguished from the power to make decisions in the exercise of administrative functions.

<sup>1</sup> *Chavez v. Public Estates Authority*, 433 Phil. 506, 534 (2002).

<sup>2</sup> New Code of Judicial Conduct for the Philippine Judiciary.



Judicial Privilege is *merely implied* from Judicial Power. Thus, another limitation on Judicial Privilege is the need to carefully weigh and calibrate its exercise when it clashes with *express* constitutional rights and principles, such as freedom of expression,<sup>3</sup> freedom of the press,<sup>4</sup> the right of the people to information on matters of public concern,<sup>5</sup> and the State policy of full disclosure of all transactions involving public interest.<sup>6</sup> While these express constitutional rights and principles do not negate Judicial Privilege, the Judiciary cannot invoke Judicial Privilege to claim confidentiality beyond what is essential and necessary to preserve the exercise of Judicial Power.

Thus, information of no, or *de minimis*, value to the preservation of Judicial Power, such as the **date and time of receipt by the Clerk of Court**<sup>7</sup> of the Dissenting Opinion of a Justice, cannot be deemed confidential. By no stretch of the imagination can release of such information impair even slightly the exercise of Judicial Power. Such information is obviously not part of the “internal deliberations and actions of the Court.” On the other hand, such information is an **official record** and falls under the people’s constitutional right to “*access to official records, and to documents, and papers pertaining to official x x x decisions.*”<sup>8</sup> This is one instance when an express constitutional right must prevail over the invocation of Judicial Privilege.

<sup>3</sup> Section 4, Article III, 1987 Constitution.

<sup>4</sup> *Id.*

<sup>5</sup> Section 7, Article III, 1987 Constitution.

<sup>6</sup> Section 28, Article II, 1987 Constitution.

<sup>7</sup> In Item 15 of Annex “A” to the Resolution of 14 February 2012, the majority considers the date and time of receipt by the Clerk of Court of Justice Maria Lourdes P. A. Sereno’s Dissenting Opinion as confidential information.

<sup>8</sup> Section 7, Article III, 1987 Constitution.



## 2. On the Constitutional Duty to Explain One's Dissent

The Constitution mandates that a Justice who dissents must explain his dissent. Thus, Section 13, Article VIII of the 1987 Constitution provides in part:

Section 13. x x x Any Member who took no part, or dissented, or abstained from decision or resolution **must state the reason therefor.**  
x x x (Underscoring and boldfacing supplied)

The framers of the 1987 Constitution used the word “must” to emphasize that the duty to explain one’s dissent is “**mandatory.**” The framers considered a violation of this express duty a “culpable violation of the Constitution.”<sup>9</sup>

Without this constitutional command to state the reasons for his dissent, a Justice still has a *right* to explain his dissent under the constitutional right of a citizen to freedom of expression. With this constitutional command, a Justice has not only a right, but also a *duty*, to explain his dissent. Under a Justice’s freedom of expression, he may or may not explain his dissent. Under his constitutional duty to state the reason for his dissent, he has no choice but to explain his dissent.

Thus, the majority can *never* suppress the dissent of any Justice because to write a dissent is not only a constitutional right but also a constitutional duty. If the majority suppress a dissent, then they commit a culpable violation of the Constitution. This *express* constitutional right and duty to explain one’s dissent should be given utmost deference *vis-à-vis*

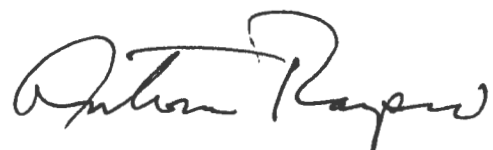
<sup>9</sup> Records of the Constitutional Commission, Vol. I, p. 501 (14 July 1986).



Judicial Privilege which is merely implied from Judicial Power. **When a Justice explains his dissent, he may even include in his dissent internal deliberations if such internal deliberations are material in complying with his constitutional duty to state the reasons for his dissent.** Assuming that the dissent of a Justice breaches Judicial Privilege, any sanction for such breach can only be made through impeachment by Congress, which has the **sole power** to discipline impeachable officers. Any other rule means that the majority can terrorize the minority into acquiescence by threatening to sanction them for their dissents.

A Justice who dissents can explain his position only in his dissent and nowhere else. He cannot go to media to expound on his dissent. He can articulate, and state his reasons, only in his dissent. Thus, a Justice who dissents often strives to put into his dissent all the arguments he could possibly marshal, hoping that his arguments could one day in the future carry more weight with the wisdom of hindsight. Indeed, in both American and Philippine jurisprudence, many dissents eventually emerged as the majority rule, and some dissents were even enacted into law by the legislature. This is another reason for giving dissents as much leeway as possible.

Accordingly, I concur with the Resolution of 14 February 2012 subject to the foregoing clarifications and reservations.



**ANTONIO T. CARPIO**  
Associate Justice