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sentenced to suffer the penalty of *reclusion perpetua*, without eligibility for parole. Accused-appellant Carlos Alhambra *y* Masing is likewise ordered to pay interest on all monetary awards for damages at the rate of six percent (6%) *per annum* from the date of finality of this Resolution until fully satisfied.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Villarama, Jr., JJ.,* concur.

EN BANC

[G.R. No. 209287. July 1, 2014]

MARIA CAROLINA P. ARAULLO, CHAIRPERSON, BAGONG ALYANSANG MAKABAYAN; JUDY M. TAGUIWALO, PROFESSOR, UNIVERSITY OF THE PHILIPPINES DILIMAN, CO-CHAIRPERSON, PAGBABAGO; HENRI KAHN, CONCERNED CITIZENS MOVEMENT; REP. LUZ ILAGAN, GABRIELA WOMEN'S PARTY REPRESENTATIVE; REP. TERRY L. RIDON, KABATAAN PARTYLIST REPRESENTATIVE; REP. CARLOS ISAGANI ZARATE, BAYAN MUNA PARTY-LIST REPRESENTATIVE; RENATO M. REYES, JR., SECRETARY GENERAL OF BAYAN; MANUEL K. DAYRIT, CHAIRMAN, ANG KAPATIRAN PARTY; VENCER MARI E. CRISOSTOMO, CHAIRPERSON, ANAKBAYAN; VICTOR L. VILLANUEVA, CONVENOR, YOUTH ACT NOW, *petitioners, vs.* **BENIGNO SIMEON C. AQUINO III, PRESIDENT OF THE REPUBLIC OF THE PHILIPPINES; PAQUITO N. OCHOA, JR.,**

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EXECUTIVE SECRETARY; and FLORENCIO B. ABAD, SECRETARY OF THE DEPARTMENT OF BUDGET AND MANAGEMENT, *respondents.*

[G.R. No. 209135. July 1, 2014]

AUGUSTO L. SYJUCO, JR., Ph.D., *petitioner, vs.* **FLORENCIO B. ABAD, IN HIS CAPACITY AS THE SECRETARY OF DEPARTMENT OF BUDGET AND MANAGEMENT; and HON. FRANKLIN MAGTUNAO DRILON, IN HIS CAPACITY AS THE SENATE PRESIDENT OF THE REPUBLIC OF THE PHILIPPINES,** *respondents.*

[G.R. No. 209136. July 1, 2014]

MANUELITO R. LUNA, *petitioner, vs.* **SECRETARY FLORENCIO ABAD, IN HIS OFFICIAL CAPACITY AS HEAD OF THE DEPARTMENT OF BUDGET AND MANAGEMENT; and EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR., IN HIS OFFICIAL CAPACITY AS ALTER EGO OF THE PRESIDENT,** *respondents.*

[G.R. No. 209155. July 1, 2014]

ATTY. JOSE MALVAR VILLEGAS, *petitioner, vs.* **THE HONORABLE SECRETARY PAQUITO N. OCHOA, JR.; and THE SECRETARY OF BUDGET AND MANAGEMENT FLORENCIO B. ABAD,** *respondents.*

[G.R. No. 209164. July 1, 2014]

PHILIPPINE CONSTITUTION ASSOCIATION (PHILCONSA), REPRESENTED BY DEAN FROILAN M. BACUNGAN, BENJAMIN E. DIOKNO and LEONOR M. BRIONES, *petitioners,*

vs. **THE DEPARTMENT OF BUDGET AND MANAGEMENT and/or HON. FLORENCIO B. ABAD,** *respondents.*

[G.R. No. 209260. July 1, 2014]

INTEGRATED BAR OF THE PHILIPPINES (IBP), *petitioner, vs.* **SECRETARY FLORENCIO B. ABAD OF THE DEPARTMENT OF BUDGET AND MANAGEMENT (DBM),** *respondent.*

[G.R. No. 209442. July 1, 2014]

GRECO ANTONIOUS BEDA B. BELGICA; BISHOP REUBEN M. ABANTE and REV. JOSE L. GONZALEZ, *petitioners, vs.* **PRESIDENT BENIGNO SIMEON C. AQUINO III, THE SENATE OF THE PHILIPPINES, REPRESENTED BY SENATE PRESIDENT FRANKLIN M. DRILON; THE HOUSE OF REPRESENTATIVES, REPRESENTED BY SPEAKER FELICIANO BELMONTE, JR.; THE EXECUTIVE OFFICE, REPRESENTED BY EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR.; THE DEPARTMENT OF BUDGET AND MANAGEMENT, REPRESENTED BY SECRETARY FLORENCIO ABAD; THE DEPARTMENT OF FINANCE, REPRESENTED BY SECRETARY CESAR V. PURISIMA; and THE BUREAU OF TREASURY, REPRESENTED BY ROSALIA V. DE LEON,** *respondents.*

[G.R. No. 209517. July 1, 2014]

CONFEDERATION FOR UNITY, RECOGNITION AND ADVANCEMENT OF GOVERNMENT EMPLOYEES (COURAGE), REPRESENTED BY ITS 1ST VICE PRESIDENT, SANTIAGO DASMARIÑAS, JR.; ROSALINDA NARTATES,

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FOR HERSELF AND AS NATIONAL PRESIDENT OF THE CONSOLIDATED UNION OF EMPLOYEES NATIONAL HOUSING AUTHORITY (CUE-NHA); MANUEL BACLAGON, FOR HIMSELF AND AS PRESIDENT OF THE SOCIAL WELFARE EMPLOYEES ASSOCIATION OF THE PHILIPPINES, DEPARTMENT OF SOCIAL WELFARE AND DEVELOPMENT CENTRAL OFFICE (SWEAP-DSWD CO); ANTONIA PASCUAL, FOR HERSELF AND AS NATIONAL PRESIDENT OF THE DEPARTMENT OF AGRARIAN REFORM EMPLOYEES ASSOCIATION (DAREA); ALBERT MAGALANG, FOR HIMSELF AND AS PRESIDENT OF THE ENVIRONMENT AND MANAGEMENT BUREAU EMPLOYEES UNION (EMBEU); and MARCIAL ARABA, FOR HIMSELF AND AS PRESIDENT OF THE KAPISANAN PARA SA KAGALINGAN NG MGA KAWANI NG MMDA (KKK-MMDA), *petitioners, vs.* **BENIGNO SIMEON C. AQUINO III, PRESIDENT OF THE REPUBLIC OF THE PHILIPPINES; PAQUITO OCHOA, JR., EXECUTIVE SECRETARY; and HON. FLORENCIO B. ABAD, SECRETARY OF THE DEPARTMENT OF BUDGET AND MANAGEMENT,** *respondents.*

[G.R. No. 209569. July 1, 2014]

VOLUNTEERS AGAINST CRIME AND CORRUPTION (VACC), REPRESENTED BY DANTE L. JIMENEZ, *petitioner, vs.* **PAQUITO N. OCHOA, EXECUTIVE SECRETARY, and FLORENCIO B. ABAD, SECRETARY OF THE DEPARTMENT OF BUDGET AND MANAGEMENT,** *respondents.*

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SYLLABUS

1. **POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; JUDICIAL POWER IS VESTED IN THE SUPREME COURT AND THE LOWER COURTS AS MAY BE ESTABLISHED BY LAW.—** Section 1, Article VIII of the 1987 Constitution [vests the] judicial power in one Supreme Court and in such lower courts as may be established by law. x x x [T]hat judicial power includes the duty of the courts of justice not only "to settle actual controversies involving rights which are legally demandable and enforceable" but also "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

2. **REMEDIAL LAW; SPECIAL CIVIL ACTIONS; PETITIONS FOR *CERTIORARI* AND PROHIBITION; APPROPRIATE REMEDIES TO RAISE CONSTITUTIONAL ISSUES AND TO REVIEW THE ACTS OF LEGISLATIVE AND EXECUTIVE OFFICIALS.—** The present *Rules of Court* uses two special civil actions for determining and correcting grave abuse of discretion amounting to lack or excess of jurisdiction. These are the special civil actions for *certiorari* and prohibition, and both are governed by Rule 65. x x x With respect to the Court, the remedies of *certiorari* and prohibition [may be issued] x x x to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, *even if the latter does not exercise judicial, quasi-judicial or ministerial functions.* x x x Thus, petitions for *certiorari* and prohibition are appropriate remedies to raise constitutional issues and to review and/or prohibit or nullify the acts of legislative and executive officials. Necessarily, in discharging its duty x x x the Court is not at all precluded from making the inquiry provided the challenge was properly brought by interested or affected parties. The Court has been thereby entrusted expressly or by necessary implication with both the duty and the obligation of determining, in appropriate cases, the validity of any assailed legislative or executive action. This entrustment is consistent with the republican system of checks and balances.

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3. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; POWER OF JUDICIAL REVIEW; REQUISITES.— The requisites for the exercise of the power of judicial review are the following, namely: (1) there must be an actual case or justiciable controversy before the Court; (2) the question before the Court must be ripe for adjudication; (3) the person challenging the act must be a proper party; and (4) the issue of constitutionality must be raised at the earliest opportunity and must be the very *litis mota* of the case.

4. ID.; ID.; ID.; ID.; ID.; THERE MUST BE A JUSTICIABLE CONTROVERSY RIPE FOR ADJUDICATION; PRESENT IN THE ISSUE OF CONSTITUTIONALITY OF DISBURSEMENT ACCELERATION PROGRAM (DAP) AND ITS RELEVANT ISSUANCES.— The first requisite demands that there be an actual case calling for the exercise of judicial power by the Court. x x x The incompatibility of the perspectives of the parties on the constitutionality of the DAP and its relevant issuances satisfy the requirement for a conflict between legal rights. The issues being raised herein meet the requisite ripeness considering that the challenged executive acts were already being implemented by the DBM, and there are averments by the petitioners that such implementation was repugnant to the letter and spirit of the Constitution. Moreover, the implementation of the DAP entailed the allocation and expenditure of huge sums of public funds. The fact that public funds have been allocated, disbursed or utilized by reason or on account of such challenged executive acts gave rise, therefore, to an actual controversy that is ripe for adjudication by the Court.

5. ID.; ID.; ID.; ID.; ID.; PROPRIETY THEREOF DESPITE CASE RENDERED MOOT AND ACADEMIC BY SUPERVENING EVENTS; TERMINATION OF DAP IN CASE AT BAR DID NOT EFFECTIVELY MOOT THE CASE.— A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value. The Court cannot agree that the termination of the DAP as a program was a supervening event that effectively mooted these consolidated cases. Verily, the Court had in the past exercised its power of judicial review despite the cases being rendered moot and academic by supervening events, like: (1) when there was a grave violation

of the Constitution; (2) when the case involved a situation of exceptional character and was of paramount public interest; (3) when the constitutional issue raised required the formulation of controlling principles to guide the Bench, the Bar and the public; and (4) when the case was capable of repetition yet evading review.

6. ID.; ID.; ID.; ID.; *LOCUS STANDI* OF PETITIONERS TO SUE ESTABLISHED BY THEIR SUFFICIENT INTEREST IN THE OUTCOME OF THE CONTROVERSY.— Legal standing, as a requisite for the exercise of judicial review, refers to "a right of appearance in a court of justice on a given question." x x x Under their respective circumstances, each of the petitioners has established sufficient interest in the outcome of the controversy as to confer *locus standi* on each of them. In addition, considering that the issues center on the extent of the power of the Chief Executive to disburse and allocate public funds, whether appropriated by Congress or not, these cases pose issues that are of transcendental importance to the entire Nation, the petitioners included. As such, the determination of such important issues call for the Court's exercise of its broad and wise discretion "to waive the requirement and so remove the impediment to its addressing and resolving the serious constitutional questions raised."

7. ID; EXECUTIVE DEPARTMENT; BUDGET SYSTEM OF THE PHILIPPINES.— An understanding of the Budget System of the Philippines will aid the Court in properly appreciating and justly resolving the substantive issues. [Thus, a review of the following.] ***a)*** **Origin of the Budget System** x x x ***b)*** **Evolution of the Philippine Budget System** x x x ***c)*** **The Philippine Budget Cycle** x x x **c.1. Budget Preparation** x x x **c.2. Budget Legislation** x x x **c.3. Budget Execution** x x x **c.4. Accountability.**

8. ID.; DISBURSEMENT ACCELERATION PROGRAM (DAP); NATURE OF DAP AS A FISCAL PLAN; PROMOTION OF ECONOMIC GROWTH.— DAP was a program designed to promote economic growth x x x The DAP proved to be a demonstration that expenditure was a policy instrument that the Government could use to direct the economies towards growth and development. The Government, by spending on public infrastructure, would signify its commitment of ensuring profitability for prospective investors. The Program Activity

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or Project (PAPs) funded under the DAP were chosen for this reason based on their: (1) multiplier impact on the economy and infrastructure development; (2) beneficial effect on the poor; and (3) translation into disbursements.

9. ID.; ID.; ID.; IMPLEMENTATION AND FUNDING OF DAP.— [A]ll pertinent issuances relative thereto showed how the DAP was to be implemented and funded, that is — (1) by declaring "savings" coming from the various departments and agencies derived from pooling unobligated allotments and withdrawing unreleased appropriations; (2) releasing unprogrammed funds; and (3) applying the "savings" and unprogrammed funds to augment existing PAPs or to support other priority PAPs.

10. ID.; ID.; ID.; DAP WAS NOT AN APPROPRIATION MEASURE AND DOES NOT REQUIRE AN IMPLEMENTING APPROPRIATION LAW.— The DAP was a government policy or strategy designed to stimulate the economy through accelerated spending. In the context of the DAP's adoption and implementation being a function pertaining to the Executive as the main actor during the **Budget Execution Stage** under its constitutional mandate to faithfully execute the laws, including the GAAs, Congress did not need to legislate to adopt or to implement the DAP. x x x On the other hand, the President, in keeping with his duty to faithfully execute the laws, had sufficient discretion during the execution of the budget to adapt the budget to changes in the country's economic situation. He could adopt a plan like the DAP for the purpose. He could pool the savings and identify the PAPs to be funded under the DAP. The pooling of savings pursuant to the DAP, and the identification of the PAPs to be funded under the DAP did not involve appropriation in the strict sense because the money had been already set apart from the public treasury by Congress through the GAAs. In such actions, the Executive did not usurp the power vested in Congress under Section 29(1), Article VI of the Constitution.

11. ID.; ID.; ANY TRANSFER OF APPROPRIATED FUNDS SHOULD CONFORM WITH SECTION 25 (5), ARTICLE VI OF THE 1987 CONSTITUTION.— Section 25 (5) Article VI of the Constitution provides: No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of

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Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations. x x x The Constitutional Commission included Section 25(5), to keep a tight rein on the exercise of the power to transfer funds appropriated by Congress by the President and the other high officials of the Government named therein. x x x Accordingly, we should interpret Section 25(5), *supra*, in the context of a limitation on the President's discretion over the appropriations during the **Budget Execution Phase**.

12. ID.; ID.; ID.; REQUISITES.— The transfer of appropriated funds, to be valid under Section 25(5), *supra*, must be made upon a concurrence of the following requisites, namely: (1) There is a law authorizing the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of the Constitutional Commissions to transfer funds within their respective offices; (2) The funds to be transferred are savings generated from the appropriations for their respective offices; and (3) The purpose of the transfer is to augment an item in the general appropriations law for their respective offices.

13. ID.; ID.; ID.; ID.; IMPLEMENTING LAW; GENERALLY THE GENERAL APPROPRIATIONS ACT (GAA) OF A GIVEN FISCAL YEAR; 2011 GAA SEC. 59 AND 2012 GAA SEC. 53 ARE DEFECTIVE.— Section 25(5), *supra*, not being a self-executing provision of the Constitution, must have an implementing law for it to be operative. That law, generally, is the GAA of a given fiscal year. To comply with the first requisite, the GAAs should expressly authorize the transfer of funds. x x x A reading [of 2011 GAA Sec. 59 and 2012 GAA Sec. 53] shows, however, that both were textually unfaithful to the Constitution for not carrying the phrase "*for their respective offices*" contained in Section 25(5), *supra*. The impact of the phrase "*for their respective offices*" was to authorize only transfers of funds within their offices.

14. ID.; ID.; ID.; ID.; ID.; ID.; ID.; THE SOURCE OF FUNDS TO BE TRANSFERRED WERE SAVINGS FROM

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APPROPRIATIONS WITHIN THE RESPECTIVE OFFICES; PRINCIPLES TO CONSIDER IN ASCERTAINING THE MEANING OF "SAVINGS".— In ascertaining the meaning of savings, certain principles should be borne in mind. The **first principle** is that Congress wields the power of the purse. x x x The **second principle** is that the Executive, as the department of the Government tasked to enforce the laws, is expected to faithfully execute the GAA and to spend the budget in accordance with the provisions of the GAA. x x x The **third principle** is that in making the President's power to augment operative under the GAA, Congress recognizes the need for flexibility in budget execution. x x x And the **fourth principle** is that savings should be actual. "Actual" denotes something that is real or substantial, or something that exists presently in fact, as opposed to something that is merely theoretical, possible, potential or hypothetical. The foregoing principles caution us to construe savings strictly against expanding the scope of the power to augment. It is then indubitable that the power to augment was to be used only when the purpose for which the funds had been allocated were already satisfied, or the need for such funds had ceased to exist, for only then could savings be properly realized. This interpretation prevents the Executive from unduly transgressing Congress' power of the purse.

15. ID.; ID.; ID.; ID.; ID.; UNRELEASED OR UNALLOTED APPROPRIATIONS ARE NOT NECESSARILY SAVINGS; DISCUSSED.— The DBM declares that part of the savings brought under the DAP came from "pooling of unreleased appropriations such as unreleased Personnel Services appropriations which will lapse at the end of the year, unreleased appropriations of slow moving projects and discontinued projects per Zero-Based Budgeting findings." The declaration of the DBM by itself does not state the clear legal basis for the treatment of unreleased or unalloted appropriations as savings. x x x For us to consider unreleased appropriations as savings, unless these met the statutory definition of savings, would seriously undercut the congressional power of the purse, because such appropriations had not even reached and been used by the agency concerned *vis-à-vis* the PAPs for which Congress had allocated them. However, if an agency has unfilled positions in its *plantilla* and did not receive an allotment and

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NCA for such vacancies, appropriations for such positions, although unreleased, may already constitute savings for that agency under the second instance. Unobligated allotments, on the other hand, were encompassed by the first part of the definition of "savings" in the GAA, that is, as portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance." But the first part of the definition was further qualified by the three enumerated instances of when savings would be realized: (a) the PAP for which the appropriation had been authorized was completed, finally discontinued, or abandoned; or (b) there were vacant positions and leaves of absence without pay; or (c) the required or planned targets, programs and services were realized at a lesser cost because of the implementation of measures resulting in improved systems and efficiencies. As such, unobligated allotments could not be indiscriminately declared as savings without first determining whether any of the three instances existed. This signified that the DBM's withdrawal of unobligated allotments had disregarded the definition of savings under the GAAs.

16. ID.; ID.; ID.; ID.; ID.; NATIONAL BUDGET CIRCULAR NO. 541 ON WITHDRAWAL OF UNOBLIGATED ALLOTMENTS OF AGENCIES WITH LOW LEVELS OF OBLIGATIONS TO FUND PRIORITY OR FAST-MOVING PROJECTS WHICH COULD BE REISSUED FOR THE ORIGINAL PROGRAMS/ PROJECTS OF THE AGENCIES CONCERNED; SUCH FUNDS CANNOT BE DECLARED AS SAVINGS.— The DBM's Memorandum for the President dated June 25, 2012 (which became the basis of NBC No. 541) stated: ON THE AUTHORITY TO WITHDRAW UNOBLIGATED ALLOTMENTS x x x 9.0 It may be emphasized that **the allotments to be withdrawn will be based on the list of slow moving projects to be identified by the agencies and their catch up plans to be evaluated by the DBM**. x x x However, NBC No. 541 did not set in clear terms the criteria for the withdrawal of unobligated allotments. x x x A perusal of its various provisions reveals that NBC No. 541 targeted the "withdrawal of unobligated allotments of agencies with low levels of obligations" "to fund priority and/or fast-moving programs/projects." But the fact that the withdrawn allotments could be "[r]eissued for the original programs and projects of the agencies/ Operating Units (OUs) concerned, from which the allotments were withdrawn" supported the conclusion

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that the PAPs had not yet been finally discontinued or abandoned. Thus, the purpose for which the withdrawn funds had been appropriated was not yet fulfilled, or did not yet cease to exist, rendering the declaration of the funds as savings impossible.

17. ID.; ID.; ID.; ID.; ID.; WITHDRAWALS PURSUANT THERETO DISREGARDED THE 2-YEAR PERIOD OF AVAILABILITY OF THE APPROPRIATIONS FOR MAINTENANCE AND OTHER OPERATING EXPENSES (MOOE) AND CAPITAL OUTLAY EXTENDED UNDER THE 2011 AND 2012 GAAs.— NBC No. 541 immediately considered for withdrawal all released allotments in 2011 charged against the 2011 GAA that had remained unobligated based on the following considerations, to wit: 5.4.1. The departments/agencies' approved priority programs and projects are assumed to be implementation-ready and doable during the given fiscal year; and 5.4.2 The practice of having substantial carryover appropriations may imply that the agency has a slower-than-programmed implementation capacity **or** agency tends to implement projects within a two-year timeframe. Such withdrawals pursuant to NBC No. 541, the circular that affected the unobligated allotments for continuing and current appropriations as of June 30, 2012, disregarded the 2-year period of availability of the appropriations for Maintenance and Other Operating Expenses (MOOE) and capital outlay extended under Section 65, General Provisions of the 2011 GAA. x x x and Section 63 General Provisions of the 2012 GAA. x x x Thus, another alleged area of constitutional infirmity was that the DAP and its relevant issuances shortened the period of availability of the appropriations for MOOE and capital outlays.

18. ID.; ID.; ID.; ID.; ID.; ID.; THE WITHDRAWAL OF UNOBLIGATED ALLOTMENTS AND THE RETENTION OF APPROPRIATED FUNDS ARE NOT CONSIDERED AS IMPOUNDMENT.— According to *Philippine Constitution Association v. Enriquez*: "Impoundment refers to a refusal by the President, for whatever reason, to spend funds made available by Congress. It is the failure to spend or obligate budget authority of any type." Impoundment under the GAA is understood to mean the retention or deduction of appropriations. The 2011 GAA authorized impoundment only in case of unmanageable National Government budget deficit.

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> x x x The withdrawal of unobligated allotments under the DAP should not be regarded as impoundment because it entailed only the transfer of funds, not the retention or deduction of appropriations. Nor could Section 68 of the 2011 GAA (and the similar provisions of the 2012 and 2013 GAAs) be applicable. x x x The provision pertained to the retention or deduction of allotments upon their release from the DBM, which was a different matter altogether. The Court should not expand the meaning of the provision by applying it to the withdrawal of allotments. x x x Moreover, the DBM did not suspend or stop further expenditures in accordance with Section 38 [Chapter 5, Book VI of the Administrative Code of 1987] but instead transferred the funds to other PAPs. It is relevant to remind at this juncture that the balances of appropriations that remained unexpended at the end of the fiscal year were to be reverted to the General Fund. This was the mandate of Section 28, Chapter IV, Book VI of the *Administrative Code*. x x x The Executive could not circumvent this provision by declaring unreleased appropriations and unobligated allotments as savings prior to the end of the fiscal year.

19. ID.; ID.; ID.; ID.; THE PURPOSE OF THE TRANSFER OF FUNDS SHOULD BE TO AUGMENT AN ITEM IN THE GENERAL APPROPRIATIONS LAW FOR THE RESPECTIVE OFFICES; NOT PRESENT AS SAVINGS POOLED UNDER THE DAP WERE ALLOCATED TO PROGRAM ACTIVITY OR PROJECTS (PAPs) NOT COVERED BY ANY APPROPRIATIONS IN THE PERTINENT GAAs.— The third requisite for a valid transfer of funds is that the purpose of the transfer should be "to augment an item in the general appropriations law for the respective offices." The term "augment" means to enlarge or increase in size, amount, or degree. The GAAs for 2011, 2012 and 2013 set as a condition for augmentation that x x x an appropriation for any PAP must first be determined to be deficient before it could be augmented from savings. [T]he OSG has submitted **seven evidence packets** containing memoranda, SAROs, and other pertinent documents relative to the implementation and fund transfers under the DAP. Upon careful review of the documents contained in the **seven evidence packets**, we conclude that the "savings" pooled under the DAP were allocated to PAPs that were not covered by any appropriations in the pertinent GAAs.

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20. ID.; ID.; ID.; THE EXECUTIVE IS MANDATED TO REMAIN FAITHFUL TO THE PROVISIONS OF THE GAAs.— [The Executive] required to remain faithful to the provisions of the GAAs, given that his power to spend pursuant to the GAAs was but a delegation to him from Congress. Verily, the power to spend the public wealth resided in Congress, not in the Executive. x x x Pertinently, when it exercises its power of the purse, Congress wields control by specifying the PAPs for which public money should be spent. It is the President who proposes the budget but it is Congress that has the final say on matters of appropriations. For this purpose, appropriation involves two governing principles, namely: (1) "a Principle of the Public Fisc, asserting that all monies received from whatever source by any part of the government are public funds;" and (2) "a Principle of Appropriations Control, prohibiting expenditure of any public money without legislative authorization." To conform with the governing principles, the Executive cannot circumvent the prohibition by Congress of an expenditure for a PAP by resorting to either public or private funds. Nor could the Executive transfer appropriated funds resulting in an increase in the budget for one PAP, for by so doing the appropriation for another PAP is necessarily decreased. The terms of both appropriations will thereby be violated.

21. ID.; ID.; ID.; CROSS-BORDER AUGMENTATIONS FROM SAVINGS ARE PROHIBITED BY THE CONSTITUTION.— By providing that the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the Heads of the Constitutional Commissions may be authorized to augment any item in the GAA "for their respective offices," Section 25(5), *supra*, has delineated borders between their offices, such that funds appropriated for one office are prohibited from crossing over to another office even in the guise of augmentation of a deficient item or items. Thus, we call such transfers of funds **cross-border transfers** or **cross-border augmentations**. Cross-border transfers, whether as augmentation, or as aid, were prohibited under Section 25(5), *supra*, has delineated borders between their offices, such that funds appropriated for one office are prohibited from crossing over to another office even in the guise of augmentation of a deficient item or items. Thus, we call such transfers of funds **cross-border transfers** or **cross-border augmentations.**

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22. ID.; ID.; ID.; SOURCING THE DAP FROM UNPROGRAMMED FUNDS REQUIRES THAT THE REVENUE COLLECTIONS EXCEEDED THE REVENUE TARGETS.— Funding under the DAP were also sourced from unprogrammed funds provided in the GAAs for 2011, 2012, and 2013, x x x treated as separate sources of funds. Even so, the release and use of the unprogrammed funds were still subject to restrictions, for, to start with, the GAAs precisely specified the instances when the unprogrammed funds could be released and the purposes for which they could be used. The petitioners point out that a condition for the release of the unprogrammed funds was that the revenue collections must exceed revenue targets; and that the release of the unprogrammed funds was illegal because such condition was not met. x x x The Budget of Expenditures and Sources of Financing (BESFs) for 2011, 2012 and 2013 uniformly defined "unprogrammed appropriations" as appropriations that provided standby authority to incur additional agency obligations for priority PAPs when revenue collections exceeded targets, and when additional foreign funds are generated. x x x This meant that the collection of additional revenues from new sources did not warrant the release of the unprogrammed funds. Hence, even if the revenues not considered in the BESFs were collected or generated, the basic condition that the revenue collections should exceed the revenue targets must still be complied with in order to justify the release of the unprogrammed funds. x x x Consequently, that there were additional revenues from sources not considered in the revenue target would not be enough. The total revenue collections must still exceed the original revenue targets to justify the release of the unprogrammed funds.

23. STATUTORY CONSTRUCTION; DOCTRINE OF OPERATIVE FACT; APPLICATION IN THE DECLARATION OF UNCONSTITUTIONALITY OF THE DAP AND ITS IMPLEMENTING ISSUANCES.— After declaring the DAP and its implementing issuances constitutionally infirm, we must now deal with the consequences of the declaration. x x x The doctrine of operative fact recognizes the existence of the law or executive act prior to the determination of its unconstitutionality as an operative fact that produced consequences that cannot always be erased, ignored or disregarded. In short, it nullifies the void law or executive act but sustains its effects. It provides an

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exception to the general rule that a void or unconstitutional law produces no effect. But its use must be subjected to great scrutiny and circumspection, and it cannot be invoked to validate an unconstitutional law or executive act, but is resorted to only as a matter of equity and fair play. It applies only to cases where extraordinary circumstances exist, and only when the extraordinary circumstances have met the stringent conditions that will permit its application. We find the doctrine of operative fact applicable to the adoption and implementation of the DAP. Its application to the DAP proceeds from equity and fair play. The consequences resulting from the DAP and its related issuances could not be ignored or could no longer be undone. To be clear, the doctrine of operative fact extends to a void or unconstitutional executive act. The term *executive act* is broad enough to include any and all acts of the Executive, including those that are quasi legislative and quasi-judicial in nature. x x x To declare the implementation of the DAP unconstitutional without recognizing that its prior implementation constituted an operative fact that produced consequences in the real as well as juristic worlds of the Government and the Nation is to be impractical and unfair. [Nonetheless,] as Justice Brion has clarified, the doctrine of operative fact can apply only to the PAPs that can no longer be undone, and whose beneficiaries relied in good faith on the validity of the DAP, but cannot apply to the authors, proponents and implementors of the DAP, unless there are concrete findings of good faith in their favor by the proper tribunals determining their criminal, civil, administrative and other liabilities.

CARPIO, *J.*, *separate opinion*:

1. REMEDIAL LAW; ACTIONS; PARTIES; TAXPAYERS HAVE THE STANDING TO ASSAIL THE ILLEGAL OR UNCONSTITUTIONAL DISBURSEMENT OF PUBLIC FUNDS.— The well-settled rule is that taxpayers, like petitioners here, have the standing to assail the illegal or unconstitutional disbursement of public funds. Citizens, like petitioners here, also have standing to sue on matters of transcendental importance to the public which must be decided early, like the transfer of appropriations from one branch of government to another or to the constitutional bodies, since such transfer may impair the finely

crafted system of checks-and balances enshrined in the Constitution.

2. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; PROHIBITION ON TRANSFER OF FUNDS IN THE GENERAL APPROPRIATIONS LAW FOR ONE BRANCH OF GOVERNMENT TO ANOTHER.— Section 25(5), Article VI of the Constitution provides: No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized **to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations**. Section 25(5) prohibits the transfer of funds appropriated in the general appropriations law for one branch of government to another branch, or for one branch to other constitutional bodies, and *vice versa*. However, "**savings**" from appropriations for a branch or constitutional body may be transferred to another item of appropriation **within the same** branch or constitutional body, as set forth in the second clause of the same Section 25(5).

3. ID.; ID.; ID.; ID.; AUGMENTATION OR REALIGNMENT OF "EXISTING ITEMS" IN THE GAA FROM "SAVINGS" IN OTHER ITEMS IN THE GAA WITHIN THE SAME BRANCH OR CONSTITUTIONAL BODY, WHEN AUTHORIZED BY LAW; ELUCIDATED.— The 2011, 2012 and 2013 GAAs all have provisions authorizing the President, the Senate President, the House Speaker, the Chief Justice and the Heads of the constitutional bodies to realign savings within their respective entities. Section 25(5) expressly states that what can be realigned are "**savings**" from an item in the GAA. To repeat, only savings can be realigned. Unless there are savings, there can be no realignment. Savings can augment any ***existing*** item in the GAA, provided such item is in the "**respective appropriations" of the same branch or constitutional body**. "Augmentation implies the **existence x x x of a program, activity, or project with an appropriation**, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. **In no case shall a non-existent program, activity, or project, be funded by augmentation from savings** x x x." x x x

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In *Sanchez v. Commission on Audit*, this Court stressed the twin requisites for a valid transfer of appropriation, namely, (1) the existence of savings and (2) the existence in the appropriations law of the item, project or activity to be augmented from savings. x x x Section 25(5), Article VI of the Constitution likewise mandates that funds, savings or not from one branch, like the Executive, cannot be transferred to another branch, like the Legislature or Judiciary, or to a constitutional body, and *vice versa*. In fact, funds appropriated for the Executive branch, whether savings or not, cannot be transferred to the Legislature or Judiciary, or to the constitutional bodies, and *vice versa*.

4. ID.; ID.; ID.; ID.; ID.; ID.; DEFINITION AND SOURCES OF SAVINGS UNDER THE GAA; ELUCIDATED.— As defined in the GAAs, savings must be portions or balances from any programmed appropriation "**free from any obligation or encumbrance"**, which means there is no contract obligating payment out of such portions or balances of the appropriation. Otherwise, if there is already a contract obligating payment out of such portions or balances, the funds are not free from any obligation, and thus can not constitute savings. *First*, there can be savings when there are funds still available after completion of the work, activity or project, which means there are **excess funds remaining after the work, activity or project is completed**. There can also be savings when there is *final* discontinuance of the work, activity or project, which means there are **funds remaining after the work, activity, or project was started but finally discontinued before completion**. [Thus], the funds are obligated but the remaining funds are de-obligated upon **final** discontinuance of the project. On the other hand, abandonment means the work, activity or project can no longer be started because of lack of time to obligate the funds, resulting in the physical impossibility to obligate the funds. x x x Here, the **funds are not, and can no longer be, obligated and thus will constitute savings**. Final discontinuance or abandonment excludes suspension or temporary stoppage of the work, activity, or project. *Second*, there can be savings when there is unpaid compensation and related costs pertaining to vacant positions. *Third*, there can be savings from cost-cutting measures adopted by government agencies.

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5. ID.; ID.; ID.; ID.; ID.; ID.; ADMINISTRATIVE CODE OF 1987, WHERE THE PRESIDENT IS AUTHORIZED TO SUSPEND OR STOP FURTHER EXPENDITURE OF FUNDS ALLOTTED FOR ANY AGENCY OR ANY OTHER EXPENDITURE AUTHORIZED IN THE GAA, ARE NOT SAVINGS.— Section 38, Chapter 5, Book VI of the Administrative Code of 1987 authorizes the President, whenever in his judgment public interest requires, "to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the GAA." For example, if there are reported anomalies in the construction of a bridge, the President can order the suspension of expenditures of funds until an investigation is completed. x x x Section 38 refers only to **suspension** of expenditure of funds, not final discontinuance of work, activity or project. [T]he funds remain obligated and thus cannot constitute savings [that] can be realigned. x x x . Only funds remaining after the work, activity or project has been **finally** discontinued or abandoned will constitute savings that can be realigned by the President to augment existing items in the appropriations for the Executive branch.

6. ID.; DISBURSEMENT ACCELERATION PROGRAM (DAP); THE DAP, NBC 541 AND OTHER EXECUTIVE ISSUES RELATED TO DAP; UNOBLIGATED ALLOTMENTS ARE NOT SAVINGS.— [T]he DAP and NBC 541 directed the **"withdrawal of unobligated allotments of agencies with low level of obligations as of June 30, 2012."** The funds withdrawn are then used to augment or fund "priority and/or fast moving programs/projects of the national government." x x x This is unconstitutional. In the **middle** of the fiscal year, unobligated appropriations, other than MOOE for previous months, do not automatically become savings for the reason alone that the agency has a low level of obligations. As of 30 June of a fiscal year, there are still six months left to obligate the funds. Six months are more than enough time to conduct public bidding to obligate the funds. As of 30 June 2012, there could have been no final abandonment of any work, activity or project because there was still ample time to obligate the funds. x x x In the case of appropriations for MOOE, the same are deemed divided into twelve monthly allocations. Excess or unused MOOE appropriations for the month, other than Mandatory Expenditures and Expenditures

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for Business-type Activities, are deemed savings **after the end of the month because there is a physical impossibility to obligate and spend such funds as MOOE for a period that has already lapsed.** Such excess or unused MOOE can be realigned by the President to augment any existing item of appropriation for the Executive branch. MOOE for future months are not savings and cannot be realigned. x x x Under NBC 541, appropriations for Capital Outlays are sources of DAP funds. However, the withdrawal of unobligated allotments for Capital Outlays as of 30 June 2012 violates the General Provisions of the 2011 and 2012 GAAs. x x x The life span of Capital Outlays under the 2011 and 2012 GAAs is **two** years. This two-year life span is prescribed by law and cannot be shortened by the President, unless the appropriations qualify as "savings" under the GAA. Capital Outlay can be obligated anytime during the two year period, provided there is sufficient time to conduct a public bidding. Capital Outlay cannot be declared as savings unless there is no more time for such public bidding to obligate the allotment. x x x This two-year period applies to unused or excess MOOE of previous months in that such unused or excess MOOE can be realigned within the two-year period.

7. ID.; ID.; ID.; UNLAWFUL RELEASE OF THE UNPROGRAMMED FUND.— One of the sources of the DAP is the Unprogrammed Fund under the GAA 2011, 2012 and 2013 provisions on the Unprogrammed Fund under the 2011, 2012 and 2013 GAAs. x x x [A]s a condition for the release of the Unprogrammed Fund, **the revenue collections, as certified by the National Treasurer, must exceed the original revenue targets submitted by the President to Congress**. x x x The certifications from the Bureau of Treasury, however, do not attest the same. x x x [S]avings can never come from the Unprogrammed Fund since the term "savings" is defined under the GAAs as "portions or balances of any **programmed** appropriation." The Unprogrammed Fund can only be used for the specific purpose prescribed in the GAAs, and only if the revenue collections exceed the original revenue targets for the fiscal year. Section 3 of the General Provisions of the 2011, 2012 and 2013 GAAs uniformly provide that all fees, charges, assessments, and other receipts or revenues collected by departments, bureaus, offices or agencies in the exercise of their functions shall be deposited with the

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National Treasury as **income of the General Fund** in accordance with the provisions of the Administrative Code and Section 65 of Presidential Decree No. 1445. Such income are not savings as understood and defined in the GAAs. x x x [T]he use of the Unprogrammed Fund under the DAP is unlawful, and hence, void.

8. ID.; ID.; ID.; DAP VIOLATES THE CONSTITUTIONAL PROHIBITION ON "CROSS-BORDER" TRANSFERS.— Section 25(5), Article VI of the Constitution mandates that savings from one government branch cannot be transferred to another branch, and *vice versa*. This constitutional prohibition on cross-border transfers is clear: the President, the Senate President, the Speaker of the House of Representatives, the Chief Justice, and the Heads of constitutional bodies are only authorized to augment any item in the general appropriations law for their **respective offices** from **savings** in other items of their **respective appropriations**. Contrary to Section 25(5), Article VI of the Constitution, there were instances of cross-border transfers under the DAP. x x x Attached to DBM Secretary Abad's Memorandum for the President, dated 12 October 2011, is a Project List for FY 2011 DAP. The last item on the list, item no. 22, is for **PDAF augmentation in the amount of ₱6.5 billion**, also listed as various other local projects. x x x [T]he transfer of DAP funds, in the amount of ₱6.5 billion, to augment the unconstitutional PDAF is also unconstitutional because it is an augmentation of an unconstitutional appropriation. x x x The Constitution clearly prohibits the President from transferring appropriations of the Executive branch to other branches of government or to constitutional bodies *for whatever reason.* "The *fundamental policy of the Constitution* is against transfer of appropriations even by law, since this 'juggling' of funds is often a rich source of unbridled patronage, abuse and interminable corruption." Moreover, the "cross-border" transfer of appropriations to constitutional bodies impairs the independence of the constitutional bodies.

9. ID.; ID.; ID.; NO PRESIDENTIAL POWER OF IMPOUNDMENT.— If Congress in the GAA directs the expenditure of public funds for a specific purpose, the President has no power to cancel, prevent or permanently stop such expenditure once the GAA becomes a law. **What the President can do is to veto that specific**

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item in the GAA. But once the President approves the GAA or allows it to lapse into law the president can no longer veto or cancel any item in the GAA or impound the disbursement of funds authorized to be spent in the GAA. Section 38, Chapter V, Book VI of the Administrative Code of 1987 allows the President "**to suspend or otherwise stop further expenditure**" of appropriated funds for a legitimate purpose, x x x [but it does not] authorize the President **to permanently stop** so as to cancel the implementation of a project in the GAA because the President has no power to amend the law, and the GAA is a law. Section 38 cannot also be read to authorize the President to impound the disbursement of funds for projects approved in the GAA because the President has no power to impound funds approved by Congress. The President can suspend or stop further expenditure of appropriated funds only after the appropriated funds have become **obligated**, that is, a contract has been signed for the implementation of the project. x x x [And] despite the order to suspend or stop further expenditure of funds the appropriated funds remain obligated until the contract is rescinded. As long as the appropriated funds are still obligated, the funds cannot constitute savings because "savings" as defined in the GAA, must come from appropriations that are "**free from any obligation or encumbrance.**"

10. STATUTORY CONSTRUCTION; APPLICABILITY OF THE DOCTRINE OF OPERATIVE FACT.— An unconstitutional act confers no rights, imposes no duties, and affords no protection. An unconstitutional act is inoperative as if it has not been passed at all. The exception to this rule is the doctrine of operative fact. Under this doctrine, the law or administrative issuance is recognized as unconstitutional but the effects of the unconstitutional law or administrative issuance, prior to its declaration of nullity, may be left undisturbed as a matter of **equity and fair play**. As a rule of equity, the doctrine of operative fact can be invoked only by those who relied in good faith on the law or the administrative issuance, prior to its declaration of nullity. Those who acted in bad faith or with gross negligence cannot invoke the doctrine. Likewise, those **directly responsible** for an illegal or unconstitutional act cannot invoke the doctrine. He who comes to equity must come with clean hands, and he who seeks equity must do equity. **Only**

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those who merely relied in good faith on the illegal or unconstitutional act, without any direct participation in the commission of the illegal or unconstitutional act, can invoke the doctrine. Moreover, the doctrine of operative fact is applicable only if nullifying the effects of the unconstitutional law or administrative issuance will result in injustice or serious prejudice to the public or innocent third parties. To illustrate, if DAP funds were used to build school houses without anomalies other than the fact that DAP funds were used, the contract could no longer be rescinded for to do so would prejudice the innocent contractor who built the school houses in good faith. However, if DAP funds were used to augment the PDAF of members of Congress whose identified projects were in fact non-existent or anomalously implemented, the doctrine of operative fact would not apply.

BRION, *J.*, *separate opinion*:

1. **POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; POWERS OF THE COURT; ON PURE CONSTITUTIONAL DISPUTES ATTENDED BY GRAVE ABUSE OF DISCRETION IN THE PROCESS INVOLVED OR IN THEIR RESULTS; APPLICABLE IN THE ISSUE OF DAP'S CONSTITUTIONALITY.—** [T]he Court under the 1987 Constitution possesses three powers: x x x (3) **pure constitutional disputes** attended by **grave abuse of discretion** in the process involved or in their result/s. The present petitions allege that grave abuse of discretion and violations of the Constitution attended the DAP, from the perspectives of both its **creation and terms**, and **its sourcing and use of funds**. In these lights, the exercise of our expanded power of judicial review falls within the third kind above.

2. **ID.; ID.; BUDGETARY PROCESS; DISCUSSED.—** At the ***budget preparation and proposal stage, the Executive is given the initiative***; x x x ***This budget contains the appropriations recommended by the President for the operation of the government***. x x x ***[T]he Constitution mandates that no money shall be paid out of the treasury except in pursuance of an appropriation made by law***. ***Also, the Constitution prohibits the transfer of appropriations, with specified exceptions, in***

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order to ensure that the power of appropriation remains exclusively with Congress. [T]he Constitution also requires that the procedure in approving appropriations for Congress shall strictly follow the procedure for approving appropriations for other departments and agencies. Section 25(3), Article VII of the Constitution seeks to ensure that while Congress is given the power of appropriation, it must undergo the same process before its budget is approved. x x x The Constitution authorizes the President to exercise some degree of control over an appropriation legislation by allowing him to exercise an ***item-veto power***. ***As a counter-balance, Congress may override the President's veto by a vote of 2/3 of all its members***. Upon passage of the general appropriations bill into law (either by presidential approval or inaction allowing the bill to lapse into a law), none of the three branches of government and the constitutional bodies can thwart congressional budgetary will by crossing constitutional boundaries through the transfer of appropriations or funds across departmental borders.

3. ID.; DISBURSEMENT ACCELERATION PROGRAM (DAP); VIOLATION OF THE PRINCIPLES OF CHECKS AND BALANCES AND THE SEPARATION OF POWERS IN THE BUDGETARY PROCESS.— [T]he DAP violates the principles of separation of powers and checks and balances on two (2) counts: ***first*, by pooling funds that cannot at all be classified as savings; and *second*, by using these funds to finance projects outside the Executive or for projects with no appropriation cover.** x x x These violations of the "no transfer" proviso of Section 25(5) of Article VI of the Constitution had the effect of ***allowing the Executive to encroach on the domain of Congress in the budgetary process***. [T]he DAP in effect allowed the President to circumvent the constitutional budgetary process and to veto items of the GAA without subjecting them to the 2/3 overriding veto that Congress is empowered to exercise. Additionally, this practice ***allows the creation of a budget within a budget***.

4. ID.; ID.; VIOLATION OF SECTION 25 (5) OF THE 1987 CONSTITUTION ON THE PROHIBITION AGAINST THE TRANSFER OF APPROPRIATIONS; THE POWER TO AUGMENT IS A VERY NARROW EXCEPTION TO THE RULE.— Section 25(5), Article VI of the 1987 Constitution prohibits the enactment of any law authorizing the transfer of appropriations: x x x [With] a narrow exception : **it allowed a**

transfer of funds allocated for a particular appropriation x x x in the presence of the folllowing conditions ***First***, the transfer may be allowed only when appropriations have become savings; ***Second***, the transfer may be exercised only by specific public officials (*i.e.*, by the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions); ***Third***, these savings may only be used to augment and only existing items in the GAA can be augmented; and ***Fourth***, these items must be found within each branch of government's respective appropriations. **And the transfer of appropriations may only be exercised if Congress authorized it by law.**

5. ID.; ID.; ID.; ID.; "ACTUAL SAVINGS" IS REQUIRED; REQUISITES.— "**[A]ctual savings** is a *sine qua non* to a valid transfer of funds from one government agency to another." Thus, two essential requisites must be present for a transfer of appropriation to be validly carried out. ***First***, there must be savings in the programmed appropriation of the transferring agency. ***Second***, there must be an existing item, project or activity with an appropriation in the receiving agency to which the savings will be transferred.

6. ID.; ID.; ID.; ID.; ID.; SAVINGS CANNOT BE USED TO FUND PROGRAMS AND PROJECTS NOT APPROPRIATED FOR BY CONGRESS.— [S]avings cannot be used to augment non-existent items in the GAA. Where there are no appropriations for capital outlay in a specific agency or program, for example, savings cannot be used to buy capital equipment for that program. Neither can savings be used to fund the hiring of personnel, where a program's appropriation does not specify an item for personnel services.

7. ID.; ID.; ID.; ID.; ID.; GAAs ON SAVINGS THAT EFFECTIVELY LIMIT THE EXECUTIVE'S EXERCISE OF THE POWER TO AUGMENT.— The GAAs of 2010, 2011 and 2012 all have identical provisions x x x [that] effectively limit the Executive's exercise of the power to augment, as they strictly define when funds may be considered as savings and when funds may be used to augment other items in the GAA. From these provisions, the existence of "savings" required the

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concurrence of the following statutory requirements: 1. That there be a programmed appropriation. 2. That there be an unexpended amount (available balance) from this programmed appropriation. 3. That the available balance be due to, or must arise from, any of the following: a. A work, activity or purpose under a programmed appropriation is **completed**, **finally discontinued or abandoned** OR b. The unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; OR c. The implementation of measures that resulted in improved systems and efficiencies, enabling agencies to meet and deliver the required or planned targets, programs, and services at a lesser cost. 4. That the available balance be unobligated or unencumbered. When the Executive decides to finally discontinue or abandon a project or activity under a programmed appropriation, the Executive must necessarily stop the expenditure and thereby reduce or retain the funds. The available balance from a project that is completed, finally discontinued or abandoned, by clear definition of law, becomes "savings" that may be used to augment a deficient item of appropriation in the GAA.

8. ID.; ID.; ID.; ID.; ID.; GAAs ON GENERAL PROHIBITION AGAINST IMPOUNDMENT OF RELEASES.— [I]n addition to limiting when funds may be used to augment other items in the GAA, Congress also prohibited the deduction and retention of their release. Sections 64 and 65 of the GAAs of 2010, 2011 and 2012 x x x read together, [they] clearly set out Congress' intent that the appropriations in the GAA could be released and used only as programmed. This is the general rule. As an exception, the President was given the power to retain or reduce **appropriations only in case of an unmanageable National Government budget deficit.** x x x Impounding appropriations [in the GAA] is an action contrary to the President's duty to ensure that all laws are faithfully executed. x x x **Impoundment** refers to the refusal by the President, for whatever reason, to spend funds made available by Congress. It is the failure to spend or obligate budgetary authority of any type. x x x [P]residential impoundment does not enjoy any express or implied constitutional support. x x x In the Philippines, the only instance when retention and reduction of appropriation is allowed is in the case of **reserves** [for contingency and emergency purposes]. This exception is based on Section 37,

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Chapter 5, Book VI of the Administrative Code of 1987 which, by it terms, is not strictly an impoundment provision.

9. ID.; ID.; ID.; ID.; ID.; THE SOURCES OF DAP FUNDS CANNOT QUALIFY AS SAVINGS; UNOBLIGATED ALLOTMENTS.— [F]unds allotted for particular appropriations may only be used to augment other items in the GAA when there are actual savings. The DAP, by pooling funds together to fast-track priority projects of the government, violated this critical requirement as the sources of DAP funds cannot qualify as savings. In pooling together "unobligated allotments" to augment other items in the GAA, the DAP used funds that had already been allotted but had yet to be obligated or spent for its intended purpose. x x x NBC No. 541 states that it shall cover the **withdrawal of unobligated allotments as of June 30, 2012** of all national government agencies charged against FY 2011 Continuing Appropriation (R.A. No. 10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to 3.1.1 Capital Outlays (CO); 3.1.2 Maintenance and Other Operating Expenses (MOOE) related to the implementation of programs and projects, as well as capitalized MOOE[.] This withdrawal is contrary to the intent and language of Section 61 of the 2011 GAA, and Section 65 which extends the availability of an appropriation up to the next year, *i.e.*, FY 2012. x x x Appropriations for CO and MOOE may be stopped when the PAPs they fund get completed, finally discontinued, or abandoned, and the excess funds left, if any, will be considered as savings. x x x By its very nature, appropriations for the MOOE lapse monthly, and thus any fund allotted for the month left unused qualifies as savings, with two exceptions: (1) MOOE which **under the GAA can be declared as savings only in the last quarter** of the FY and (2) **expenditures for Business-type activities**, which under the GAA cannot be realigned. Funds appropriated for CO, on the other hand, cannot be declared as savings unless the PAP it finances gets completed, finally discontinued or abandoned, and there are excess funds allotted for the PAP. Neither can **it be declared as savings unless there is no more time for public bidding to obligate the allotment within its two-year period of availability.** Thus, NBC 541 cannot validly declare CO as savings in the middle of the FY, long before the end of the two-year period when such funds could still be obligated. And while MOOE for FY 2012 from January to June 2012 may be considered

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savings, the MOOE for a future period does not qualify as such. In this light, NBC No. 541 fostered a constitutional illegality.

10. ID.; ID.; ID.; ID.; ID.; FINAL DISCONTINUANCE OR ABANDONMENT.— The GAA itself provides an illustration of the impossibility or non-feasibility of a project that justified its discontinuance or abandonment: Sec. 61. Realignment/ Relocation of Capital Outlays. The amount appropriated in this Act for acquisition, construction, replacement, rehabilitation and completion of various Capital Outlays may be realigned/ relocated in cases of **imbalanced allocation of projects within the district, duplication of projects, overlapping of funding source and similar cases**: PROVIDED, That such realignment/ relocation of Capital Outlays shall be done only upon prior consultation with the representative of the legislative district concerned. Unless the respondents, however, can actually show that the reallocation of unobligated allotments pertaining to capital outlays was made with prior consultation with the legislative district representative concerned under the terms of above-quoted Section 61, they cannot claim any legitimate basis to come under its terms.

11. ID.; ID.; ID.; ID.; ID.; USE OF SECTION 38, CHAPTER 5, BOOK VI OF THE ADMINISTRATIVE CODE TO JUSTIFY THE WITHDRAWAL AND POOLING OF UNOBLIGATED ALLOTMENTS AND UNRELEASED APPPROPRIATIONS FOR SLOW MOVING PROJECTS, NOT APPRECIATED.— Section 38, Chapter 5, Book VI of the Administrative Code reads: **Section 38.** *Suspension of Expenditure of Appropriations.* - **Except as otherwise provided in the General Appropriations Act** and whenever in his judgment the public interest so requires, **the President**, upon notice to the head of office concerned, **is authorized to suspend or otherwise stop further expenditure of funds allotted for any agency,** or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees. x x x Funds are only considered **allotted** *when the DBM has authorized an agency to incur obligation for specified amounts contained in an appropriation law*. Unlike an appropriation which is made by the legislative, an **allotment** is an executive authorization to the different departments, bureaus, offices and agencies that obligations may now be incurred.

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Allotment is part of the President's power to execute an appropriations law and **it is this power that he can suspend or reverse, not the will of Congress expressed through the appropriations law**. Thus, the President cannot exercise the power to suspend or stop expenditure under Section 38 towards appropriations, as funds for it have yet to be released and allotted. Neither can the President use Section 38 to justify the withdrawal of unobligated allotments under the terms of NBC 541 and its treatment as savings. x x x Suspension involves a temporary stoppage while the pooling of unobligated allotments under the DAP was intended to create savings, which involves the final discontinuance or abandonment of PAPs. Neither can the withdrawal of unobligated allotments be justified under the authority to stop expenditures in Section 38, as NBC 541 provides that these allotments can still be reissued. **That the withdrawn allotments can be reissued back to the "original program or project from which it was withdrawn**" ***only means that the original program or project has not really been "completed or abandoned" so as to qualify the funds therefor as "savings***."

12. ID.; ID.; ID.; ID.; ID.; THE DAP VIOLATES THE PROHIBITION AGAINST IMPOUNDMENT.— The Executive does not have any power to impound appropriations (where otherwise appropriable) except on the basis of an **unmanageable budget deficit** or as **reserve for purposes of meeting contingencies and emergencies**. None of these exceptions, however, were ever invoked as a justification for the withdrawal of unreleased appropriations for slow-moving projects.

13. ID.; ID.; ID.; ID.; ID.; QUALIFICATIONS TO THE PRESIDENT'S FLEXIBILITY IN BUDGET EXECUTION.— Flexibility in the budget execution means implementing the provisions of the GAA and exercising the discretion this entails ***within the limits provided by the GAA and the Constitution***. It does not mean a wholesale authority to choose which appropriations should get funding, which appropriations should have less or more, and which should have none at all.x x x [T]he DAP exceeded these flexibilities because it did not comply with the requisites necessary before both the power of augmentation and the power of impoundment can be lawfully exercised. With respect to these two prerogatives, a distinction should be made between *(1)* the transfer of funds from one purpose (project/

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program/activity) to another where both purposes are covered by the same item of expenditure authorized in the GAA, and *(2)* the transfer of funds from one purpose to another where the other purpose is already covered by a different item of expenditure authorized in the GAA. x x x In sum, while the President has flexibility in pushing for priority programs and crafting policies that he may deem fit and necessary, the DAP exceeded and over-extended what the President can legitimately undertake. Specifically, several sources of funding used to facilitate the DAP, as well as the programs that the DAP funded, went beyond the allowed flexibility given to the President in budget execution.

14. ID.; ID.; ID.; ID.; ID.; THE DAP IN FUNDING ITEMS NOT FOUND IN THE GAA, VIOLATED THE CONSTITUTION.— I agree with the *ponencia's* conclusion that the DAP, in funding items that are not in the GAA, violated the Constitution. The *ponencia's* exhaustive review of the evidence packets submitted by the OSG shows that some of the projects and programs that the DAP funded had no appropriation. x x x Since these expenditures were not given congressional appropriation, the transfer of funds under the DAP to fund these items cannot be justified even under the exception to the general prohibition under Section 25(5), Article VI of the 1987 Constitution.

15. ID.; ID.; ID.; ID.; ID.; THE DAP VIOLATES THE SPECIAL CONDITIONS FOR THE RELEASE OF THE UNPROGRAMMED FUND IN THE 2011 AND 2013 GAAs.— The Unprogrammed Fund in both the 2011 and the 2012 GAAs requires as a condition *sine qua non* for its release that the revenue collections exceed the original revenue targets for that year. x x x The proviso allowing the use of sources not considered in the original revenue targets to cover releases from the Unprogrammed Fund was not intended to prevail over the general provision requiring that revenue collections first exceed the original revenue targets. In the interpretation of statutes, that which implements the entire statute should be applied, as against an interpretation that would render some of its portions ineffectual. Neither should a proviso be given an interpretation that renders the general phrase it qualifies entirely inutile.

16. ID.; ID.; APPLICATION OF THE OPERATIVE FACT DOCTRINE TO THE DAP'S CONSTITUTIONALITY.— Application of the operative fact doctrine: **(1)** to the programs, works and projects the DAP funded in relying on its validity; **(2)** to the officials who undertook the programs, works and projects; and **(3)** to the public officials responsible for the establishment and implementation of the DAP. x x x To be very clear about our positions, we can only apply the operative fact doctrine ***to the programs, projects and works that can no longer he undone and where the beneficiaries relied in good faith on the validity of the DAP***. ***The authors, proponents and implementors of DAP are not among those who can seek coverage under the doctrine; their link to the DAP was merely to establish and implement the terms that we now find unconstitutional. The matter of their good faith in the performance of duty (or its absence) and their liability therefor, if any, can be made only by the proper tribunals, not by this Court in the present case. Based on these premises***, I concur that the DAP is unconstitutional and should be struck down. I likewise concur in the application of the Operative Fact Doctrine.

PERLAS-BERNABE, *J., separate concurring opinion*:

1. POLITICAL LAW; DISBURSEMENT ACCELERATION PROGRAM (DAP); WITHDRAWAL OF ALLOTMENTS AND POOLING OF FUNDS BY THE EXECUTIVE DEPARTMENT FOR REALIGNMENT IS NOT AUGMENTATION IN THE CONSTITUTIONAL SENSE OF THE WORD; TRANSFER OF APPROPRIATIONS; ELUCIDATED.— The actions and/or practices taken under the DAP should not entirely be taken as augmentations. This is because the "withdrawal of allotments" and "pooling of funds" by the Executive Department for realignment (in case of suspension under Section 38 *infra*) and/or simple utilization for projects without sufficient funding due to fiscal deficits (in case of stoppage under Section 38 *infra*) is not "augmentation" in the constitutional sense of the word. The concept of augmentation pertains to the delegated legislative authority, conferred **by law** to the various heads of government to **transfer appropriations** within their respective offices. The term "appropriation" merely relates to the authority

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given by legislature to proper officers to apply a distinctly specified sum from a designated fund out of the treasury in a given year for a specific object or demand against the State. [I]t is "**nothing more than the legislative authorization prescribed by the Constitution that money be paid out of the Treasury**." [A] "transfer of appropriations" should then be understood to pertain to **changes in the legislative parameters** found in selected items of appropriations, whereby the statutory value of one increases. x x x The word "augmentation," in common parlance, means "[t]he action or process of making or becoming greater in size or amount." Accordingly, by the import of this word "augmentation," the process under Section 25(5) *supra* would then connote changes in the selected appropriation items' statutory values, and not of its statutory purposes.

2. ID.; ID.; ID.; ID.; CONCEPT OF SAVINGS; DISCUSSED.— The incremental value coming from one appropriation item to effectively and actually increase the statutory value of another appropriation item is what Section 25(5) *supra* refers to as "savings." The General Appropriations Acts (GAA) define savings as those "portions or balances of any programmed appropriation x x x **free from any obligation or encumbrance** x x x," when the said item becomes defunct, thereby "freeing-up" either totally or partially the funds initially allotted thereto. x x x According to the GAAs, the following supervening events would render an appropriation item defunct: (*a*) completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized (*b*) regarding employee compensation, vacancy of positions and leaves of absence without pay; and (*c*) implementation of measures resulting in improved systems and efficiencies, thus enabling agencies to meet and deliver required or planned targets, programs, and services. When any of these events happen, the Constitution allows augmentation as a form of re-appropriation so that the various heads of government may, **by law**, work with existing but defunct items of appropriation and practically utilize the funds allotted therefor as "savings" in order to augment another appropriation item which has been established to be deficient. x x x – [T]he GAA's definition of augmentation which "**implies** the existence x x x of program, activity or project with an appropriation, which upon

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implementation or subsequent evaluation of needed resources, is determined to be **deficient**."

3. **ID.; ID.; ID.; ID.; APPROPRIATION POWER OF THE PRESIDENT THEREIN.—** [T]he term "appropriation" properly refers to the statutory authority to spend. Appropriation is the province of Congress. The President, in full control of the executive arm of government, in turn, implements the legislative command in the form of appropriation items pursuant to his constitutional mandate to faithfully execute the laws. The Executive Department controls all phases of budget execution; it acts according to and carries out the directive of Congress. Hence, the constitutional mandate that "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law." x x x When the Executive Department exercises its power of fiscal management through, for instance, withdrawing unobligated allotments and pooling them under Sections 38 and 39, Chapter 5, Book VI of the Administrative Code of 1987 x x x the President acts within his sphere of authority for he is merely managing the execution of the budget taking into account existing fiscal deficits as well as the circumstances that occur during actual PAP implementation. However, he must always observe and comply with existing constitutional and statutory limitations when doing so. x x x [Thus] Executive can allot, disburse, and/or spend x amount of money for x project for as long as the allotment, disbursement or expenditure is within the value limit and only for the project provided in the appropriation item. When the Executive implements an appropriation item, it is not always the case that it automatically and completely allots, disburses, and spends the specified amount of public funds to the full extent of that statutory limit.

4. **ID.; ID.; ID.; ID.; ID.; WHOLESALE WITHDRAWAL OF UNOBLIGATED ALLOTMENTS WITHOUT EXPLANATION BEHIND POSES A POLITICAL CONUNDRUM.—** When conducting fiscal management through suspending and realigning expenditures under Section 38 *supra*, the President is not technically "augmenting" according to Section 25(5) *supra* since he is not changing the legislative parameters of the appropriation items (through decreasing and increasing their statutory values). This is because, despite the suspension of expenditures and their realignment (which are matters that

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connote temporariness), the legislative parameters of the appropriation items still remain the same; hence, no savings are generated nor are savings needed. On the contrary, when he permanently stops expenditures under Section 38 *supra* in the interest of the public, he, in relation to the first GAA parameter on completion, final discontinuance and abandonment, generates savings. The permanent stoppage of expenditures may then be treated as a precursor act for either: (*a*) augmentation, when the statutory value of the target appropriation item resultantly increases (in this case, savings are used under Section 39 *supra* in relation to Section 25[5] *supra* to address a deficiency in the appropriation item itself, and not only the funds allocated therefor) ; or (*b*) for simple utilization, when the statutory value of the target appropriation item is not increased and the PAP covered by the said item only needs sufficient funding (in this case, savings are used under Section 39 *supra* only to address a fiscal deficit x x x When the President approves the wholesale withdrawal of unobligated allotments by invoking the **blanket authority** of Section 38 *supra vis-à-vis* the **general** policy impetus to ramp up government spending, without any discernible explanation behind a **particular** PAP expenditure's suspension or stoppage, or any clarification as to whether the funds withdrawn then pooled would be used either for realignment or only to cover a fiscal deficit, or for augmentation (in this latter case, necessitating therefor the determination of whether said funds are savings or not), a constitutional conundrum arises. What results is a pooling of funds, from which· a multitude of executive options is opened.

LEONEN, *J.*, *concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; BUDGET EXECUTION; POWER OF THE PRESIDENT THEREIN.— With respect to the discretions in relation to budget execution: ***The legislature has the power to authorize a maximum amount to spend per item, and the executive has the power to spend for the item up to the amount limited in the appropriations act.*** The metaphor that Congress has "the power of the purse" does not fully capture this distinction. It only captures part of the dynamic between the

executive and the legislature. Any expenditure beyond the maximum amount provided for the item in the appropriations act is an augmentation of that item. It amounts to a transfer of appropriation. This is generally prohibited except for instances when "upon implementation or subsequent evaluation of needed resources, [the appropriation for a program, activity or project existing in the General Appropriations Act] is determined to be deficient." In which case, all the conditions provided in Article VI, Section 25 (5) of the Constitution must first be met. The limits defined in this case only pertain to the power of the President — and by implication, other constitutional offices — to augment items of appropriation. There is also the power of the President to realign allocations of funds to another item — ***without augmenting that item*** — whenever revenues are insufficient in order to meet the priorities of government. The President's power or discretion to spend up to the limits provided by law is inherent in executive power. It is essential to his exercise of his constitutional duty to "ensure that the laws be faithfully executed" and his constitutional prerogative to "have control of all the executive departments." The legislative authority to spend up to a certain amount for a specific item does not mean that the President must spend that full amount. The President can spend less due to efficiency. He may also recall any allocation of unobligated funds to control an executive agency. The expenditure may turn out to be irregular, extravagant, unnecessary, or illegal. It is always possible that there are contemporary circumstances that would lead to these irregularities that could not have been seen by Congress. Congress authorizes a budget predicting the needs for an entire fiscal year. But the President must execute that budget based on the realities that he encounters. Parenthetically, because of the constitutional principle of independence, the power to spend is also granted to the judiciary. The President does not have the discretion to withhold any amount pertaining to the judiciary. The Constitution requires that all appropriations for it shall be "automatically and regularly released." The President's power to implement the laws and the existence of provisions on automatic and regular release of appropriations of independent constitutional branches and bodies support the concept that the President's discretion to spend up to the amount allowed

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in the appropriations act inherent in executive power is exclusively for offices within his department.

2. ID.; ID.; ID.; ID.; ID.; PREROGATIVES OF THE PRESIDENT; CONCEPT OF REALIGNMENT OF FUNDS AS DIFFERENTIATED FROM AUGMENTATION OF AN ITEM.— The appropriations act is promulgated, therefore, on the basis of hypothetical revenues of government in the coming fiscal year. While hypothetical, it is the best educated, economic, and political collective guess of the President and Congress. Projected expenditures may not be equal to what will actually be collected. Hence, there is no prohibition from enacting budgets that may result in a deficit spending. There is no requirement in the Constitution that Congress pass only balanced budgets. x x x It is necessary for the government to be able to identify the different factors limiting the impact of expenditures on economic growth. It is also necessary that it makes the necessary adjustments consistent with the country's short-term and long-term goals. The government must be capable of making its own priorities so that resources could be shifted in accordance with the country's actual needs. Thus, it makes sense for economic managers to recommend that government expenditures be used efficiently: *Scarce resources must be used for the project that will have the most impact at the soonest time*. While Congress contributes by putting the frame through the Appropriations Act, actual economic impact will be decided by the executive who attends to present needs. The executive may aim for better distribution of income among the population or, simply, more efficient ways to build physical and social infrastructure so that prosperity thrives. Certainly, good economic management on the part of our government officials means being concerned about projects or activities that do not progress in accordance with measured expectations. At the beginning of the year or at some regular intervals, the executive should decide on resource allocations reviewing prior ones so as to achieve the degree of economic efficiency required by good governance. These allocations are authorities to start the process of obligation. To obligate means the process of entering into contract for the expenditure of public money. However, disbursement of funds is not automatic upon allocation or allotment. There are procurement laws to contend with. Funds are disbursed only after the government enters

into a contract, and a notice of cash allocation is issued. At any time before disbursement of funds, the President may again deal with contingencies. Inherent in executive power is also the necessary power for the President to decide on priorities without violating the law. How and when the President reviews these priorities are within his discretion. The Constitution should not be viewed with such awkward academic restrictions that will constrain, in practice, the ability of the President to respond. Constitutional interpretation may be complex, but it is not unreasonable. It should always be relevant. Congress has the constitutional authority to determine the maximum levels of expenditures per item in the budget. It is not Congress, however, that decides when and how, in fact, the resources are to be actually spent. Congress cannot do so because it is a collective deliberative body designed to create policy through laws. It cannot and does not implement the law. Parenthetically, this was one of the principal reasons why we declared the Priority Development Assistance Fund (PDAF) as unconstitutional. Since the President attends to realities and decides according to priorities, our constitutional design is to grant him the flexibility to make these decisions subject to clear legal limitations. Hence, changes in the allotment of funds are not prohibited transfers of appropriations if these changes are still consistent with the maximum allowances under the GAA. They are merely manifestations of changing priorities in the use of funds. They are still in line with the President's duty to implement the General Appropriations Act. Thus, if revenues have not been fully collected at a certain time but there is a need to fully spend for an item authorized in the appropriations act, the President should be able to move the funds from an agency, which is not effectively and efficiently using its allocation, to another agency. *This is the concept of realignment of funds as differentiated from augmentation of an item.*

3. ID.; ID.; ID.; ID.; ID.; ID. — Realignment of the allocation of funds is different from the concept of augmentation contained in Article VI, Section 25 (5) of the Constitution. In realignment of allocation of funds, the President, upon recommendation of his subalterns like the Department of Budget and Management, finds that there is an item in the appropriations act that needs to be funded. However, it may be that the allocated funds for

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that targeted item are not sufficient. He, therefore, moves allocations from another budget item to that item ***but only to fund the deficiency: that is, the amount needed to fill in so that the maximum amount authorized to be spent for that item in the appropriations act is actually spent.*** The appropriated amount is not increased. It is only filled in order that the item's purpose can be fully achieved with the amount provided in the appropriations law. There is no augmentation that happens. *In such cases, there is no need to identify savings. The concept of savings is only constitutionally relevant as a requirement for augmentation of items. It is the executive who needs to fully and faithfully implement sundry policies contained in many statutes and needs to decide on priorities, given actual revenues. The flexibility of realignment is required to allow the President to fully exercise his basic constitutional duty to faithfully execute the law and to serve the public "with utmost responsibility . . . and efficiency."* Unlike in augmentation, which deals with increases in appropriations, realignment involves determining priorities and deals with allotments without increases in the legislated appropriation. In realignment, therefore, there is no express or implied amendment of any of the provisions of the Appropriations Act. The actual expenditure is only up to the amount contained in the law. For purposes of adapting to the country's changing needs, the President's power to realign expenditures necessarily includes the power to withdraw allocations that were previously made for projects that are not effectively and efficiently moving or that, in his discretion, are not needed at the present. These concepts are implicit in law. Thus, Book VI, Chapter 5, Section 3 of the Administrative Code provides: Section 3. Declaration of Policy. — It is hereby declared the policy of the State to formulate and implement a National Budget that is an instrument of national development, reflective of national objectives, strategies and plans. *The budget shall be supportive of and consistent with the socio-economic development plan and shall be oriented towards the achievement of explicit objectives and expected results, to ensure that funds are utilized and operations are conducted effectively, economically, and efficiently.* To set priorities is to favor one project over the other given limited resources available. Thus, there is a possibility when resources are wanting, that some projects or activities authorized in the General Appropriations Act may be suspended.

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4. ID.; ID.; ID.; ID.; ID.; LINE ITEM VETO IN THE GENERAL APPROPRIATIONS ACT; IMPOUNDMENT, CONSTRUED.— When there are reasons apparent to the President at the time when the General Appropriations Act is submitted for approval, then he can use his line item veto. However, at a time when he executes his priorities, suspension of projects is a valid legal remedy. Suspension is not impoundment. Besides, the prohibition against impoundment is not yet constitutional doctrine. It is true that the General Appropriations Act provides for impoundment. *Philconsa v. Enriquez* declined to rule on its constitutional validity. Until a ripe and actual case, its constitutional contours have yet to be determined. Certainly, there has been no specific expenditure under the umbrella of the Disbursement Allocation Program alleged in the petition and properly traversed by respondents that would allow us the proper factual framework to delve into this issue. Any definitive pronouncement on impoundment as constitutional doctrine will be premature, advisory, and, therefore, beyond the province of review in these cases Impoundment is not mentioned in the Constitution. At best, it can be derived either from the requirement for the President to faithfully execute the laws with reference to the General Appropriations Act. Alternatively, it can be implied as a limitation imposed by the legislature in relation to the preparation of a budget. The constitutional authority that will serve as the standpoint to carve out doctrine, thus, is not yet clear. To be constitutionally sound doctrine, impoundment should refer to a willful and malicious withholding of funds for a legally mandated and funded project or activity. The difficulty in making broad academic pronouncements is that there may be instances where it is necessary that some items in the appropriations act be unfunded. The President, not Congress, decides priorities when actual revenue collections during a fiscal year are not sufficient to fund all authorized expenditures. In doing so, the President may have to leave some items with partial or no funding. Making priorities for spending is inherently a discretion within the province of the executive. Without priorities, no legal mandate may be fulfilled. It may be that refusing to fund a project in deficit situations is what is needed to faithfully execute the other mandates provided in law. In such cases, attempting to partially fund all projects may result in none being implemented. Of course, even if there is

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a deficit, impoundment may exist if there is evidence of willful and malicious conduct on the part of the executive to withdraw funding from a specific item other than to make priorities. Whether that situation is present in the cases at bar is not clear. It has neither been pleaded nor proven. The contrary has not been asserted by petitioners. They have filed broad petitions unarmed with the specifics of each of the expenditures. They have also failed to traverse the "evidence packets" presented by respondents. Impoundment, as a constitutional doctrine, therefore, becomes clear and salient under conditions of surpluses; that is, that the revenue actually collected and available exceeds the expenditures that have been authorized. Again, this situation has neither been pleaded nor proven.

5. ID.; ID.; ID.; ID.; ID.; FISCAL RESPONSIBILITY; DUTY TO PREVENT IRREGULAR, UNNECESSARY, EXCESSIVE OR EXTRAVAGANT EXPENSES.— Of course, there are instances when the President must mandatorily withhold allocations and even suspend expenditure in an obligated item. This is in accordance with the concept of "fiscal responsibility": a duty imposed on heads of agencies and other government officials with authority over the finances of their respective agencies. Section 25 (1) of Presidential Decree No. 1445, which defines the powers of the Commission on Audit, states: Section 25. Statement of Objectives. – . . . (1) To determine whether or not the fiscal responsibility that rests directly with the head of the government agency has been properly and effectively discharged; . . . This was reiterated in Volume I, Book 1, Chapter 2, Section 13 of the Government Accounting and Auditing Manual. x x x *Included in fiscal responsibility is the duty to prevent irregular, unnecessary, excessive, or extravagant expenses*. x x x [Section 33] authorizes the Commission on Audit to promulgate rules and regulations. But, this provision also guides all other government agencies *not to make any expenditure that is "irregular, unnecessary, excessive, or extravagant."* The President should be able to prevent unconstitutional or illegal expenditure based on any allocation or obligation of government funds. Volume I, Book III, Title 3, Article 2 of the Government Accounting and Auditing Manual defines irregular, unnecessary, excessive, extravagant, and unconscionable expenditures. x x x These are sufficient guidelines for government officials and heads of agencies to determine whether a particular

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program, activity, project, or any other act that involves the expenditure of government funds should be approved or not. The constitutional framework and the statutory provisions should be the context for interpreting Section 38, Chapter 5, Book VI of the Administrative Code: x x x The President can withhold allocations from items that he deems will be "irregular, unnecessary, excessive or extravagant." ***Viewed in another way, should the President be confronted with an expenditure that is clearly "irregular, unnecessary, excessive or extravagant," it may be an abuse of discretion for him not to withdraw the allotment or withhold or suspend the expenditure For purposes of augmenting items — as opposed to realigning funds — the President should be able to treat such amounts resulting from otherwise "irregular, unnecessary, excessive or extravagant" expenditures as savings.***

6. ID.; ID.; ID.; ID.; ID.; SAVINGS IN ARTICLE VI, SECTION 25 (5) OF THE CONSTITUTION IN RELATION TO THE POWER OF THE HEADS OF GOVERNMENT BRANCHES AND CONSTITUTIONAL COMMISSIONS TO AUGMENT ITEMS IN THEIR APPROPRIATIONS.— The Constitution mentions "savings" in Article VI, Section 25 (5) in relation to the power of the heads of government branches and constitutional commissions to augment items in their appropriations. x x x The existence of savings in one item is a fundamental constitutional requirement for augmentation of another item. Augmentation modifies the maximum amount provided in the General Appropriations Act appropriated for an item by way of increasing such amount. The power to augment items allows heads of government branches and constitutional commissions to exceed the limitations imposed on their appropriations, through their savings, to meet the difference between the actual and authorized allotments. The law provides for the definition of savings. The law mentioned in Article VI, Section 25 (5) refers not only to the General Appropriations Act's general provisions but also to other statutes such as the Administrative Code and the Auditing Code contained in Presidential Decree No. 1445. The clause in the General Appropriations Act for Fiscal Years 2011, 2012, and 2013, subject to our interpretation for purposes of determination of savings, is as follows: [S]avings refer to portions or balances of any programmed appropriation in this

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Act free from any obligation or encumbrances which are (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized. x x x The phrase, "free from any obligation or encumbrances," however, provides for three situations namely: (1) completion; (2) final discontinuance; or (3) abandonment. The existence of any of these three situations should constitute an appropriation as free from obligation. These words are separated by "or" as a conjunctive. Thus, "final discontinuance" should be given a meaning that is different from "abandonment." The only logical reading in relation to the other provisions of law is that "abandonment" may be discontinuance in progress. This means that a project is temporarily stopped because to continue would mean to spend in a manner that is "irregular, unnecessary, excessive or extravagant." When the project is remedied to prevent the irregularity in these expenditures, then the project can further be funded. When the project is not remedied, then the executive declares a "final discontinuance" of the project. In these cases, it makes sense for the President to withdraw or withhold allocation or further obligation of the funds. It is in this light that the Administrative Code provides that the President may suspend work or the entire program when, based on his judgment, public interest requires it. To further comply with the duty to use funds "effectively, economically and efficiently," the President should be able to realign or reallocate these funds. The allocations withdrawn for any of these purposes should be available either for realignment or as savings to augment certain appropriation items. National Budget Circular No. 541 was issued because of the executive's concern about the number of "slow-moving projects." The slow pace of implementation may have been due to irregularities or illegalities. It could be that it was due to inefficiencies, or it could be that there were simply projects which the executive refused to implement.

7. ID.; ID.; ID.; ID.; ID.; ID.; OTHER SPECIES OF LEGITIMATE SAVINGS FOR PURPOSES OF AUGMENTATION OF APPROPRIATION ITEMS THAT JUSTIFY WITHDRAWAL OF ALLOCATIONS.— There are other species of legitimate savings for purposes of augmentation of appropriation items that justify withdrawal of allocations. "Final discontinuance" or "abandonment" can occur when, even with the exercise of

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good faith by officials of the executive departments, there are unforeseen events that make it improbable to complete the procurement and obligation of an item within the time period allowed in the relevant General Appropriations Act. DBM NBC No. 541 provides an implicit deadline of June 30, 2012 for unobligated but allocated items. There is a mechanism of consultation with the agencies concerned. For instance, the 5th Evidence Packet submitted by the Office of the Solicitor General shows a copy of Department of Transportation and Communication Secretary Joseph Abaya's letter to the Department of Budget and Management, recommending withdrawal of funds from certain projects, which they were having difficulties in implementing. x x x These assumptions as well as the determination of a deadline are consistent with the President's power to control "all the executive departments, bureaus and offices." It is also within the scope of his power to fully and faithfully execute laws. Judicial review of the deadline as well as its policy basis will only be possible if there is a clear and convincing showing by a petitioner that grave abuse of discretion is present. Generally, the nature of the expenditure, the time left to procure, and the efforts both of the agency concerned and the Department of Budget and Management to meet the obstacles to meet the procurement plans would be relevant. But in most instances, this is really a matter left to the judgment of the President. To this extent, I disagree with the proposal of Justice Carpio on our declaration of the timelines for purposes of determining when there can be savings. x x x It is not within the scope of our powers to insist on a specific time period for all expenditures given the nuances of executing a budget. To so hold would be to impinge on the ability of the President to execute laws and exercise his control over all executive departments.

8. **ID.; ID.; ID.; ID.; ID.; ANY AUGMENTATION TO BE VALID, IT MUST BE FOR AN EXISTING ITEM.—** Article VI, Section 25 (5) requires that for any augmentation to be valid, it must be for an existing item. Furthermore, with respect to the President, the augmentation may only be for items within the executive department. The power to augment under this provision is qualified by the words, "respective offices." This means that the President and the other officials enumerated can only

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augment items within their departments. In other words, augmentation of items is allowed provided that the source department and the recipient department are the same. Transfer of funds from one department to other departments had already been declared as unconstitutional in *Demetria v. Alba*. Moreover, a corollary to our pronouncement in *Gonzales v. Macaraig, Jr.* that "[t]he doctrine of separation of powers is in no way endangered because the transfer is made within a department (or branch of government) and not from one department (branch) to another" is that transfers across departments are unconstitutional for being violative of the doctrine of separation of powers. There are admissions in the entries contained in the evidence packets that presumptively show that there have been at least two (2) instances of augmentation by the executive of items outside its department. If these are indeed validated upon the proper audit to have been actually expended, then such acts are unconstitutional. x x x Acquiescence of an unconstitutional act by one department of government can never be a justification for this court not to do its constitutional duty. The Constitution will fail to provide for the neutrality and predictability inherent in a society thriving within the auspices of the rule of law if this court fails to act in the face of an actual violation. The interpretation of the other departments of government of their powers under the Constitution may be persuasive on us, but it is our collective reading which is final. The constitutional order cannot exist with acquiescence as suggested by respondents. Furthermore, the residual powers of the President exist only when there are plainly ambiguous statements in the Constitution. If there are instances that require more funds for a specific item outside the executive agencies, a request for supplemental appropriation may be made with Congress. Interdependence is not proscribed but must happen in the context of the rule of law. No exigent circumstances were presented that could lead to a clear and convincing explanation why this constitutional fiat should not be followed.

9. ID.; ID.; ID.; ID.; ID.; DISBURSEMENT ACCELERATION PROGRAM (DAP).— Definitely, Section 5.7.3 of DBM NBC No. 541 is not an ideal example of good rule writing. By this provision, withdrawn allotments may be: 5.7.3 Used to augment

existing programs and projects of any agency and to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year. This provision is too broad. It appears to sanction the unconstitutional act of augmenting a non-existing item in the general appropriations acts (GAAs) or any supplemental appropriations law. The Solicitor General suggests that this provision should be read broadly so as to skirt any constitutional infirmity. x x x Every presumption in interpreting a provision of law should indeed be granted so as to allow constitutionality in any provision in law or regulation. This presumption applies to facial reviews of provisions. However, it is unavailing in the face of actual facts that clearly and convincingly show a breach of the constitutional provision. Such facts must be established through the rules of evidence. The Solicitor General himself submitted "evidence packets" which admit projects benefiting from the DAP. Based on respondent's allegations, the projects have "appropriations cover." Petitioners were unable to refute these allegations. Perhaps, it was because it was the first time that they encountered this full accounting of the DAP. In my view, it is not in this petition for *certiorari* and prohibition that the proper traverse of factual allegations can be done. We cannot go beyond guidance that any allocation — or augmentation — for an activity not covered by any item in any appropriation act is both unconstitutional and illegal.

10. ID.; ID.; ID.; ID.; ID.; CONSTITUTIONALITY THEREOF.— I agree with the assessment on the constitutionality of using unprogrammed funds as appropriations cover. An increase in the dividends coming from government financial institutions and government owned and -controlled corporations is not the condition precedent for using revenues for items allowed to be funded from unplanned revenues. The provisions of the General Appropriations Act clearly provide that the actual revenues exceed the projected revenues presented and used in the approval of the current law. I agree with Justice Bernabe's views relating to the pooling of funds. There are many laudable intentions in the Disbursement Acceleration Program (DAP). But its major problem lies in the concept of pooled funds. That is, that there is a lump sum from various sources used both to realign allocation and to augment appropriations items. It is unclear whether augmentation of one item is done with funds

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that are legitimately savings from another. It is difficult to assess each and every source as well as whether each and every expenditure has appropriations cover. It would have been better if the executive just augmented an item and was clear about its source for savings. What happened was that there was an intermediary mechanism of commingling and pooling funds. Thus, there was the confusion as to whether DAP was the source or ultimately only the mechanism to create savings. Besides, access to information, clarity, and simplicity of governmental acts can ensure public accountability. When the information cannot be accessed freely or when access is too sophisticated, public doubt will not be far behind. x x x ACCORDINGLY, for guidance of the bench and bar, I vote to declare the following acts and practices under the Disbursement Acceleration Program (DAP); National Budget Circular No. 541 dated July 18, 2012; and related executive issuances as unconstitutional: (a) any implementation of Section 5. 7 .3 insofar as it relates to activities not related to any existing appropriation item even if in anticipation of future projects; (b) any augmentation by the President of items appropriated for offices outside the executive branch; (c) any augmentation of any item, even within the executive department, which is sourced from funds withdrawn from activities which have not yet been (1) completed, (2) finally discontinued, or (3) abandoned; and (d) any use of unprogrammed funds without all the conditions in the General Appropriations Act being present. Let a copy of this decision be served on all the other officers covered in Article VI, Section 25 (5) of the 1987 Constitution for their guidance. The evidence packets submitted by respondents should also be transmitted to the Commission on Audit for their appropriate action.

11. ID.; STATUTORY CONSTRUCTION; DOCTRINE OF OPERATIVE ACTS.— The general rule is that a declaration of unconstitutionality of any act means that such act has no legal existence: It is *null and void ab initio*. The existing exception is the doctrine of operative facts. The application of this doctrine should, however, be limited to situations where (a) there is a showing of good faith in the acts involved or (b) where in equity we find that the difficulties that will be borne by the public far outweigh rigid application to the effect of legal nullity of an act. The doctrine saves only the effects of the unconstitutional act. It does not hint or even determine

whether there can be any liability arising from such acts. Whether the constitutional violation is in good faith or in bad faith, or whether any administrative or criminal liability is forthcoming, is the subject of other proceedings in other forums. Likewise, to rule that a declaration of unconstitutionality *per se* is the basis for determining liability is a dangerous proposition. It is not proper that there are suggestions of administrative or criminal liability even before the proper charges are raised, investigated, and filed. Any discussion on good faith or bad faith is, thus, premature. But, in our jurisdiction, the presumption of good faith is a universal one. It assures the fundamental requisites of due process and fairness. It frames a judicial attitude that requires us to be impartial. *Certiorari* and prohibition as remedies are, thus, unavailing for these questions where the factual conditions per expense item cannot be convincingly established and where the regulations have become moot and academic. This is definitely not the proper case to assess the effects of each of the 116 projects under the DAP. Our decision today should not be misinterpreted as authority to undo infrastructure built or expenditures made under the DAP. Nor should it be immediately used as basis for saying that any or all officials or beneficiaries are either liable or not liable. Each expenditure must be audited in accordance with our ruling.

DEL CASTILLO, *J., concurring and dissenting*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT (ARTICLE VI); SECTION 25 (5) PROHIBITING THE TRANSFER OF APPROPRIATIONS; NATURE, SCOPE AND RATIONALE THEREOF.— Article VI, Section 25(5) of the Constitution provides: No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations. The subject constitutional provision prohibits the transfer of appropriations. Congress cannot pass a law authorizing such transfer. However, it is allowed to enact a law to authorize the heads of offices to transfer savings from one item to another provided that the items fall within the

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appropriations of the same office: the President relative to the Executive Department, the Senate President with respect to the Senate, the Speaker relative to the House of Representatives, the Chief Justice with respect to the Judicial Department, and the heads of the constitutional bodies relative to their respective offices. The purpose of the subject constitutional provision is to afford considerable flexibility to the heads of offices in the use of public funds and resources. For a transfer of savings to be valid under Article VI, Section 25(5), four (4) requisites must concur: (1) there must be a law authorizing the heads of offices to transfer savings for augmentation purposes, (2) there must be savings from an item/s in the appropriations of the office, (3) there must be an item requiring augmentation in the appropriations of the office, and (4) the transfer of savings should be from one item to another of the appropriations within the same office. While the members of the Constitutional Commission did not extensively discuss or debate the salient points of the subject constitutional provision, the deliberations do reveal its rationale which is crucial to the just disposition of this case: x x x [that] the power to augment under Article VI, Section 25(5) of the Constitution serves two principal purposes: (1) negatively, as an integral component of the system of checks and balances under our plan of government, and (2) positively, as a fiscal management tool for the effective and efficient use of public funds to promote the common good. For these reasons, as preliminarily intimated, the just resolution of this case hinges on the balancing of two paramount State interests: (1) the prevention of abuse or misuse of the power to augment, and (2) the promotion of the general welfare through the power to augment.

2. ID.; ID.; ID.; ID.; POWER TO AUGMENT MUST BE AUTHORIZED BY LAW; STANDARD PRACTICE IS TO INCLUDE IN THE ANNUAL GENERAL APPROPRIATIONS ACT (GAA) A PROVISION GRANTING THE POWER TO AUGMENT TO THE HEADS OF OFFICES; GRANT OF AUTHORITY TO AUGMENT UNDER THE 2011 AND 2012 GAAs ARE CONSTITUTIONAL.— Article VI, Section 25(5) of the Constitution states that the power to augment must be authorized "by law." Thus, it has become standard practice to

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include in the annual general appropriations act (GAA) a provision granting the power to augment to the heads of offices. x x x The subject [2011 and 2012] GAAs are duly enacted laws which enjoy the presumption of constitutionality. Thus, they are to be construed, if possible, to avoid a declaration of unconstitutionality. x x x [T]he 2011 and 2012 GAAs can be so reasonably interpreted by construing the phrase "of their respective appropriations" as qualifying the phrase "to augment any item in this Act." Under this construction, the authority to augment is, thus, limited to items within the appropriations of the office from which the savings were generated. Hence, no constitutional infirmity obtains.

3. ID.; GAA 2011, 2012 AND 2013; "SAVINGS" AND "AUGMENTATION."— The definition of "savings" and "augmentation" is uniform for the 2011, 2012 and 2013 GAAs, to wit: [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrances which are**: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized;** (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost. Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, **which upon implementation or subsequent evaluation of needed resources**, is determined to be deficient. In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized by this Act.

4. ID.; ID.; SAVINGS; PORTIONS OR BALANCES OF ANY PROGRAMMED APPROPRIATION FREE FROM ANY OBLIGATION OR ENCUMBRANCES WHICH ARE STILL AVAILABLE AFTER THE COMPLETION OR FINAL DISCONTINUANCE OR ABANDONMENT OF THE WORK, ACTIVITY OR PURPOSE FOR WHICH THE APPROPRIATION IS AUTHORIZED; SHOULD BE CIRCUMSCRIBED BY THE STANDARDS OF EFFECTIVITY, EFFICIENCY AND

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ECONOMY IN THE UTILIZATION OF PUBLIC FUNDS.— [T]he power to finally discontinue or abandon the work, activity or purpose, before savings may arise, should, thus, be circumscribed by the standards of effectivity, efficiency and economy in the utilization of public funds. For example, if a work, activity or purpose is found to be tainted with anomalies, the head of office can order the final discontinuance of the work, activity or purpose because public funds are being fraudulently dissipated contrary to the standard of effectivity in the utilization of public funds.

5. ID.; ID.; ID.; ID.; RELATED TO THE POWER OF THE PRESIDENT TO SUSPEND OR STOP FURTHER EXPENDITURE OF FUNDS, RELATIVE TO THE APPROPRIATIONS OF THE EXECUTIVE DEPARTMENT UNDER THE ADMINISTRATIVE CODE.— The power to finally discontinue or abandon the work, activity or purpose for which the appropriation is authorized in the GAA should be related to the power of the President to suspend or otherwise stop further expenditure of funds, relative to the appropriations of the Executive Department, under Book VI, Chapter V, Section 38 (hereinafter "Section 38") of the Administrative Code*:* x x x Section 38 contemplates two different situations: (1) to suspend expenditure, and (2) **to otherwise stop further expenditure**. "Suspend" means "to cause to stop temporarily; to set aside or make temporarily inoperative; to defer to a later time on specified conditions;" "to stop temporarily; to discontinue or to cause to be intermitted or interrupted." On the other hand, "stop" means "to cause to give up or change a course of action; to keep from carrying out a proposed action"; "to bring or come to an end." While "suspending" also connotes "stopping," the former does not mean that a course of action is to end completely since to suspend is to stop *with an expectation or purpose of resumption*. On the other hand, "stop" when used as a verb means "to bring or come to an end." Thus, "stopping" *brings an activity to its* ***complete*** *termination*. x x x Consequently, if the President orders the stoppage of further expenditure of funds, pursuant to the second phrase in Section 38, the work, activity or purpose is **completely**, **finally, permanently** or **definitively** put to an end or terminated because there is no intention to resume and thus, no further work or activity can be done without the needed funds. The **net effect** is that the

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work, activity or purpose is ***finally discontinued or abandoned***. In other words, through the power to ***permanently*** stop expenditure, pursuant to the second phrase of Section 38, the President is effectively given the power to finally discontinue or abandon a work, activity or purpose under a *broader* standard of "public interest." When the President exercises this power thusly, the first type of "savings" in the GAA, as previously discussed, is necessarily generated. Moreover, Section 38 states in broad and categorical terms that the power of the President to suspend (*i.e.*, temporary stoppage) or to otherwise stop further expenditure (*i.e.*, permanent stoppage) refers to "funds **allotted** for any agency, or any other expenditure authorized in the General Appropriations Act, x x x." [T]he phrase "funds allotted" in Section 38, therefore, refers to ***both*** unobligated ***and*** obligated allotments for, precisely, an unobligated allotment refers to an authorization to incur obligations issued by the Department of Budget and Management (DBM). The law says "to suspend or otherwise stop further expenditure of funds allotted for any agency" *without qualification*, and *not* ""to suspend or otherwise stop further expenditure of obligated allotments for any agency." The power of the President to suspend or to permanently stop expenditure in Section 38 is, thus, broad enough to cover both unobligated and obligated allotments.

6. ID.; ID.; ID.; ID.; ID.; NATIONAL BUDGET CIRCULAR (NBC 541); AMOUNT OF WITHDRAWN ALLOTMENTS THAT MAY BE REISSUED OR PLOUGHED BACK TO THE SAME PROJECT MAY BE LESS THAN THE AMOUNT OF THE UNOBLIGATED ALLOTMENT PREVIOUSLY WITHDRAWN IN THAT PROJECT; WITHDRAWAL OF UNOBLIGATED ALLOTMENTS FROM SLOW-MOVING PROJECTS WHICH WERE NOT FINALLY DISCONTINUED OR ABANDONED, AND AUTHORIZED USE OF SUCH WITHDRAWN UNOBLIGATED ALLOTMENTS AS SAVINGS, VIOLATED THE CONSTITUTION.— NBC 541 does not categorically state that the withdrawal of the unobligated allotments from slow-moving projects will result to the final discontinuance or abandonment of the work, activity or purpose. x x x When NBC 541 states that the released but unobligated allotments of projects as of June 30, 2012 shall be immediately **considered** for withdrawal, this may be reasonably taken to mean that the

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Executive Department has made an ***initial*** determination that a project is slow-moving. x x x [W]hen the withdrawn allotments are reissued or ploughed back to the same project, this may be reasonably interpreted to mean that the Executive Department has made a ***final*** determination that the project is not slow-moving and, thus, should not be discontinued in order to spur economic growth. x x x In scenario (4) where the withdrawn unobligated allotment for a particular project is ***partially*** reissued or ploughed back to the same project, a constitutional and statutory breach would be present [because] then the project is not actually finally discontinued or abandoned [and] x x x no "savings" can validly be generated pursuant to the GAA definition of "savings." x x x [T]he project now suffers from a reduction of its original allotments which, under NBC 541, is treated and used as "savings." This cannot be validly done for it would contravene the definition of "savings" under the GAA and, thus, circumvent the constitutional power of appropriation vested in Congress.

7. ID.; DISBURSEMENT ACCELERATION PROGRAM (DAP); THE PRESIDENT VALIDLY ORDERED THE FINAL DISCONTINUANCE OR ABANDONMENT OF THE SUBJECT SLOW-MOVING PROJECTS PURSUANT TO "PUBLIC INTEREST" STANDARD UNDER SECTION 38 OF THE ADMINISTRATIVE CODE.— The burden of proof rests on petitioners to show that the permanent stoppage of expenditure on slow-moving projects does not meet the "public interest" standard under Section 38. x x x It is **undisputed** that, at the time the DAP was put in place, our nation was facing serious economic woes due to considerable government under spending. The President, thus, sought to speed up government spending through the DAP by, among others, permanently discontinuing slow-moving projects and transferring the savings generated therefrom to fast-moving, high impact priority projects. It is, again, **undisputed** that the DAP achieved its purpose and significantly contributed to economic growth. Thus, on its face, and absent clear and convincing proof that the DAP did not serve public interest or was pursued with grave abuse of discretion, the Court must sustain the validity of the President's actions. x x x It x x x appears that the DAP was instituted to meet an economic exigency which, after being fully addressed, resulted in the discontinuance thereof. This is significant

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because it demonstrates that the DAP was a temporary measure. It negates the existence of an unjustifiable permanent or continuing pattern or policy of discontinuing slow-moving projects in order to pursue fast-moving projects under the GAA which, if left unabated, would effectively defeat the legislative will as expressed in the GAA. At the very least, the move by the Executive Department to solve the systemic problems in the implementation of its projects shows good faith in seeking to abide by the appropriations set by Congress in the GAA.

8. ID.; ID.; ID.; THE GAA PROVISION ON THE AVAILABILITY FOR RELEASE AND OBLIGATION OF THE APPROPRIATIONS RELATIVE TO THE MAINTENANCE AND OTHER OPERATING EXPENSES (MOOE) AND CAPITAL OUTLAYS (CO) FOR A PERIOD OF TWO YEARS IS NOT A GROUND TO DECLARE DAP INVALID.— The availability for release of the appropriations for the MOOE and CO for a period of two years simply means that the work or activity *may be pursued* within the aforesaid period. It does not follow that the aforesaid provision prevents the President from finally discontinuing or abandoning such work, activity or purpose, through the exercise of the power to permanently stop further expenditure, if public interest so requires, under the second phrase of Section 38 of the Administrative Code. It should be emphasized that Section 38 requires that the power of the President to suspend or to permanently stop expenditure must be *expressly* abrogated by a *specific provision* in the GAA in order to prevent the President from stopping a specific expenditure.

9. ID.; ID.; THE POWER TO PERMANENTLY STOP EXPENDITURE UNDER SECTION 38 OF THE ADMINISTRATIVE CODE IN RELATION TO THE PROHIBITION ON IMPOUNDMENT UNDER SECTIONS 64 AND 65 OF THE 2012 GAA; PRACTICAL EFFECTS THEREOF.— To my mind, the crucial issue in this case is the relationship between the power to permanently stop expenditure under the second phrase of Section 38 of the Administrative Code *vis-à-vis* the prohibition on impoundment under Sections 64 x x x and 65 of the 2012 GAA. x x x The practical effects [thereof] may be summarized as follows: 1. The President is prohibited from impounding appropriations, through retention or deduction, pursuant to Section 64 unless

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there is an unmanageable national government budget deficit as defined in Section 65. Consequently, the President must authorize the release orders of allotments of all appropriations in the GAA relative to the three great branches of government and the constitutional bodies. 2. However, once the allotments have been released, the President possesses the power to suspend or to permanently stop expenditure, relative to the appropriations of the Executive Department, if public interest so requires, pursuant to Section 38 of the Administrative Code. As a necessary consequence of the above, the power to permanently stop expenditure under Section 38 is not rendered inoperative by Section 64. Hence, the actions taken by the President, pursuant to Section 38 in relation to NBC 541, as previously discussed, are valid notwithstanding the prohibition on impoundment under Section 64. 3. The power to suspend or to permanently stop expenditure, under Section 38, must comply with the public interest standard, that is, there must be a sufficiently compelling public interest that would justify such suspension or permanent stoppage of expenditure. 4. Because the President's determination of the existence of public interest justifying such suspension or permanent stoppage of expenditure enjoys the presumption of constitutionality, the burden of proof is on the challenger to show that the public interest standard has not been met. If brought before the courts, compliance with the public interest standard will, thus, have to be decided on a case-to-case basis.

10. ID.; ID.; SECTION 38 WHICH ALLOWS THE PRESIDENT TO PERMANENTLY STOP EXPENDITURES, IS A VALID LEGISLATIVE GRANT OF THE POWER OF IMPOUNDMENT TO THE PRESIDENT.— Assuming *arguendo* that the President has no inherent or implied power of impoundment under the Constitution, Section 38 is valid and constitutional because it constitutes an ***express legislative grant*** of the power of impoundment. x x x ***And the Court cannot deny the President of that power***. x x x Section 38 is a valid grant of such power because it complies with the sufficiency of standard test which is public interest. [P]ublic interest" is a sufficient standard, when read in relation to the goals on effectivity, efficiency and economy in the execution of the budget under the Administrative Code, thus, precluding a finding of undue

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delegation of legislative powers. Further, x x x Section 38 can be harmonized with Section 64 in that Section 38 is an exception to the general prohibition on the power of the President to impound appropriations under Section 64.

11. ID.; ID.; THE POWER TO FINALLY DISCONTINUE OR ABANDON A WORK, ACTIVITY OR PURPOSE IN THE GAA *VIS-À-VIS* SECTION 38; DISCUSSED.— Even if we were to concede that the President could not have validly ordered the permanent stoppage of expenditure on slow-moving projects under Section 38 in relation to NBC 541, he would still possess this power under his power to finally discontinue or abandon a work, activity or purpose under the GAA. The lack of specific standards in the GAA and the resort to the broad standards of "effectivity, efficiency and economy" as well as the "irregular, unnecessary, excessive, extravagant or unconscionable" standards, as aforementioned, in the Constitution and pertinent laws permit this result. In particular, the ineffective and inefficient use of funds on slow-moving projects would easily satisfy the aforementioned standards. From this perspective, the GAA itself has provided for a limited grant of the power of impoundment through the power to finally discontinue or abandon the work, activity or purpose.

12. ID.; ID.; ID.; THE ENORMOUS POWERS OF THE PRESIDENT TO PERMANENTLY STOP EXPENDITURES UNDER SECTION 38 AND TO FINALLY DISCONTINUE OR ABANDON A WORK, ACTIVITY OR PURPOSE UNDER THE GAA DEFINITION OF "SAVINGS"; REMEDY.— [A] law cannot be declared invalid nor can a constitutional provision be rendered inoperative because of the possibility or fear of its abuse. x x x ***The remedy is and has always been constant unwavering vigilance***. The remedy is and has always been to prosecute instances when the power has been abused ***with the full force of the law***. The remedy is and has always been ***to put in place sufficient safeguards***, through remedial legislation and the proper exercise of the legislative oversight powers, to prevent the abuse and misuse of these powers while giving the holder of the power sufficient flexibility in pursuing the common good.

13. ID.; ID.; NBC 541, THE SOURCE OF SAVINGS UNDER THE DAP, REFERS TO UNOBLIGATED ALLOTMENTS OF

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PROGRAMMED APPROPRIATIONS AS THE SOURCES OF SAVINGS GENERATED THEREFROM.— [U]nder NBC 541, the "savings" component of the DAP was not sourced from "unreleased appropriations," in its strict and technical sense, but from unobligated allotments which were already released to the various departments or agencies. The implementing executive issuance, NBC 541, is clear and categorical, unobligated allotments (and *not* unreleased appropriations) were the sources of the "savings" component of the DAP. Consequently, it does not contravene the definition of savings under the pertinent provisions of the GAA for, precisely, an unobligated allotment is an appropriation that is "free from any obligation or encumbrances."

14. ID.; ID.; AUTHORIZING AUGMENTATIONS OF ITEMS IN THE GAA MANY TIMES OVER THEIR ORIGINAL APPROPRIATIONS; NOT A VIOLATION OF THE CONSTITUTION.— [T]he view has been expressed that the DAP was used to authorize the augmentations of items in the GAA many times over their original appropriations. While the magnitude of these supposed augmentations are, indeed, considerable, it must be recalled that Article VI, Section 25(5) of the Constitution purposely did not set a limit, in terms of percentage, on the power to augment of the heads of offices: x x x [T]he burden of proof is on the challenger to show that the huge augmentations were done with grave abuse of discretion, such as where it was merely a veiled attempt to defeat the legislative will as expressed in the GAA, or where there was no real or actual deficiency in the original appropriation, or where the augmentation was motivated by malice, ill will or to obtain illicit political concessions.

15. ID.; ID.; CROSS-BORDER TRANSFER OF SAVINGS PROHIBITED UNDER THE CONSTITUTION.— Article VI, Section 25(5) clearly prohibits cross-border transfer of savings regardless of whether the recipient office requested for the funds. x x x In the final analysis, until and unless the absolute prohibition on crossborder transfer of savings in our Constitution is amended, we must follow its letter, and any deviation therefrom must necessarily suffer from the vice of unconstitutionality.

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16. ID.; ID.; RELEASE OF THE UNPROGRAMMED FUND THROUGH THE DAP; ISSUE OF LAWFULNESS IS PREMATURE.— [I]t is erroneous and premature to rule that the Executive Department made unlawful releases from the unprogrammed Fund of the 2011, 2012 and 2013 GAAs merely because the DBM was unable to submit a certification that the revenue collections exceeded the original revenue targets for these years considering that the funds so released may have been authorized under the afore-discussed *provisos* or exception clauses of the respective GAAs. x x x Under the 2013 GAA, the condition x x x which will trigger the release of the funds from the Unprogrammed Fund, as a general rule, is that the revenue collections, *including collections arising from sources not considered in the original revenue targets*, exceed the original revenue targets, and *not* revenue collections exceed the original revenue targets. x x x The proper recourse, if the circumstances so warrant, is to establish that the x x x general rule ***and*** exceptions were not met insofar as the releases from the Unprogrammed Fund in the 2011, 2012 and 2013 GAAs, respectively, are concerned.

17. ID.; ID.; OPERATIVE FACT DOCTRINE; APPLICATION IN CASE AT BAR.— [T]he general rule is that an unconstitutional executive or legislative act is void and inoperative; conferring no rights, imposing no duties, and affording no protection. As an exception to this rule, the doctrine of operative fact recognizes that the existence of an executive or legislative act, prior to a determination of its unconstitutionality, is an operative fact and may have consequences that cannot always be ignored. x x x As a rule of equity, good faith and bad faith are of necessity relevant in determining the applicability of this doctrine. x x x The reason, is that, the doctrine seeks to protect the interests of those who relied in good faith on the invalid executive or legislative act.

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D E C I S I O N

BERSAMIN, *J.*:

For resolution are the consolidated petitions assailing the constitutionality of the Disbursement Acceleration Program (DAP), National Budget Circular (NBC) No. 541, and related issuances of the Department of Budget and Management (DBM) implementing the DAP.

At the core of the controversy is Section 29(1) of Article VI of the 1987 Constitution, a provision of the fundamental law that firmly ordains that "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law." The tenor and context of the challenges posed by the petitioners against the DAP indicate that the DAP contravened this provision by allowing the Executive to allocate public money pooled from programmed and unprogrammed funds of its various agencies in the guise of the President exercising his constitutional authority under Section 25(5) of the 1987 Constitution to transfer funds out of savings to augment the appropriations of offices within the Executive Branch of the Government. But the challenges are further complicated by the interjection of allegations of transfer of funds to agencies or offices outside of the Executive.

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Antecedents

What has precipitated the controversy?

On September 25, 2013, Sen. Jinggoy Ejercito Estrada delivered a privilege speech in the Senate of the Philippines to reveal that some Senators, including himself, had been allotted an additional ₱50 Million each as "incentive" for voting in favor of the impeachment of Chief Justice Renato C. Corona.

Responding to Sen. Estrada's revelation, Secretary Florencio Abad of the DBM issued a public statement entitled *Abad: Releases to Senators Part of Spending Acceleration Program*,[1] explaining that the funds released to the Senators had been part of the DAP, a program designed by the DBM to ramp up spending to accelerate economic expansion. He clarified that the funds had been released to the Senators based on their letters of request for funding; and that it was not the first time that releases from the DAP had been made because the DAP had already been instituted in 2011 to ramp up spending after sluggish disbursements had caused the growth of the gross domestic product (GDP) to slow down. He explained that the funds under the DAP were usually taken from (1) unreleased appropriations under Personnel Services;[2] (2) unprogrammed funds; (3) carry-over appropriations unreleased from the previous year; and (4) budgets for slow-moving items or projects that had been realigned to support faster-disbursing projects.

The DBM soon came out to claim in its website[3] that the DAP releases had been sourced from savings generated by the Government, and from unprogrammed funds; and that the savings had been derived from (1) the pooling of unreleased appropriations, like unreleased Personnel Services[4] appropriations

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[1] <http://www.dbm.gov.ph/?p=7302> (visited May 27, 2014).

[2] Labeled as "Personal Services" under the GAAs.

[3] Frequently Asked Questions about the Disbursement Acceleration Program (DAP) <http://www.dbm.gov.ph/?page_id=7362> (visited May 27, 2014).

[4] See note 2.

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that would lapse at the end of the year, unreleased appropriations of slow-moving projects and discontinued projects per zero-based budgeting findings;[5] and (2) the withdrawal of unobligated allotments also for slow-moving programs and projects that had been earlier released to the agencies of the National Government.

The DBM listed the following as the legal bases for the DAP's use of savings,[6] namely: (1) Section 25(5), Article VI of the 1987 Constitution, which granted to the President the authority to augment an item for his office in the general appropriations law; (2) Section 49 (*Authority to Use Savings for Certain Purposes*) and Section 38 (*Suspension of Expenditure Appropriations*), Chapter 5, Book VI of Executive Order (EO) No. 292 (*Administrative Code of 1987*); and (3) the General Appropriations Acts (GAAs) of 2011, 2012 and 2013, particularly their provisions on the (*a*) use of savings; (*b*) meanings of *savings* and *augmentation*; and (*c*) priority in the use of savings.

As for the use of unprogrammed funds under the DAP, the DBM cited as legal bases the special provisions on unprogrammed fund contained in the GAAs of 2011, 2012 and 2013.

The revelation of Sen. Estrada and the reactions of Sec. Abad and the DBM brought the DAP to the consciousness of the Nation for the first time, and made this present controversy inevitable. That the issues against the DAP came at a time when the Nation was still seething in anger over Congressional

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[5] Zero-based budgeting is a budgeting approach that involves the review/evaluation of on-going programs and projects implemented by different departments/agencies in order to: (a) establish the continued relevance of programs/projects given the current developments/directions; (b) assess whether the program objectives/outcomes are being achieved; (c) ascertain alternative or more efficient or effective ways of achieving the objectives; and (d) guide decision makers on whether or not the resources for the program/project should continue at the present level or be increased, reduced or discontinued. (see NBC Circular No. 539, March 21, 2012).

[6] Constitutional and Legal Bases < http://www.dbm.gov.ph/?page_id=7364> (visited May 27, 2014).

pork barrel – "an appropriation of government spending meant for localized projects and secured solely or primarily to bring money to a representative's district"[7] – excited the Nation as heatedly as the pork barrel controversy.

Nine petitions assailing the constitutionality of the DAP and the issuances relating to the DAP were filed within days of each other, as follows: G.R. No. 209135 (Syjuco), on October 7, 2013; G.R. No. 209136 (Luna), on October 7, 2013; G.R. No. 209155 (Villegas),[8] on October 16, 2013; G.R. No. 209164 (PHILCONSA), on October 8, 2013; G.R. No. 209260 (IBP), on October 16, 2013; G.R. No. 209287 (Araullo), on October 17, 2013; G.R. No. 209442 (Belgica), on October 29, 2013; G.R. No. 209517 (COURAGE), on November 6, 2013; and G.R. No. 209569 (VACC), on November 8, 2013.

In G.R. No. 209287 (Araullo), the petitioners brought to the Court's attention NBC No. 541 (*Adoption of Operational Efficiency Measure – Withdrawal of Agencies' Unobligated Allotments as of June 30, 2012*), alleging that NBC No. 541, which was issued to implement the DAP, directed the withdrawal of unobligated allotments as of June 30, 2012 of government agencies and offices with low levels of obligations, both for continuing and current allotments.

In due time, the respondents filed their Consolidated Comment through the Office of the Solicitor General (OSG).

The Court directed the holding of oral arguments on the significant issues raised and joined.

Issues

Under the Advisory issued on November 14, 2013, the presentations of the parties during the oral arguments were limited to the following, to wit:

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[7] *Belgica v. Executive Secretary Ochoa*, G.R. No. 208566, November 19, 2013.

[8] The Villegas petition was originally undocketed due to lack of docket fees being paid; subsequently, the docket fees were paid.

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Procedural Issue:

A. Whether or not *certiorari*, prohibition, and *mandamus* are proper remedies to assail the constitutionality and validity of the Disbursement Acceleration Program (DAP), National Budget Circular (NBC) No. 541, and all other executive issuances allegedly implementing the DAP. Subsumed in this issue are whether there is a controversy ripe for judicial determination, and the standing of petitioners.

Substantive Issues:

B. Whether or not the DAP violates Sec. 29, Art. VI of the 1987 Constitution, which provides: "No money shall be paid out of the Treasury except in pursuance of an appropriation made by law."

C. Whether or not the DAP, NBC No. 541, and all other executive issuances allegedly implementing the DAP violate Sec. 25(5), Art. VI of the 1987 Constitution insofar as:

(a) They treat the unreleased appropriations and unobligated allotments withdrawn from government agencies as "savings" as the term is used in Sec. 25(5), in relation to the provisions of the GAAs of 2011, 2012 and 2013;

(b) They authorize the disbursement of funds for projects or programs not provided in the GAAs for the Executive Department; and

(c) They "augment" discretionary lump sum appropriations in the GAAs.

D. Whether or not the DAP violates: (1) the Equal Protection Clause, (2) the system of checks and balances, and (3) the principle of public accountability enshrined in the 1987 Constitution considering that it authorizes the release of funds upon the request of legislators.

E. Whether or not factual and legal justification exists to issue a temporary restraining order to restrain the implementation of the DAP, NBC No. 541, and all other executive issuances allegedly implementing the DAP.

In its Consolidated Comment, the OSG raised the matter of unprogrammed funds in order to support its argument regarding the President's power to spend. During the oral arguments,

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the propriety of releasing unprogrammed funds to support projects under the DAP was considerably discussed. The petitioners in G.R. No. 209287 (Araullo) and G.R. No. 209442 (Belgica) dwelled on unprogrammed funds in their respective memoranda. Hence, an additional issue for the oral arguments is stated as follows:

F. Whether or not the release of unprogrammed funds under the DAP was in accord with the GAAs.

During the oral arguments held on November 19, 2013, the Court directed Sec. Abad to submit a list of savings brought under the DAP that had been sourced from (*a*) completed programs; (*b*) discontinued or abandoned programs; (*c*) unpaid appropriations for compensation; (*d*) a certified copy of the President's directive dated June 27, 2012 referred to in NBC No. 541; and (e) all circulars or orders issued in relation to the DAP.[9]

In compliance, the OSG submitted several documents, as follows:

(1) A certified copy of the Memorandum for the President dated June 25, 2012 (*Omnibus Authority to Consolidate Savings/ Unutilized Balances and their Realignment*);[10]

(2) Circulars and orders, which the respondents identified as related to the DAP, namely:

a. NBC No. 528 dated January 3, 2011 (*Guidelines on the Release of Funds for FY 2011*);

b. NBC No. 535 dated December 29, 2011 (*Guidelines on the Release of Funds for FY 2012*);

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[9] *Rollo* (G.R. No. 209287), p. 119.

[10] *Id*. at 190-196. Sec. Abad manifested that the Memorandum for the President dated June 25, 2012 was the directive referred to in NBC No. 541; and that although the date appearing on the Memorandum was June 25, 2012, the actual date of its approval was June 27, 2012.

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c. NBC No. 541 dated July 18, 2012 (*Adoption of Operational Efficiency Measure – Withdrawal of Agencies' Unobligated Allotments as of June 30, 2012*);

d. NBC No. 545 dated January 2, 2013 (*Guidelines on the Release of Funds for FY 2013*);

e. DBM Circular Letter No. 2004-2 dated January 26, 2004 (*Budgetary Treatment of Commitments/ Obligations of the National Government*);

f. COA-DBM Joint Circular No. 2013-1 dated March 15, 2013 (*Revised Guidelines on the Submission of Quarterly Accountability Reports on Appropriations, Allotments, Obligations and Disbursements*);

g. NBC No. 440 dated January 30, 1995 (*Adoption of a Simplified Fund Release System in the Government*).

(3) A breakdown of the sources of savings, including savings from discontinued projects and unpaid appropriations for compensation from 2011 to 2013.

On January 28, 2014, the OSG, to comply with the Resolution issued on January 21, 2014 directing the respondents to submit the documents not yet submitted in compliance with the directives of the Court or its Members, submitted several evidence packets to aid the Court in understanding the factual bases of the DAP, to wit:

(1) **First Evidence Packet**[11] – containing seven memoranda issued by the DBM through Sec. Abad, inclusive of annexes, listing in detail the 116 DAP identified projects approved and duly signed by the President, as follows:

a. Memorandum for the President dated October 12, 2011 (*FY 2011 Proposed Disbursement Acceleration Program Projects and Sources of Funds*);

b. Memorandum for the President dated December 12, 2011 (*Omnibus Authority to Consolidate*

[11] *Id*. at 523-625.

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Savings/Unutilized Balances and its Realignment);

c. Memorandum for the President dated June 25, 2012 (*Omnibus Authority to Consolidate Savings/ Unutilized Balances and their Realignment*);

d. Memorandum for the President dated September 4, 2012 (*Release of funds for other priority projects and expenditures of the Government*);

e. Memorandum for the President dated December 19, 2012 (*Proposed Priority Projects and Expenditures of the Government*);

f. Memorandum for the President dated May 20, 2013 (*Omnibus Authority to Consolidate Savings/ Unutilized Balances and their Realignment to Fund the Quarterly Disbursement Acceleration Program*); and

g. Memorandum for the President dated September 25, 2013 (*Funding for the Task Force Pablo Rehabilitation Plan*).

(2) **Second Evidence Packet**[12] – consisting of 15 applications of the DAP, with their corresponding Special Allotment Release Orders (SAROs) and appropriation covers;

(3) **Third Evidence Packet**[13] – containing a list and descriptions of 12 projects under the DAP;

(4) **Fourth Evidence Packet**[14] – identifying the DAP-related portions of the Annual Financial Report (AFR) of the Commission on Audit for 2011 and 2012;

(5) **Fifth Evidence Packet**[15] – containing a letter of Department of Transportation and Communications (DOTC) Sec. Joseph Abaya addressed to Sec. Abad

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[12] *Id*. at 627-692.

[13] *Id*. at 693-698.

[14] *Id*. at 699-746.

[15] *Id*. at 748-764.

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recommending the withdrawal of funds from his agency, inclusive of annexes; and

(6) **Sixth Evidence Packet**[16] – a print-out of the Solicitor General's visual presentation for the January 28, 2014 oral arguments.

On February 5, 2014,[17] the OSG forwarded the **Seventh Evidence Packet**,[18] which listed the sources of funds brought under the DAP, the uses of such funds per project or activity pursuant to DAP, and the legal bases thereof.

On February 14, 2014, the OSG submitted another set of documents in further compliance with the Resolution dated January 28, 2014, *viz:*

(1) Certified copies of the certifications issued by the Bureau of Treasury to the effect that the revenue collections exceeded the original revenue targets for the years 2011, 2012 and 2013, including collections arising from sources not considered in the original revenue targets, which certifications were required for the release of the unprogrammed funds as provided in Special Provision No. 1 of Article XLV, Article XVI, and Article XLV of the 2011, 2012 and 2013 GAAs; and

(2) A report on releases of savings of the Executive Department for the use of the Constitutional Commissions and other branches of the Government, as well as the fund releases to the Senate and the Commission on Elections (COMELEC).

RULING

I.
Procedural Issue:

a) **The petitions under Rule 65 are proper remedies**

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[16] *Id*. at 766-784.

[17] *Id*. at 925.

[18] *Id*. at 786-922.

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All the petitions are filed under Rule 65 of the *Rules of Court*, and include applications for the issuance of writs of preliminary prohibitory injunction or temporary restraining orders. More specifically, the nature of the petitions is individually set forth hereunder, to wit:

G.R. No. 209135 (Syjuco)	*Certiorari*, Prohibition and *Mandamus*
G.R. No. 209136 (Luna)	*Certiorari* and Prohibition
G.R. No. 209155 (Villegas)	*Certiorari* and Prohibition
G.R. No. 209164 (PHILCONSA)	*Certiorari* and Prohibition
G.R. No. 209260 (IBP)	Prohibition
G.R. No. 209287 (Araullo)	*Certiorari* and Prohibition
G.R. No. 209442 (Belgica)	*Certiorari*
G.R. No. 209517 (COURAGE)	*Certiorari* and Prohibition
G.R. No. 209569 (VACC)	*Certiorari* and Prohibition

The respondents submit that there is no actual controversy that is ripe for adjudication in the absence of adverse claims between the parties;[19] that the petitioners lacked legal standing to sue because no allegations were made to the effect that they had suffered any injury as a result of the adoption of the DAP and issuance of NBC No. 541; that their being taxpayers did not immediately confer upon the petitioners the legal standing to sue considering that the adoption and implementation of the DAP and the issuance of NBC No. 541 were not in the exercise of the taxing or spending power of Congress;[20] and that even if the petitioners had suffered injury, there were plain, speedy and adequate remedies in the ordinary course of law available to them, like assailing the regularity of the DAP and related issuances before the Commission on Audit (COA) or in the trial courts.[21]

The respondents aver that the special civil actions of *certiorari* and prohibition are not proper actions for directly assailing the constitutionality and validity of the DAP, NBC No. 541, and the other executive issuances implementing the DAP.[22]

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[19] *Rollo* (G.R. No. 209287), pp. 1050-1051 (Respondents' Memorandum).

[20] *Id.* at 1044.

[21] *Id.* at 1048.

[22] *Id.* at 1053.

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In their memorandum, the respondents further contend that there is no authorized proceeding under the Constitution and the *Rules of Court* for questioning the validity of any law unless there is an actual case or controversy the resolution of which requires the determination of the constitutional question; that the jurisdiction of the Court is largely appellate; that for a court of law to pass upon the constitutionality of a law or any act of the Government when there is no case or controversy is for that court to set itself up as a reviewer of the acts of Congress and of the President in violation of the principle of separation of powers; and that, in the absence of a pending case or controversy involving the DAP and NBC No. 541, any decision herein could amount to a mere advisory opinion that no court can validly render.[23]

The respondents argue that it is the application of the DAP to actual situations that the petitioners can question either in the trial courts or in the COA; that if the petitioners are dissatisfied with the ruling either of the trial courts or of the COA, they can appeal the decision of the trial courts by petition for review on *certiorari*, or assail the decision or final order of the COA by special civil action for *certiorari* under Rule 64 of the *Rules of Court*.[24]

The respondents' arguments and submissions on the procedural issue are bereft of merit.

Section 1, Article VIII of the 1987 Constitution expressly provides:

> Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

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[23] *Id*. at 1053-1056.

[24] *Id*. at 1056.

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Thus, the Constitution vests judicial power in the Court and in such lower courts as may be established by law. In creating a lower court, Congress concomitantly determines the jurisdiction of that court, and that court, upon its creation, becomes by operation of the Constitution one of the repositories of judicial power.[25] However, only the Court is a constitutionally created court, the rest being created by Congress in its exercise of the legislative power.

The Constitution states that judicial power includes the duty of the courts of justice not only "to settle actual controversies involving rights which are legally demandable and enforceable" but also "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." It has thereby expanded the concept of judicial power, which up to then was confined to its traditional ambit of settling actual controversies involving rights that were legally demandable and enforceable.

The background and rationale of the expansion of judicial power under the 1987 Constitution were laid out during the deliberations of the 1986 Constitutional Commission by Commissioner Roberto R. Concepcion (a former Chief Justice of the Philippines) in his sponsorship of the proposed provisions on the Judiciary, where he said:–

> The Supreme Court, like all other courts, has one main function: to settle actual controversies involving conflicts of rights which are demandable and enforceable. There are rights which are guaranteed by law but cannot be enforced by a judicial party. In a decided case, a husband complained that his wife was unwilling to perform her duties as a wife. The Court said: "We can tell your wife what her duties as such are and that she is bound to comply with them, but we cannot force her physically to discharge her main marital duty to her husband. There are some rights guaranteed by law, but they

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[25] Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 2009 Edition, p. 959.

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are so personal that to enforce them by actual compulsion would be highly derogatory to human dignity."

This is why the first part of the second paragraph of Section 1 provides that:

> Judicial power includes the duty of courts to settle actual controversies involving rights which are legally demandable or enforceable…

The courts, therefore, cannot entertain, much less decide, hypothetical questions. **In a presidential system of government, the Supreme Court has, also, another important function. The powers of government are generally considered divided into three branches: the Legislative, the Executive and the Judiciary. Each one is supreme within its own sphere and independent of the others. Because of that supremacy power to determine whether a given law is valid or not is vested in courts of justice.**

Briefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction, or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature.

This is the background of paragraph 2 of Section 1, which means that the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters constitute a political question. (Bold emphasis supplied)[26]

Upon interpellation by Commissioner Nolledo, Commissioner Concepcion clarified the scope of judicial power in the following manner:–

MR. NOLLEDO. x x x

The second paragraph of Section 1 states: "Judicial power includes the duty of courts of justice to settle actual controversies…" The

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[26] I RECORD of the 1986 Constitutional Commission 436 (July 10, 1986).

term "actual controversies" according to the Commissioner should refer to questions which are political in nature and, therefore, the courts should not refuse to decide those political questions. But do I understand it right that this is restrictive or only an example? I know there are cases which are not actual yet the court can assume jurisdiction. An example is the petition for declaratory relief.

May I ask the Commissioner's opinion about that?

MR. CONCEPCION. The Supreme Court has no jurisdiction to grant declaratory judgments.

MR. NOLLEDO. The Gentleman used the term "judicial power" but judicial power is not vested in the Supreme Court alone but also in other lower courts as may be created by law.

MR. CONCEPCION. Yes.

MR. NOLLEDO. And so, is this only an example?

MR. CONCEPCION. No, I know this is not. The Gentleman seems to identify political questions with jurisdictional questions. But there is a difference.

MR. NOLLEDO. Because of the expression "judicial power"?

MR. CONCEPCION. No. **Judicial power, as I said, refers to ordinary cases but where there is a question as to whether the government had authority or had abused its authority to the extent of lacking jurisdiction or excess of jurisdiction, that is not a political question. Therefore, the court has the duty to decide.**[27]

Our previous Constitutions equally recognized the extent of the power of judicial review and the great responsibility of the Judiciary in maintaining the allocation of powers among the three great branches of Government. Speaking for the Court in *Angara v. Electoral Commission*,[28] Justice Jose P. Laurel intoned:

x x x In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if

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[27] I RECORD of the 1986 Constitutional Commission, 439 (July 10, 1986).

[28] 63 Phil. 139 (1936).

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not entirely obliterated. **In cases of conflict, the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several department and among the integral or constituent units thereof**.

x x x x x x x x x

The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other department; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed "judicial supremacy" which properly is the power of judicial review under the Constitution. x x x [29]

What are the remedies by which the grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government may be determined under the Constitution?

The present *Rules of Court* uses two special civil actions for determining and correcting grave abuse of discretion amounting to lack or excess of jurisdiction. These are the special civil actions for *certiorari* and prohibition, and both are governed by Rule 65. A similar remedy of *certiorari* exists under Rule 64, but the remedy is expressly applicable only to the judgments and final orders or resolutions of the Commission on Elections and the Commission on Audit.

The ordinary nature and function of the writ of *certiorari* in our present system are aptly explained in *Delos Santos v. Metropolitan Bank and Trust Company*:[30]

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[29] *Id*. at 157-158.

[30] G.R. No. 153852, October 24, 2012, 684 SCRA 410.

In the common law, from which the remedy of *certiorari* evolved, the writ of *certiorari* was issued out of Chancery, or the King's Bench, commanding agents or officers of the inferior courts to return the record of a cause pending before them, so as to give the party more sure and speedy justice, for the writ would enable the superior court to determine from an inspection of the record whether the inferior court's judgment was rendered without authority. The errors were of such a nature that, if allowed to stand, they would result in a substantial injury to the petitioner to whom no other remedy was available. If the inferior court acted without authority, the record was then revised and corrected in matters of law. The writ of *certiorari* was limited to cases in which the inferior court was said to be exceeding its jurisdiction or was not proceeding according to essential requirements of law and would lie only to review judicial or quasi-judicial acts.

The concept of the remedy of *certiorari* in our judicial system remains much the same as it has been in the common law. In this jurisdiction, however, the exercise of the power to issue the writ of *certiorari* is largely regulated by laying down the instances or situations in the *Rules of Court* in which a superior court may issue the writ of *certiorari* to an inferior court or officer. Section 1, Rule 65 of the *Rules of Court* compellingly provides the requirements for that purpose, *viz*:

x x x x x x x x x

The sole office of the writ of *certiorari* is the correction of errors of jurisdiction, which includes the commission of grave abuse of discretion amounting to lack of jurisdiction. In this regard, mere abuse of discretion is not enough to warrant the issuance of the writ. The abuse of discretion must be grave, which means either that the judicial or quasi-judicial power was exercised in an arbitrary or despotic manner by reason of passion or personal hostility, or that the respondent judge, tribunal or board evaded a positive duty, or virtually refused to perform the duty enjoined or to act in contemplation of law, such as when such judge, tribunal or board exercising judicial or quasi-judicial powers acted in a capricious or whimsical manner as to be equivalent to lack of jurisdiction.[31]

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[31] *Id*. at 420-423.

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Although similar to prohibition in that it will lie for want or excess of jurisdiction, *certiorari* is to be distinguished from prohibition by the fact that it is a corrective remedy used for the re-examination of some action of an inferior tribunal, and is directed to the cause or proceeding in the lower court and not to the court itself, while prohibition is a preventative remedy issuing to restrain future action, and is directed to the court itself.[32] The Court expounded on the nature and function of the writ of prohibition in *Holy Spirit Homeowners Association, Inc. v. Defensor*:[33]

> A petition for prohibition is also not the proper remedy to assail an IRR issued in the exercise of a quasi-legislative function. Prohibition is an extraordinary writ directed against any tribunal, corporation, board, officer or person, whether exercising judicial, quasi-judicial or ministerial functions, ordering said entity or person to desist from further proceedings when said proceedings are without or in excess of said entity's or person's jurisdiction, or are accompanied with grave abuse of discretion, and there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of law. Prohibition lies against judicial or ministerial functions, but not against legislative or quasi-legislative functions. Generally, the purpose of a writ of prohibition is to keep a lower court within the limits of its jurisdiction in order to maintain the administration of justice in orderly channels. Prohibition is the proper remedy to afford relief against usurpation of jurisdiction or power by an inferior court, or when, in the exercise of jurisdiction in handling matters clearly within its cognizance the inferior court transgresses the bounds prescribed to it by the law, or where there is no adequate remedy available in the ordinary course of law by which such relief can be obtained. Where the principal relief sought is to invalidate an IRR, petitioners' remedy is an ordinary action for its nullification, an action which properly falls under the jurisdiction of the Regional Trial Court. In any case, petitioners' allegation that "respondents are performing or threatening to perform functions without or in excess of their jurisdiction" may appropriately

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[32] *Municipal Council of Lemery v. Provincial Board of Batangas,* No. L-36201, October 29, 1931, 56 Phil. 260, 266-267.

[33] G.R. No. 163980, August 3, 2006, 497 SCRA 581, 595-596.

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be enjoined by the trial court through a writ of injunction or a temporary restraining order.

With respect to the Court, however, the remedies of *certiorari* and prohibition are necessarily broader in scope and reach, and the writ of *certiorari* or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, *even if the latter does not exercise judicial, quasi-judicial or ministerial functions.* This application is expressly authorized by the text of the second paragraph of Section 1, *supra*.

Thus, petitions for *certiorari* and prohibition are appropriate remedies to raise constitutional issues and to review and/or prohibit or nullify the acts of legislative and executive officials.[34]

Necessarily, in discharging its duty under Section 1, *supra*, to set right and undo any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, the Court is not at all precluded from making the inquiry provided the challenge was properly brought by interested or affected parties. The Court has been thereby entrusted expressly or by necessary implication with both the duty and the obligation of determining, in appropriate cases, the validity of any assailed legislative or executive action. This entrustment is consistent with the republican system of checks and balances.[35]

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[34] *Francisco, Jr. v. Toll Regulatory Board*, G.R. No. 166910, October 19, 2010, 633 SCRA 470, 494.

[35] *Planas v. Gil*, 67 Phil. 62, 73-74 (1939), with the Court saying:

> It must be conceded that the acts of the Chief Executive performed within the limits of his jurisdiction are his official acts and courts will neither direct nor restrain executive action in such cases. **The rule is non-interference. But from this legal premise, it does not necessarily follow that we are precluded from making an inquiry into the validity or constitutionality of his acts when these are properly challenged in**

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Following our recent dispositions concerning the congressional pork barrel, the Court has become more alert to discharge its constitutional duty. We will not now refrain from exercising our expanded judicial power in order to review and determine, with authority, the limitations on the Chief Executive's spending power.

b) **Requisites for the exercise of the power of judicial review were complied with**

The requisites for the exercise of the power of judicial review are the following, namely: (1) there must be an actual case or justiciable controversy before the Court; (2) the question before the Court must be ripe for adjudication; (3) the person challenging the act must be a proper party; and (4) the issue of constitutionality must be raised at the earliest opportunity and must be the very *litis mota* of the case.[36]

The first requisite demands that there be an actual case calling for the exercise of judicial power by the Court.[37] An actual case or controversy, in the words of *Belgica v. Executive Secretary Ochoa*:[38]

x x x is one which involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as

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an appropriate proceeding. xxx **As far as the judiciary is concerned, while it holds "neither the sword nor the purse" it is by constitutional placement the organ called upon to allocate constitutional boundaries, and to the Supreme Court is entrusted expressly or by necessary implication the obligation of determining in appropriate cases the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation. (Sec.2 [1], Art. VIII, Constitution of the Philippines.) In this sense and to this extent, the judiciary restrains the other departments of the government and this result is one of the necessary corollaries of the "system of checks and balances" of the government established**.

[36] *Funa v. Villar*, G.R. No. 192791, April 24, 2012, 670 SCRA 579, 593. According to Black's Law Dictionary (Ninth Edition), ***lis mota*** **is "[a] dispute that has begun and later forms the basis of a lawsuit."**

[37] Bernas, *op. cit.*, at 970.

[38] *Supra* note 7.

distinguished from a hypothetical or abstract difference or dispute. In other words, "[t]here must be a contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence." Related to the requirement of an actual case or controversy is the requirement of "ripeness," meaning that the questions raised for constitutional scrutiny are already ripe for adjudication. "A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. It is a prerequisite that something had then been accomplished or performed by either branch before a court may come into the picture, and the petitioner must allege the existence of an immediate or threatened injury to itself as a result of the challenged action." "Withal, courts will decline to pass upon constitutional issues through advisory opinions, bereft as they are of authority to resolve hypothetical or moot questions."

An actual and justiciable controversy exists in these consolidated cases. The incompatibility of the perspectives of the parties on the constitutionality of the DAP and its relevant issuances satisfy the requirement for a conflict between legal rights. The issues being raised herein meet the requisite ripeness considering that the challenged executive acts were already being implemented by the DBM, and there are averments by the petitioners that such implementation was repugnant to the letter and spirit of the Constitution. Moreover, the implementation of the DAP entailed the allocation and expenditure of huge sums of public funds. The fact that public funds have been allocated, disbursed or utilized by reason or on account of such challenged executive acts gave rise, therefore, to an actual controversy that is ripe for adjudication by the Court.

It is true that Sec. Abad manifested during the January 28, 2014 oral arguments that the DAP as a program had been meanwhile discontinued because it had fully served its purpose, saying: "In conclusion, Your Honors, may I inform the Court that because the DAP has already fully served its purpose, the Administration's economic managers have recommended its termination to the President. x x x."[39]

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[39] Oral Arguments, TSN of January 28, 2014, p. 14.

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The Solicitor General then quickly confirmed the termination of the DAP as a program, and urged that its termination had already mooted the challenges to the DAP's constitutionality, *viz*:

> DAP as a program, no longer exists, thereby mooting these present cases brought to challenge its constitutionality. Any constitutional challenge should no longer be at the level of the program, which is now extinct, but at the level of its prior applications or the specific disbursements under the now defunct policy. We challenge the petitioners to pick and choose which among the 116 DAP projects they wish to nullify, the full details we will have provided by February 5. We urge this Court to be cautious in limiting the constitutional authority of the President and the Legislature to respond to the dynamic needs of the country and the evolving demands of governance, lest we end up straight-jacketing our elected representatives in ways not consistent with our constitutional structure and democratic principles.[40]

A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value.[41]

The Court cannot agree that the termination of the DAP as a program was a supervening event that effectively mooted these consolidated cases. Verily, the Court had in the past exercised its power of judicial review despite the cases being rendered moot and academic by supervening events, like: (1) when there was a grave violation of the Constitution; (2) when the case involved a situation of exceptional character and was of paramount public interest; (3) when the constitutional issue raised required the formulation of controlling principles to guide the Bench, the Bar and the public; and (4) when the case was capable of repetition yet evading review.[42] Assuming that the

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[40] *Id.* at 23.

[41] *Funa v. Ermita*, G.R. No. 184740, February 11, 2010, 612 SCRA 308, 319.

[42] *Funa v. Villar*, *supra* note 36, at 592; citing *David v. Macapagal-Arroyo*, G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 & 171424, May 3, 2006, 489 SCRA 160, 214-215.

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petitioners' several submissions against the DAP were ultimately sustained by the Court here, these cases would definitely come under all the exceptions. Hence, the Court should not abstain from exercising its power of judicial review.

Did the petitioners have the legal standing to sue?

Legal standing, as a requisite for the exercise of judicial review, refers to "a right of appearance in a court of justice on a given question."[43] The concept of legal standing, or *locus standi*, was particularly discussed in *De Castro v. Judicial and Bar Council*,[44] where the Court said:

> In public or constitutional litigations, the Court is often burdened with the determination of the *locus standi* of the petitioners due to the ever-present need to regulate the invocation of the intervention of the Court to correct any official action or policy in order to avoid obstructing the efficient functioning of public officials and offices involved in public service. It is required, therefore, that the petitioner must have a personal stake in the outcome of the controversy, for, as indicated in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*:
>
> > **The question on legal standing is whether such parties have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Accordingly, it has been held that the interest of a person assailing the constitutionality of a statute must be direct and personal. He must be able to show, not only that the law or any government act is invalid, but also that he sustained or is in imminent danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers thereby in some indefinite way. It must appear that the person complaining has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of**.

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[43] *Black's Law Dictionary*, 941 (6th Ed. 1991).

[44] G.R. No. 191002, March 17, 2010, 615 SCRA 666.

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It is true that as early as in 1937, in *People v. Vera*, the Court adopted the *direct injury test* for determining whether a petitioner in a public action had *locus standi*. There, the Court held that the person who would assail the validity of a statute must have "a personal and substantial interest in the case such that he has sustained, or will sustain direct injury as a result." *Vera* was followed in *Custodio v. President of the Senate, Manila Race Horse Trainers' Association v. De la Fuente, Anti-Chinese League of the Philippines v. Felix*, and *Pascual v. Secretary of Public Works.*

Yet, the Court has also held that the requirement of *locus standi*, being a mere procedural technicality, can be waived by the Court in the exercise of its discretion. For instance, in 1949, in *Araneta v. Dinglasan*, the Court liberalized the approach when the cases had "transcendental importance." Some notable controversies whose petitioners did not pass the *direct injury test* were allowed to be treated in the same way as in *Araneta v. Dinglasan*.

In the 1975 decision in *Aquino v. Commission on Elections*, this Court decided to resolve the issues raised by the petition due to their "far-reaching implications," even if the petitioner had no personality to file the suit. The liberal approach of *Aquino v. Commission on Elections* has been adopted in several notable cases, permitting ordinary citizens, legislators, and civic organizations to bring their suits involving the constitutionality or validity of laws, regulations, and rulings.

However, the assertion of a public right as a predicate for challenging a supposedly illegal or unconstitutional executive or legislative action rests on the theory that the petitioner represents the public in general. Although such petitioner may not be as adversely affected by the action complained against as are others, it is enough that he sufficiently demonstrates in his petition that he is entitled to protection or relief from the Court *in the vindication of a public right*.

Quite often, as here, the petitioner in a public action sues as a *citizen* or *taxpayer* to gain *locus standi*. That is not surprising, for even if the issue may appear to concern only the public in general, such capacities nonetheless equip the petitioner with adequate interest to sue. In *David v. Macapagal-Arroyo,* the Court aptly explains why:

Case law in most jurisdictions now allows both "citizen" and "taxpayer" standing in public actions. The distinction was first laid

down in *Beauchamp v. Silk*, where it was held that the plaintiff in a taxpayer's suit is in a different category from the plaintiff in a citizen's suit. **In the former, the plaintiff is affected by the expenditure of public funds, while in the latter, he is but the mere instrument of the public concern.** As held by the New York Supreme Court in *People ex rel Case v. Collins*: "**In matter of mere public right, however…the people are the real parties…It is at least the right, if not the duty, of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied**." With respect to taxpayer's suits, *Terr v. Jordan* held that "**the right of a citizen and a taxpayer to maintain an action in courts to restrain the unlawful use of public funds to his injury cannot be denied.**"[45]

The Court has cogently observed in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*[46] that "[s]tanding is a peculiar concept in constitutional law because in some cases, suits are not brought by parties who have been personally injured by the operation of a law or any other government act but by concerned citizens, taxpayers or voters who actually sue in the public interest."

Except for PHILCONSA, a petitioner in G.R. No. 209164, the petitioners have invoked their capacities as taxpayers who, by averring that the issuance and implementation of the DAP and its relevant issuances involved the illegal disbursements of public funds, have an interest in preventing the further dissipation of public funds. The petitioners in G.R. No. 209287 (Araullo) and G.R. No. 209442 (Belgica) also assert their right as citizens to sue for the enforcement and observance of the constitutional limitations on the political branches of the Government.[47] On its part, PHILCONSA simply reminds that the Court has long recognized its legal standing to bring cases upon constitutional issues.[48] Luna, the petitioner in G.R. No. 209136, cites his additional capacity as a lawyer. The IBP, the petitioner in G.R. No. 209260, stands by "its avowed duty to work for the rule

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[45] *Id.* at 722-726.

[46] G.R. No. 155001, May 5, 2003, 402 SCRA 612, 645.

[47] *Rollo* (G.R. No. 209412), Petition, pp. 3-4.

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of law and of paramount importance of the question in this action, not to mention its civic duty as the official association of all lawyers in this country."[49]

Under their respective circumstances, each of the petitioners has established sufficient interest in the outcome of the controversy as to confer *locus standi* on each of them.

In addition, considering that the issues center on the extent of the power of the Chief Executive to disburse and allocate public funds, whether appropriated by Congress or not, these cases pose issues that are of transcendental importance to the entire Nation, the petitioners included. As such, the determination of such important issues call for the Court's exercise of its broad and wise discretion "to waive the requirement and so remove the impediment to its addressing and resolving the serious constitutional questions raised."[50]

II.
Substantive Issues

1.
Overview of the Budget System

An understanding of the Budget System of the Philippines will aid the Court in properly appreciating and justly resolving the substantive issues.

a) Origin of the Budget System

The term "budget" originated from the Middle English word *bouget* that had derived from the Latin word *bulga* (which means bag or purse).[51]

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[49] *Rollo* (G.R. No. 209260), p. 6.

[50] *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, note 46 at 645.

[51] Magtolis-Briones, Leonor, *Philippine Public Fiscal Administration*, National Research Council of the Philippines and Commission on Audit, 1983, p. 243.

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In the Philippine setting, Commonwealth Act (CA) No. 246 (*Budget Act*) defined "budget" as the financial program of the National Government for a designated fiscal year, consisting of the statements of estimated receipts and expenditures for the fiscal year for which it was intended to be effective based on the results of operations during the preceding fiscal years. The term was given a different meaning under Republic Act No. 992 (*Revised Budget Act*) by describing the budget as the delineation of the services and products, or benefits that would accrue to the public together with the estimated unit cost of each type of service, product or benefit.[52] For a forthright definition, budget should simply be identified as the financial plan of the Government,[53] or "the master plan of government."[54]

The concept of budgeting has not been the product of recent economies. In reality, financing public goals and activities was an idea that existed from the creation of the State.[55] To protect the people, the territory and sovereignty of the State, its government must perform vital functions that required public expenditures. At the beginning, enormous public expenditures were spent for war activities, preservation of peace and order, security, administration of justice, religion, and supply of limited goods and services.[56] In order to finance those expenditures,

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[52] Manasan, Rosario G., *Public Finance in the Philippines: A Review of the Literature,* Philippine Institute for Development Studies Working Paper 81-03, March 1981, p. 37.

[53] Magtolis-Briones, *op. cit.,* p. 79.

[54] American economist Prof. Philip E. Taylor has tendered the following understanding of the term *budget* (as quoted in Magtolis-Briones, *op. cit.*, p. 243), to wit:

> The budget is the master plan of government. It brings together estimates of anticipated revenues and proposed expenditures, implying the schedule of activities to be undertaken and the means of financing those activities. In the budget, fiscal policies are coordinated, and only in the budget can a more unified view of the financial direction which the government is going to be observed.

[55] *Id.* at 10.

[56] *Id.* at 10-11.

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the State raised revenues through taxes and impositions.[57] Thus, budgeting became necessary to allocate public revenues for specific government functions.[58] The State's budgeting mechanism eventually developed through the years with the growing functions of its government and changes in its market economy.

The Philippine Budget System has been greatly influenced by western public financial institutions. This is because of the country's past as a colony successively of Spain and the United States for a long period of time. Many aspects of the country's public fiscal administration, including its Budget System, have been naturally patterned after the practices and experiences of the western public financial institutions. At any rate, the Philippine Budget System is presently guided by two principal objectives that are vital to the development of a progressive democratic government, namely: (1) to carry on all government activities under a comprehensive fiscal plan developed, authorized and executed in accordance with the Constitution, prevailing statutes and the principles of sound public management; and (2) to provide for the periodic review and disclosure of the budgetary status of the Government in such detail so that persons entrusted by law with the responsibility as well as the enlightened citizenry can determine the adequacy of the budget actions taken, authorized or proposed, as well as the true financial position of the Government.[59]

b) **Evolution of the Philippine Budget System**

The budget process in the Philippines evolved from the early years of the American Regime up to the passage of the Jones Law in 1916. A Budget Office was created within the Department of Finance by the Jones Law to discharge the budgeting function,

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[57] *Id*. at 11.

[58] *Id*. at 12.

[59] Manasan, *op. cit*., at 39; Manasan, *Budget Operations Manual Revised Edition,* Operations Budget Commission (1968), p. 3.

and was given the responsibility to assist in the preparation of an executive budget for submission to the Philippine Legislature.[60]

As early as under the 1935 Constitution, a budget policy and a budget procedure were established, and subsequently strengthened through the enactment of laws and executive acts.[61] EO No. 25, issued by President Manuel L. Quezon on April 25, 1936, created the Budget Commission to serve as the agency that carried out the President's responsibility of preparing the budget.[62] CA No. 246, the first budget law, went into effect on January 1, 1938 and established the Philippine budget process. The law also provided a line-item budget as the framework of the Government's budgeting system,[63] with emphasis on the observance of a "balanced budget" to tie up proposed expenditures with existing revenues.

CA No. 246 governed the budget process until the passage on June 4, 1954 of Republic Act (RA) No. 992, whereby Congress introduced performance-budgeting to give importance to functions, projects and activities in terms of expected results.[64] RA No. 992 also enhanced the role of the Budget Commission as the fiscal arm of the Government.[65]

The 1973 Constitution and various presidential decrees directed a series of budgetary reforms that culminated in the enactment of PD No. 1177 that President Marcos issued on July 30, 1977, and of PD No. 1405, issued on June 11, 1978. The latter decree converted the Budget Commission into the Ministry of Budget, and gave its head the rank of a Cabinet member. The Ministry of Budget was later renamed the Office of Budget and Management (OBM) under EO No. 711. The

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[60] Magtolis-Briones, *op. cit.*, at 80.

[61] *Id*.

[62] *http://www.dbm.gov.ph/?page_id=352*. Visited on May 27, 2014.

[63] *Id*.

[64] Magtolis-Briones, *op. cit.*, p. 269.

[65] *http://www.dbm.gov.ph/?page_id=352.* Visited on March 27, 2014.

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OBM became the DBM pursuant to EO No. 292 effective on November 24, 1989.

c) **The Philippine Budget Cycle**[66]

Four phases comprise the Philippine budget process, specifically: (1) **Budget Preparation**; (2) **Budget Legislation**; (3) **Budget Execution**; and (4) **Accountability**. Each phase is distinctly separate from the others but they overlap in the implementation of the budget during the budget year.

c.1. **Budget Preparation**[67]

The budget preparation phase is commenced through the issuance of a **Budget Call** by the DBM. The **Budget Call** contains budget parameters earlier set by the Development Budget Coordination Committee (DBCC) as well as policy guidelines and procedures to aid government agencies in the preparation and submission of their budget proposals. The **Budget Call** is of two kinds, namely: (1) a **National Budget Call**, which is addressed to all agencies, including state universities and colleges; and (2) a **Corporate Budget Call**, which is addressed to all government-owned and -controlled corporations (GOCCs) and government financial institutions (GFIs).

Following the issuance of the **Budget Call**, the various departments and agencies submit their respective **Agency Budget Proposals** to the DBM. To boost citizen participation, the current administration has tasked the various departments and agencies to partner with civil society organizations and other citizen-stakeholders in the preparation of the **Agency Budget Proposals**, which proposals are then presented before a technical panel of the DBM in scheduled budget hearings wherein the various departments and agencies are given the opportunity to defend their budget proposals. DBM bureaus thereafter review the **Agency Budget Proposals** and come up with recommendations for the Executive Review Board,

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[66] *http://budgetngbayan.com/the-budget-cycle/.* Visited on March 27, 2014.

[67] *http://budgetngbayan.com/budget-101/budget.preparation.*

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comprised by the DBM Secretary and the DBM's senior officials. The discussions of the Executive Review Board cover the prioritization of programs and their corresponding support *vis-à-vis* the priority agenda of the National Government, and their implementation.

The DBM next consolidates the recommended agency budgets into the **National Expenditure Program (NEP)** and a **Budget of Expenditures and Sources of Financing (BESF)**. The **NEP** provides the details of spending for each department and agency by **program, activity or project (PAP)**, and is submitted in the form of a proposed GAA. The **Details of Selected Programs and Projects** is the more detailed disaggregation of key PAPs in the **NEP**, especially those in line with the National Government's development plan. The **Staffing Summary** provides the staffing complement of each department and agency, including the number of positions and amounts allocated.

The **NEP** and **BESF** are thereafter presented by the DBM and the DBCC to the President and the Cabinet for further refinements or re-prioritization. Once the NEP and the BESF are approved by the President and the Cabinet, the DBM prepares the budget documents for submission to Congress. The budget documents consist of: (1) the **President's Budget Message**, through which the President explains the policy framework and budget priorities; (2) the **BESF**, mandated by Section 22, Article VII of the Constitution,[68] which contains the macroeconomic assumptions, public sector context, breakdown of the expenditures and funding sources for the fiscal year and the two previous years; and (3) the NEP.

Public or government expenditures are generally classified into two categories, specifically: (1) **capital expenditures or outlays**; and (2) **current operating expenditures**. **Capital expenditures** are the expenses whose usefulness lasts for

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[68] Section 22. The President shall submit to the Congress, within thirty days from the opening of every regular session as the basis of the general appropriations bill, a **budget of expenditures and sources of financing**, including receipts from existing and proposed revenue measures.

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more than one year, and which add to the assets of the Government, including investments in the capital of government-owned or controlled corporations and their subsidiaries.[69] **Current operating expenditures** are the purchases of goods and services in current consumption the benefit of which does not extend beyond the fiscal year.[70] The two components of current expenditures are those for **personal services** (PS), and those for **maintenance and other operating expenses** (MOOE).

Public expenditures are also broadly grouped *according to their functions* into: (1) **economic development expenditures** (*i.e.*, expenditures on agriculture and natural resources, transportation and communications, commerce and industry, and other economic development efforts);[71] (2) **social services or social development expenditures** (*i.e.*, government outlay on education, public health and medicare, labor and welfare and others);[72] (3) **general government or general public services expenditures** (*i.e.*, expenditures for the general government, legislative services, the administration of justice, and for pensions and gratuities);[73] (4) **national defense expenditures** (*i.e.*, sub-divided into

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[69] Section 2(e), P.D. No. 1177 states that **capital expenditures « refer to appropriations for the purchase of goods and services, the benefits of which extend beyond the fiscal year and which add to the assets of Government, including investments in the capital of government-owned or controlled corporations and their subsidiaries. »**

[70] Section 2(d), P.D. No. 1177 defines **current oprating expenditures as « appropriations for the purchase of goods and services for current consumption or within the fiscal year, including the acquisition of furniture and equipment normally used in the conduct of government operations, and for temporary construction of promotional, research and similar purposes. »**

[71] Manasan, *op. cit.*, at 32.

[72] *Id*.

[73] *Id*.

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national security expenditures and expenditures for the maintenance of peace and order);[74] and (5) **public debt**.[75]

Public expenditures may further be classified *according to the nature of funds*, *i.e.*, **general fund**, **special fund** or **bond fund**.[76]

On the other hand, **public revenues** complement public expenditures and cover all income or receipts of the government treasury used to support government expenditures.[77]

Classical economist Adam Smith categorized **public revenues** based on two principal sources, stating: "The revenue which must defray…the necessary expenses of government may be drawn either, first from some fund which peculiarly belongs to the sovereign or commonwealth, and which is independent of the revenue of the people, or, secondly, from the revenue of the people."[78] Adam Smith's classification relied on the two aspects of the nature of the State: first, the State as a juristic person with an artificial personality, and, second, the State as a sovereign or entity possessing supreme power. Under the first aspect, the State could hold property and engage in trade, thereby deriving what is called its **quasi-private income** or **revenues**, and which "peculiarly belonged to the sovereign." Under the second aspect, the State could collect by imposing charges on the revenues of its subjects in the form of **taxes**.[79]

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[74] *Id*.

[75] *Id*.; see also Banzon Abello, Amelia, *Pattern of Philippine Public Expenditures and Revenue*, UP Institute of Economic Development and Research, p. 2 (1962).

[76] Magtolis-Briones, *op. cit.*, at 383.

[77] *Id.* at 139.

[78] Quoted in Banzon Abello, *op. cit.*, at 32-33.

[79] Prof. Charles Bastable, a political economist, proposed a similar classification of public revenues in *Public Finance* (3rd Edition (1917), Book II, Chapter I(2), London: McMillan and Co., Ltd.), to wit:

The widest division of public revenue is into (1) that obtained by the State in its various functions as a great corporation or "juristic person," operating under the ordinary conditions that govern individuals or private

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In the Philippines, **public revenues** are generally derived from the following sources, to wit: (1) **tax revenues** (*i.e.*, compulsory contributions to finance government activities);[80] (2) **capital revenues** (*i.e.*, proceeds from sales of fixed capital assets or scrap thereof and public domain, and gains on such sales like sale of public lands, buildings and other structures, equipment, and other properties recorded as fixed assets);[81] (3) **grants** (*i.e.*, voluntary contributions and aids given to the Government for its operation on specific purposes in the form of money and/or materials, and do not require any monetary commitment on the part of the recipient);[82] (4) **extra-ordinary income** (*i.e.*, repayment of loans and advances made by government corporations and local governments and the receipts and shares in income of the Banko Sentral ng Pilipinas, and other receipts);[83] and (5) **public borrowings** (*i.e.*, proceeds of repayable obligations generally with interest from domestic and foreign creditors of the Government in general, including the National Government and its political subdivisions).[84]

More specifically, **public** revenues are classified as follows:[85]

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companies, and (2) that taken from the revenues of the society by the power of the sovereign. To the former class belong the rents received by the State as landlord, rent charges due to it, interest on capital lent by it, the earnings of its various employments, whether these cover the expenses of the particular function or not, and finally the accrual of property by escheat or absence of a visible owner. Under the second class have to be placed taxes, either general or special, and finally all extra returns obtained by state industrial agencies through the privileges granted by them.

[80] Magtolis-Briones, *supra* at 140.

[81] *Id*. at 141.

[82] *Id.*

[83] *Id*. at 142.

[84] *Id*.

[85] *Manual on the New Government Accounting System*, Accounting Policies, Volume I, Chapter 1, Section 17 (For National Government Agencies).

General Income	Specific Income
1.Subsidy Income from National Government	1. Income Taxes
2.Subsidy from Central Office	2. Property Taxes
3.Subsidy from Regional Office/Staff Bureaus	3. Taxes on Goods and Services
4.Income from Government Services	4. Taxes on International Trade and Transactions
5.Income from Government Business Operations	5. Other Taxes
6.Sales Revenue	6. Fines and Penalties-Tax Revenue
7.Rent Income	7. Other Specific Income
8.Insurance Income	
9.Dividend Income	
10.Interest Income	
11.Sale of Confiscated Goods and Properties	
12.Foreign Exchange (FOREX) Gains	
13.Miscellaneous Operating and Service Income	
14.Fines and Penalties-Government Services and Business Operations	
15.Income from Grants and Donations	

c.2. Budget Legislation[86]

The **Budget Legislation Phase** covers the period commencing from the time Congress receives the **President's Budget**, which is inclusive of the **NEP** and the **BESF**, up to the President's approval of the GAA. This phase is also known as the **Budget Authorization Phase**, and involves the significant participation of the Legislative through its deliberations.

Initially, the **President's Budget** is assigned to the House of Representatives' **Appropriations Committee** on First Reading. The **Appropriations Committee** and its various Sub-Committees schedule and conduct **budget hearings** to examine

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[86] *http://budgetngbayan.com/budget-101/budget-legislation*.

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the PAPs of the departments and agencies. Thereafter, the House of Representatives drafts the **General Appropriations Bill** (GAB).[87]

The **GAB** is sponsored, presented and defended by the House of Representatives' **Appropriations Committee** and **Sub-Committees** in plenary session. As with other laws, the GAB is approved on Third Reading before the House of Representatives' version is transmitted to the Senate.[88]

After transmission, the Senate conducts its own committee hearings on the GAB. To expedite proceedings, the Senate may conduct its committee hearings simultaneously with the House of Representatives' deliberations. The Senate's **Finance Committee** and its **Sub-Committees** may submit the proposed amendments to the GAB to the plenary of the Senate only after the House of Representatives has formally transmitted its version to the Senate. The Senate version of the GAB is likewise approved on Third Reading.[89]

The House of Representatives and the Senate then constitute a panel each to sit in the **Bicameral Conference Committee**

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[87] Article VI of the 1987 Constitution provides:

Section 24. All appropriation, revenue or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills shall **originate exclusively** in the House of Representatives, but the Senate may propose or concur with amendments.

[88] Section 26, Article VI of the 1987 Constitution, to wit:

Section 26.

1. Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

2. No bill passed by either House shall become a law unless it has passed three readings on separate days, and printed copies thereof in its final form have been distributed to its Members three days before its passage, except when the President certifies to the necessity of its immediate enactment to meet a public calamity or emergency. Upon the last reading of a bill, no amendment thereto shall be allowed, and the vote thereon shall be taken immediately thereafter, and the yeas and nays entered in the Journal.

[89] *Id.*

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for the purpose of discussing and harmonizing the conflicting provisions of their versions of the GAB. The "harmonized" version of the GAB is next presented to the President for approval.[90] The President reviews the GAB, and prepares the **Veto Message** where budget items are subjected to direct veto,[91] or are identified for conditional implementation.

If, by the end of any fiscal year, the Congress shall have failed to pass the GAB for the ensuing fiscal year, the GAA for the preceding fiscal year shall be deemed re-enacted and shall remain in force and effect until the GAB is passed by the Congress.[92]

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[90] Section 27,1, Article VI of the 1987 Constitution, *viz.*:

Section 27.

1. Every bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same he shall sign it; otherwise, he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the Members of such House shall agree to pass the bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law. In all such cases, the votes of each House shall be determined by yeas or nays, and the names of the Members voting for or against shall be entered in its Journal. The President shall communicate his veto of any bill to the House where it originated within thirty days after the date of receipt thereof, otherwise, it shall become a law as if he had signed it.

2. The President shall have the power to veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto shall not affect the item or items to which he does not object.

[91] *Id.*

[92] Section 25, 7, Article VI of the 1987 Constitution, thus :

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7. If, by the end of any fiscal year, the Congress shall have failed to pass the general appropriations bill for the ensuing fiscal year, the general appropriations law for the preceding fiscal year shall be deemed re-enacted and shall remain in force and effect until the general appropriations bill is passed by the Congress.

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c.3. Budget Execution[93]

With the GAA now in full force and effect, the next step is the implementation of the budget. The **Budget Execution Phase** is primarily the function of the DBM, which is tasked to perform the following procedures, namely: (1) to issue the programs and guidelines for the release of funds; (2) to prepare an **Allotment and Cash Release Program**; (3) to release allotments; and (4) to issue disbursement authorities.

The implementation of the GAA is directed by the guidelines issued by the DBM. Prior to this, the various departments and agencies are required to submit **Budget Execution Documents** (**BED**) to outline their plans and performance targets by laying down the **physical and financial plan**, the **monthly cash program**, the **estimate of monthly income**, and the **list of obligations that are not yet due and demandable**.

Thereafter, the DBM prepares an **Allotment Release Program (ARP)** and a **Cash Release Program (CRP).** The **ARP** sets a limit for allotments issued in general and to a specific agency. The **CRP** fixes the monthly, quarterly and annual disbursement levels.

Allotments, which authorize an agency to enter into obligations, are issued by the DBM. **Allotments** are lesser in scope than **appropriations**, in that the latter embrace the **general legislative authority to spend**. **Allotments** may be released in two forms – through a comprehensive **Agency Budget Matrix** (**ABM**),[94] or, individually, by **SARO**.[95]

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[93] *http://budgetngbayan.com/budget-101/budget-execution.*

[94] The ABM disaggregates all programmed appropriations for each agency into two main expenditure categories: "not needing clearance" and "needing clearance"; it is a comprehensive allotment release document for all appropriations that do not need clearance, or those that have already been itemized and fleshed out in the GAA.

[95] Items identified as "needing clearance" are those that require the approval of the DBM or the President, as the case may be (for instance, lump sum funds and confidential and intelligence funds). For such items, an agency needs to submit a Special Budget Request to the DBM with supporting documents. Once approved, a SARO is issued.

Armed with either the **ABM** or the **SARO**, agencies become authorized to incur obligations[96] on behalf of the Government in order to implement their PAPs. Obligations may be incurred in various ways, like hiring of personnel, entering into contracts for the supply of goods and services, and using utilities.

In order to settle the obligations incurred by the agencies, the DBM issues a **disbursement authority** so that cash may be allocated in payment of the obligations. A **cash or disbursement authority** that is periodically issued is referred to as a **Notice of Cash Allocation** (**NCA**),[97] which issuance is based upon an agency's submission of its **Monthly Cash Program** and other required documents. The **NCA** specifies the maximum amount of cash that can be withdrawn from a government servicing bank for the period indicated. Apart from the NCA, the DBM may issue a **Non-Cash Availment Authority** (**NCAA**) to authorize non-cash disbursements, or a **Cash Disbursement Ceiling** (**CDC**) for departments

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[96] Liabilities legally incurred that the Government will pay for.

[97] *Belgica v. Executive Secretary*, *supra* note 7 clarifies the distinction between an NCA and SARO, *viz*:

A SARO, as defined by the DBM itself in its website, is "[a] specific authority issued to identified agencies to incur obligations not exceeding a given amount during a specified period for the purpose indicated. It shall cover expenditures the release of which is subject to compliance with specific laws or regulations, or is subject to separate approval or clearance by competent authority." **Based on this definition, it may be gleaned that a SARO only evinces the existence of an obligation and not the directive to pay. Practically speaking, the SARO does not have the direct andimmediate effect of placing public funds beyond the control of the disbursing authority.** In fact, a SARO may even be withdrawn under certain circumstances which will prevent the actual release of funds. **On the otherto pay. Practically speaking, the SARO does not have the direct and immediate effect of placing public funds beyond the control of the disbursing authority.** In fact, a SARO may even be withdrawn under certain circumstances which will prevent the actual release of funds. **On the other**

hand, the actual release of funds is brought about by the issuance of the NCA, which is subsequent to the issuance of a SARO. xxx

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with overseas operations to allow the use of income collected by their foreign posts for their operating requirements.

Actual disbursement or spending of government funds terminates the **Budget Execution Phase** and is usually accomplished through the **Modified Disbursement Scheme** under which disbursements chargeable against the National Treasury are coursed through the government servicing banks.

c.4. Accountability[98]

Accountability is a significant phase of the budget cycle because it ensures that the government funds have been effectively and efficiently utilized to achieve the State's socio-economic goals. It also allows the DBM to assess the performance of agencies during the fiscal year for the purpose of implementing reforms and establishing new policies.

An agency's accountability may be examined and evaluated through (1) **performance targets and outcomes**; (2) **budget accountability reports**; (3) **review of agency performance**; and (4) **audit conducted by the Commission on Audit** (COA).

2.
Nature of the DAP as a fiscal plan

a. **DAP was a program designed to promote economic growth**

Policy is always a part of every budget and fiscal decision of any Administration.[99] The national budget the Executive prepares and presents to Congress represents the Administration's "blueprint for public policy" and reflects the Government's goals and strategies.[100] As such, the national budget becomes a tangible representation of the programs of the Government in monetary terms, specifying therein the PAPs

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[98] *http://budgetngbayan.com/budget-101/budget-accountability.*

[99] Fisher, *Presidential Spending Power*, 1975, p. 165.

[100] Keefe and Ogul, *The American Legislative Process: Congress and the States*, 1993, p. 359.

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and services for which specific amounts of public funds are proposed and allocated.[101] Embodied in every national budget is government spending.[102]

When he assumed office in the middle of 2010, President Aquino made efficiency and transparency in government spending a significant focus of his Administration. Yet, although such focus resulted in an improved fiscal deficit of 0.5% in the gross domestic product (GDP) from January to July of 2011, it also unfortunately decelerated government project implementation and payment schedules.[103] The World Bank observed that the Philippines' economic growth could be reduced, and potential growth could be weakened should the Government continue with its underspending and fail to address the large deficiencies in infrastructure.[104] The economic situation prevailing in the middle of 2011 thus paved the way for the development and implementation of the DAP as a stimulus package intended to fast-track public spending and to push economic growth by investing on high-impact budgetary PAPs to be funded from the "savings" generated during the year as well as from unprogrammed funds.[105] In that respect, the DAP was the product of "plain executive policy-making" to stimulate the economy by way of accelerated spending.[106] The Administration would thereby accelerate government spending by: (1) streamlining the implementation process through the clustering of infrastructure

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[101] Magtolis-Briones, *op. cit.*, p. 79.

[102] Diokno, *Philippine Fiscal Behavior in Recent History*, The Philippine Review of Economics, Vol. XLVII, No. 1, June 1, 2010, p. 53.

[103] World Bank, Philippines Quarterly Update: Solid Economic Fundamentals Cushion External Turmoil, available at http://www.investphilippines.info/arangkada/wp-content/uploads/2011/10/WB-Philippines-Quarterly-Update-Sept2011.pdf (last accessed March 31, 2014).

[104] *Id*.

[105] Department of Budget and Management, Frequently Asked Questions About the Disbursement Acceleration Program (DAP), available at http://www.dbm.gov.ph/?page_id=7362 (last accessed, December 3, 2013).

[106] Respondent's Consolidated Comment, p. 8.

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projects of the Department of Public Works and Highways (DPWH) and the Department of Education (DepEd), and (2) frontloading PPP-related projects[107] due for implementation in the following year.[108]

Did the stimulus package work?

The March 2012 report of the World Bank,[109] released after the initial implementation of the DAP, revealed that the DAP was partially successful. The disbursements under the DAP contributed 1.3 percentage points to GDP growth by the fourth quarter of 2011.[110] The continued implementation of the DAP strengthened growth by 11.8% year on year while infrastructure spending rebounded from a 29% contraction to a 34% growth as of September 2013.[111]

The DAP thus proved to be a demonstration that expenditure was a policy instrument that the Government could use to direct the economies towards growth and development.[112]

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[107] Public-Private Partnership.

[108] Philippines Quarterly Update: Solid Economic Fundamentals Cushion External Turmoil, available at http://www.investphilippines.info/arangkada/wp-content/uploads/2011/10/WB-Philippines-Quarterly-Update-Sept2011.pdf (last accessed March 31, 2014).

[109] Respondent's Memorandum, p. 2, citing the Philippines Quarterly Update: From Stability to Prosperity for All, available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/ 2012/06/12/000333037_20120612011744/Rendered/PDF/698330WP0P12740ch020120FINAL0051012.pdf (last accessed March 31, 2014).

[110] The research group IBON International contests this finding, saying that the contribution of the DAP spending was only one-fourth of a percentage point at most during the last quarter of 2011, and a "negligiblefraction" for the entire year of 2011. See "DAP did not contribute 1.3 percentage points to growth—IBON," available at http://ibon.org/ibon_articles.php?id=344 (last accessed April 5, 2014).

[111] TSN, Oral Arguments, January 28, 2014, p. 12.

[112] Diokno, *Philippine Fiscal Behavior in Recent History, The Philippine Review of Economics*, Vol. XLVII, No. 1, June 1, 2010, p. 51.

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The Government, by spending on public infrastructure, would signify its commitment of ensuring profitability for prospective investors.[113] The PAPs funded under the DAP were chosen for this reason based on their: (1) multiplier impact on the economy and infrastructure development; (2) beneficial effect on the poor; and (3) translation into disbursements.[114]

b. **History of the implementation of the DAP, and sources of funds under the DAP**

How the Administration's economic managers conceptualized and developed the DAP, and finally presented it to the President remains unknown because the relevant documents appear to be scarce.

The earliest available document relating to the genesis of the DAP was the memorandum of October 12, 2011 from Sec. Abad seeking the approval of the President to implement the proposed DAP. The memorandum, which contained a list of the funding sources for ₱72.11 billion and of the proposed priority projects to be funded,[115] reads:

MEMORANDUM FOR THE PRESIDENT

x x x x x x x x x

SUBJECT: FY 2011 PROPOSED DISBURSEMENT ACCELERATION PROGRAM (PROJECTS AND SOURCES OF FUNDS)

DATE: OCTOBER 12, 2011

Mr. President, this is to formally confirm your approval of the Disbursement Acceleration Program totaling ₱72.11 billion. We are already working with all the agencies concerned for the immediate execution of the projects therein.

A. Fund Sources for the Acceleration Program

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[113] *Id*. at 52.

[114] *Rollo* (G.R. No. 209287), p. 539, (Respondent's 1st Evidence Packet).

[115] *Id*. at 526-529, (Respondent's 1st Evidence Packet).

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Fund Sources	Amount (In million Php)	Description	Action Requested
FY 2011 Unreleased Personal Services (PS) appropriations	30,000	Unreleased Personnel Services (PS) appropriations which will lapse at the end of FY 2011 but may be pooled as savings and realigned for priority programs that require immediate funding	Declare as savings and approve/ authorize its use for the 2011 Disbursement Acceleration Program
FY 2011 Unreleased appropriations	482	Unreleased appropriations (slow moving projects and programs for discontinuance)	
FY 2010 Unprogrammed Fund	12,336	Supported by the GFI Dividends	Approve and authorize its use for the 2011 Disbursement Acceleration Program
FY 2010 Carryover Appropriation	21,544	Unreleased appropriations (slow moving projects and programs for discontinuance) and savings from Zero-based Budgeting Initiative	With prior approval from the President in November 2010 to declare as savings and with authority to use for priority projects
FY 2011 Budget items for realignment	7,748	FY 2011 Agency Budget items that can be realigned within the agency to fund new fast disbursing projects	For information

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		DPWH-3.981 Billion DA – 2.497 Billion DOT – 1.000 Billion DepEd – 270 Million	
TOTAL	**72.110**		

B. Projects in the Disbursement Acceleration Program
(Descriptions of projects attached as Annex A)

GOCCs and GFIs	
Agency/Project (SATO and NCS Release)	**Allotment (in Million)**
1. LRTA: Rehabilitation of LRT 1 and 2	1,868
2. NHA:	11,050
a. Resettlement of North Triangle residents to Camarin A7	450
b. Housing for BFP/BJMP	500
c. On-site development for families living along dangerous	10,000
d. Relocation sites for informal settlers along Iloilo River and its tributaries	100
3. PHIL. HEART CENTER: Upgrading of ageing physical plant and medical equipment	357
4. CREDIT INFO CORP: Establishment of centralized credit information system	75
5. PIDS: purchase of land to relocate the PIDS office and building construction	100
6. HGC: Equity infusion for credit insurance and mortgage guaranty operations of HGC	400
7. PHIC: Obligations incurred (premium subsidy for indigent families) in January-June 2010, booked for payment in Jul[y] – Dec 2010. The delay in payment is due to the delay in the certification of the LGU counterpart. Without it, the NG is obliged to pay the full amount.	1,496
8. Philpost: Purchase of foreclosed property. Payment of Mandatory Obligations, (GSIS, PhilHealth, ECC), Franking Privilege	644

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9. BSP: First equity infusion out of Php 40B capitalization under the BSP Law	10,000
10. PCMC: Capital and Equipment Renovation	280
11. LCOP:	105
a. Pediatric Pulmonary Program	35
b. Bio-regenerative Technology Program (Stem-Cell Research – subject to legal review and presentation)	70
12. TIDCORP: NG Equity infusion	570
TOTAL	**26,945**

NGAs/LGUs		
Agency/Project	**Allotment (SARO) (In Million PhP)**	**Cash Requirement (NCA)**
13.DOF-BIR: NPSTAR centralization of data processing and others (To be synchronized with GFMIS activities)	758	758
14. COA: IT infrastructure program and hiring of additional litigational experts	144	144
15.DND-PAF: On Base Housing Facilities and Communication Equipment	30	30
16. DA:	2,959	2,223
a. Irrigation, FMRs and Integrated Community-Based Multi-Species Hatchery and Aquasilvi Farming	1,629	1,629
b. Mindanao Rural Development Project	919	183
c. NIA Agno River Integrated Irrigation Project	411	411
17. DAR:	1,293	1,293
a. Agrarian Reform Communities Project 2	1,293	132
b. Landowners Compensation		5,432
18.DBM: Conduct of National Survey of Farmers/Fisherfolks/ IPs	625	625

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19.DOJ: Operating requirements of 50 investigation agents and 15 state attorneys	11	11
20. DOT: Preservation of the Cine Corregidor Complex	25	25
21. OPAPP: Activities for Peace Process (PAMANA- Project details: budget breakdown, implementation plan, and conditions on fund release attached as Annex B)	1,819	1,819
22. DOST a. Establishment of National Meterological and Climate Center b. Enhancement of Doppler Radar Network for National Weather Watch, Accurate Forecasting and Flood Early Warning	425 275 190	425 275 150
23.DOF-BOC: To settle the principal obligations with PDIC consistent with the agreement with the CISS and SGS	2,800	2,800
24. OEO-FDCP: Establishment of the National Film Archive and local cinematheques, and other local activities	20	20
25. DPWH: Various infrastructure projects	5,500	5,500
26. DepEd/ERDT/DOST: Thin Client Cloud Computing Project	270	270
27. DOH: Hiring of nurses and midwives	294	294
28. TESDA: Training Program in partnership with BPO industry and other sectors	1,100	1,100
29. DILG: Performance Challenge Fund (People Empowered		

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Community Driven Development with DSWD and NAPC)	250	250
30. ARMM: Comprehensive Peace and Development Intervention	8,592	8,592
31.DOTC-MRT: Purchase of additional MRT cars	4,500	-
32. LGU Support Fund	6,500	6,500
33. Various Other Local Projects	6,500	6,500
34. Development Assistance to the Province of Quezon	750	750
TOTAL	**45,165**	**44,000**

C. Summary

	Fund Sources Identified for Approval (In Million Php)	**Allotments for release**	**Cash Requirements for Release in FY 2011**
Total	72,110	72,110	70,895
GOCCs		26,895	26,895
NGAs/LGUs		45,165	44,000

For His Excellency's Consideration
(Sgd.) FLORENCIO B. ABAD

[/] APPROVED
[ ] DISAPPROVED

(Sgd.) H.E. BENIGNO S. AQUINO, III
OCT 12, 2011

The memorandum of October 12, 2011 was followed by another memorandum for the President dated December 12, 2011[116] requesting omnibus authority to consolidate the savings and unutilized balances for fiscal year 2011. Pertinent portions of the memorandum of December 12, 2011 read:

[116] *Id*. at 537-540.

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MEMORANDUM FOR THE PRESIDENT

xxx x x x xxx

SUBJECT: Omnibus Authority to Consolidate Savings/ Unutilized Balances and its Realignment

DATE: December 12, 2011

This is to respectfully request for the grant of Omnibus Authority to consolidate savings/unutilized balances in FY 2011 corresponding to completed or discontinued projects which may be pooled to fund additional projects or expenditures.

In addition, Mr. President, this measure will allow us to undertake projects even if their implementation carries over to 2012 without necessarily impacting on our budget deficit cap next year.

BACKGROUND

1.0 The DBM, during the course of performance reviews conducted on the agencies' operations, particularly on the implementation of their projects/activities, including expenses incurred in undertaking the same, have identified savings out of the 2011 General Appropriations Act. Said savings correspond to completed or discontinued projects under certain departments/agencies which may be pooled, for the following:

1.1 to provide for new activities which have not been anticipated during preparation of the budget;
1.2 to augment additional requirements of on-going priority projects; and
1.3 to provide for deficiencies under the Special Purpose Funds, *e.g.*, PDAF, Calamity Fund, Contingent Fund
1.4 to cover for the modifications of the original allotment class allocation as a result of on-going priority projects and implementation of new activities

2.0 xxx xxx xxx
1. x x x
2. x x x

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ON THE UTILIZATION OF POOLED SAVINGS

3.0 It may be recalled that the President approved our request for omnibus authority to pool savings/unutilized balances in FY 2010 last November 25, 2010.

4.0 It is understood that in the utilization of the pooled savings, the DBM shall secure the corresponding approval/ confirmation of the President. Furthermore, it is assured that the proposed realignments shall be within the authorized Expenditure level.

5.0 Relative thereto, we have identified some expenditure items that may be sourced from the said pooled appropriations in FY 2010 that will expire on December 31, 2011 and appropriations in FY 2011 that may be declared as savings to fund additional expenditures.

5.1 The 2010 Continuing Appropriations (pooled savings) is proposed to be spent for the projects that we have identified to be immediate actual disbursements considering that this same fund source will expire on December 31, 2011.

5.2 With respect to the proposed expenditure items to be funded from the FY 2011 Unreleased Appropriations, most of these are the same projects for which the DBM is directed by the Office of the President, thru the Executive Secretary, to source funds.

6. Among others, the following are such proposed additional projects that have been chosen given their multiplier impact on economy and infrastructure development, their beneficial effect on the poor, and their translation into disbursements. Please note that we have classified the list of proposed projects as follows:

7. x x x

FOR THE PRESIDENT'S APPROVAL

8. Foregoing considered, may we respectfully request for the President's approval for the following:

8.1 Grant of omnibus authority to consolidate FY 2011 savings/ unutilized balances and its realignment; and

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8.2 The proposed additional projects identified for funding.

For His Excellency's consideration and approval.

(Sgd.)

[/] APPROVED
[ ] DISAPPROVED

(Sgd.) H.E. BENIGNO S. AQUINO, III
DEC 21, 2011

Substantially identical requests for authority to pool savings and to fund proposed projects were contained in various other memoranda from Sec. Abad dated June 25, 2012,[117] September 4, 2012,[118] December 19, 2012,[119] May 20, 2013,[120] and September 25, 2013.[121] The President apparently approved all the requests, withholding approval only of the proposed projects contained in the June 25, 2012 memorandum, as borne out by his marginal note therein to the effect that the proposed projects should still be "subject to further discussions."[122]

In order to implement the June 25, 2012 memorandum, Sec. Abad issued NBC No. 541 (*Adoption of Operational Efficiency Measure – Withdrawal of Agencies' Unobligated Allotments as of June 30, 2012*),[123] reproduced herein as follows:

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[117] *Id*. at 549-555.

[118] *Id*. at 563-568.

[119] *Id*. at 579-587.

[120] *Id*. at 601-608.

[121] This memorandum was a request to fund the rehabilitation plan for the Typhoon Pablo-stricken areas in Mindanao amounting to ₱10.534 billion to be sourced from the (i) 2012 and 2013 pooled savings from programmed appropriations, and (ii) revenue windfall collections during the first semester comprising the 2013 Unprogrammed Fund, Respondent's 1st Evidence Packet, p. 609-B.

[122] *Rollo* (G.R. No. 209287), p. 555, (Respondent's 1st Evidence Packet).

[123] *Id*. at 185-189, (Respondent's Manifestation dated December 6, 2013).

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NATIONAL BUDGET CIRCULAR **No. 541**
July 18, 2012

TO : All Heads of Departments/Agencies/State Universities and Colleges and other Offices of the National Government, Budget and Planning Officers; Heads of Accounting Units and All Others Concerned

SUBJECT : **Adoption of Operational Efficiency Measure – Withdrawal of Agencies' Unobligated Allotments as of June 30, 2012**

1.0 Rationale

The DBM, as mandated by Executive Order (EO) No. 292 (Administrative Code of 1987), periodically reviews and evaluates the departments/agencies' efficiency and effectiveness in utilizing budgeted funds for the delivery of services and production of goods, consistent with the government priorities.

In the event that a measure is necessary to further improve the operational efficiency of the government, the President is authorized to suspend or stop further use of funds allotted for any agency or expenditure authorized in the General Appropriations Act. Withdrawal and pooling of unutilized allotment releases can be effected by DBM based on authority of the President, as mandated under Sections 38 and 39, Chapter 5, Book VI of EO 292.

For the first five months of 2012, the National Government has not met its spending targets. In order to accelerate spending and sustain the fiscal targets during the year, expenditure measures have to be implemented to optimize the utilization of available resources.

Departments/agencies have registered low spending levels, in terms of obligations and disbursements per initial review of their 2012 performance. To enhance agencies' performance, the DBM conducts continuous consultation meetings and/or send call-up letters, requesting them to identify slow-moving programs/projects and the factors/issues affecting their performance (both pertaining to internal systems and those which are outside the agencies' spheres of control). Also, they are asked to formulate strategies and improvement plans for the rest of 2012.

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Notwithstanding these initiatives, some departments/agencies have continued to post low obligation levels as of end of first semester, thus resulting to substantial unobligated allotments.

In line with this, the President, per directive dated June 27, 2012 authorized the withdrawal of unobligated allotments of agencies with low levels of obligations as of **June 30, 2012**, both for continuing and current allotments. This measure will allow the maximum utilization of available allotments to fund and undertake other priority expenditures of the national government.

2.0 **Purpose**

2.1 To provide the conditions and parameters on the withdrawal of unobligated allotments of agencies as of June 30, 2012 to fund priority and/or fast-moving programs/projects of the national government;

2.2 To prescribe the reports and documents to be used as bases on the withdrawal of said unobligated allotments; and

2.3 To provide guidelines in the utilization or reallocation of the withdrawn allotments.

3.0 **Coverage**

3.1 These guidelines shall cover the withdrawal of unobligated allotments as of June 30, 2012 of all national government agencies (NGAs) charged against FY 2011 Continuing Appropriation (R.A. No.10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to:

3.1.1 Capital Outlays (CO);

3.1.2 Maintenance and Other Operating Expenses (MOOE) related to the implementation of programs and projects, as well as capitalized MOOE; and

3.1.3 Personal Services corresponding to unutilized pension benefits declared as savings by the agencies concerned based on their updated/validated list of pensioners.

3.2 The withdrawal of unobligated allotments may cover the identified programs, projects and activities of the departments/agencies reflected in the DBM list shown as **Annex A** or specific programs and projects as may be identified by the agencies.

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4.0 **Exemption**

These guidelines shall **not** apply to the following:

4.1 NGAs

4.1.1 Constitutional Offices/Fiscal Autonomy Group, granted fiscal autonomy under the Philippine Constitution; and

4.1.2 State Universities and Colleges, adopting the Normative Funding allocation scheme *i.e.*, distribution of a predetermined budget ceiling.

4.2 Fund Sources

4.2.1 Personal Services other than pension benefits;

4.2.2 MOOE items earmarked for specific purposes or subject to realignment conditions per General Provisions of the GAA:

- Confidential and Intelligence Fund;
- Savings from Traveling, Communication, Transportation and Delivery, Repair and Maintenance, Supplies and Materials and Utility which shall be used for the grant of Collective Negotiation Agreement incentive benefit;
- Savings from mandatory expenditures which can be realigned only in the last quarter after taking into consideration the agency's full year requirements, i.e., Petroleum, Oil and Lubricants, Water, Illumination, Power Services, Telephone, other Communication Services and Rent.

4.2.3 Foreign-Assisted Projects (loan proceeds and peso counterpart);

4.2.4 Special Purpose Funds such as: E-Government Fund, International Commitments Fund, PAMANA, Priority Development Assistance Fund, Calamity Fund, Budgetary Support to GOCCs and Allocation to LGUs, among others;

4.2.5 Quick Response Funds; and

4.2.6 Automatic Appropriations *i.e.*, Retirement Life Insurance Premium and Special Accounts in the General Fund.

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5.0 **Guidelines**

5.1 National government agencies shall continue to undertake procurement activities notwithstanding the implementation of the policy of withdrawal of unobligated allotments until the end of the third quarter, FY 2012. Even without the allotments, the agency shall proceed in undertaking the procurement processes (*i.e.*, procurement planning up to the conduct of bidding but short of awarding of contract) pursuant to GPPB Circular Nos. 02-2008 and 01-2009 and DBM Circular Letter No. 2010-9.

5.2 For the purpose of determining the amount of unobligated allotments that shall be withdrawn, all departments/agencies/ operating units (OUs) shall submit to DBM not later than **July 30, 2012**, the following budget accountability reports as of June 30, 2012;

- Statement of Allotments, Obligations and Balances (SAOB);
- Financial Report of Operations (FRO); and
- Physical Report of Operations.

5.3 In the absence of the June 30, 2012 reports cited under item 5.2 of this Circular, the agency's latest report available shall be used by DBM as basis for withdrawal of allotment. The DBM shall compute/approximate the agency's obligation level as of June 30 to derive its unobligated allotments as of same period. Example: If the March 31 SAOB or FRO reflects actual obligations of ₱800M then the June 30 obligation level shall approximate to ₱1,600 M (*i.e.*, ₱800 M x 2 quarters).

5.4 All released allotments in FY 2011 charged against R.A. No. 10147 which remained unobligated as of June 30, 2012 **shall be immediately considered for withdrawal**. This policy is based on the following considerations:

5.4.1 The departments/agencies' approved priority programs and projects are assumed to be implementation-ready and doable during the given fiscal year; and

5.4.2 The practice of having substantial carryover appropriations may imply that the agency has a slower-than-programmed implementation capacity **or** agency tends to implement projects within a two-year timeframe.

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5.5. Consistent with the President's directive, the DBM shall, based on evaluation of the reports cited above and results of consultations with the departments/agencies, withdraw the unobligated allotments as of June 30, 2012 through issuance of negative Special Allotment Release Orders (SAROs).

5.6 DBM shall prepare and submit to the President, a report on the magnitude of withdrawn allotments. The report shall highlight the agencies which failed to submit the June 30 reports required under this Circular.

5.7 The withdrawn allotments may be:

5.7.1 Reissued for the **original** programs and projects of the agencies/OUs concerned, from which the allotments were withdrawn;

5.7.2 Realigned to cover additional funding for **other existing** programs and projects of the agency/OU; or

5.7.3 Used to augment existing programs and projects of **any agency** and to fund priority programs and projects **not considered** in the 2012 budget but expected to be started or implemented during the current year.

5.8 For items 5.7.1 and 5.7.2 above, agencies/OUs concerned may submit to DBM a Special Budget Request (SBR), supported with the following:

5.8.1 Physical and Financial Plan (PFP);

5.8.2 Monthly Cash Program (MCP); and

5.8.3 Proof that the project/activity has started the procurement processes *i.e.*, Proof of Posting and/or Advertisement of the Invitation to Bid.

5.9 The deadline for submission of request/s pertaining to these categories shall be until the end of the third quarter *i.e.*, **September 30, 2012**. After said cut-off date, the withdrawn allotments shall be pooled and form part of the overall savings of the national government.

5.10 Utilization of the consolidated withdrawn allotments for other priority programs and projects as cited under item 5.7.3 of this Circular, shall be subject to approval of the President.

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Based on the approval of the President, DBM shall issue the SARO to cover the approved priority expenditures subject to submission by the agency/OU concerned of the SBR and supported with PFP and MCP.

5.11 It is understood that all releases to be made out of the withdrawn allotments (both 2011 and 2012 unobligated allotments) shall be within the approved Expenditure Program level of the national government for the current year. The SAROs to be issued shall properly disclose the appropriation source of the release to determine the extent of allotment validity, as follows:

- For charges under R.A. 10147 – allotments shall be valid up to December 31, 2012; and
- For charges under R.A. 10155 – allotments shall be valid up to December 31, 2013.

5.12 Timely compliance with the submission of existing BARs and other reportorial requirements is reiterated for monitoring purposes.

6.0 **Effectivity**

This circular shall take effect immediately.

(Sgd.) **FLORENCIO B. ABAD**
Secretary

As can be seen, NBC No. 541 specified that the unobligated allotments of all agencies and departments as of June 30, 2012 that were charged against the continuing appropriations for fiscal year 2011 and the 2012 GAA (R.A. No. 10155) were subject to withdrawal through the issuance of negative SAROs, but such allotments could be either: (1) reissued for the original PAPs of the concerned agencies from which they were withdrawn; or (2) realigned to cover additional funding for other existing PAPs of the concerned agencies; or (3) used to augment existing PAPs of any agency and to fund priority PAPs not considered in the 2012 budget but expected to be started or implemented in 2012. Financing the other priority PAPs was made subject to the approval of the President. Note here that NBC No. 541 used terminologies like "realignment" and

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"augmentation" in the application of the withdrawn unobligated allotments.

Taken together, all the issuances showed how the DAP was to be implemented and funded, that is — (1) by declaring "savings" coming from the various departments and agencies derived from pooling unobligated allotments and withdrawing unreleased appropriations; (2) releasing unprogrammed funds; and (3) applying the "savings" and unprogrammed funds to augment existing PAPs or to support other priority PAPs.

c. **DAP was not an appropriation measure; hence, no appropriation law was required to adopt or to implement it**

Petitioners Syjuco, Luna, Villegas and PHILCONSA state that Congress did not enact a law to establish the DAP, or to authorize the disbursement and release of public funds to implement the DAP. Villegas, PHILCONSA, IBP, Araullo, and COURAGE observe that the appropriations funded under the DAP were not included in the 2011, 2012 and 2013 GAAs. To petitioners IBP, Araullo, and COURAGE, the DAP, being actually an appropriation that set aside public funds for public use, should require an enabling law for its validity. VACC maintains that the DAP, because it involved huge allocations that were separate and distinct from the GAAs, circumvented and duplicated the GAAs without congressional authorization and control.

The petitioners contend in unison that based on how it was developed and implemented the DAP violated the mandate of Section 29(1), Article VI of the 1987 Constitution that "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law."

The OSG posits, however, that no law was necessary for the adoption and implementation of the DAP because of its being neither a fund nor an appropriation, but a program or an administrative system of prioritizing spending; and that the adoption of the DAP was by virtue of the authority of the President as the Chief Executive to ensure that laws were faithfully executed.

We agree with the OSG's position.

The DAP was a government policy or strategy designed to stimulate the economy through accelerated spending. In the context of the DAP's adoption and implementation being a function pertaining to the Executive as the main actor during the **Budget Execution Stage** under its constitutional mandate to faithfully execute the laws, including the GAAs, Congress did not need to legislate to adopt or to implement the DAP. Congress could appropriate but would have nothing more to do during the **Budget Execution Stage**. Indeed, appropriation was the act by which Congress "designates a particular fund, or sets apart a specified portion of the public revenue or of the money in the public treasury, to be applied to some general object of governmental expenditure, or to some individual purchase or expense."[124] As pointed out in *Gonzales v. Raquiza*:[125] '"In a strict sense, appropriation has been defined 'as nothing more than the legislative authorization prescribed by the Constitution that money may be paid out of the Treasury,' while appropriation made by law refers to 'the act of the legislature setting apart or assigning to a particular use a certain sum to be used in the payment of debt or dues from the State to its creditors.'"[126]

On the other hand, the President, in keeping with his duty to faithfully execute the laws, had sufficient discretion during the execution of the budget to adapt the budget to changes in the country's economic situation.[127] He could adopt a plan like the DAP for the purpose. He could pool the savings and identify the PAPs to be funded under the DAP. The pooling

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[124] *Blacks' Law Dictionary* (6th Ed.) p. 102.

[125] G.R. No. L-29627, December 19, 1989, 180 SCRA 254.

[126] *Id*. at 160.

[127] Daniel Tomassi, "Budget Execution," in Budgeting and Budgetary Institutions, ed. Anwar Shah (Washington: The International Bank for Reconstruction and Development/World Bank, 2007), p. 279, available at http://siteresources.worldbank.org/PSGLP/Resources/BudgetingandBudgetaryInstitutions.pdf (last accessed April 9, 2014).

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of savings pursuant to the DAP, and the identification of the PAPs to be funded under the DAP did not involve appropriation in the strict sense because the money had been already set apart from the public treasury by Congress through the GAAs. In such actions, the Executive did not usurp the power vested in Congress under Section 29(1), Article VI of the Constitution.

3.
Unreleased appropriations and withdrawn unobligated allotments under the DAP were not savings, and the use of such appropriations contravened Section 25(5), Article VI of the 1987 Constitution.

Notwithstanding our appreciation of the DAP as a plan or strategy validly adopted by the Executive to ramp up spending to accelerate economic growth, the challenges posed by the petitioners constrain us to dissect the mechanics of the actual execution of the DAP. The management and utilization of the public wealth inevitably demands a most careful scrutiny of whether the Executive's implementation of the DAP was consistent with the Constitution, the relevant GAAs and other existing laws.

a. **Although executive discretion and flexibility are necessary in the execution of the budget, any transfer of appropriated funds should conform to Section 25(5), Article VI of the Constitution**

We begin this dissection by reiterating that Congress cannot anticipate all issues and needs that may come into play once the budget reaches its execution stage. Executive discretion is necessary at that stage to achieve a sound fiscal administration and assure effective budget implementation. The heads of offices, particularly the President, require flexibility in their operations under performance budgeting to enable them to make whatever adjustments are needed to meet established work goals under

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changing conditions.[128] In particular, the power to transfer funds can give the President the flexibility to meet unforeseen events that may otherwise impede the efficient implementation of the PAPs set by Congress in the GAA.

Congress has traditionally allowed much flexibility to the President in allocating funds pursuant to the GAAs,[129] particularly when the funds are grouped to form lump sum accounts.[130] It is assumed that the agencies of the Government enjoy more flexibility when the GAAs provide broader appropriation items.[131] This flexibility comes in the form of policies that the Executive may adopt during the budget execution phase. The DAP – as a strategy to improve the country's economic position – was one policy that the President decided to carry out in order to fulfill his mandate under the GAAs.

Denying to the Executive flexibility in the expenditure process would be counterproductive. In *Presidential Spending Power*,[132] Prof. Louis Fisher, an American constitutional scholar whose specialties have included budget policy, has justified extending discretionary authority to the Executive thusly:

> [T]he impulse to deny discretionary authority altogether should be resisted. There are many number of reasons why obligations and outlays by administrators may have to differ from appropriations by legislators. Appropriations are made many months, and sometimes years, in advance of expenditures. Congress acts with imperfect knowledge in trying to legislate in fields that are highly technical

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[128] Budget Operations Manual (Revised Edition) 1968, Office of the President, Budget Commission.

[129] Fujitani and Shirck, *Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound*. Harvard Law School, Federal Budget Policy Seminar, Briefing Paper No. 8, p. 1, available at http://www.law.harvard.edu/faculty/hjackson/ExecutiveSpendingPowers_8.pdf (last accessed December 3, 2013).

[130] *Id*. at 8.

[131] *Id*.

[132] Princeton University Press, 1975, pp. 261-262.

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and constantly undergoing change. New circumstances will develop to make obsolete and mistaken the decisions reached by Congress at the appropriation stage. It is not practicable for Congress to adjust to each new development by passing separate supplemental appropriation bills. **Were Congress to control expenditures by confining administrators to narrow statutory details, it would perhaps protect its power of the purse but it would not protect the purse itself. The realities and complexities of public policy require executive discretion for the sound management of public funds.**

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x x x The expenditure process, by its very nature, requires substantial discretion for administrators. They need to exercise judgment and take responsibility for their actions, but those actions ought to be directed toward executing congressional, not administrative policy. Let there be discretion, but channel it and use it to satisfy the programs and priorities established by Congress.

In contrast, by allowing to the heads of offices some power to transfer funds within their respective offices, the Constitution itself ensures the fiscal autonomy of their offices, and at the same time maintains the separation of powers among the three main branches of the Government. The Court has recognized this, and emphasized so in *Bengzon v. Drilon*,[133] *viz*:

The Judiciary, the Constitutional Commissions, and the Ombudsman must have the independence and flexibility needed in the discharge of their constitutional duties. The imposition of restrictions and constraints on the manner the independent constitutional offices allocate and utilize the funds appropriated for their operations is anathema to fiscal autonomy and violative not only of the express mandate of the Constitution but especially as regards the Supreme Court, of the independence and separation of powers upon which the entire fabric of our constitutional system is based.

In the case of the President, the power to transfer funds from one item to another within the Executive has not been the mere offshoot of established usage, but has emanated from law itself. It has existed since the time of the American

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[133] G.R. No. 103524, April 15, 1992, 208 SCRA 133, 150.

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Governors-General.[134] Act No. 1902 (*An Act authorizing the Governor-General to direct any unexpended balances of appropriations be returned to the general fund of the Insular Treasury and to transfer from the general fund moneys which have been returned thereto*), passed on May 18, 1909 by the First Philippine Legislature,[135] was the first enabling law that granted statutory authority to the President to transfer funds. The authority was without any limitation, for the Act explicitly empowered the Governor-General to transfer any unexpended balance of appropriations for any bureau or office to another, and to spend such balance as if it had originally been appropriated for that bureau or office.

From 1916 until 1920, the appropriations laws set a cap on the amounts of funds that could be transferred, thereby limiting the power to transfer funds. Only 10% of the amounts appropriated for contingent or miscellaneous expenses could be transferred to a bureau or office, and the transferred funds were to be used to cover deficiencies in the appropriations also for miscellaneous expenses of said bureau or office.

In 1921, the ceiling on the amounts of funds to be transferred from items under miscellaneous expenses to any other item of a certain bureau or office was removed.

During the Commonwealth period, the power of the President to transfer funds continued to be governed by the GAAs despite the enactment of the Constitution in 1935. It is notable that the 1935 Constitution did not include a provision on the power to transfer funds. At any rate, a shift in the extent of the President's power to transfer funds was again experienced during this era, with the President being given more flexibility in implementing the budget. The GAAs provided that the power to transfer all

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[134] Waldby, Odell, *Philippine Public Fiscal Administration*, Institute of Public Administration, University of the Philippines, 1954, p. 319.

[135] The Philippine Commission, which lasted from 1900 to 1916, comprised the Upper House of the Philippines Legislature. The Philippine Assembly, which existed from 1907 to 1916, served in its time as the Lower House of the Philippine Legislature.

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or portions of the appropriations in the Executive Department could be made in the "interest of the public, as the President may determine."[136]

In its time, the 1971 Constitutional Convention wanted to curtail the President's seemingly unbounded discretion in transferring funds.[137] Its Committee on the Budget and Appropriation proposed to prohibit the transfer of funds among the separate branches of the Government and the independent constitutional bodies, but to allow instead their respective heads to augment items of appropriations from savings in their respective budgets under certain limitations.[138] The clear intention of the Convention was to further restrict, not to liberalize, the power to transfer appropriations.[139] Thus, the Committee on the Budget and Appropriation initially considered setting stringent limitations on the power to augment, and suggested that the augmentation of an item of appropriation could be made "by not more than ten percent if the original item of appropriation to be augmented does not exceed one million pesos, or by not more than five percent if the original item of appropriation to be augmented exceeds one million pesos."[140] But two members of the Committee objected to the ₱1,000,000.00 threshold, saying that the amount was arbitrary and might not be reasonable in the future. The Committee agreed to eliminate the ₱1,000,000.00 threshold, and settled on the ten percent limitation.[141]

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[136] Waldby, *op. cit.*, pp. 321-322.

[137] In his Sponsorship Speech, Delegate Honesto Mendoza, the Chairman of the Committee on Budget and Appropriations of the 1971 Constitutional Convention, stated that it was deemed "absolutely necessary to remove the anomaly of illegal fund transfers of public funds to projects or purposes not contemplated by law."

[138] Minutes of the Meeting, Commission on Budget and Appropriations, 1971 Constitutional Convention, November 4, 1971, p. 18.

[139] Minutes of the Meeting, Commission on Budget and Appropriations, 1971 Constitutional Convention, January 13, 1972, p. 10.

[140] *Id*. at 9.

[141] *Id*. at 10-11.

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In the end, the ten percent limitation was discarded during the plenary of the Convention, which adopted the following final version under Section 16, Article VIII of the 1973 Constitution, to wit:

> (5) No law shall be passed authorizing any transfer of appropriations; however, the President, the Prime Minister, the Speaker, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may by law be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

The 1973 Constitution explicitly and categorically prohibited the transfer of funds from one item to another, unless Congress enacted a law authorizing the President, the Prime Minister, the Speaker, the Chief Justice of the Supreme Court, and the heads of the Constitutional Commissions to transfer funds for the purpose of augmenting any item from savings in another item in the GAA of their respective offices. The leeway was limited to augmentation only, and was further constricted by the condition that the funds to be transferred should come from savings from another item in the appropriation of the office.[142]

On July 30, 1977, President Marcos issued PD No. 1177, providing in its Section 44 that:

> Section 44. *Authority to Approve Fund Transfers.* **The President shall have the authority to transfer any fund appropriated for the different departments, bureaus, offices and agencies of the Executive Department which are included in the General Appropriations Act, to any program, project, or activity of any department, bureau or office included in the General Appropriations Act or approved after its enactment.**
>
> The President shall, likewise, have the authority to augment any appropriation of the Executive Department in the General Appropriations Act, from savings in the appropriations of another department, bureau, office or agency within the Executive Branch, pursuant to the provisions of Article VIII, Section 16 (5) of the Constitution.

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[142] *Demetria v. Alba*, No. L-71977, February 27, 1987, 148 SCRA 208.

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In *Demetria v. Alba*, however, the Court struck down the first paragraph of Section 44 for contravening Section 16(5) of the 1973 Constitution, ruling:

> Paragraph 1 of Section 44 of P.D. No. 1177 unduly over-extends the privilege granted under said Section 16. It empowers the President to indiscriminately transfer funds from one department, bureau, office or agency of the Executive Department to any program, project or activity of any department, bureau or office included in the General Appropriations Act or approved after its enactment, **without regard as to whether or not the funds to be transferred are actually savings in the item from which the same are to be taken, or whether or not the transfer is for the purpose of augmenting the item to which said transfer is to be made**. It does not only completely disregard the standards set in the fundamental law, thereby amounting to an undue delegation of legislative powers, but likewise goes beyond the tenor thereof. Indeed, such constitutional infirmities render the provision in question null and void.[143]

It is significant that *Demetria* was promulgated 25 days after the ratification by the people of the 1987 Constitution, whose Section 25(5) of Article VI is identical to Section 16(5), Article VIII of the 1973 Constitution, to wit:

> Section 25. x x x
>
> x x x x x x x x x
>
> 5) No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.
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> x x x x x x x x x

The foregoing history makes it evident that the Constitutional Commission included Section 25(5), *supra*, to keep a tight rein on the exercise of the power to transfer funds appropriated by

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[143] *Id*. at 214-215.

Congress by the President and the other high officials of the Government named therein. The Court stated in *Nazareth v. Villar*:[144]

> In the funding of current activities, projects, and programs, the general rule should still be that the budgetary amount contained in the appropriations bill is the extent Congress will determine as sufficient for the budgetary allocation for the proponent agency. The only exception is found in Section 25 (5), Article VI of the Constitution, by which the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions are authorized to transfer appropriations *to augment* any item in the GAA for their respective offices from the savings in other items of their respective appropriations. The plain language of the constitutional restriction leaves no room for the petitioner's posture, which we should now dispose of as untenable.

It bears emphasizing that the exception in favor of the high officials named in Section 25(5), Article VI of the Constitution limiting the authority to transfer savings only to augment another item in the GAA is strictly but reasonably construed as exclusive. As the Court has expounded in *Lokin, Jr. v. Commission on Elections*:

> When the statute itself enumerates the exceptions to the application of the general rule, the exceptions are strictly but reasonably construed. The exceptions extend only as far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exceptions. Where the general rule is established by a statute with exceptions, none but the enacting authority can curtail the former. Not even the courts may add to the latter by implication, and it is a rule that an express exception excludes all others, although it is always proper in determining the applicability of the rule to inquire whether, in a particular case, it accords with reason and justice.
>
> The appropriate and natural office of the exception is to exempt something from the scope of the general words of a statute, which is otherwise within the scope and meaning of such general words. Consequently, the existence of an

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[144] G.R. No. 188635, January 29, 2013, 689 SCRA 385, 402-404.

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> exception in a statute clarifies the intent that the statute shall apply to all cases not excepted. Exceptions are subject to the rule of strict construction; hence, any doubt will be resolved in favor of the general provision and against the exception. Indeed, the liberal construction of a statute will seem to require in many circumstances that the exception, by which the operation of the statute is limited or abridged, should receive a restricted construction.

Accordingly, we should interpret Section 25(5), *supra*, in the context of a limitation on the President's discretion over the appropriations during the **Budget Execution Phase**.

b. **Requisites for the valid transfer of appropriated funds under Section 25(5), Article VI of the 1987 Constitution**

The transfer of appropriated funds, to be valid under Section 25(5), *supra*, must be made upon a concurrence of the following requisites, namely:

(1) There is a law authorizing the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of the Constitutional Commissions to transfer funds within their respective offices;

(2) The funds to be transferred are savings generated from the appropriations for their respective offices; and

(3) The purpose of the transfer is to augment an item in the general appropriations law for their respective offices.

b.1. First Requisite –GAAs of 2011 and 2012 lacked valid provisions to authorize transfers of funds under the DAP; hence, transfers under the DAP were unconstitutional

Section 25(5), *supra*, not being a self-executing provision of the Constitution, must have an implementing law for it to be

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operative. That law, generally, is the GAA of a given fiscal year. To comply with the first requisite, the GAAs should expressly authorize the transfer of funds.

Did the GAAs expressly authorize the transfer of funds?

In the 2011 GAA, the provision that gave the President and the other high officials the authority to transfer funds was Section 59, as follows:

> Section 59. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to augment **any item in this Act** from savings in other items of their respective appropriations.

In the 2012 GAA, the empowering provision was Section 53, to wit:

> Section 53. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to augment **any item in this Act** from savings in other items of their respective appropriations.

In fact, the foregoing provisions of the 2011 and 2012 GAAs were cited by the DBM as justification for the use of savings under the DAP.[145]

A reading shows, however, that the aforequoted provisions of the GAAs of 2011 and 2012 were textually unfaithful to the Constitution for not carrying the phrase "*for their respective offices*" contained in Section 25(5), *supra*. The impact of the phrase "*for their respective offices*" was to authorize only transfers of funds within their offices (*i.e.*, in the case of the President, the transfer was to an item of appropriation within the Executive). The provisions carried a different phrase ("*to*

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[145] Constitutional and Legal Bases <http://www.dbm.gov.ph/?page_id=7364> (visited March 27, 2014).

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augment any item in this Act"), and the effect was that the 2011 and 2012 GAAs thereby literally allowed the transfer of funds from savings to augment *any item* in the GAAs even if the item belonged to an office outside the Executive. To that extent did the 2011 and 2012 GAAs contravene the Constitution. At the very least, the aforequoted provisions cannot be used to claim authority to transfer appropriations from the Executive to another branch, or to a constitutional commission.

Apparently realizing the problem, Congress inserted the omitted phrase in the counterpart provision in the 2013 GAA, to wit:

> Section 52. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to use savings in their respective appropriations to augment actual deficiencies incurred for the current year in any item **of their respective appropriations**.

Even had a valid law authorizing the transfer of funds pursuant to Section 25(5), *supra*, existed, there still remained two other requisites to be met, namely: that the source of funds to be transferred were savings from appropriations within the respective offices; and that the transfer must be for the purpose of augmenting an item of appropriation within the respective offices.

b.2. Second Requisite – There were no savings from which funds could be sourced for the DAP

Were the funds used in the DAP actually savings?

The petitioners claim that the funds used in the DAP — the unreleased appropriations and withdrawn unobligated allotments — were not actual savings within the context of Section 25(5), *supra*, and the relevant provisions of the GAAs. Belgica argues that "savings" should be understood to refer to the excess money after the items that needed to be funded have been funded, or those that needed to be paid have been paid pursuant to the

budget.[146] The petitioners posit that there could be savings only when the PAPs for which the funds had been appropriated were actually implemented and completed, or finally discontinued or abandoned. They insist that savings could not be realized with certainty in the middle of the fiscal year; and that the funds for "slow-moving" PAPs could not be considered as savings because such PAPs had not actually been abandoned or discontinued yet.[147] They stress that NBC No. 541, by allowing the withdrawn funds to be reissued to the "original program or project from which it was withdrawn," conceded that the PAPs from which the supposed savings were taken had not been completed, abandoned or discontinued.[148]

The OSG represents that "savings" were "appropriations balances," being the difference between the appropriation authorized by Congress and the actual amount allotted for the appropriation; that the definition of "savings" in the GAAs set only the parameters for determining when savings occurred; that it was still the President (as well as the other officers vested by the Constitution with the authority to augment) who ultimately determined when savings actually existed because savings could be determined only during the stage of budget execution; that the President must be given a wide discretion to accomplish his tasks; and that the withdrawn unobligated allotments were savings inasmuch as they were clearly "portions or balances of any programmed appropriation…free from any obligation or encumbrances which are (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized…"

We partially find for the petitioners.

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[146] *Rollo* (G.R. No. 209442), p. 7.

[147] *Rollo* (G.R. No. 209260), p. 17; (G.R. No. 209517), p. 19; (G.R. No. 209155), p. 11; (G.R. No. 209135), p. 13.

[148] *Rollo* (G.R. No. 209287), p. 6; (G.R. No. 209517), p. 19; (G.R. No. 209442), p. 23.

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In ascertaining the meaning of savings, certain principles should be borne in mind. The **first principle** is that Congress wields the power of the purse. Congress decides how the budget will be spent; what PAPs to fund; and the amounts of money to be spent for each PAP. The **second principle** is that the Executive, as the department of the Government tasked to enforce the laws, is expected to faithfully execute the GAA and to spend the budget in accordance with the provisions of the GAA.[149] The Executive is expected to faithfully implement the PAPs for which Congress allocated funds, and to limit the expenditures within the allocations, unless exigencies result to deficiencies for which augmentation is authorized, subject to the conditions provided by law. The **third principle** is that in making the President's power to augment operative under the GAA, Congress recognizes the need for flexibility in budget execution. In so doing, Congress diminishes its own power of the purse, for it delegates a fraction of its power to the Executive. But Congress does not thereby allow the Executive to override its authority over the purse as to let the Executive exceed its delegated authority. And the **fourth principle** is that savings should be actual. "Actual" denotes something that is real or substantial, or something that exists presently in fact, as opposed to something that is merely theoretical, possible, potential or hypothetical.[150]

The foregoing principles caution us to construe savings strictly against expanding the scope of the power to augment. It is then indubitable that the power to augment was to be used only when the purpose for which the funds had been allocated were already satisfied, or the need for such funds had ceased to exist, for only then could savings be properly realized. This interpretation prevents the Executive from unduly transgressing Congress' power of the purse.

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[149] Section 17, Article VII of the 1987 Constitution provides:

Section 17. The President shall have control of all the executive departments, bureaus, and offices. **He shall ensure that the laws be faithfully executed**.

[150] *Sanchez v. Commission on Audit*, G.R. No. 127545, April 23, 2008, 552 SCRA 471, 497.

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The definition of "savings" in the GAAs, particularly for 2011, 2012 and 2013, reflected this interpretation and made it operational, *viz*:

> Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) **still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized**; (ii) **from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay**; **and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost**.

The three instances listed in the GAAs' aforequoted definition were a sure indication that savings could be generated only upon the purpose of the appropriation being fulfilled, or upon the need for the appropriation being no longer existent.

The phrase "*free from any obligation or encumbrance*" in the definition of savings in the GAAs conveyed the notion that the appropriation was at that stage when the appropriation was already obligated and the appropriation was already released. This interpretation was reinforced by the enumeration of the three instances for savings to arise, which showed that the appropriation referred to had reached the agency level. It could not be otherwise, considering that only when the appropriation had reached the agency level could it be determined whether (a) the PAP for which the appropriation had been authorized was completed, finally discontinued, or abandoned; or (b) there were vacant positions and leaves of absence without pay; or (c) the required or planned targets, programs and services were realized at a lesser cost because of the implementation of measures resulting in improved systems and efficiencies.

The DBM declares that part of the savings brought under the DAP came from "pooling of unreleased appropriations such as unreleased Personnel Services appropriations which will lapse at the end of the year, unreleased appropriations of slow moving

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projects and discontinued projects per Zero-Based Budgeting findings."

The declaration of the DBM by itself does not state the clear legal basis for the treatment of unreleased or unalloted appropriations as savings. The fact alone that the appropriations are unreleased or unalloted is a mere description of the status of the items as unalloted or unreleased. They have not yet ripened into categories of items from which savings can be generated. Appropriations have been considered "released" if there has already been an allotment or authorization to incur obligations and disbursement authority. This means that the DBM has issued either an ABM (for those not needing clearance), or a SARO (for those needing clearance), and consequently an NCA, NCAA or CDC, as the case may be. Appropriations remain unreleased, for instance, because of noncompliance with documentary requirements (like the Special Budget Request), or simply because of the unavailability of funds. But the appropriations do not actually reach the agencies to which they were allocated under the GAAs, and have remained with the DBM technically speaking. *Ergo*, unreleased appropriations refer to appropriations with allotments but without disbursement authority.

For us to consider unreleased appropriations as savings, unless these met the statutory definition of savings, would seriously undercut the congressional power of the purse, because such appropriations had not even reached and been used by the agency concerned *vis-à-vis* the PAPs for which Congress had allocated them. However, if an agency has unfilled positions in its *plantilla* and did not receive an allotment and NCA for such vacancies, appropriations for such positions, although unreleased, may already constitute savings for that agency under the second instance.

Unobligated allotments, on the other hand, were encompassed by the first part of the definition of "savings" in the GAA, that is, as "portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance." But the

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first part of the definition was further qualified by the three enumerated instances of when savings would be realized. As such, unobligated allotments could not be indiscriminately declared as savings without first determining whether any of the three instances existed. This signified that the DBM's withdrawal of unobligated allotments had disregarded the definition of savings under the GAAs.

Justice Carpio has validly observed in his Separate Concurring Opinion that MOOE appropriations are deemed divided into twelve monthly allocations within the fiscal year; hence, savings could be generated monthly from the excess or unused MOOE appropriations other than the Mandatory Expenditures and Expenditures for Business-type Activities because of the physical impossibility to obligate and spend such funds as MOOE for a period that already lapsed. Following this observation, MOOE for future months are not savings and cannot be transferred.

The DBM's Memorandum for the President dated June 25, 2012 (which became the basis of NBC No. 541) stated:

> ON THE AUTHORITY TO WITHDRAW UNOBLIGATED ALLOTMENTS
>
> 5.0 The DBM, during the course of performance reviews conducted on the agencies' operations, particularly on the implementation of their projects/activities, including expenses incurred in undertaking the same, have been continuously calling the attention of all National Government agencies (NGAs) with low levels of obligations as of end of the first quarter to speed up the implementation of their programs and projects in the second quarter.
>
> 6.0 Said reminders were made in a series of consultation meetings with the concerned agencies and with call-up letters sent.
>
> 7.0 Despite said reminders and the availability of funds at the department's disposal, the level of financial performance of some departments registered below program, with the targeted obligations/disbursements for the first semester still not being met.

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8.0 In order to maximize the use of the available allotment, all unobligated balances as of June 30, 2012, both for continuing and current allotments shall be withdrawn and pooled to fund fast moving programs/projects.

9.0 It may be emphasized that **the allotments to be withdrawn will be based on the list of slow moving projects to be identified by the agencies and their catch up plans to be evaluated by the DBM**.

It is apparent from the foregoing text that the withdrawal of unobligated allotments would be based on whether the allotments pertained to slow-moving projects, or not. However, NBC No. 541 did not set in clear terms the criteria for the withdrawal of unobligated allotments, *viz*:

3.1. These guidelines shall cover the withdrawal of unobligated allotments as of June 30, 2012 of all national government agencies (NGAs) charged against FY 2011 Continuing Appropriation (R.A. No. 10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to:

3.1.1 Capital Outlays (CO);

3.1.2 Maintenance and Other Operating Expenses (MOOE) related to the implementation of programs and projects, as well as capitalized MOOE; and

3.1.3 Personal Services corresponding to unutilized pension benefits declared as savings by the agencies concerned based on their undated/validated list of pensioners.

A perusal of its various provisions reveals that NBC No. 541 targeted the "withdrawal of unobligated allotments of agencies with low levels of obligations"[151] "to fund priority and/or fast-moving programs/projects."[152] But the fact that the withdrawn

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[151] NBC No. 541 (Rationale); see also NBC No. 541 (5.3), which stated that, in case of failure to submit budget accountability reports, the DBM would compute/approximate the agency's obligation level as of June 30 to derive its unobligated allotments as of the same period.

[152] NBC No. 541 (2.1).

allotments could be "[r]eissued for the original programs and projects of the agencies/OUs concerned, from which the allotments were withdrawn"[153] supported the conclusion that the PAPs had not yet been finally discontinued or abandoned. Thus, the purpose for which the withdrawn funds had been appropriated was not yet fulfilled, or did not yet cease to exist, rendering the declaration of the funds as savings impossible.

Worse, NBC No. 541 immediately considered for withdrawal all released allotments in 2011 charged against the 2011 GAA that had remained unobligated based on the following considerations, to wit:

> 5.4.1 The departments/agencies' approved priority programs and projects are assumed to be implementation-ready and doable during the given fiscal year; and
>
> 5.4.2 The practice of having substantial carryover appropriations may imply that the agency has a slower-than-programmed implementation capacity **or** agency tends to implement projects within a two-year timeframe.

Such withdrawals pursuant to NBC No. 541, the circular that affected the unobligated allotments for continuing and current appropriations as of June 30, 2012, disregarded the 2-year period of availability of the appropriations for MOOE and capital outlay extended under Section 65, General Provisions of the 2011 GAA, *viz*:

> Section 65. Availability of Appropriations. — Appropriations for MOOE and capital outlays authorized in this Act shall be available **for release and obligation for the purpose specified**, and under the same special provisions applicable thereto, **for a period extending to one fiscal year after the end of the year in which such items were appropriated**: PROVIDED, That appropriations for MOOE and capital outlays under R.A. No. 9970 shall be made available up to the end of FY 2011: PROVIDED, FURTHER, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations.

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[153] NBC No. 541 (5.7.1).

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and Section 63 General Provisions of the 2012 GAA, *viz*:

> Section 63. Availability of Appropriations. — Appropriations for **MOOE and capital outlays** authorized in this Act shall be available **for release and obligation for the purpose specified**, and under the same special provisions applicable thereto, **for a period extending to one fiscal year after the end of the year in which such items were appropriated**: PROVIDED, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations, either in printed form or by way of electronic document.[154]

Thus, another alleged area of constitutional infirmity was that the DAP and its relevant issuances shortened the period of availability of the appropriations for MOOE and capital outlays.

Congress provided a one-year period of availability of the funds for all allotment classes in the 2013 GAA (R.A. No. 10352), to wit:

> Section 63. Availability of Appropriations.— All appropriations authorized in this Act shall be available for release and obligation for the purposes specified, and under the same special provisions applicable thereto, until the end of FY 2013: PROVIDED, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and House Committee on Appropriations, either in printed form or by way of electronic document.

Yet, in his memorandum for the President dated May 20, 2013, Sec. Abad sought omnibus authority to consolidate savings and

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[154] These GAA provisions are reflected, respectively, in NBC No. 528 (*Guidelines on the Release of funds for FY 2011*), thus:

> 3.9.1.2 Appropriations under FY 2011 GAA, R.A. 10147 shall be available for release and obligations **up to December 31, 2012** with the exception of PS which shall lapse at the end of 2011.

and NBC No. 535 (*Guidelines on the Release of funds for FY 2012*), thus:

> 3.9.1.2 Appropriations under CY 2012 GAA, R.A. 10155 shall be available for release and obligations **up to December 31, 2013** with the exception of PS which shall lapse at the end of 2012.

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unutilized balances to fund the DAP *on a quarterly basis, viz*:

> 7.0 If the level of financial performance of some department will register below program, even with the availability of funds at their disposal, the targeted obligations/disbursements for each quarter will not be met. It is important to note that these funds will lapse at the end of the fiscal year if these remain unobligated.
>
> 8.0 To maximize the use of the available allotment, all unobligated balances **at the end of every quarter**, both for continuing and current allotments shall be withdrawn and pooled to fund fast moving programs/projects.
>
> 9.0 It may be emphasized that the allotments to be withdrawn will be based on the list of slow moving projects to be identified by the agencies and their catch up plans to be evaluated by the DBM.

The validity period of the affected appropriations, already given the brief lifespan of one year, was further shortened to only a quarter of a year under the DBM's memorandum dated May 20, 2013.

The petitioners accuse the respondents of forcing the generation of savings in order to have a larger fund available for discretionary spending. They aver that the respondents, by withdrawing unobligated allotments in the middle of the fiscal year, in effect deprived funding for PAPs with existing appropriations under the GAAs.[155]

The respondents belie the accusation, insisting that the unobligated allotments were being withdrawn upon the instance of the implementing agencies based on their own assessment that they could not obligate those allotments pursuant to the President's directive for them to spend their appropriations as quickly as they could in order to ramp up the economy.[156]

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[155] *Rollo* (G.R. No. 209442), p. 23.

[156] *Rollo* (G.R. No. 209287), p. 1060, (Memorandum for the Respondents).

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We agree with the petitioners.

Contrary to the respondents' insistence, the withdrawals were upon the initiative of the DBM itself. The text of NBC No. 541 bears this out, to wit:

> 5.2 For the purpose of determining the amount of unobligated allotments that shall be withdrawn, all departments/agencies/ operating units (OUs) **shall submit** to DBM not later than **July 30, 2012**, the following budget accountability reports as of June 30, 2012;
>
> • Statement of Allotments, Obligation and Balances (AOB);
> • Financial Report of Operations (FRO); and
> • Physical Report of Operations.
>
> 5.3 In the absence of the June 30, 2012 reports cited under item 5.2 of this Circular, the agency's latest report available shall be used by DBM as basis for withdrawal of allotment. The DBM shall compute/approximate the agency's obligation level as of June 30 to derive its unobligated allotments as of same period. Example: If the March 31 SAOB or FRO reflects actual obligations of ₱800M then the June 30 obligation level shall approximate to ₱1,600 M (*i.e.*, ₱800 M x 2 quarters).

The petitioners assert that no law had authorized the withdrawal and transfer of unobligated allotments and the pooling of unreleased appropriations; and that the unbridled withdrawal of unobligated allotments and the retention of appropriated funds were akin to the impoundment of appropriations that could be allowed only in case of "unmanageable national government budget deficit" under the GAAs,[157] thus violating the provisions of the GAAs of 2011, 2012 and 2013 prohibiting the retention or deduction of allotments.[158]

In contrast, the respondents emphasize that NBC No. 541 adopted a spending, not saving, policy as a last-ditch effort of the Executive to push agencies into actually spending their appropriations; that such policy did not amount to an impoundment

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[157] *Rollo* (209287), pp. 18-19.

[158] *Rollo* (209442), pp. 21-22.

scheme, because impoundment referred to the decision of the Executive to refuse to spend funds for political or ideological reasons; and that the withdrawal of allotments under NBC No. 541 was made pursuant to Section 38, Chapter 5, Book VI of the *Administrative Code*, by which the President was granted the authority to suspend or otherwise stop further expenditure of funds allotted to any agency whenever in his judgment the public interest so required.

The assertions of the petitioners are upheld. The withdrawal and transfer of unobligated allotments and the pooling of unreleased appropriations were invalid for being bereft of legal support. Nonetheless, such withdrawal of unobligated allotments and the retention of appropriated funds cannot be considered as impoundment.

According to *Philippine Constitution Association v. Enriquez*:[159] "Impoundment refers to a refusal by the President, for whatever reason, to spend funds made available by Congress. It is the failure to spend or obligate budget authority of any type." Impoundment under the GAA is understood to mean the retention or deduction of appropriations. The 2011 GAA authorized impoundment only in case of unmanageable National Government budget deficit, to wit:

> Section 66. Prohibition Against Impoundment of Appropriations. No appropriations authorized under this Act shall be impounded through retention or deduction, unless in accordance with the rules and regulations to be issued by the DBM: PROVIDED, That all the funds appropriated for the purposes, programs, projects and activities authorized under this Act, except those covered under the Unprogrammed Fund, shall be released pursuant to Section 33 (3), Chapter 5, Book VI of E.O. No. 292.
>
> Section 67. Unmanageable National Government Budget Deficit. Retention or deduction of appropriations authorized in this Act shall be effected only in cases where there is an unmanageable national government budget deficit.

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[159] G.R. No. 113105, August 19, 1994, 235 SCRA 506, 545.

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> Unmanageable national government budget deficit as used in this section shall be construed to mean that (i) the actual national government budget deficit has exceeded the quarterly budget deficit targets consistent with the full-year target deficit as indicated in the FY 2011 Budget of Expenditures and Sources of Financing submitted by the President and approved by Congress pursuant to Section 22, Article VII of the Constitution, or (ii) there are clear economic indications of an impending occurrence of such condition, as determined by the Development Budget Coordinating Committee and approved by the President.

The 2012 and 2013 GAAs contained similar provisions.

The withdrawal of unobligated allotments under the DAP should not be regarded as impoundment because it entailed only the transfer of funds, not the retention or deduction of appropriations.

Nor could Section 68 of the 2011 GAA (and the similar provisions of the 2012 and 2013 GAAs) be applicable. They uniformly stated:

> Section 68. Prohibition Against Retention/Deduction of Allotment. Fund releases from appropriations provided in this Act shall be transmitted intact or in full to the office or agency concerned. No retention or deduction as reserves or overhead shall be made, except as authorized by law, or upon direction of the President of the Philippines. The COA shall ensure compliance with this provision to the extent that sub-allotments by agencies to their subordinate offices are in conformity with the release documents issued by the DBM.

The provision obviously pertained to the retention or deduction of allotments upon their release from the DBM, which was a different matter altogether. The Court should not expand the meaning of the provision by applying it to the withdrawal of allotments.

The respondents rely on Section 38, Chapter 5, Book VI of the *Administrative Code of 1987* to justify the withdrawal of unobligated allotments. But the provision authorized only the suspension or stoppage of further expenditures, not the withdrawal of unobligated allotments, to wit:

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> Section 38. *Suspension of Expenditure of Appropriations.* - Except as otherwise provided in the General Appropriations Act and whenever in his judgment the public interest so requires, the President, upon notice to the head of office concerned, is authorized to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees.

Moreover, the DBM did not suspend or stop further expenditures in accordance with Section 38, *supra*, but instead transferred the funds to other PAPs.

It is relevant to remind at this juncture that the balances of appropriations that remained unexpended at the end of the fiscal year were to be reverted to the General Fund. This was the mandate of Section 28, Chapter IV, Book VI of the *Administrative Code*, to wit:

> Section 28. *Reversion of Unexpended Balances of Appropriations, Continuing Appropriations.* - Unexpended balances of appropriations authorized in the General Appropriation Act shall revert to the unappropriated surplus of the General Fund at the end of the fiscal year and shall not thereafter be available for expenditure except by subsequent legislative enactment: Provided, that appropriations for capital outlays shall remain valid until fully spent or reverted: provided, further, that continuing appropriations for current operating expenditures may be specifically recommended and approved as such in support of projects whose effective implementation calls for multi-year expenditure commitments: provided, finally, that the President may authorize the use of savings realized by an agency during given year to meet non-recurring expenditures in a subsequent year.
>
> The balances of continuing appropriations shall be reviewed as part of the annual budget preparation process and the preparation process and the President may approve upon recommendation of the Secretary, the reversion of funds no longer needed in connection with the activities funded by said continuing appropriations.

The Executive could not circumvent this provision by declaring unreleased appropriations and unobligated allotments as savings prior to the end of the fiscal year.

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b.3. Third Requisite – No funds from savings could be transferred under the DAP to augment deficient items not provided in the GAA

The third requisite for a valid transfer of funds is that the purpose of the transfer should be "to augment an item in the general appropriations law for the respective offices." The term "augment" means to enlarge or increase in size, amount, or degree.[160]

The GAAs for 2011, 2012 and 2013 set as a condition for augmentation that the appropriation for the PAP item to be augmented must be deficient, to wit: –

> x x x Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation, or subsequent evaluation of needed resources, is **determined to be deficient**. In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.

In other words, an appropriation for any PAP must first be determined to be deficient before it could be augmented from savings. Note is taken of the fact that the 2013 GAA already made this quite clear, thus:

> Section 52. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to use savings in their respective appropriations **to augment actual deficiencies** incurred for the current year in any item of their respective appropriations.

As of 2013, a total of ₱144.4 billion worth of PAPs were implemented through the DAP.[161] Of this amount ₱82.5 billion were released in 2011 and ₱54.8 billion in 2012.[162] Sec. Abad

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[160] *Webster's Third New International Dictionary.*

[161] TSN, January 28, 2014, p. 12.

[162] DBM, "Sec. Abad: DAP used to buoy spending, not to buy votes," available at http://www.dbm.gov.ph/?p=7328 (last accessed March 28, 2014).

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has reported that 9% of the total DAP releases were applied to the PAPs identified by the legislators.[163]

The petitioners disagree, however, and insist that the DAP supported the following PAPs that had not been covered with appropriations in the respective GAAs, namely:

(i) ₱1.5 billion for the Cordillera People's Liberation Army;
(ii) ₱1.8 billion for the Moro National Liberation Front;
(iii) ₱700 million for assistance to Quezon Province;[164]
(iv) ₱50 million to ₱100 (million) each to certain senators;[165]
(v) ₱10 billion for the relocation of families living along dangerous zones under the National Housing Authority;
(vi) ₱10 billion and ₱20 billion equity infusion under the Bangko Sentral;
(vii) ₱5.4 billion landowners' compensation under the Department of Agrarian Reform;
(viii) ₱8.6 billion for the ARMM comprehensive peace and development program;
(ix) ₱6.5 billion augmentation of LGU internal revenue allotments
(x) ₱5 billion for crucial projects like tourism road construction under the Department of Tourism and the Department of Public Works and Highways;
(xi) ₱1.8 billion for the DAR-DPWH Tulay ng Pangulo;
(xii) ₱1.96 billion for the DOH-DPWH rehabilitation of regional health units; and
(xiii) ₱4 billion for the DepEd-PPP school infrastructure projects.[166]

In refutation, the OSG argues that a total of 116 DAP-financed PAPs were implemented, had appropriation covers, and could properly be accounted for because the funds were released following and pursuant to the standard practices adopted by the DBM.[167] In support of its argument, the OSG has submitted

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[163] DBM, "Sec. Abad: DAP used to buoy spending, not to buy votes," available at http://www.dbm.gov.ph/?p=7328 (last accessed March 28, 2014).

[164] *Rollo* (G.R. No. 209136), p. 18.

[165] *Rollo* (G.R. No. 209136), p. 18; (G.R. No. 209442), p. 13.

[166] *Rollo* (G.R. No. 209155), p. 9.

[167] *Rollo* (G.R. No. 209287), pp. 68-104; (Respondents' Consolidated Comment).

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seven evidence packets containing memoranda, SAROs, and other pertinent documents relative to the implementation and fund transfers under the DAP.[168]

Upon careful review of the documents contained in the **seven evidence packets**, we conclude that the "savings" pooled under the DAP were allocated to PAPs that were not covered by any appropriations in the pertinent GAAs.

For example, the SARO issued on December 22, 2011 for the highly-vaunted Disaster Risk, Exposure, Assessment and Mitigation (DREAM) project under the Department of Science and Technology (DOST) covered the amount of ₱1.6 Billion,[169] broken down as follows:

APPROPRIATION CODE	PARTICULARS	AMOUNT AUTHORIZED
A.03.A.01.a	Generation of new knowledge and technologies and research capability building in priority areas identified as strategic to National Development	
	Personnel Services	₱ 43,504,024
	Maintenance and Other Operating Expenses	1,164,517,589
	Capital Outlays	391,978,387
		₱1,600,000,000

the pertinent provision of the 2011 GAA (R.A. No. 10147) showed that Congress had appropriated only ₱537,910,000 for MOOE, but nothing for personnel services and capital outlays, to wit:

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[168] *Rollo* (G.R. No. 209287), pp. 524-922.

[169] SARO No. E-11-02253; *Rollo* (G.R. No. 209287), p. 628, (Respondents' 2nd Evidence Packet).

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	Personnel Services	Maintenance and Other Operating Expenditures	Capital Outlays	TOTAL
III. Operations				
a. Funding Assistance to Science and Technology Activities	177,406,000	1,887,365,000	49,090,000	2,113,861,000
1. Central Office		1,554,238,000		1,554,238,000
a. Generation of new knowledge and technologies and research capability building in priority areas identified as strategic to National Development		537,910,000		537,910,000

Aside from this transfer under the DAP to the DREAM project exceeding by almost 300% the appropriation by Congress for the program *Generation of new knowledge and technologies and research capability building in priority areas identified as strategic to National Development*, the Executive allotted funds for personnel services and capital outlays. The Executive thereby substituted its will to that of Congress. Worse, the Executive had not earlier proposed any amount for personnel services and capital outlays in the NEP that became the basis of the 2011 GAA.[170]

It is worth stressing in this connection that the failure of the GAAs to set aside any amounts for an expense category sufficiently indicated that Congress purposely did not see fit to fund, much less implement, the PAP concerned. This indication becomes clearer when even the President himself did not recommend in the NEP to fund the PAP. The consequence was that any PAP requiring expenditure that did not receive any appropriation under the GAAs could only be a new PAP, any funding for which would go beyond the authority laid down by Congress in enacting the GAAs. That happened in some instances under the DAP.

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[170] See FY2011 National Expenditure Program, p. 1186, available at http://www.dbm.gov.ph/wp-content/uploads/NEP2011/DOSTG-GAA.pdf.

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In relation to the December 22, 2011 SARO issued to the Philippine Council for Industry, Energy and Emerging Technology Research and Development (DOST-PCIEETRD)[171] for *Establishment of the Advanced Failure Analysis Laboratory*, which reads:

APPROPRIATION CODE	PARTICULARS	AMOUNT AUTHORIZED
A.02.a	Development, integration and coordination of the National Research System for Industry, Energy and Emerging Technology and Related Fields Capital Outlays	₱300,000,000

the appropriation code and the particulars appearing in the SARO did not correspond to the program specified in the GAA, whose particulars were *Research and Management Services* (inclusive of the following activities: (1) *Technological and Economic Assessment for Industry, Energy and Utilities*; (2) *Dissemination of Science and Technology Information*; and (3) *Management of PCIERD Information System for Industry, Energy and Utilities*. Even assuming that *Development, integration and coordination of the National Research System for Industry, Energy and Emerging Technology and Related Fields* – the particulars stated in the SARO – could fall under the broad program description of *Research and Management Services* – as appearing in the SARO, it would nonetheless remain a new activity by reason of its not being specifically stated in the GAA. As such, the DBM, sans legislative authorization, could not validly fund and implement such PAP under the DAP.

In defending the disbursements, however, the OSG contends that the Executive enjoyed sound discretion in implementing the budget given the generality in the language and the broad

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[171] SARO No. E-14-02254; *Rollo* (G.R. No. 209287), p. 630, (Respondents' 2nd Evidence Packet).

policy objectives identified under the GAAs;[172] and that the President enjoyed unlimited authority to spend the initial appropriations under his authority to declare and utilize savings,[173] and in keeping with his duty to faithfully execute the laws.

Although the OSG rightly contends that the Executive was authorized to spend in line with its mandate to faithfully execute the laws (which included the GAAs), such authority did not translate to unfettered discretion that allowed the President to substitute his own will for that of Congress. He was still required to remain faithful to the provisions of the GAAs, given that his power to spend pursuant to the GAAs was but a delegation to him from Congress. Verily, the power to spend the public wealth resided in Congress, not in the Executive.[174] Moreover, leaving the spending power of the Executive unrestricted would threaten to undo the principle of separation of powers.[175]

Congress acts as the guardian of the public treasury in faithful discharge of its power of the purse whenever it deliberates

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[172] *Rollo* (G.R. No. 209287), p. 27, (Respondents' Memorandum).

[173] TSN, January 28, 2014, p. 26.

[174] Section 29(1), Article VI of the 1987 Constitution provides that no money shall be paid out of the Treasury except in pursuance of an appropriation made by law.

[175] According to Allen and Miller. *The Constitutionality of Executive Spending Powers*, Harvard Law School, Federal Budget Policy Seminar, Briefing Paper No. 38, p. 16, available at http://www.law.harvard.edu/faculty/hjackson/ConstitutionalityOfExecutive_38.pdf (December 3, 2013):

> If the executive could spend under its own authority, "then the constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will. The '[L]egislative Powers' referred to in section 8 of Article I would then be shared by the President in his executive as well as in his legislative capacity" **The framers intended the powers to spend and the powers to tax to be "two sides of the same coin," and for good reason. Separating the two powers — or giving the President one without the other — might reduce accountability and result in excessive spending: the President would be able to spend and leave Congress to deal with the political repercussions of financing such spending through heightened tax rates**.

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and acts on the budget proposal submitted by the Executive.[176] Its power of the purse is touted as the very foundation of its institutional strength,[177] and underpins "all other legislative decisions and regulating the balance of influence between the legislative and executive branches of government."[178] Such enormous power encompasses the capacity to generate money for the Government, to appropriate public funds, and to spend the money.[179] Pertinently, when it exercises its power of the purse, Congress wields control by specifying the PAPs for which public money should be spent.

It is the President who proposes the budget but it is Congress that has the final say on matters of appropriations.[180] For this purpose, appropriation involves two governing principles, namely: (1) "a Principle of the Public Fisc, asserting that all monies received from whatever source by any part of the government are public funds;" and (2) "a Principle of Appropriations Control, prohibiting expenditure of any public money without legislative authorization."[181] To conform with the governing principles, the Executive cannot circumvent the prohibition by Congress of an expenditure for a PAP by resorting to either public or private funds.[182] Nor could the Executive transfer appropriated funds resulting in an increase in the budget for one PAP, for by so doing the appropriation for another PAP is necessarily

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[176] Bernas, *op. cit.*, at 811.

[177] Wander and Herbert (Ed.), Congressional Budgeting: Politics, Process and Power (1984), p. 3.

[178] Wander and Herbert (Ed.), Congressional Budgeting: Politics, Process and Power (1984), at 133.

[179] Bernas, *op. cit.*, at 812.

[180] *Philippine Constitution Association v. Enriquez*, *supra*, note 159, at 522.

[181] Stith, Kate, "Congress' Power of the Purse" (1988), Faculty Scholarship Series, Paper No. 1267, p. 1345, available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2282&context=fss_papers (last accessed March 29, 2014).

[182] *Id*. at 1377.

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decreased. The terms of both appropriations will thereby be violated.

b.4 Third Requisite – Cross-border augmentations from savings were prohibited by the Constitution

By providing that the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the Heads of the Constitutional Commissions may be authorized to augment any item in the GAA "for their respective offices," Section 25(5), *supra*, has delineated borders between their offices, such that funds appropriated for one office are prohibited from crossing over to another office even in the guise of augmentation of a deficient item or items. Thus, we call such transfers of funds **cross-border transfers** or **cross-border augmentations**.

To be sure, the phrase "respective offices" used in Section 25(5), *supra*, refers to the entire Executive, with respect to the President; the Senate, with respect to the Senate President; the House of Representatives, with respect to the Speaker; the Judiciary, with respect to the Chief Justice; the Constitutional Commissions, with respect to their respective Chairpersons.

Did any cross-border transfers or augmentations transpire?

During the oral arguments on January 28, 2014, Sec. Abad admitted making some cross-border augmentations, to wit:

JUSTICE BERSAMIN:

Alright, the whole time that you have been Secretary of Department of Budget and Management, did the Executive Department ever redirect any part of savings of the National Government under your control cross border to another department?

SECRETARY ABAD:

Well, in the Memos that we submitted to you, such an instance, Your Honor.

JUSTICE BERSAMIN:

Can you tell me two instances? I don't recall having read your material.

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SECRETARY ABAD:

Well, the first instance had to do with a request from the House of Representatives. They started building their e-library in 2010 and they had a budget for about 207 Million but they lack about 43 Million to complete its 250 Million requirements. Prior to that, the COA, in an audit observation informed the Speaker that they had to continue with that construction otherwise the whole building, as well as the equipments therein may suffer from serious deterioration. And at that time, since the budget of the House of Representatives was not enough to complete 250 Million, they wrote to the President requesting for an augmentation of that particular item, which was granted, Your Honor. The second instance in the Memos is a request from the Commission on Audit. At the time they were pushing very strongly the good governance programs of the government and therefore, part of that is a requirement to conduct audits as well as review financial reports of many agencies. And in the performance of that function, the Commission on Audit needed information technology equipment as well as hire consultants and litigators to help them with their audit work and for that they requested funds from the Executive and the President saw that it was important for the Commission to be provided with those IT equipments and litigators and consultants and the request was granted, Your Honor.

JUSTICE BERSAMIN:

These cross border examples, cross border augmentations were not supported by appropriations…

SECRETARY ABAD:

They were, we were augmenting existing items within their… (interrupted)

JUSTICE BERSAMIN:

No, appropriations before you augmented because this is a cross border and the tenor or text of the Constitution is quite clear as far as I am concerned. It says here, "The power to augment may only be made to increase any item in the General Appropriations Law for their respective offices." Did you not feel constricted by this provision?

SECRETARY ABAD:

Well, as the Constitution provides, the prohibition we felt was on the transfer of appropriations, Your Honor. What we thought

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we did was to transfer savings which was needed by the Commission to address deficiency in an existing item in both the Commission as well as in the House of Representatives; that's how we saw…(interrupted)

JUSTICE BERSAMIN:

So your position as Secretary of Budget is that you could do that?

SECRETARY ABAD:

In an extreme instances because…(interrupted)

JUSTICE BERSAMIN:

No, no, in all instances, extreme or not extreme, you could do that, that's your feeling.

SECRETARY ABAD:

Well, in that particular situation when the request was made by the Commission and the House of Representatives, we felt that we needed to respond because we felt…(interrupted).[183]

The records show, indeed, that funds amounting to ₱143,700,000.00 and ₱250,000,000.00 were transferred under the DAP respectively to the COA[184] and the House of Representatives.[185] Those transfers of funds, which constituted **cross-border augmentations** for being from the Executive to the COA and the House of Representatives, are graphed as follows:[186]

OFFICE	PURPOSE	DATE RELEASED	AMOUANT (In thousand pesos)	
			Reserve IImposed	Releases
Commission on Audit	IT Infrastructure Program and hiring of additional litigation experts	11/11/11		143,700
Congress – House of Representatives	Completion of the construction of the Legislative Library and Archives Building/ Congressional e-library	07/23/12	207,034 (Savings of HOR)	250,000

[183] TSN of January 28, 2014, pp. 42-45.

[184] *Rollo* (G.R. No. 209287), p. 883, (Respondents' 7th Evidence Packet).

[185] *Id*. at 562, (Respondents' 1st Evidence Packet).

[186] See the OSG's Compliance dated February 14, 2014, Annex B, p. 2.

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The respondents further stated in their memorandum that the President "made available" to the "Commission on Elections the savings of his department upon [its] request for funds…"[187] This was another instance of a **cross-border augmentation**.

The respondents justified all the **cross-border transfers** thusly:

> 99. The Constitution does not prevent the President from transferring savings of his department to another department upon the latter's request, provided it is the recipient department that uses such funds to augment its own appropriation. In such a case, the President merely gives the other department access to public funds but he cannot dictate how they shall be applied by that department whose fiscal autonomy is guaranteed by the Constitution.[188]

In the oral arguments held on February 18, 2014, Justice Vicente V. Mendoza, representing Congress, announced a different characterization of the cross-border transfers of funds as in the nature of "aid" instead of "augmentation," *viz*:

> HONORABLE MENDOZA:
>
> The cross-border transfers, if Your Honors please, is not an application of the DAP. What were these cross-border transfers? They are transfers of savings as defined in the various General Appropriations Act. So, that makes it similar to the DAP, the use of savings. There was a cross-border which appears to be in violation of Section 25, paragraph 5 of Article VI, in the sense that the border was crossed. **But never has it been claimed that the purpose was to augment a deficient item in another department of the government or agency of the government. The cross-border transfers, if Your Honors please, were in the nature of [aid] rather than augmentations. Here is a government entity separate and independent from the Executive Department solely in need of public funds. The President is there 24 hours a day, 7 days a week. He's in charge of the whole operation although six or seven heads of government offices are given the power to augment. Only the President stationed there and in effect in-charge and has the responsibility for the failure of any**

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[187] *Rollo* (G.R. No. 209287), p. 35, (Memorandum for the Respondents).

[188] *Id*.

part of the government. You have election, for one reason or another, the money is not enough to hold election. There would be chaos if no money is given as an aid, not to augment, but as an aid to a department like COA. The President is responsible in a way that the other heads, given the power to augment, are not. So, he cannot very well allow this, if Your Honor please.[189]

JUSTICE LEONEN:

May I move to another point, maybe just briefly. I am curious that the position now, I think, of government is that some transfers of savings is now considered to be, if I'm not mistaken, aid not augmentation. Am I correct in my hearing of your argument?

HONORABLE MENDOZA:

That's our submission, if Your Honor, please.

JUSTICE LEONEN:

May I know, Justice, where can we situate this in the text of the Constitution? Where do we actually derive the concepts that transfers of appropriation from one branch to the other or what happened in DAP can be considered as aid? What particular text in the Constitution can we situate this?

HONORABLE MENDOZA:

There is no particular provision or statutory provision for that matter, if Your Honor please. It is drawn from the fact that the Executive is the executive in-charge of the success of the government.

JUSTICE LEONEN:

So, the residual powers labelled in *Marcos v. Manglapus* would be the basis for this theory of the government?

HONORABLE MENDOZA:

Yes, if Your Honor, please.

JUSTICE LEONEN:

A while ago, Justice Carpio mentioned that the remedy is might be to go to Congress. That there are opportunities and there have been opportunities of the President to actually go to Congress and ask for supplemental budgets?

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[189] TSN of February 18, 2014, p. 32.

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HONORABLE MENDOZA:
If there is time to do that, I would say yes.

JUSTICE LEONEN:
So, the theory of aid rather than augmentation applies in extra-ordinary situation?

HONORABLE MENDOZA:
Very extra-ordinary situations.

JUSTICE LEONEN:
But Counsel, this would be new doctrine, in case?

HONORABLE MENDOZA:
Yes, if Your Honor please.[190]

Regardless of the variant characterizations of the **cross-border transfers** of funds, the plain text of Section 25(5), *supra*, disallowing cross-border transfers was disobeyed. Cross-border transfers, whether as augmentation, or as aid, were prohibited under Section 25(5), *supra*.

4.
Sourcing the DAP from unprogrammed funds despite the original revenue targets not having been exceeded was invalid

Funding under the DAP were also sourced from unprogrammed funds provided in the GAAs for 2011, 2012, and 2013. The respondents stress, however, that the unprogrammed funds were not brought under the DAP as savings, but as separate sources of funds; and that, consequently, the release and use of unprogrammed funds were not subject to the restrictions under Section 25(5), *supra*.

The documents contained in the Evidence Packets by the OSG have confirmed that the unprogrammed funds were treated as separate sources of funds. Even so, the release and use of the unprogrammed funds were still subject to restrictions, for, to start with, the GAAs precisely specified the instances when

[190] TSN of February 18, 2014, pp. 45-46.

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the unprogrammed funds could be released and the purposes for which they could be used.

The petitioners point out that a condition for the release of the unprogrammed funds was that the revenue collections must exceed revenue targets; and that the release of the unprogrammed funds was illegal because such condition was not met.[191]

The respondents disagree, holding that the release and use of the unprogrammed funds under the DAP were in accordance with the pertinent provisions of the GAAs. In particular, the DBM avers that the unprogrammed funds could be availed of when any of the following three instances occur, to wit: (1) the revenue collections exceeded the original revenue targets proposed in the BESFs submitted by the President to Congress; (2) new revenues were collected or realized from sources not originally considered in the BESFs; or (3) newly-approved loans for foreign-assisted projects were secured, or when conditions were triggered for other sources of funds, such as perfected loan agreements for foreign-assisted projects.[192] This view of the DBM was adopted by all the respondents in their Consolidated Comment.[193]

The BESFs for 2011, 2012 and 2013 uniformly defined "unprogrammed appropriations" as appropriations that provided standby authority to incur additional agency obligations for priority PAPs when revenue collections exceeded targets, and when additional foreign funds are generated.[194] Contrary to the DBM's averment that there were three instances when unprogrammed funds could be released, the BESFs envisioned only two instances. The third mentioned by the DBM – the collection of new revenues from sources not originally considered in the BESFs – was not

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[191] *Rollo* (G.R. No. 209287), p. 1027; (G.R. No. 209442), p. 8.

[192] Other References: A Brief on the Special Purpose Funds in the National Budget <http://www.dbm.gov.ph/?page_id=7366> (visited May 2, 2014).

[193] *Rollo* (G.R. No. 209287), p. 95.

[194] Glossary of Terms, BESF.

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included. This meant that the collection of additional revenues from new sources did not warrant the release of the unprogrammed funds. Hence, even if the revenues not considered in the BESFs were collected or generated, the basic condition that the revenue collections should exceed the revenue targets must still be complied with in order to justify the release of the unprogrammed funds.

The view that there were only two instances when the unprogrammed funds could be released was bolstered by the following texts of the Special Provisions of the 2011 and 2012 GAAs, to wit:

2011 GAA

1. Release of Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, including savings generated from programmed appropriations for the year: PROVIDED, **That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund**: PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds: PROVIDED, FURTHERMORE, That if there are savings generated from the programmed appropriations for the first two quarters of the year, the DBM may, subject to the approval of the President, release the pertinent appropriations under the Unprogrammed Fund corresponding to only fifty percent (50%) of the said savings net of revenue shortfall: PROVIDED, FINALLY, That the release of the balance of the total savings from programmed appropriations for the year shall be subject to fiscal programming and approval of the President.

2012 GAA

1. Release of the Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution:

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PROVIDED, **That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund**: PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.

As can be noted, the provisos in both provisions to the effect that "collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund" gave the authority to use such additional revenues for appropriations funded from the unprogrammed funds. They did not at all waive compliance with the basic requirement that revenue collections must still exceed the original revenue targets.

In contrast, the texts of the provisos with regard to additional revenues generated from newly-approved foreign loans were clear to the effect that the perfected loan agreement would be in itself "sufficient basis" for the issuance of a SARO to release the funds but only to the extent of the amount of the loan. In such instance, the revenue collections need not exceed the revenue targets to warrant the release of the loan proceeds, and the mere perfection of the loan agreement would suffice.

It can be inferred from the foregoing that under these provisions of the GAAs the additional revenues from sources not considered in the BESFs must be taken into account in determining if the revenue collections exceeded the revenue targets. The text of the relevant provision of the 2013 GAA, which was substantially similar to those of the GAAs for 2011 and 2012, already made this explicit, thus:

1. Release of the Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, **including collections arising from sources not considered in the aforesaid original revenue target**, as certified by the BTr: PROVIDED, That in case of newly approved loans for foreign-assisted projects,

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the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.

Consequently, that there were additional revenues from sources not considered in the revenue target would not be enough. The total revenue collections must still exceed the original revenue targets to justify the release of the unprogrammed funds (other than those from newly-approved foreign loans).

The present controversy on the unprogrammed funds was rooted in the correct interpretation of the phrase "*revenue collections should exceed the original revenue targets*." The petitioners take the phrase to mean that the total revenue collections must exceed the total revenue target stated in the BESF, but the respondents understand the phrase to refer only to the collections for each source of revenue as enumerated in the BESF, with the condition being deemed complied with once the revenue collections from a particular source already exceeded the stated target.

The BESF provided for the following sources of revenue, with the corresponding revenue target stated for each source of revenue, to wit:

TAX REVENUES

Taxes on Net Income and Profits
Taxes on Property
Taxes on Domestic Goods and Services
    General Sales, Turnover or VAT
    Selected Excises on Goods
Selected Taxes on Services
Taxes on the Use of Goods or Property or Permission to Perform Activities
Other Taxes
Taxes on International Trade and Transactions

NON-TAX REVENUES

Fees and Charges
BTR Income

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Government Services
Interest on NG Deposits
Interest on Advances to Government Corporations
Income from Investments
Interest on Bond Holdings
Guarantee Fee
Gain on Foreign Exchange
NG Income Collected by BTr
Dividends on Stocks
NG Share from Airport Terminal Fee
NG Share from PAGCOR Income
NG Share from MIAA Profit
Privatization
Foreign Grants

Thus, when the Court required the respondents to submit a certification from the Bureau of Treasury (BTr) to the effect that the revenue collections had exceeded the original revenue targets,[195] they complied by submitting certifications from the BTr and Department of Finance (DOF) pertaining to only one identified source of revenue – the dividends from the shares of stock held by the Government in government-owned and controlled corporations.

To justify the release of the unprogrammed funds for 2011, the OSG presented the certification dated March 4, 2011 issued by DOF Undersecretary Gil S. Beltran, as follows:

> This is to certify that under the Budget for Expenditures and Sources of Financing for 2011, the programmed income from dividends from shares of stock in government-owned and controlled corporations is 5.5 billion.
>
> This is to certify further that based on the records of the Bureau of Treasury, the National Government has recorded dividend income amounting to ₱23.8 billion as of 31 January 2011.[196]

For 2012, the OSG submitted the certification dated April 26, 2012 issued by National Treasurer Roberto B. Tan, *viz*:

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[195] TSN, January 28, 2014, p. 106.

[196] *Rollo* (G.R. No. 209155), pp. 327 & 337.

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This is to certify that the actual dividend collections remitted to the National Government for the period January to March 2012 amounted to ₱19.419 billion compared to the full year program of ₱5.5 billion for 2012.[197]

And, finally, for 2013, the OSG presented the certification dated July 3, 2013 issued by National Treasurer Rosalia V. De Leon, to wit:

This is to certify that the actual dividend collections remitted to the National Government for the period January to May 2013 amounted to ₱12.438 billion compared to the full year program of ₱10.01[198] billion for 2013.

Moreover, the National Government accounted for the sale of the right to build and operate the NAIA expressway amounting to ₱11.0 billion in June 2013.[199]

The certifications reflected that by collecting dividends amounting to ₱23.8 billion in 2011, ₱19.419 billion in 2012, and ₱12.438 billion in 2013 the BTr had exceeded only the ₱5.5 billion in target revenues in the form of dividends from stocks in each of 2011 and 2012, and only the ₱10 billion in target revenues in the form of dividends from stocks in 2013.

However, the requirement that revenue collections exceed the original revenue targets was to be construed in light of the purpose for which the unprogrammed funds were incorporated in the GAAs as standby appropriations to support additional expenditures for certain priority PAPs should the revenue collections exceed the resource targets assumed in the budget or when additional foreign project loan proceeds were realized. The unprogrammed funds were included in the GAAs to provide ready cover so as not to delay the implementation of the PAPs

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[197] *Id*. at 337 & 338.

[198] The target revenue for dividends on stocks of ₱5.5 billion was according to the BESF (2013), Table C.1 Revenue Program, by Source 2011-2013.

[199] *Rollo* (G.R. No. 209155), pp. 337 & 339.

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should new or additional revenue sources be realized during the year.[200] Given the tenor of the certifications, the unprogrammed funds were thus not yet supported by the corresponding resources.[201]

The revenue targets stated in the BESF were intended to address the funding requirements of the proposed programmed appropriations. In contrast, the unprogrammed funds, as standby appropriations, were to be released only when there were revenues in excess of what the programmed appropriations required. As such, the revenue targets should be considered as a whole, not individually; otherwise, we would be dealing with artificial revenue surpluses. The requirement that revenue collections must exceed revenue target should be understood to mean that the revenue collections must exceed the total of the revenue targets stated in the BESF. Moreover, to release the unprogrammed funds simply because there was an excess revenue as to one source of revenue would be an unsound fiscal management measure because it would disregard the budget plan and foster budget deficits, in contravention of the Government's surplus budget policy.[202]

We cannot, therefore, subscribe to the respondents' view.

5.
Equal protection, checks and balances, and public accountability challenges

The DAP is further challenged as violative of the Equal Protection Clause, the system of checks and balances, and the principle of public accountability.

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[200] Other References: A Brief on the Special Purpose Funds in the National Budget <http://www.dbm.gov.ph/?page_id=7366> (visited May 2, 2014).

[201] Basic Concepts in Budgeting <http://www.dbm.gov.ph/wp-content/uploads/2012/03/PGB-B1.pdf> (visited May 2, 2014).

[202] *Id*.

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With respect to the challenge against the DAP under the Equal Protection Clause,[203] Luna argues that the implementation of the DAP was "unfair as it [was] selective" because the funds released under the DAP was not made available to all the legislators, with some of them refusing to avail themselves of the DAP funds, and others being unaware of the availability of such funds. Thus, the DAP practised "undue favoritism" in favor of select legislators in contravention of the Equal Protection Clause.

Similarly, COURAGE contends that the DAP violated the Equal Protection Clause because no reasonable classification was used in distributing the funds under the DAP; and that the Senators who supposedly availed themselves of said funds were differently treated as to the amounts they respectively received.

Anent the petitioners' theory that the DAP violated the system of checks and balances, Luna submits that the grant of the funds under the DAP to some legislators forced their silence about the issues and anomalies surrounding the DAP. Meanwhile, Belgica stresses that the DAP, by allowing the legislators to identify PAPs, authorized them to take part in the implementation and execution of the GAAs, a function that exclusively belonged to the Executive; that such situation constituted undue and unjustified legislative encroachment in the functions of the Executive; and that the President arrogated unto himself the power of appropriation vested in Congress because NBC No. 541 authorized the use of the funds under the DAP for PAPs not considered in the 2012 budget.

Finally, the petitioners insist that the DAP was repugnant to the principle of public accountability enshrined in the Constitution,[204] because the legislators relinquished the power

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[203] The Equal Protection Clause is found in Section 1, Article III of the 1987 Constitution, to wit:

Section 1. No person shall be deprived of life, liberty, or property without due process of law, **nor shall any person be denied the equal protection of the laws**.

[204] Article XI of the 1987 Constitution states:

of appropriation to the Executive, and exhibited a reluctance to inquire into the legality of the DAP.

The OSG counters the challenges, stating that the supposed discrimination in the release of funds under the DAP could be raised only by the affected Members of Congress themselves, and if the challenge based on the violation of the Equal Protection Clause was really against the constitutionality of the DAP, the arguments of the petitioners should be directed to the entitlement of the legislators to the funds, not to the proposition that all of the legislators should have been given such entitlement.

The challenge based on the contravention of the Equal Protection Clause, which focuses on the release of funds under the DAP to legislators, lacks factual and legal basis. The allegations about Senators and Congressmen being unaware of the existence and implementation of the DAP, and about some of them having refused to accept such funds were unsupported with relevant data. Also, the claim that the Executive discriminated against some legislators on the ground alone of their receiving less than the others could not of itself warrant a finding of contravention of the Equal Protection Clause. The denial of equal protection of any law should be an issue to be raised only by parties who supposedly suffer it, and, in these cases, such parties would be the few legislators claimed to have been discriminated against in the releases of funds under the DAP. The reason for the requirement is that only such affected legislators could properly and fully bring to the fore when and how the denial of equal protection occurred, and explain why there was a denial in their situation. The requirement was not met here. Consequently, the Court was not put in the position to determine if there was a denial of equal protection. To have the Court do so despite the inadequacy of the showing of factual and legal support would be to compel it to speculate, and the outcome would not do justice to those for whose

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Section 1. Public office is a public trust. **Public officers and employees must, at all times, be accountable to the people**, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives.

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supposed benefit the claim of denial of equal protection has been made.

The argument that the release of funds under the DAP effectively stayed the hands of the legislators from conducting congressional inquiries into the legality and propriety of the DAP is speculative. That deficiency eliminated any need to consider and resolve the argument, for it is fundamental that speculation would not support any proper judicial determination of an issue simply because nothing concrete can thereby be gained. In order to sustain their constitutional challenges against official acts of the Government, the petitioners must discharge the basic burden of proving that the constitutional infirmities actually existed.[205] Simply put, guesswork and speculation cannot overcome the presumption of the constitutionality of the assailed executive act.

We do not need to discuss whether or not the DAP and its implementation through the various circulars and memoranda of the DBM transgressed the system of checks and balances in place in our constitutional system. Our earlier expositions on the DAP and its implementing issuances infringing the doctrine of separation of powers effectively addressed this particular concern.

Anent the principle of public accountability being transgressed because the adoption and implementation of the DAP constituted an assumption by the Executive of Congress' power of appropriation, we have already held that the DAP and its implementing issuances were policies and acts that the Executive could properly adopt and do in the execution of the GAAs to the extent that they sought to implement strategies to ramp up or accelerate the economy of the country.

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[205] See *Fariñas v. Executive Secretary*, G.R. No. 147387, December 10, 2003, 417 SCRA 503.

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6.
Doctrine of operative fact was applicable

After declaring the DAP and its implementing issuances constitutionally infirm, we must now deal with the consequences of the declaration.

Article 7 of the *Civil Code* provides:

> Article 7. Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary.
>
> **When the courts declared a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.**
>
> **Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws or the Constitution.**

A legislative or executive act that is declared void for being unconstitutional cannot give rise to any right or obligation.[206] However, the generality of the rule makes us ponder whether rigidly applying the rule may at times be impracticable or wasteful. Should we not recognize the need to except from the rigid application of the rule the instances in which the void law or executive act produced an almost irreversible result?

The need is answered by the doctrine of operative fact. The doctrine, definitely not a novel one, has been exhaustively explained in *De Agbayani v. Philippine National Bank*:[207]

> The decision now on appeal reflects the orthodox view that an unconstitutional act, for that matter an executive order or a municipal ordinance likewise suffering from that infirmity, cannot be the source of any legal rights or duties. Nor can it justify any official act taken under it. Its repugnancy to the fundamental law once judicially declared results in its being to all intents and purposes a mere scrap

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[206] *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, October 8, 2013.

[207] G.R. No. L-23127, April 29, 1971, 38 SCRA 429, 434-435.

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of paper. As the new Civil Code puts it: 'When the courts declare a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.' Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws of the Constitution. It is understandable why it should be so, the Constitution being supreme and paramount. Any legislative or executive act contrary to its terms cannot survive.

Such a view has support in logic and possesses the merit of simplicity. It may not however be sufficiently realistic. It does not admit of doubt that prior to the declaration of nullity such challenged legislative or executive act must have been in force and had to be complied with. This is so as until after the judiciary, in an appropriate case, declares its invalidity, it is entitled to obedience and respect. Parties may have acted under it and may have changed their positions. What could be more fitting than that in a subsequent litigation regard be had to what has been done while such legislative or executive act was in operation and presumed to be valid in all respects. It is now accepted as a doctrine that prior to its being nullified, its existence as a fact must be reckoned with. This is merely to reflect awareness that precisely because the judiciary is the governmental organ which has the final say on whether or not a legislative or executive measure is valid, a period of time may have elapsed before it can exercise the power of judicial review that may lead to a declaration of nullity. It would be to deprive the law of its quality of fairness and justice then, if there be no recognition of what had transpired prior to such adjudication.

In the language of an American Supreme Court decision: 'The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, with respect to particular relations, individual and corporate, and particular conduct, private and official.'"

The doctrine of operative fact recognizes the existence of the law or executive act prior to the determination of its unconstitutionality as an operative fact that produced consequences that cannot always be erased, ignored or disregarded. In short, it nullifies the void law or executive act

but sustains its effects. It provides an exception to the general rule that a void or unconstitutional law produces no effect.[208] But its use must be subjected to great scrutiny and circumspection, and it cannot be invoked to validate an unconstitutional law or executive act, but is resorted to only as a matter of equity and fair play.[209] It applies only to cases where extraordinary circumstances exist, and only when the extraordinary circumstances have met the stringent conditions that will permit its application.

We find the doctrine of operative fact applicable to the adoption and implementation of the DAP. Its application to the DAP proceeds from equity and fair play. The consequences resulting from the DAP and its related issuances could not be ignored or could no longer be undone.

To be clear, the doctrine of operative fact extends to a void or unconstitutional executive act. The term *executive act* is broad enough to include any and all acts of the Executive, including those that are quasi-legislative and quasi-judicial in nature. The Court held so in *Hacienda Luisita, Inc. v. Presidential Agrarian Reform Council*:[210]

> Nonetheless, the minority is of the persistent view that the applicability of the operative fact doctrine should be limited to statutes and rules and regulations issued by the executive department that are accorded the same status as that of a statute or those which are quasi-legislative in nature. Thus, the minority concludes that the phrase 'executive act' used in the case of *De Agbayani v. Philippine National Bank* refers only to acts, orders, and rules and regulations that have the force and effect of law. The minority also made mention of the Concurring Opinion of Justice Enrique Fernando in *Municipality of Malabang v. Benito*, where it was supposedly made explicit that the operative fact doctrine applies to executive acts, which are ultimately quasi-legislative in nature.

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[208] *Yap v. Thenamaris Ship's Management*, G.R. No. 179532, May 30 2011, 649 SCRA 369, 381.

[209] *League of Cities Philippines v. COMELEC*, G.R. No. 176951, August 24, 2010, 628 SCRA 819, 833.

[210] G.R. No. 171101, November 22, 2011, 660 SCRA 525, 545-548.

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We disagree. For one, neither the *De Agbayani* case nor the *Municipality of Malabang* case elaborates what 'executive act' mean. Moreover, while orders, rules and regulations issued by the President or the executive branch have fixed definitions and meaning in the Administrative Code and jurisprudence, the phrase 'executive act' does not have such specific definition under existing laws. It should be noted that in the cases cited by the minority, nowhere can it be found that the term 'executive act' is confined to the foregoing. **Contrarily, the term 'executive act' is broad enough to encompass decisions of administrative bodies and agencies under the executive department which are subsequently revoked by the agency in question or nullified by the Court.**

A case in point is the concurrent appointment of Magdangal B. Elma (Elma) as Chairman of the Presidential Commission on Good Government (PCGG) and as Chief Presidential Legal Counsel (CPLC) which was declared unconstitutional by this Court in *Public Interest Center, Inc. v. Elma*. In said case, this Court ruled that the concurrent appointment of Elma to these offices is in violation of Section 7, par. 2, Article IX-B of the 1987 Constitution, since these are incompatible offices. Notably, the appointment of Elma as Chairman of the PCGG and as CPLC is, without a question, an executive act. Prior to the declaration of unconstitutionality of the said executive act, certain acts or transactions were made in good faith and in reliance of the appointment of Elma which cannot just be set aside or invalidated by its subsequent invalidation.

In *Tan v. Barrios*, this Court, in applying the operative fact doctrine, held that despite the invalidity of the jurisdiction of the military courts over civilians, certain operative facts must be acknowledged to have existed so as not to trample upon the rights of the accused therein. Relevant thereto, in *Olaguer v. Military Commission No. 34*, it was ruled that 'military tribunals pertain to the Executive Department of the Government and are simply instrumentalities of the executive power, provided by the legislature for the President as Commander-in-Chief to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.'

Evidently, the operative fact doctrine is not confined to statutes and rules and regulations issued by the executive department that are accorded the same status as that of a statute or those which are quasi-legislative in nature.

Even assuming that *De Agbayani* initially applied the operative fact doctrine only to executive issuances like orders and rules and regulations, said principle can nonetheless be applied, by analogy, to decisions made by the President or the agencies under the executive department. This doctrine, in the interest of justice and equity, can be applied liberally and in a broad sense to encompass said decisions of the executive branch. In keeping with the demands of equity, the Court can apply the operative fact doctrine to acts and consequences that resulted from the reliance not only on a law or executive act which is quasi-legislative in nature but also on decisions or orders of the executive branch which were later nullified. This Court is not unmindful that such acts and consequences must be recognized in the higher interest of justice, equity and fairness.

Significantly, a decision made by the President or the administrative agencies has to be complied with because it has the force and effect of law, springing from the powers of the President under the Constitution and existing laws. Prior to the nullification or recall of said decision, it may have produced acts and consequences in conformity to and in reliance of said decision, which must be respected. It is on this score that the operative fact doctrine should be applied to acts and consequences that resulted from the implementation of the PARC Resolution approving the SDP of HLI. (Bold underscoring supplied for emphasis)

In *Commissioner of Internal Revenue v. San Roque Power Corporation*,[211] the Court likewise declared that "for the operative fact doctrine to apply, there must be a '**legislative or executive measure,**' meaning a **law or executive issuance.**" Thus, the Court opined there that the operative fact doctrine did not apply to a mere administrative practice of the Bureau of Internal Revenue, *viz*:

Under Section 246, taxpayers may rely upon a rule or ruling issued by the Commissioner from the time the rule or ruling is issued up to its reversal by the Commissioner or this Court. The reversal is not given retroactive effect. This, in essence, is the doctrine of operative fact. **There must, however, be a rule or ruling issued by the Commissioner that is relied upon by the taxpayer in good faith. A mere administrative practice, not formalized into a rule or ruling, will not suffice because such a mere administrative practice may not be uniformly and**

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[211] *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, October 8, 2013.

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consistently applied. An administrative practice, if not formalized as a rule or ruling, will not be known to the general public and can be availed of only by those with informal contacts with the government agency.

It is clear from the foregoing that the adoption and the implementation of the DAP and its related issuances were executive acts. The DAP itself, as a policy, transcended a merely administrative practice especially after the Executive, through the DBM, implemented it by issuing various memoranda and circulars. The pooling of savings pursuant to the DAP from the allotments made available to the different agencies and departments was consistently applied throughout the entire Executive. With the Executive, through the DBM, being in charge of the third phase of the budget cycle – the budget execution phase, the President could legitimately adopt a policy like the DAP by virtue of his primary responsibility as the Chief Executive of directing the national economy towards growth and development. This is simply because savings could and should be determined only during the budget execution phase.

As already mentioned, the implementation of the DAP resulted into the use of savings pooled by the Executive to finance the PAPs that were not covered in the GAA, or that did not have proper appropriation covers, as well as to augment items pertaining to other departments of the Government in clear violation of the Constitution. To declare the implementation of the DAP unconstitutional without recognizing that its prior implementation constituted an operative fact that produced consequences in the real as well as juristic worlds of the Government and the Nation is to be impractical and unfair. Unless the doctrine is held to apply, the Executive as the disburser and the offices under it and elsewhere as the recipients could be required to undo everything that they had implemented in good faith under the DAP. That scenario would be enormously burdensome for the Government. Equity alleviates such burden.

The other side of the coin is that it has been adequately shown as to be beyond debate that the implementation of the DAP yielded undeniably positive results that enhanced the

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economic welfare of the country. To count the positive results may be impossible, but the visible ones, like public infrastructure, could easily include roads, bridges, homes for the homeless, hospitals, classrooms and the like. Not to apply the doctrine of operative fact to the DAP could literally cause the physical undoing of such worthy results by destruction, and would result in most undesirable wastefulness.

Nonetheless, as Justice Brion has pointed out during the deliberations, the doctrine of operative fact does not always apply, and is not always the consequence of every declaration of constitutional invalidity. It can be invoked only in situations where the nullification of the effects of what used to be a valid law would result in inequity and injustice;[212] but where no such result would ensue, the general rule that an unconstitutional law is totally ineffective should apply.

In that context, as Justice Brion has clarified, the doctrine of operative fact can apply only to the PAPs that can no longer be undone, and whose beneficiaries relied in good faith on the validity of the DAP, but cannot apply to the authors, proponents and implementors of the DAP, unless there are concrete findings of good faith in their favor by the proper tribunals determining their criminal, civil, administrative and other liabilities.

WHEREFORE, the Court **PARTIALLY GRANTS** the petitions for *certiorari* and prohibition; and **DECLARES** the following acts and practices under the Disbursement Acceleration Program, National Budget Circular No. 541 and related executive issuances **UNCONSTITUTIONAL** for being in violation of Section 25(5), Article VI of the 1987 Constitution and the doctrine of separation of powers, namely:

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[212] This view is similarly held by Justice Leonen, who asserts in his separate opinion that the application of the doctrine of operative fact should be limited to situations (a) where there has been a reliance in good faith in the acts involved, or (b) where in equity the difficulties that will be borne by the public far outweigh the rigid application of the legal nullity of an act.

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(a) The withdrawal of unobligated allotments from the implementing agencies, and the declaration of the withdrawn unobligated allotments and unreleased appropriations as savings prior to the end of the fiscal year and without complying with the statutory definition of savings contained in the General Appropriations Acts;

(b) The cross-border transfers of the savings of the Executive to augment the appropriations of other offices outside the Executive; and

(c) The funding of projects, activities and programs that were not covered by any appropriation in the General Appropriations Act.

The Court further **DECLARES VOID** the use of unprogrammed funds despite the absence of a certification by the National Treasurer that the revenue collections exceeded the revenue targets for non-compliance with the conditions provided in the relevant General Appropriations Acts.

SO ORDERED.

Sereno, C.J., Peralta, Villarama, Jr., Perez, Mendoza, and *Reyes, JJ.,* concur.

Carpio, Brion, Perlas-Bernabe, and *Leonen, JJ.,* see separate opinions.

Velasco, Jr., joins the concurring and dissenting opinion of *J. del Castillo.*

Del Castillo, J., see concurring and dissenting opinion.

Leonardo-de Castro, J., no part.

SEPARATE OPINION

CARPIO, *J.*:

These consolidated special civil actions for *certiorari* and prohibition[1] filed by petitioners as taxpayers and Filipino citizens challenge the constitutionality of the Disbursement Acceleration Program (DAP) implemented by the President, through the Department of Budget and Management (DBM), which issued National Budget Circular No. 541 (NBC 541) dated 18 July 2012.

Petitioners assail the constitutionality of the DAP, as well as NBC 541, mainly on the following grounds: (1) there is no law passed for the creation of the DAP, contrary to Section 29, Article VI of the Constitution; and (2) the realignment of funds which are not savings, the augmentation of non-existing items in the General Appropriations Act (GAA), and the transfer of appropriations from the Executive branch to the Legislative branch and constitutional bodies all violate Section 25(5), Article VI of the Constitution.

On the other hand, respondents, represented by the Office of the Solicitor General (OSG), argue that no law is required for the creation of the DAP, which is a fund management system, and the DAP is a constitutional exercise of the President's power to augment or realign.

Petitioners have standing to sue. The well-settled rule is that taxpayers, like petitioners here, have the standing to assail the illegal or unconstitutional disbursement of public funds.[2] Citizens, like petitioners here, also have standing to sue on matters of

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[1] G.R. No. 209135 is a petition for prohibition, *mandamus*, and *certiorari* under Rule 65 with a petition for declaratory relief under Rule 63, while the rest are petitions for *certiorari* and/or prohibition.

[2] *Pascual v. Secretary of Public Works*, 110 Phil. 331 (1960)*; Information Technology Foundation of the Phils. v. COMELEC*, 464 Phil. 173 (2004). See also *Kilosbayan, Inc. v. Morato*, 320 Phil. 171 (1995), J. Vicente V. Mendoza, *ponente*.

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transcendental importance to the public which must be decided early,[3] like the transfer of appropriations from one branch of government to another or to the constitutional bodies, since such transfer may impair the finely crafted system of checks-and-balances enshrined in the Constitution.

The DBM admits that under the DAP the total actual disbursements are as follows:

Table 3. (Figures in Thousand Pesos)[4]

DAP DISBURSEMENTS	AMOUNT
10-Oct-11	67,722,280
21-Dec-11	11,004,157
27-Jun-12	21,564,587
05-Sep-12	2,731,080
21-Dec-12	33,082,603
17-Jun-13	4,658,215
26-Sep-13	8,489,600
TOTAL	149,252,523

Under NBC 541, the sources of DAP funds are as follows:

3.1 These guidelines shall cover the withdrawal of unobligated allotments as of June 30, 2012 of all national government agencies (NGAs) charged against FY 2011 Continuing Appropriation (R.A. No. 10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to:

3.1.1 Capital Outlays (CO);

3.1.2 Maintenance and Other Operating Expenses (MOOE) related to the implementation of programs and projects, as well as capitalized MOOE; and

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[3] *Chavez v. PCGG*, 360 Phil. 133 (1998); *Chavez v. Public Estates Authority*, 433 Phil. 506 (2002); *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, 589 Phil. 387 (2008).

[4] *Rollo* (G.R. No. 209135), p. 175. Consolidated Comment, p. 20.

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> 3.1.3 Personal Services corresponding to unutilized pension benefits declared as savings by the agencies concerned based on their updated/validated list of pensioners. (Boldfacing supplied)

In its Consolidated Comment,[5] the OSG declared that another source of DAP funds is the Unprogrammed Fund in the GAAs, which the DBM claimed can be tapped when government has windfall revenue collections, *e.g.*, dividends from government-owned and controlled corporations and proceeds from the sale of government assets.[6]

I.

Presidential power to augment or realign

The OSG justifies the disbursements under DAP as an exercise of the President's power to augment or realign under the Constitution. The OSG has represented that the President approved the DAP disbursements and NBC 541.[7] Section 25(5), Article VI of the Constitution provides:

> No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court,

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[5] *Id.* at 163. Consolidated Comment, p. 8.

[6] *Rollo* (G.R. No. 209260), p. 29 (Annex "B" of the Petition in G.R. No. 209260), citing the DBM website which contained the Constitutional and Legal Bases of the DAP (http://www.dbm.gov.ph/?page_id=7364).

[7] Memorandum for the Respondents, p. 25; TSN, 28 January 2014, p. 17. Solicitor General Jardeleza stated during the Oral Arguments:

> **SOLICITOR GENERAL JARDELEZA:**
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> x x x x x x x x x
>
> Presidential approval, again, did the President authorize the disbursements under the DAP? Yes, Your Honors, kindly look at the 1stst Evidence Packet. It contains all the seven (7) memoranda corresponding to the various disbursements under the DAP. The memoranda list in detail all 116 and I repeat 1-1-6 identified and approved DAP projects. They show that every augmentation exercise was approved and duly signed by the President himself. **This should lay to rest any suggestion that DAP was carried out without Presidential approval**. (Boldfacing supplied)

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and the heads of Constitutional Commissions may, by law, be authorized **to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.** (Boldfacing supplied)

Section 25(5) prohibits the transfer of funds appropriated in the general appropriations law for one branch of government to another branch, or for one branch to other constitutional bodies, and *vice versa*. However, "**savings**" from appropriations for a branch or constitutional body may be transferred to another item of appropriation **within the same** branch or constitutional body, as set forth in the second clause of the same Section 25(5).

In *Nazareth v. Villar*,[8] this Court stated:

> In the funding of current activities, projects, and programs, the general rule should still be that the budgetary amount contained in the appropriations bill is the extent Congress will determine as sufficient for the budgetary allocation for the proponent agency. The only exception is found in Section 25 (5), Article VI of the Constitution, by which the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions are authorized to transfer appropriations to augment any item in the GAA for their respective offices from the savings in other items of their respective appropriations. x x x.

Section 25(5) mandates that no law shall be passed authorizing any transfer of appropriations. However, there can be, when authorized by law, augmentation of existing items in the GAA from savings in other items in the GAA within the same branch or constitutional body. This power to augment or realign is lodged in the President with respect to the Executive branch, the Senate President for the Senate, the Speaker for the House of Representatives, the Chief Justice for the Judiciary, and the Heads of the constitutional bodies for their respective entities. The 2011, 2012 and 2013 GAAs all have provisions authorizing

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[8] G.R. No. 188635, 29 January 2013, 689 SCRA 385, 402-403.

the President, the Senate President, the House Speaker, the Chief Justice and the Heads of the constitutional bodies to realign savings within their respective entities.

Section 25(5) expressly states that what can be realigned are "**savings**" from an item in the GAA. To repeat, only savings can be realigned. Unless there are savings, there can be no realignment.

Savings can augment any ***existing*** item in the GAA, provided such item is in the "respective appropriations" of the same branch or constitutional body. As defined in Section 60, Section 54, and Section 53 of the General Provisions of the 2011, 2012 and 2013 GAAs, respectively, "augmentation implies the **existence x x x of a program, activity, or project with an appropriation**, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. **In no case shall a non-existent program, activity, or project, be funded by augmentation from savings** x x x."

In *Demetria v. Alba*,[9] this Court construed an identical provision in the 1973 Constitution:[10]

> The prohibition to transfer an appropriation for one item to another was explicit and categorical under the 1973 Constitution. However, to afford the heads of the different branches of the government and those of the constitutional commissions considerable flexibility in the use of public funds and resources, the Constitution allowed the enactment of a law authorizing the transfer of funds for the purpose of augmenting an item from savings in another item in the appropriation of the government branch or constitutional body concerned. The leeway granted was thus limited. **The purpose and conditions for which funds may be transferred were specified, *i.e.***

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[9] 232 Phil. 222, 229 (1987).

[10] Article VIII, Sec. 16[5]. No law shall be passed authorizing any transfer of appropriations, however, the President, the Prime Minister, the Speaker, the Chief Justice of the Supreme Court, and the heads of constitutional commissions may by law be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

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transfer may be allowed for the purpose of augmenting an item and *such transfer may be made only if there are savings from another item in the appropriation of the government branch or constitutional body.* (Boldfacing and italicization supplied)

In *Sanchez v. Commission on Audit*,[11] this Court stressed the twin requisites for a valid transfer of appropriation, namely, (1) the existence of savings and (2) the existence in the appropriations law of the item, project or activity to be augmented from savings, thus:

> Clearly, there are two essential requisites in order that a transfer of appropriation with the corresponding funds may legally be effected. **First, there must be savings in the programmed appropriation of the transferring agency. Second, there must be an existing item, project or activity with an appropriation in the receiving agency to which the savings will be transferred.**
>
> **Actual savings is a *sine qua non* to a valid transfer of funds from one government agency to another.** The word "actual" denotes that something is real or substantial, or exists presently in fact as opposed to something which is merely theoretical, possible, potential or hypothetical. (Boldfacing supplied)

In *Nazareth v. Villar*,[12] this Court reiterated the requisites for a valid transfer of appropriation as mandated in Section 25(5), Article VI of the Constitution, thus:

> Under these provisions, the authority granted to the President was subject to **two essential requisites** in order that a transfer of appropriation from the agency's savings would be validly effected. **The first required that there must be savings from the authorized appropriation of the agency. The second demanded that there must be an existing item, project, activity, purpose or object of expenditure with an appropriation to which the savings would be transferred for augmentation purposes only.** (Boldfacing supplied)

Section 25(5), Article VI of the Constitution likewise mandates that savings from one branch, like the Executive, cannot be

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[11] 575 Phil. 428, 454 (2008).

[12] *Supra* note 8, at 405.

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transferred to another branch, like the Legislature or Judiciary, or to a constitutional body, and *vice versa*. In fact, funds appropriated for the Executive branch, whether savings or not, cannot be transferred to the Legislature or Judiciary, or to the constitutional bodies, and *vice versa*. Hence, funds from the Executive branch, **whether savings or not**, cannot be transferred to the Commission on Elections, the House of Representatives, or the Commission on Audit.

In *Pichay v. Office of the Deputy Executive Secretary*,[13] this Court declared that the President is constitutionally authorized to augment any item in the GAA appropriated for the Executive branch using savings from other items of appropriations for the Executive branch, thus:

> x x x [To] x x x enable the President to run the affairs of the executive department, he is likewise given constitutional authority to augment any item in the General Appropriations Law **using the savings** in other items of the appropriation for his office. In fact, he is explicitly allowed by law to transfer any fund appropriated for the different departments, bureaus, offices and agencies of the Executive Department which is included in the General Appropriations Act, to any program, project or activity of any department, bureau or office included in the General Appropriations Act or approved after its enactment. (Boldfacing supplied)

In *PHILCONSA v. Enriquez*,[14] this Court emphasized that only the President is authorized to use savings to augment items for the Executive branch, thus:

> Under Section 25(5) no law shall be passed authorizing any transfer of appropriations, and under Section 29(1), no money shall be paid out of the Treasury except in pursuance of an appropriation made by law. **While Section 25(5) allows as an exception the realignment of savings to augment items in the general appropriations law for the executive branch, such right must and can be exercised only by the President pursuant to a specific law.** (Boldfacing supplied)

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[13] G.R. No. 196425, 24 July 2012, 677 SCRA 408, 424.

[14] G.R. Nos. 113105, *et al.*, 19 August 1994, 235 SCRA 506, 544.

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II.
Definition and Sources of Savings

One of the requisites for a valid transfer of appropriations under Section 25(5), Article VI of the Constitution is that there must be **savings** from the appropriations of the same branch or constitutional body. For the President to exercise his realignment power, there must first be savings from other items in the GAA appropriated to the departments, bureaus and offices of the Executive branch, and such savings can be realigned only to existing items of appropriations within the Executive branch.

When do funds for an item in the GAA become "savings"? Section 60, Section 54, and Section 53 of the 2011, 2012, and 2013 GAAs,[15] respectively, **uniformly** define the term "savings" as follows:

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[15] The 2011 and 2012 GAAs contain similar provisions:

2011 GAA

Sec. 60. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.

x x x x x x x x x

2012 GAA

Sec. 54. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the

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> Savings refer to **portions or balances of any programmed appropriation** in this Act free **from any obligation or encumbrance** which are:
>
> (i) still available **after the completion or final discontinuance or abandonment** of the work, activity or purpose for which the appropriation is authorized;
>
> (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and
>
> (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost. (Boldfacing supplied)

The same definition of "savings" is also found in the GAAs from 2003 to 2010. Prior to 2010, the definition of savings in the GAAs did not contain item (iii) above.

As clearly defined in the 2011, 2012 and 2013 GAAs, savings must be portions or balances from any programmed appropriation "**free from any obligation or encumbrance"**, which means there is no contract obligating payment out of such portions or balances of the appropriation. Otherwise, if there is already a contract obligating payment out of such portions or balances, the funds are not free from any obligation, and thus can not constitute savings.

Section 60, Section 54, and Section 53 of the General Provisions of the 2011, 2012 and 2013 GAAs, respectively, contemplate three sources of savings. *First*, there can be savings when there are funds still available after completion of the work, activity or project, which means there are **excess funds remaining after the work, activity or project is completed**. There can also be savings when there is *final* discontinuance of the work, activity or project, which means there are **funds remaining after the work, activity, or project was started but finally discontinued before completion**. To illustrate, a bridge, half-way completed, is destroyed by floods or earthquake,

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and thus finally discontinued because the remaining funds are not sufficient to rebuild and complete the bridge. Here, the funds are obligated but the remaining funds are de-obligated upon **final** discontinuance of the project. On the other hand, abandonment means the work, activity or project can no longer be started because of lack of time to obligate the funds, resulting in the physical impossibility to obligate the funds. This happens when a month or two before the end of the fiscal year, there is no more time to conduct a public bidding to obligate the funds. Here, the **funds are not, and can no longer be, obligated and thus will constitute savings**. Final discontinuance or abandonment excludes suspension or temporary stoppage of the work, activity, or project.

Second, there can be savings when there is unpaid compensation and related costs pertaining to vacant positions. *Third*, there can be savings from cost-cutting measures adopted by government agencies.

Section 38, Chapter 5, Book VI of the Administrative Code of 1987[16] authorizes the President, whenever in his judgment public interest requires, "to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the GAA." For example, if there are reported anomalies in the construction of a bridge, the President can order the suspension of expenditures of funds until an investigation is completed. This is only a **temporary, and not**

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implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.

x x x x x x x x x

[16] SECTION 38. Suspension of Expenditure of Appropriations.—Except as otherwise provided in the General Appropriations Act and whenever in his judgment the public interest so requires, the President, upon notice to the head of office concerned, is authorized to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees.

a final, discontinuance of the work and thus **the funds remain obligated**. Section 38 does not speak of savings or realignment. Section 38 does not refer to work, activity, or project that is finally discontinued, which is required for the existence of savings. Section 38 refers only to **suspension** of expenditure of funds, not final discontinuance of work, activity or project. Under Section 38, the funds remain obligated and thus cannot constitute savings.

Funds which are temporarily not spent under Section 38 are not savings that can be realigned by the President. Only funds that qualify as savings under Section 60, Section 54, and Section 53 of the 2011, 2012 and 2013 GAAs, respectively, can be realigned. If the work, activity or program is merely suspended, there are no savings because there is no final discontinuance of the work, activity or project. If the work, activity or project is only suspended, the funds remain obligated. If the President "stops further expenditure of funds," it means that the work, activity or project has already started and the funds have already been obligated. Any discontinuance must be final before the unused funds are de-obligated to constitute savings that can be realigned.

To repeat, funds pertaining to work, activity or project merely suspended or temporarily discontinued by the President are not savings. Only funds remaining after the work, activity or project has been **finally** discontinued or abandoned will constitute savings that can be realigned by the President to augment existing items in the appropriations for the Executive branch.

III.
The DAP, NBC 541 and Other Executive Issuances Related to DAP

A. Unobligated Allotments are not Savings.

In the present cases, the DAP and NBC 541 directed the **"withdrawal of unobligated allotments of agencies with low level of obligations as of June 30, 2012."** The funds withdrawn are then used to augment or fund "priority and/or

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fast moving programs/projects of the national government." NBC 541 states:

> For the first five months of 2012, the National Government has not met its spending targets. **In order to accelerate spending and sustain the fiscal targets during the year, expenditure measures have to be implemented to optimize the utilization of available resources.**
>
> x x x x x x x x x
>
> In line with this, **the President,** per directive dated June 27, 2012, **authorized the withdrawal of unobligated allotments of agencies with low levels of obligations as of June 30, 2012**, both for continuing and current allotments. This measure will allow the maximum utilization of available allotments to fund and undertake other priority expenditures of the national government. (Boldfacing supplied)

Except for MOOE for previous months, unobligated allotments of agencies with low levels of obligations are not savings that can be realigned by the President to fund priority projects of the government. In the **middle** of the fiscal year, unobligated appropriations, other than MOOE for previous months, do not automatically become savings for the reason alone that the agency has a low level of obligations. As of 30 June of a fiscal year, there are still six months left to obligate the funds. Six months are more than enough time to conduct public bidding to obligate the funds. As of 30 June 2012, there could have been no final abandonment of any work, activity or project because there was still ample time to obligate the funds.

However, if the funds are not yet obligated by the end of November, and the item involves a construction project, then it may be physically impossible to obligate the funds because a public bidding will take at least a month. In such a case, there can be a final abandonment of the work, activity or project.

In the case of appropriations for MOOE, the same are deemed divided into twelve monthly allocations. Excess or unused MOOE appropriations for the month, other than Mandatory Expenditures and Expenditures for Business-type Activities, are deemed

savings **after the end of the month because there is a physical impossibility to obligate and spend such funds as MOOE for a period that has already lapsed.** Such excess or unused MOOE can be realigned by the President to augment any existing item of appropriation for the Executive branch. MOOE for future months are not savings and cannot be realigned.

The OSG claims that the DAP, which is used "to fund priority and/or fast moving programs/projects of the national government," is an exercise of the President's power to realign savings. However, except for MOOE for previous months, the DAP funds used for realignment under NBC 541 do not qualify as savings under Section 60, Section 54 and Section 53 of the General Provisions of the 2011, 2012, and 2013 GAAs, respectively. Unobligated allotments for Capital Outlay, as well as MOOE for July to December 2012, of agencies with low level of obligations as of 30 June 2012 are definitely not savings. The low level of obligations by agencies as of 30 June 2012 is not one of the conditions for the existence of savings under the General Provisions of the 2011, 2012, and 2013 GAAs. To repeat, unobligated allotments withdrawn under NBC 541, except for excess or unused MOOE from January to June 2012, do not constitute savings and cannot be realigned by the President. The withdrawal of such unobligated allotments of agencies with low level of obligations as of 30 June 2012 for purposes of realignment violates Section 25(5), Article VI of the Constitution. Thus, such withdrawal and realignment of funds under NBC 541 are unconstitutional.

The OSG's contention that the President may discontinue or abandon a project as early as the third month of the fiscal year under Section 38, Chapter 5, Book VI of the Administrative Code is clearly misplaced. Section 38 refers only to suspension or stoppage of expenditure of obligated funds, and not to final discontinuance or abandonment of work, activity or project.

Under NBC 541, appropriations for Capital Outlays are sources of DAP funds. However, the withdrawal of unobligated allotments for Capital Outlays as of 30 June 2012 violates the General Provisions of the 2011 and 2012 GAAs.

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Section 65 of the General Provisions of the 2011 GAA provides:

> Sec. 65. Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act shall be available for release and obligation for the purpose specified, and under the same special provisions applicable thereto, **for a period extending to one fiscal year after the end of the year in which such items were appropriated:** PROVIDED, That appropriations for MOOE and capital outlays under R.A. No. 9970 shall be made available up to the end of FY 2011: PROVIDED, FURTHER, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations. (Boldfacing supplied)

The same provision was substantially reproduced in the 2012 GAA, as follows:

> Sec. 63. Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act shall be available for release and obligation for the purpose specified, and under the same special provisions applicable thereto, **for a period extending to one fiscal year after the end of the year in which such items were appropriated:** PROVIDED, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations, either in printed form or by way of electronic document. (Boldfacing supplied)

The life span of Capital Outlays under the 2011 and 2012 GAAs is **two** years. This two-year life span is prescribed by law and cannot be shortened by the President, unless the appropriations qualify as "savings" under the GAA. Capital Outlay can be obligated anytime during the two-year period, provided there is sufficient time to conduct a public bidding. Capital Outlay cannot be declared as savings unless there is no more time for such public bidding to obligate the allotment. MOOE, however, can qualify as savings once the appropriations for the month are deemed abandoned by the lapse of the month without the appropriations being fully spent. The only exceptions are (1) Mandatory Expenditures which under the GAA can be declared as savings only in the last quarter of the fiscal year; and (2) Expenditures for Business-type Activities, which under

the GAA cannot be realigned.[17] The MOOE is deemed divided into twelve monthly allocations. The lapse of the month without the allocation for that month being fully spent is an abandonment of the allocation, qualifying the unspent allocations as savings.

Appropriations for **future** MOOE cannot be declared as savings. However, NBC 541 allows the withdrawal and realignment of unobligated allotments for MOOE and Capital Outlays as of 30 June 2012. NBC 541 cannot validly declare Capital Outlays as savings in the middle of the fiscal year, long before the end of the two-year period when such funds can still be obligated. This two-year period applies to unused or excess MOOE of previous months in that such unused or excess MOOE can be realigned within the two-year period. However, the declaration of savings and realignment of MOOE for July to December 2012 is contrary to the GAA and the Constitution since MOOE appropriations for a future period are not savings.

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[17] Section 57 of the 2013 GAA provides:

Sec. 57. Mandatory Expenditures. The amounts programmed for petroleum, oil and lubricants as well as for water, illumination and power services, telephone and other communication services, and rent requirements shall be disbursed solely for such items of expenditures: PROVIDED, That any savings generated from these items after taking into consideration the agency's full year requirements may be realigned only in the last quarter and subject to the rules on the realignment of savings provided in Section 54 hereof.

Use of funds in violation of this section shall be void, and shall subject the erring officials and employees to disciplinary actions in accordance with Section 43, Chapter 5 and Section 80, Chapter 7, Book VI of E.O. No. 292, and to appropriate criminal action under existing penal laws.

Section 58 of the 2013 GAA provides:

Sec. 58. Expenditures for Business-Type Activities. Appropriations for the procurement of supplies and materials intended to be utilized in the conduct of business-type activities shall be disbursed solely for such business-type activity and shall not be realigned to any other expenditure item.

Use of funds in violation of this section shall be void, and shall subject the erring officials and employees to disciplinary actions in accordance with Section 43, Chapter 5 and Section 80, Chapter 7, Book VI of E.O. No. 292, and to appropriate criminal action under existing penal laws.

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Thus, the realignment under the DAP of unobligated Capital Outlays as of 30 June 2012, as well as the realignment of MOOE allocated for the second semester of the fiscal year, violates Section 25(5), Article VI of the Constitution, and is thus unconstitutional.

B. Unlawful release of the Unprogrammed Fund

One of the sources of the DAP is the Unprogrammed Fund under the GAA. The provisions on the Unprogrammed Fund under the 2011, 2012 and 2013 GAAs state:

2011 GAA (Article XLV):

Special Provision(s)

1. Release of Fund. The amounts authorized herein shall be released **only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress** pursuant to Section 22, Article VII of the Constitution, including savings generated from programmed appropriations for the year x x x. (Boldfacing supplied)

2012 GAA (Article XLVI)

1. Release of Fund. The amounts authorized herein shall be released **only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress** pursuant to Section 22, Article VII of the Constitution x x x. (Boldfacing supplied)

2013 GAA (Article XLV)

1. Release of Fund. The amounts authorized herein shall be released **only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress** pursuant to Section 22, Article VII of the Constitution, including collections arising from sources not considered in the aforesaid original revenue targets, **as certified by the Btr**. x x x. (Boldfacing supplied)

It is clear from these provisions that as a condition for the release of the Unprogrammed Fund, **the revenue collections, as certified by the National Treasurer, must exceed the original revenue targets submitted by the President to Congress**. During the Oral Arguments on 28 January 2014,

the OSG assured the Court that the revenue collections exceeded the original revenue targets for fiscal years 2011, 2012 and 2013. I required the Solicitor General to submit to the Court a certified true copy of the certifications by the Bureau of Treasury that the revenue collections exceeded the original revenue targets for 2011, 2012 and 2013. The transcript of the Oral Arguments showed the following exchange:

JUSTICE CARPIO:
Counsel, you stated in your comment that one of the sources of DAP is the Unprogrammed Fund, is that correct?

SOLGEN JARDELEZA:
Yes, Your Honor.

JUSTICE CARPIO:
Now x x x the Unprogrammed Fund can be used only if the revenue collections exceed the original revenue targets as certified by the Bureau of Treasury, correct?

SOLGEN JARDELEZA:
Yes, Your Honor.

JUSTICE CARPIO:
In other words, the Bureau of Treasury certified to DBM that the revenue collections exceeded the original revenue target, correct?

SOLGEN JARDELEZA:
Yes, Your Honor.

JUSTICE CARPIO:
Can you please submit to the Court a certified true copy of the Certification by the Bureau of Treasury for 2011, 2012 and 2013?

SOLGEN JARDELEZA:
We will, Your Honor.

JUSTICE CARPIO:
Because as far as I know, I may be wrong, we have never collected more than the revenue target. Our collections have always fallen short of the original revenue target. The GAA says "original" because they were trying to move this target by reducing it. x x x I do not know of an instance where our government collected more than the original revenue target. But anyway, please submit that certificate.

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SOLGEN JARDELEZA:

We will, Your Honor.[18] (Boldfacing supplied)

In a Resolution dated 28 January 2014, the Court directed the OSG to submit the certifications by the Bureau of Treasury in accordance with the undertaking of the Solicitor General during the Oral Arguments.

On 14 February 2014, the OSG submitted its Compliance attaching the following certifications:

1. Certification dated 11 February 2014 signed by Rosalia V. De Leon, Treasurer of the Philippines. It states:

This is to certify that based on the records of the Bureau of Treasury, the amounts indicated in the attached Certification of the Department of Finance dated 04 March 2011 pertaining to the programmed dividend income from shares of stocks in government-owned or controlled corporations for 2011 and to the recorded dividend income as of 31 January 2011 are accurate.

This Certification is issued this 11th day of February 2014.

2. Certification dated 4 March 2011 signed by Gil S. Beltran, Undersecretary of the Department of Finance which states:

This is to certify that under the Budget for Expenditures and Sources of Financing for 2011, the programmed income from dividends from shares of stock in government-owned and controlled corporations is ₱5.5 billion.

This is to certify further that based on the records of the Bureau of Treasury, the National Government has recorded dividend income amounting of ₱23.8 billion as of 31 January 2011.

3. Certification dated 26 April 2012 signed by Roberto B. Tan, Treasurer of the Philippines. It states:

This is to certify that the actual dividend collections remitted to the National Government for the period January to March 2012 amounted to ₱19.419 billion compared to the full year program of ₱5.5 billion for 2012.

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[18] TSN, 28 January 2014, p. 106.

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4. Certification dated 3 July 2013 signed by Rosalia V. De Leon, Treasurer of the Philippines which states:

This is to certify that the actual dividend collections remitted to the National Government for the period January to May 2013 amounted to ₱12.438 billion compared to the full year program of ₱10.0 billion for 2013.

Moreover, the National Government accounted for the sale of right to build and operate the NAIA expressway amounting to ₱11.0 billion in June 2013.

The certifications submitted by the OSG are not compliant with the Court's directive. **The certifications do not state that the revenue collections exceeded the original revenue targets as submitted by the President to Congress**. Except for the ₱11 billion NAIA expressway revenue, the certifications refer solely to dividend collections, and programmed (target) dividends, and not to excess revenue collections as against revenue targets. Programmed dividends from government-owned or controlled corporations constitute **only a portion** of the original revenue targets, and dividend collections from government-owned or controlled corporations constitute **only a portion** of the total revenue collections. The Revenue Program by source of the government is divided into "**Tax Revenues**" and "**Non-Tax Revenues.**" Dividends from government-owned and controlled corporations constitute *only one of the items* in "Non-Tax Revenues."[19] Non-Tax Revenues consist of all income collected by the Bureau of Treasury, privatization proceeds and foreign grants. The bulk of these revenues comes from the BTr's income, which consists among others of dividends on stocks and the interest on the national government's deposits. Non-Tax Revenues include all windfall income. Any income not falling under Tax Revenues necessarily falls under Non-Tax Revenues. **For 2011, the total programmed (target) Tax and Non-Tax Revenues of the government was ₱1.359 trillion, for 2012 ₱1.560 trillion, and for 2013 ₱1.780 trillion.**[20]

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[19] *See* Table C.1 (Revenue Program, By Source, 2011-2013) of 2013 Budget of Expenditures and Sources of Financing (http://www.dbm.gov.ph/wp-content/uploads/BESF/BESF2013/C1.pdf)

[20] *Id*.

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Clearly, the DBM has failed to show that the express condition in the 2011, 2012 and 2013 GAAs for the use of the Unprogrammed Fund has been met. Thus, disbursements from the Unprogrammed Fund in 2011, 2012, and 2013 under the DAP and NBC 541 were in violation of the law.

At any rate, dividends from government-owned or controlled corporations are not savings but revenues, like tax collections, that go directly to the National Treasury in accordance with Section 44, Chapter 5, Book VI of the Administrative Code of 1987, which states:

> SEC. 44. *Accrual of Income to Unappropriated Surplus of the General Fund.* - Unless otherwise specifically provided by law, all income accruing to the departments, offices and agencies by virtue of the provisions of existing laws, orders and regulations shall be deposited in the National Treasury or in the duly authorized depository of the Government and shall accrue to the unappropriated surplus of the General Fund of the Government: Provided, That amounts received in trust and from business-type activities of government may be separately recorded and disbursed in accordance with such rules and regulations as may be determined by the Permanent Committee created under this Act.

Dividends form part of the unappropriated surplus of the General Fund of the Government and they cannot be spent unless there is an appropriations law. The same rule applies to windfall revenue collections which also form part of the unappropriated General Fund. Proceeds from sales of government assets are not savings but revenues that also go directly to the National Treasury. Savings can only come from the three sources expressly specified in Section 60, Section 54 and Section 53 of the General Provisions of the 2011, 2012, and 2013 GAAs, respectively.

Besides, by definition savings can never come from the Unprogrammed Fund since the term "savings" is defined under the GAAs as "portions or balances of any **programmed** appropriation." The Unprogrammed Fund can only be used for the specific purpose prescribed in the GAAs, and only if

the revenue collections exceed the original revenue targets for the fiscal year.

Section 3 of the General Provisions of the 2011, 2012 and 2013 GAAs uniformly provide that all fees, charges, assessments, and other receipts or revenues collected by departments, bureaus, offices or agencies in the exercise of their functions shall be deposited with the National Treasury as **income of the General Fund** in accordance with the provisions of the Administrative Code and Section 65 of Presidential Decree No. 1445.[21] Such income are not savings as understood and defined in the GAAs.

To repeat, dividend collections of government-owned and controlled corporations do not qualify as savings as defined in Section 60, Section 54, and Section 53 of the General Provisions of the 2011, 2012, and 2013 GAAs, respectively. Dividend collections are revenues that go directly to the National Treasury. The Unprogrammed Fund under the 2011, 2012, and 2013 GAAs can only be released when revenue collections exceed the original revenue targets. The DBM miserably failed to show any excess revenue collections during the period the DAP was implemented. Therefore, in violation of the GAAs, the Executive used the Unprogrammed Fund without complying with the express condition for its use – that revenue collections of the government exceed the original revenue target, as certified by the Bureau of Treasury. In other words, the use of the Unprogrammed Fund under the DAP is unlawful, and hence, void.[22]

C. DAP violates the constitutional prohibition on "cross-border" transfers.

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[21] Section 65, PD No. 1445 states:

SECTION 65. Accrual of Income to Unappropriated Surplus of the General Fund. – (1) Unless otherwise specifically provided by law, all income accruing to the agencies by virtue of the provisions of law, orders and regulations shall be deposited in the National Treasury or in any duly authorized government depository, and shall accrue to the unappropriated surplus of the General Fund of the Government.

[22] Article 5 of the Civil Code states:

Acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.

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Section 25(5), Article VI of the Constitution mandates that savings from one government branch cannot be transferred to another branch, and *vice versa*. This constitutional prohibition on cross-border transfers is clear: the President, the Senate President, the Speaker of the House of Representatives, the Chief Justice, and the Heads of constitutional bodies are only authorized to augment any item in the general appropriations law for their **respective offices** from **savings** in other items of their **respective appropriations**.

Contrary to Section 25(5), Article VI of the Constitution, there were instances of cross-border transfers under the DAP. In the interpellation by Justice Bersamin during the Oral Arguments, Budget Secretary Florencio Abad **expressly admitted** the existence of cross-border transfers of funds, thus:

JUSTICE BERSAMIN:

Alright, the whole time that you have been Secretary of Department of Budget and Management, **did the Executive Department ever redirect any part of savings of the National Government under your control cross border to another department?**

SECRETARY ABAD:

Well, in the Memos that we submitted to you, such an instance, Your Honor.

JUSTICE BERSAMIN:

Can you tell me two instances? I don't recall having read yet your material.

SECRETARY ABAD:

Well, **the first instance had to do with a request from the House of Representatives.** They started building their e-library in 2010 and they had a budget for about 207 Million but they lack about 43 Million to complete its 250 Million requirement. Prior to that, the COA, in an audit observation informed the Speaker that they had to continue with that construction otherwise the whole building, as well as the equipments therein may suffer from serious deterioration. And at that time, since the budget of the House of Representatives was not enough to complete 250 Million, they wrote to the President requesting for an augmentation of that particular item, which was granted, Your Honor. **The second instance in the Memos is a request from the**

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Commission on Audit. At the time they were pushing very strongly the good governance programs of the government and therefore, part of that is a requirement to conduct audits as well as review financial reports of many agencies. And in the performance of that function, the Commission on Audit needed information technology equipment as well as hire consultants and litigators to help them with their audit work and for that they requested funds from the Executive and the President saw that it was important for the Commission to be provided with those IT equipments and litigators and consultants and the request was granted, Your Honor.[23] (Boldfacing supplied)

Attached to DBM Secretary Abad's Memorandum for the President, dated 12 October 2011, is a Project List for FY 2011 DAP. The last item on the list, item no. 22, is for **PDAF augmentation in the amount of ₱6.5 billion**, also listed as various other local projects.[24] The relevant portion of the Project List attached to the Memorandum for the President dated 12 October 2011, **which the President approved on the same date,** reads:

PROJECT LIST: FY 2011 DISBURSEMENT ACCELERATION PLAN

Agency	Amount (in Million Php)	Details
x x x		
22. **PDAF** (Various other local projects)	**6,500**	**For augmentation**

The Memorandum for the President dated 12 December 2011 also stated that savings that correspond to completed or discontinued projects may be pooled, among others, to augment deficiencies under the Special Purpose Funds, *e.g.*, **PDAF**, Calamity Fund, and Contingent Fund.[25] The same provision to

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[23] TSN, 28 January 2014, pp. 42-43.

[24] *Rollo* (G.R. No. 209287), p. 536.

[25] *Rollo* (G.R. No. 209287), p. 537. The relevant portions of the Memorandum for the President dated 12 December 2011 state:

x x x x x x x x x

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augment deficiencies under the Special Purpose Funds, including **PDAF**, was included in the Memorandum for the President dated 25 June 2012.[26]

The Special Provisions on the PDAF in the 2013 GAA allowed "the *individual* House member and *individual* Senator to identify the project to be funded and implemented, which identification is made after the enactment into law of the GAA."[27] In addition, Special Provision No. 4 allowed the realignment of funds, and not savings, conditioned on the concurrence of the individual legislator to the request for realignment. In the landmark case of *Belgica v. Executive Secretary,*[28] the Court struck down these Special Provisions on the PDAF primarily for violating the principle of separation of powers.

Clearly, the transfer of DAP funds, in the amount of ₱6.5 billion, to augment the unconstitutional PDAF is also unconstitutional because it is an augmentation of an unconstitutional appropriation.

The OSG contends that "[t]he Constitution does not prevent the President from transferring savings of his department to another department upon the latter's request, provided it is the recipient department that uses such funds to augment its own

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BACKGROUND

1.0 The DBM, during the course of performance reviews conducted on the agencies' operations, particularly on the implementation of their projects/activities, including expenses incurred in undertaking the same, have (sic) identified savings out of the 2011 General Appropriations Act. Said savings correspond to completed or discontinued projects under certain departments/agencies which may be pooled, for the following:

x x x x x x x x x

1.3 to provide for deficiencies under the Special Purpose Funds, *e.g.*, PDAF, Calamity Fund, Contingent Fund

x x x x x x x x x

[26] *Rollo* (G.R. No. 209287), p. 550.

[27] Carpio, *J.*, Concurring Opinion, *Belgica v. Executive Secretary,* G.R. Nos. 208566, 208493, and 209251, 19 November 2013.

[28] G.R. Nos. 208566, 208493, and 209251, 19 November 2013.

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appropriation." **The OSG further submits that "[i]n relation to the DAP, the President made available to the Commission on Audit, House of Representatives, and the Commission on Elections the savings of his department upon their request for funds, but it was those institutions that applied such savings to augment items in their respective appropriations."**[29] Thus, the OSG **expressly admits** that the Executive transferred appropriations for the Executive branch to the COA, the House of Representatives and the COMELEC but justifies such transfers to the recipients' request for funds to augment items in the recipients' respective appropriations.

The OSG's arguments are obviously untenable. Nowhere in the language of the Constitution is such a misplaced interpretation allowed. Section 25(5), Article VI of the Constitution does not distinguish whether the recipient entity requested or did not request additional funds from the Executive branch to augment items in the recipient entity's appropriations. The Constitution clearly prohibits the President from transferring appropriations of the Executive branch to other branches of government or to constitutional bodies *for whatever reason.* **Congress cannot even enact a law allowing such transfers.** "The *fundamental policy of the Constitution* is against transfer of appropriations even by law, since this 'juggling' of funds is often a rich source of unbridled patronage, abuse and interminable corruption."[30] Moreover, the "cross-border" transfer of appropriations to constitutional bodies impairs the independence of the constitutional bodies.

IV.
No Presidential power of impoundment

The GAA is a law and the President is sworn to uphold and faithfully implement the law. If Congress in the GAA directs

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[29] *Rollo* (G.R. No. 209287), p. 1072. Memorandum for the Respondents, p. 35.

[30] Padilla, *J.*, Dissenting Opinion, *Gonzales v. Macaraig, Jr.*, G.R. No. 87636, 19 November 1990, 191 SCRA 452, 484.

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the expenditure of public funds for a specific purpose, the President has no power to cancel, prevent or permanently stop such expenditure once the GAA becomes a law. **What the President can do is to veto that specific item in the GAA**. But once the President approves the GAA or allows it to lapse into law, the President can no longer veto or cancel any item in the GAA or impound the disbursement of funds authorized to be spent in the GAA.

Section 38, Chapter V, Book VI of the Administrative Code of 1987 allows the President "**to suspend or otherwise stop further expenditure**" of appropriated funds but this must be for a legitimate purpose, like when there are anomalies in the implementation of a project or in the disbursement of funds. Section 38 cannot be read to authorize the President **to permanently stop** so as to cancel the implementation of a project in the GAA because the President has no power to amend the law, and the GAA is a law. Section 38 cannot also be read to authorize the President to impound the disbursement of funds for projects approved in the GAA because the President has no power to impound funds approved by Congress.

The President can suspend or stop further expenditure of appropriated funds only after the appropriated funds have become **obligated**, that is, a contract has been signed for the implementation of the project. The reason for the suspension or stoppage must be legitimate, as when there are anomalies. The President has the Executive power to see to it that the GAA is faithfully implemented, without anomalies. However, despite the order to suspend or stop further expenditure of funds the appropriated funds remain obligated until the contract is rescinded. As long as the appropriated funds are still obligated, the funds cannot constitute savings because "savings" as defined in the GAA, must come from appropriations that are "**free from any obligation or encumbrance.**"

Section 38 cannot be used by the President **to stop *permanently* the expenditure of *unobligated* appropriated funds** because that would amount to a Presidential power to

impound funds appropriated in the GAA. **The President has no power to impound unobligated funds in the GAA** for two reasons: *first*, the GAA once it becomes law cannot be amended by the President and an impoundment of unobligated funds is an amendment of the GAA since it **reverses the will of Congress**; *second*, the Constitution gives the President the power to prevent unsound appropriations by Congress **only through his line item veto power**, which he can exercise only when the GAA is submitted to him by Congress for approval.

Once the President approves the GAA or allows it to lapse into law, he himself is bound by it. **There is no presidential power of impoundment in the Constitution and this Court cannot create one**. Any ordinary legislation giving the President the power to impound unobligated appropriations is unconstitutional. The power to impound unobligated appropriations in the GAA, coupled with the power to realign such funds to any project, whether existing or not in the GAA, is not only a usurpation of the power of the purse of Congress and a violation of the constitutional separation of powers, but also **a substantial re-writing of the 1987 Constitution**.

Under the present Constitution, if the President vetoes an item of appropriation in the GAA, Congress may override such veto by an extraordinary two-thirds vote of each chamber of Congress. However, if this Court allows the President to impound the funds appropriated by Congress under a law, then the constitutional power of Congress to override the President's veto becomes inutile and meaningless. This is a substantial and drastic revision of the constitutional check-and-balance finely crafted in the Constitution.

Professor Laurence H. Tribe, in his classic textbook *American Constitutional Law*, explains why there is no constitutional power of impoundment by the President under the U.S. Federal Constitution:

> The federal courts have traditionally rejected the argument that the President possesses inherent power to impound funds and thus halt congressionally authorized expenditures. The Supreme Court

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issued its first major pronouncement on the constitutional basis of executive impoundment in *Kendall v. United States ex rel. Stokes*. There, in order to resolve a contract dispute, Congress ordered the Postmaster General to pay a claimant whatever amount an outside arbitrator should decide was the appropriate settlement. Presented with a decision by the arbitrator in a case arising out of a claim for services rendered to the United States in carrying the mails, President Jackson's Postmaster General ignored the congressional mandate and paid, instead, a smaller amount that he deemed the proper settlement. The Supreme Court held that a writ of mandamus could issue directing the Postmaster General to comply with the congressional directive. **In reaching this conclusion, the Court held that the President, and thus those under his supervision, did not possess inherent authority, whether implied by the Faithful Execution Clause or otherwise, to impound funds that Congress had ordered to be spent: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible**."

Any other conclusion would have been hard to square with the care the Framers took to limit the scope and operation of the veto power, and **quite impossible to reconcile with the fact that the Framers assured Congress the power to override any veto by a two-thirds vote in each House. For presidential impoundments to halt a program would, of course, be tantamount to a veto that no majority in Congress could override**. To quote Chief Justice Rehnquist, speaking in his former capacity as Assistant Attorney General in 1969: "**With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent**. ... It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be agreed that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and **it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them**."[31] (Citations omitted; emphasis supplied)

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[31] American Constitutional Law, 3rd Edition (2000), Volume 1, pp. 732-733; *Kendall v. United States ex Rel. Stokes*, 37 U.S. 524 (1838).

In the United States, the Federal Constitution allows the U.S. President to only veto an entire appropriations bill but not line item appropriations in the bill. Thus, U.S. Presidents seldom veto an appropriations bill even if the bill contains specific appropriations they deem unsound. To stop the disbursement of appropriated funds they deem unsound, U.S. Presidents have attempted to assert an implied or inherent Presidential power to impound funds appropriated by Congress. The U.S. Supreme Court, starting from the 1838 case of *Kendall v. United States ex rel. Stokes*, has consistently rejected any attempt by U.S. Presidents to assert an implied presidential power to impound appropriated funds. In the 1975 case of *Train v. City of New York*,[32] the U.S. Supreme Court again rejected the notion that the U.S. President has the power to impound funds appropriated by Congress because **such power would frustrate the will of Congress**. This rationale applies with greater force under the Philippine Constitution, which expressly empowers the President to exercise line item veto of congressional appropriations. **Under our Constitutional scheme, the President's line item veto is the checking mechanism to unsound congressional appropriations, not any implied power of impoundment which certainly does not exist in the Constitution**.

In *PHILCONSA v. Enriquez*,[33] decided on **19 August 1994**, the Court explained the alleged opposing views in the United States on the U.S. President's power to impound appropriated funds by citing a ***1973*** Georgetown Law Journal article[34] and a ***1973*** Yale Law Journal article.[35] These law journal articles were obviously already obsolete because on **18 February 1975** the United States Supreme Court issued its decision in *Train*

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[32] 420 U.S. 35 (1975).

[33] *Supra* note 14.

[34] Notes: Presidential Impoundment Constitutional Theories and Political Realities, 61 Georgetown Law Journal 1295 (1973).

[35] Notes Protecting Fisc: Executive Impoundment and Congressional Power, 82 Yale Law Journal 1686 (1973).

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v. City of New York. Worse, *PHILCONSA* failed to mention the 1838 U.S. Supreme Court case of *Kendall v. United States ex rel. Stokes* cited by Prof. Tribe in his textbook. **In U.S. Federal constitutional jurisprudence, it is well-settled that the U.S. President has no implied or inherent power to impound funds appropriated by Congress.** In any event, the issue of impoundment was not decisive in *PHILCONSA* since the Court based its decision on another legal ground.

This Court must be clear and categorical. Under the U.S. Federal Constitution as well as in our Constitutions, whether the 1935, 1973 or the present 1987 Constitution, there is no implied or inherent Presidential power to impound funds appropriated by Congress. Otherwise, our present 1987 Constitution will become a mangled mess.

Section 38 cannot be invoked by the President to create "savings" by ordering the **permanent stoppage** of disbursement of appropriated funds, whether obligated or not. If the appropriated funds are already **obligated**, then the stoppage of disbursements of funds does not create any savings because the funds remain obligated until the contract is rescinded. If the appropriated funds are **unobligated**, such permanent stoppage amounts to an impoundment of appropriated funds which is unconstitutional. **The authority of the President to suspend or stop the disbursement of appropriated funds under Section 38 can refer only to obligated funds; otherwise, Section 38 will be patently unconstitutional because it will constitute a power by the President to impound appropriated funds**.

Moreover, the OSG and the DBM maintain that the President, in implementing the DAP and NBC 541, "never impounded" funds. In fact, the OSG does not claim that the President exercised the power of impoundment precisely because it is contrary to the purpose of NBC 541, which was intended "to accelerate spending" and push economic growth. During the Oral Arguments, Solicitor General Jardeleza stated:

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SOLGEN JARDELEZA:
But the facts, Your Honor, showed the president never impounded, impoundment is inconsistent with the policy of spend it or use it.

JUSTICE ABAD:
Yeah, well anyway...

SOLGEN JARDELEZA:
So, there is no impoundment, Your Honor, in fact, the marching orders is spend, spend, spend. And that was achieved towards the middle of 2012. There was only DAP because there was slippage, 2010, 2011, and that's what were saying the diminishing amount, Your Honor.[36]

Therefore, it is grave error to construe that the DAP is an exercise of the President's power to impound under Section 38, Chapter VI, Book VI of the Administrative Code of 1987. The OSG and DBM do not interpret Section 38 as granting the President the power to impound. The essence of impoundment is not to spend. The essence of DAP is to "spend, spend, spend," in the words of the Solicitor General.

V.
The applicability of the doctrine of operative fact

An unconstitutional act confers no rights, imposes no duties, and affords no protection.[37] An unconstitutional act is inoperative as if it has not been passed at all.[38] The exception to this rule is the doctrine of operative fact. Under this doctrine, the law or administrative issuance is recognized as unconstitutional but the effects of the unconstitutional law or administrative issuance, prior to its declaration of nullity, may be left undisturbed as a matter of **equity and fair play**.[39]

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[36] TSN, 28 January 2014, p. 104.

[37] *Chavez v. Judicial and Bar Council,* G.R. No. 202242, 16 April 2013, 696 SCRA 496, 516.

[38] *Id*.

[39] *League of Cities of the Philippines v. Commission on Elections*, G.R. Nos. 176951, *et al.*, 24 August 2010, 628 SCRA 819, 832; *Commissioner of Internal Revenue v. San Roque Power Corporation,* G.R. No. 187485, 8 October 2013.

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As a rule of equity, the doctrine of operative fact can be invoked only by those who relied in good faith on the law or the administrative issuance, prior to its declaration of nullity. Those who acted in bad faith or with gross negligence cannot invoke the doctrine. Likewise, those **directly responsible** for an illegal or unconstitutional act cannot invoke the doctrine. He who comes to equity must come with clean hands,[40] and he who seeks equity must do equity.[41] **Only those who merely relied in good faith on the illegal or unconstitutional act, without any direct participation in the commission of the illegal or unconstitutional act, can invoke the doctrine**.

Moreover, the doctrine of operative fact is applicable only if nullifying the effects of the unconstitutional law or administrative issuance will result in injustice or serious prejudice to the public or innocent third parties. To illustrate, if DAP funds were used to build school houses without anomalies other than the fact that DAP funds were used, the contract could no longer be rescinded for to do so would prejudice the innocent contractor who built the school houses in good faith. However, if DAP funds were used to augment the PDAF of members of Congress whose identified projects were in fact non-existent or anomalously implemented, the doctrine of operative fact would not apply.

VI.
Conclusion

The Disbursement Acceleration Program has a noble end – "to fast-track public spending and push economic growth." The DAP would fund "high-impact budgetary programs and projects." However, the road to unconstitutionality is often paved with ostensibly good intentions. Under NBC 541, the President pooled funds which do not qualify as savings, and hence, the pooled funds could not validly be realigned. The unobligated allotments of agencies with low-level of obligations as of 30 June 2012

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[40] *Chemplex (Phils.), Inc. v. Pamatian*, 156 Phil. 408 (1974); *Spouses Alvendia v. Intermediate Appellate Court*, 260 Phil. 265 (1990).

[41] *Arcenas v. Cinco*, 165 Phil. 741 (1976).

are certainly not savings as defined in the GAAs, with the exception of MOOE from January to June 2012, excluding Mandatory Expenditures and Expenditures for Business-type Activities. The realignment of these funds to augment items in the GAAs patently contravenes Section 25(5), Article VI of the Constitution. Thus, such realignment under the DAP, NBC 541 and other Executive issuances related to DAP is clearly unconstitutional.

The DAP also violates the prohibition on cross-border transfers enshrined in Section 25(5), Article VI of the Constitution. No less than the DBM Secretary has admitted that the Executive transferred funds to the COA and the House of Representatives.[42] The OSG has also expressly admitted in its Memorandum of 10 March 2014 that the Executive transferred appropriations to the COA, the House of Representatives and the COMELEC.[43] The Executive transferred DAP funds to augment the PDAF, or the unconstitutional Congressional Pork Barrel, making the augmentation also unconstitutional.

The Unprogrammed Fund was released despite the clear requirement in the 2011, 2012 and 2013 GAAs that the Unprogrammed Fund can be used only if the revenue collections exceed the original revenue targets as certified by the National Treasurer, a condition that was never met for fiscal years 2011, 2012 and 2013.

The GAA is a law enacted by Congress. The most important legislation that Congress enacts every year is the GAA. Congress exercises the power of the purse when it enacts the GAA. The power of the purse is a constitutional power lodged solely in Congress, and is a vital part of the checks-and-balances enshrined in the Constitution. Under the GAA, Congress appropriates specific amounts for specified purposes, and the President spends such amounts in accordance with the authorization made by Congress in the GAA.

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[42] TSN, 28 January 2014, pp. 42-43.

[43] *Rollo* (G.R. No. 209287), p. 1072. Memorandum for Respondents, p. 35.

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Under the DAP and NBC 541, the President disregards the specific appropriations in the GAA and treats the GAA as the President's self-created all-purpose fund, which the President can spend as he chooses without regard to the specific purposes for which the appropriations are made in the GAA. In the middle of the fiscal year of the GAA, the President under the DAP and NBC 541 can declare all MOOE for future months (except Mandatory Expenditures and Expenditures for Business-type Activities), as well as all unobligated Capital Outlays, as savings and realign such savings to what he deems are priority projects, whether or not such projects have existing appropriations in the GAA. In short, the President under the DAP and NBC 541 usurps the power of the purse of Congress, making Congress inutile and a surplusage. It is surprising that the majority in the Senate and in the House of Representatives support the DAP and NBC 541 when these Executive acts actually castrate the power of the purse of Congress. This Court cannot allow a castration of a vital part of the checks-and-balances enshrined in the Constitution, even if the branch adversely affected suicidally consents to it. The solemn duty of this Court is to uphold the Constitution and to strike down the DAP and NBC 541.

ACCORDINGLY, I vote to declare the following acts and practices under the Disbursement Acceleration Program and the National Budget Circular No. 541 dated 18 July 2012 **UNCONSTITUTIONAL** for violating Section 25(5), Article VI of the Constitution:

1. Transfers of appropriations from the Executive to the Legislature, the Commission on Elections and the Commission on Audit;
2. Disbursements of unobligated allotments for MOOE as savings and their realignment to other items in the GAAs, where the MOOE that are the sources of savings are appropriations for months still to lapse;
3. Disbursements of unobligated allotments for Capital Outlay as savings and their realignment to other items in the GAA, prior to the last two months of the fiscal

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year if the period to obligate is one year, or prior to the last two months of the second year if the period to obligate is two years; and

4. Disbursements of unobligated allotments as savings and their realignment to items or projects not found in the GAA.

In addition, the use of the Unprogrammed Fund without the certification by the National Treasurer that the revenue collections for the fiscal year exceeded the revenue target for that year is declared **VOID** for being contrary to the express condition for the use of the Unprogrammed Fund under the GAAs.

SEPARATE OPINION

BRION, *J.*:

Preliminary Statement

I submit this **Concurring and Dissenting Opinion** to reflect my views on the constitutionality of the Disbursement Acceleration Program (*DAP*) and its implementing budget circular, National Budget Circular No. 541 (*NBC 541*).

The Court will recall that following the lead of *J.* Antonio Carpio, I submitted my original Separate Opinion in April 2014 during the Court's Baguio session after the promised *ponencia* was not issued. This move, to be sure, was an unusual one, as Members of the Court, in the usual course, wait for the *ponencia* or the *Member-in-Charge's* report before expressing their views through their separate opinions. Two reasons, however, compelled me to act as I did.

First, the Court failed to meaningfully consider the petitioners' prayer for a temporary restraining order (*TRO*);[1] delay intervened

[1] G.R. No. 209136, *Manuelito R. Luna v. Secretary Florencio Abad, et al.*, G.R. No. 209260 *Integrated Bar of the Philippines (IBP) v. Secretary Florencio Abad*, G.R. No. 209287, *Maria Carolina P. Araullo, et al. v. Benigno Simeon C. Aquino III, et al.* and G.R. No. 209517, *Confederation for Unity, Recognition and Advancement of Government Employees (COURAGE), et al. v. Benigno Simeon C. Aquino III, et al.*

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until it was too late to consider whether we would or would not issue a TRO. Based on this experience, I wanted to avoid any further deferment in resolving this case on the merits as the Court, under the circumstances,[2] had already been in delay. I surmise that *J*. Carpio was in a similar frame of mind when he issued his own original Opinion.

Second, I felt that we should no longer dilly-dally as, together with the closely-related Priority Development Assistance Fund (*PDAF*) case,[3] the present DAP case is a part of the country's biggest scandal and, on its own, is a precedent-setting case with profound impact on the nation.

Because of what the **PDAF** involved, namely, the ***amount*** (approximately ₱10 Billion), the ***personalities*** (the members of Congress at the highest levels) and the ***circumstances*** (perceived betrayal of public trust in a national situation of unchecked poverty and natural calamity), it caused ***"public outrage"*** and ***"emergent public distrust"*** (to use the words of *J*. Mariano del Castillo in his Separate Opinion).

The present **DAP** case, for its part, involves circumstances that are similar to the PDAF and much more: it involves funds amounting to almost ***₱150 Billion or almost 15 times the PDAF case***;[4] ***entanglement with the unconstitutional PDAF;***

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[2] On October 25, 2013, the Court issued a Resolution deferring the resolution of the petitioners' prayer for a Temporary Restraining Orderuntil after the oral arguments scheduled on November 11, 2013. This schedule was subsequently moved to November 19, 2013. A continuation of the oral arguments was scheduled on December 10, 2013, which was also subsequently moved to January 28, 2014. By this time, Solicitor General Francis Jardeleza disclosed to the Court that the Aquino Administration has terminated the DAP's implementation, *viz*.:

> In conclusion, your Honors, may I inform the Court that because the DAP has already fully served its purpose, the Administration's economic managers have recommended its termination to the President. Transcript of Oral Arguments on G.R. Nos. 209135, *etc*. on January 28, 2014, p. 14.

[3] *Belgica v. Executive Secretary*, G.R. No. 208566, November 19, 2013.

[4] For 2011-2012, a total of ₱142.23 Billion was released for programs and projects identified through the DAP.

personalities at the very highest level in both the Executive and the Legislative Departments of government; and ***demonstrated lack of respect*** for public funds, institutions, and the Constitution. This case, in my view, is the biggest since I came to the Court in terms of these factors alone.

Separate from these circumstances, many other principles underlying our Republic are at stake and we, as a nation, cannot and should not be perceived to be weak or hesitant in supporting these principles. Among them are the regime of the ***rule of law*** where we cannot afford to fail; our constitutional ***system of checks and balances*** and of the ***separation of powers*** that indicate the health of constitutionalism and democracy in our country; the stability of our government in light of the possible effect that our ruling, either way, will have on the institutions and officials involved; and the ***moral values*** and the people's ***level of trust*** that we cannot allow to disintegrate.

Under these circumstances, I felt that before any massive dissatisfaction and unrest among the populace could set in, the Court should act lest its name also be dragged into the scandal. To state the obvious, the Judiciary's complicity – whether by delay or perceptions of mishandling, cover up, whitewash or unacceptable ruling – could already entail a perception of failure of government, constitutionalism and democracy because of the involvement of the three great branches of government. **The people's inevitable question could then be: *who else is there to trust*?**

Thus, this Court should be as thorough as possible in the handling of this case, making sure that, at the very least, both the reality and perception of its integrity would be intact. Towards this end, we should thoroughly exhaust the discussion of all the

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In 2013, about ₱15.13 Billion has been approved for the hiring of policemen, additional funds for the modernization of PNP, the redevelopment of Roxas Boulevard, and funding for the Typhoon Pablo rehabilitation projects for Compostela Valley and Davao Oriental. Q&A on the Disbursement Acceleration Program, Oct. 7, 2013, at http://www.gov.ph/2013/10/07/qa-on-the-disbursement-acceleration-program/.

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issues before us – both express and implied – to ensure the maximum in transparency, lucidity and logic.

This spirit was apparently the reason why the member-in-charge, *J*. Lucas Bersamin, suffered delay in the issuance of his *ponencia*. To his credit, his Opinion, when it was issued, turned out to be thorough and comprehensive (although I disagree with some of the points he made).

As defined by J. Bersamin, based on the pleadings and without objection from the parties, the issues before the Court are quoted below.[5]

Issues

Under the Advisory issued on November 14, 2013, the presentations of the parties during the oral arguments were to be limited to the following issues, to wit:

Procedural Issue:

A. Whether or not *certiorari*, prohibition, and *mandamus* are proper remedies to assail the constitutionality and validity of the Disbursement Acceleration Program (DAP), National Budget Circular (NBC) No. 541, and all other executive issuances allegedly implementing the DAP. Subsumed in this issue are whether there is a controversy ripe for judicial determination, and the standing of petitioners.

Substantive Issues:

B. Whether or not the DAP violates Sec. 29, Art. VI of the 1987 Constitution, which provides: "No money shall be paid out of the Treasury except in pursuance of an appropriation made by law."

C. Whether or not the DAP, NBC No. 541, and all other executive issuances allegedly implementing the DAP violate Sec. 25(5), Art. VI of the 1987 Constitution insofar as:

(a) They treat the unreleased appropriations and unobligated allotments withdrawn from government agencies as "savings" as the term is issued in Sec. 25(5), in relation to the provisions of the GAAs of 2011, 2012 and 2013;

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[5] DAP Consolidated Cases Advisory for Oral Arguments of November 19, 2003.

(b) They authorize the disbursement of funds for projects or programs not provided in the GAAs for the Executive Department; and

(c) They "augment" discretionary lump sum appropriations in the GAAs.

D. Whether or not the DAP violates (1) the Equal Protection Clause, (2) the system of checks and balances, and (3) the principle of public accountability enshrined in the 1987 Constitution considering that it authorizes the release of funds upon the request of legislators.

E. Whether or not factual and legal justification exists to issue a temporary restraining order to restrain the implementation of the DAP, NBC No. 541, and all other executive issuances allegedly implementing the DAP.

In its Consolidated Comment, the OSG raised the matter of unprogrammed funds in order to support its argument regarding the President's power to spend. During the oral arguments, the propriety of releasing unprogrammed funds to support projects under the DAP was considerably discussed. The petitioners in G.R. No. 209442 (Belgica) dwelled on unprogrammed funds in their respective memoranda. Hence, an additional issue for the oral arguments is stated as follows:

F. Whether or not the release of unprogrammed funds under the DAP was in accord with the Constitution.

Separately from these, *J*. Bersamin dwelt on and discussed in his *ponencia* the applicability of the ***doctrine of operative fact*** after recognizing that the parties had been fully heard on this point. The inclusion of this issue, in my view, was a very good call on *J*. Bersamin's part as a discussion of the potential consequences of our ruling cannot be left out without risking the charge that we have been less than thorough and have made an incomplete decision.

My Positions

In this Concurring and Dissenting Opinion, I **CONCUR** with the conclusions of *J*. Bersamin to the extent discussed below and add my voice to the Separate Concurring Opinion of *J*. Carpio, that the **DAP is unconstitutional**.

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Specifically, I hold that:

a) the Court has jurisdiction to hear and decide the petitions under its expanded power of judicial review, as provided under Section 1, Article VIII of the Constitution and as explained below;

b) the DAP violates the principles of checks and balances and the separation of powers that the 1987 Constitution integrates into the budgetary process;

c) the DAP violates the constitutional prohibitions against the transfer of appropriations and against the transfer of funds from one branch of the government to another, both under Section 25(5) of Article VI of the Constitution; and

d) the DAP violates the special conditions for the release of the Unprogrammed Fund.

Thus, to me, the DAP is unconstitutional in more ways than one.

Further, **I generally agree with the *ponente*'s conclusion regarding the applicability of the operative fact doctrine**, subject to the details discussed below in this Opinion.

A Brief Background

The Court, as has been mentioned, ruled on the constitutionality of the PDAF and found the system to be unconstitutional for its disregard and violation of the constitutional separation of powers and the check and balance principles. These constitutional transgressions resulted from the irregularities and anomalies that attended the PDAF implementation.

But even before the Court could rule on the constitutionality of the PDAF, the controversy that it generated had spilled into and had created renewed demands for accountability in yet another governmental action – the DAP that, until then, had been unknown. The DAP's existence was unwittingly disclosed to the public when a senator, charged with anomalies regarding

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his PDAF, attempted to clear his name through a privilege speech.[6]

In response, the government (through the Department of Budget and Management [*DBM*]), responded by issuing press releases[7] and other public communications, explaining how the DAP worked and how it had been beneficial to the Filipino nation. No less than President Aquino, Jr. himself went on television to defend the DAP.[8] These efforts, however, proved

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[6] In his Privilege Speech on September 25, 2013, Senator Jose "Jinggoy" Ejercito Estrada, in defending himself against allegations of misuse of his allocated Presidential Development Assistance Fund (PDAF), revealed that additional PDAF allocations were given to senators who voted for the conviction of former Chief Justice Renato Corona. The Untold PDAF Story that the People Should Know - Privilege Speech of Senator Jose "Jinggoy" Ejercito Estrada (Sept. 25, 2013) (transcript available at http://newsinfo.inquirer.net/494975/privilege-speech-of-sen-jose-jinggoy-estrada-on-the-pork-scam#ixzz2vX315gvi).

[7] Statement of Secretary Florencio Abad: On the releases to the senators as part of the Spending Acceleration Program, Official Gazette, Sept. 28, 2013, *available at* http://www.gov.ph/2013/09/30/statement-the-secretary-of-budget-on-the-releases-to-senators/; Press Release, Department of Budget and Management, Constitutional and legal bases for the Disbursement Acceleration Program (DAP), (Oct. 5, 2013), http://www.gov.ph/2013/10/05/constitutional-and-legal-bases-for-the-disbursement-acceleration-program-dap/; Press Release, Department of Budget and Management, Q&A on the Disbursement Acceleration Program (Oct. 7, 2013), http://www.gov.ph/2013/10/07/qa-on-the-disbursement-acceleration-program/; Press Release, Department of Budget and Management, Aquino government pursues P72.11-B disbursement acceleration plan, (Oct. 12, 2013), http://www.gov.ph/2011/10/12/aquino-goverment-pursues-p72-11-b disbursement-acceleration-plan/.

[8] *Pambansang Pahayag ng Kagalang-galang Benigno S. Aquino III Pangulo ng Pilipinas Mula sa Palasyo ng Malacañang Inihayag sa isang live telecast (Oct. 30, 2013)* (transcript available at http://www.gov.ph/2013/10/30/pambansang-pahayag-ni-pangulong-aquino-noong-ika-30-ng-oktubre-2013/). Address of His Excellency Benigno S Aquino III President of the Philippines Live via telecast at Malacañang Palace (Oct. 30, 2013) (transcript available at http://www.gov.ph/2013/10/30/televised-address-of-president-benigno-s-aquino-iii-october-30-2013-english/)

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insufficient and did not prevent the public's distrust (heretofore directed against the PDAF) from creeping into the DAP.[9]

The DAP, like the PDAF, involved the implementation of the national budget but ***focused largely on how the Executive implemented the General Appropriations Act (GAA)***. As in the PDAF, the charges involved the unconstitutional intrusion by one branch of government (the Executive) into the exclusive prerogatives of another (the Legislative) in the budgetary process.

The present petitioners charge that the DAP was used as the **means to allow the Executive to intrude into the legislative budgetary process, thereby subverting and rendering useless the appropriations Congress made under the GAA. In short, through the DAP, the Executive effectively exercised the power of appropriation exclusively reserved by the Constitution to Congress**.

I recall at this point that we ruled in *Belgica v. Executive Secretary*[10] that the PDAF system was unconstitutional because of the **legislative intrusion** into the Executive's implementation of the PDAF – a violation of the principles of separation of powers and checks and balances.

The DAP, in parallel with the PDAF *but going the other way*, allegedly allowed the Executive to disregard the GAA so that the latter could determine the projects, activities and plans (*PAPs*) where national funds would be deployed and spent, creating thereby a budget independently determined by the Executive within the congressionally-determined budget.

If true, the two systems – the PDAF and the DAP – effectively allowed the two branches of government to unconstitutionally

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[9] See Amando Doronilla, Analysis: Pork scam devastates Aquino popularity, Phil. Daily Inq., Oct.. 22, 2013, *available at* http://opinion.inquirer.net/63861/pork-scam-devastates-aquino-popularity; Joel M. Sy Egco, *Pinoys angry, frustrated with Aquino – Diokno*, Phil. Star, No. 3, 2013, *available at* http://www.manilatimes.net/pinoys-angry-frustrated-with-aquino-diokno/50207/

[10] G.R. No. 208566, November 19, 2013.

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share in their respective exclusive prerogatives in the formulation and implementation of the national budget, contrary to the checks and balances and accountability system envisioned by the Constitution. This overarching sharing system facilitated – if preliminary congressional and news reports are to be believed – the funneling of funds into the pockets of politicians and unscrupulous private individuals in a widespread and systemic corruption of the country's budgetary process.

Notably, this combined application of the PDAF and DAP systems – according to news reports and the privilege speech of one Senator[11] – enabled the Executive to secure the votes for the conviction of former Chief Justice Renato Corona and the filing of impeachment charges against former Ombudsman Merceditas Gutierrez. Another senator also spoke in his own privilege speech on what transpired while the impeachment case against the former Chief Justice was before the Senate.[12] Interestingly, both senators were recipients of PDAF funds over and above the usual PDAF allocation,[13] and both now

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[11] In his Privilege Speech on September 25, 2013, Senator Jose "Jinggoy" Ejercito Estrada, in defending himself against allegations of misuse of his allocated Presidential Development Assistance Fund (PDAF), revealed that additional PDAF allocations were given to senators who voted for the conviction of former Chief Justice Renato Corona. The Untold PDAF Story that the People Should Know - Privilege Speech of Senator Jose "Jinggoy" Ejercito Estrada (Sept. 25, 2013) (transcript available at http://newsinfo.inquirer.net/494975/privilege-speech-of-sen-jose-jinggoy-estrada-on-the-pork-scam#ixzz2vX315gvi).

In a press conference, former Senator Joker Arroyo said that more than ₱500 million in Presidential Development Assistance Fund (PDAF) or pork barrel was distributed to 11 senators in April 2012. Senator Arroyo claims that after former Chief Justice Corona's conviction, another ₱1 billion from the Disbursement Acceleration Program (DAP) was distributed to senators who voted to convict Corona. Macon Ramos-Araneta, *Money flowed at Corona trial*, Manila Standard Today, Oct. 2, 2013 at http://manilastandardtoday.com/2013/10/02/money-flowed-at-corona-trial/.

[12] Privileged Speech of Sen. Revilla, Jr., delivered on January 20, 2014, http://www.rappler.com/move-ph/issues/budget-watch/48460-full-text-revilla-on-politicking-by-the-yellow-republic.

[13] *Supra* note 7.

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stand criminally charged in relation with the implementation of PDAF funds. A third senator, who had not spoken at all about the impeachment, likewise received additional PDAF funds and also stands similarly charged.[14]

What is truly frightening in all these series of events is that the illegalities – based on congressional investigations[15] and the initial charges recently brought by the Ombudsman[16] –

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[14] Plunder charges were filed before the Sandiganbayan on Friday [June 6, 2014] against Senate Minority Floor Leader Juan Ponce Enrile, Senators Jinggoy Estrada and Ramon 'Bong' Revilla in connection with the multibillion-peso pork barrel fund scam. Amita O. Legaspi, Napoles, 3 senators charged with plunder at Sandiganbayan, GMA News, June 6, 2014 at http://www.gmanetwork.com/news/story/364499/news/nation/napoles-3-senators-charged-with-plunder-at-sandiganbayan.

[15] "Approximately 80 percent of the PDAF has been lost probably due to corruption," the report [Senate Blue Ribbon Committee draft report presented by Senator T.G. Guingona to the media] said, apparently recalling testimonies made by Commission on Audit Chairperson Grace Pulido-Tan and Director Susan Garcia, during the first congressional hearings into the PDAF scam on August 29, 2013. "If this manner of using PDAF is descriptive of how other government funds are disbursed, then corruption is an endemic cancer insidiously spreading, and leading our government to absolute ruin." Interaksyon.com, *Ombudsman, Senate panel move to charge Enrile, Estrada, Revilla with plunder*, Interaksyon.com – News5, Apr. 1, 2014, at http://www.interaksyon.com/article/83891/ombudsman-senate-panel-move-to-charge-enrile-estrada-revilla-with-plunder.

[16] Six months after it received the plunder complaint against a first batch of 38 lawmakers, government officials, and private individuals involved in the pork barrel scam, the Office of the Ombudsman announced on Tuesday, April 1, the filing of charges against 10 of them before the Sandiganbayan.

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The charges announced on Tuesday were only for those named in the first batch of PDAF-related complaints. A second batch, with 34 respondents, was filed by the justice department with the Ombudsman in November 2013.

Rafanan [Assistant Ombudsman Asryman Rafanan] said the other complaints are being investigated, and charges may be filed against other lawmakers and other private persons in relation to the multi-billion-peso PDAF scam. Rappler.com, *Napoles, 3 senators indicted for plunder*, Rappler, Apr. 1, 2014, at http://www.rappler.com/nation/54416-ombudsman-plunder-case-filed-pdaf-senators.

appeared to have been pervasively practiced; thus, they caught in their webs a significant number of senators and congressmen. All these appeared, based on the evidence presented before this Court, to have been made possible through the action of no less than the highest levels of the Executive.[17]

Thus, what appears to be involved is ***not a one-time and one-shot act of corruption*** by one or a few government officials, but by a ***host of public officials*** whose functions and interdependent moves supported their respective private and individual nefarious objectives.

In these lights and if only to clear the air and ensure that the government maintains the people's trust, the Court must now decisively exercise its duty to protect and defend the Constitution, if need be, to declare the unconstitutionality of the DAP in the same decisive manner we declared the PDAF system unconstitutional. To shirk from this responsibility is to consent to the perversion of our republican way of life.

At its worst, the continuation of the present systems, if true, can lead to the concentration of power in the Executive, as the national budget would in effect be its sole prerogative. This surrender of the Legislative's power of the purse to the Executive affects not only the budgetary process and accountability, but injures the legislative power itself, as the funds to finance legislation crafted by Congress would be subject to the sole will of the Executive Branch. In no time, intrusion into the Judiciary cannot but follow through intimidation and perversion of values. We have had a similar incident of this type in our history and we ought, by this time, to have learned our lessons. As one philosopher cautioned, ***those who do not remember the past are condemned to repeat it***.[18]

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[17] DBM Sec. Florencio Abad in a statement admitted that there had been augmentations of the PDAF appropriations of senators through the DAP, *supra* note 7.

[18] George Santayana, *The Life of Reason: Reason in Common Sense*, Scribner Publishing (1905).

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While we have the duty to pass upon the validity of the DAP, we must, at the same time, do so fully aware of the consequences of our decision. As I have said, the highest stakes are involved for the country.

If indeed the DAP is constitutional as the government claims, we must immediately and decisively say so to clear the presently muddled constitutional air; to foster the stability of our government; and to significantly contribute to shoring up our people's trust and the nation's moral values. Our ruling, ***if it is fair and arrived at with integrity***, would help achieve these objectives.

On the other hand, if the DAP is unconstitutional, then we should unequivocally so declare as we did in the PDAF case, but we should do this with an eye on consciously protecting our institutions, whether they be executive, legislative or judicial; we cannot aim to destroy or weaken, or impose the superiority that the Constitution did not grant us. Our aim should be to maintain the balance intended by our Constitution, the guiding instrument that must at all times reign supreme.

These balancing and strengthening acts, of course, cannot come at the sacrifice of the public accountability that our Constitution has enshrined;[19] **institutions are irreplaceable but public officials are not and should go and fall if they must**. This is the type of action that will enhance transparency and public accountability. That those who erred must suffer is a consequence that evildoers should have foreseen even before they undertook their illegal and unconstitutional act.

For ease of presentation, this Concurring and Dissenting Opinion shall proceed under the following structure:

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[19] The 1987 Constitution has devoted an entire article on "Accountability of Public Officers," section one of which provides:

Section 1. Public office is a public trust. Public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives. 1987 Constitution, Article IX, Section 1.

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A. Factual Antecedents

1. The DAP and its origins

a. The Memoranda from DBM Secretary Florencio Abad to the President

B. Preliminary Matters

1. The Court's expanded power of judicial review
2. Prima facie showing of grave abuse of discretion

a. The lack of audit findings does not negate grave abuse of discretion

3. Transcendental importance of the issues presented by the petitions
4. Justiciability and Political Questions
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C. Substantive Matters

1. The DAP violates the principles of checks and balances and the separation of powers that the 1987 Constitution integrated in the budgetary process

a. The principle of separation of powers and checks and balances in the budgetary process

b. How the DAP violates these principles

2. The DAP violates the prohibition against the transfer of appropriations

a. the power to augment is a very narrow exception to the general prohibition against the transfer of appropriations
b. the need for actual savings before the power to augment may be exercised
c. savings cannot be used to fund programs and projects not appropriated by Congress
d. additional limitations imposed by Congress under the GAA

i. definition of savings

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ii. two-year period within which appropriations for Capital Outlay and Maintenance and other Operating Expense (MOOE) may be spent
iii. general prohibition against impoundment of releases

e. the sources of DAP funds cannot qualify as savings

i. unobligated allotments

i.1 final discontinuance or abandonment
i.2 use of Section 38 as justification

f. the DAP violates the prohibition against impoundment

g. qualifications to the President's flexibilities in budget execution
h. the DAP, in funding items not found in the GAA, violated the Constitution

3. The DAP violates the special conditions for the release of the Unprogrammed Fund in the 2011 and 2012 GAAs

4. The operative fact doctrine: concept, limits and application to the DAP's unconstitutionality.

A. Factual Antecedents

1. The DAP and its origins

On September 28, 2013, Secretary Abad released an **official statement,** through the DBM website, explaining that the amounts released to Senators *on top of their regular PDAF allocations* towards the end of 2012 were part of a fund he called the **DAP**.[20] He claimed that these releases were, in

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[20] Statement of Secretary Florencio Abad: *On the releases to the senators as part of the Spending Acceleration Program*

[*Released on September 28, 2013*]

In the interest of transparency, we want to set the record straight on releases made to support projects that were proposed by Senators on top of their regular PDAF allocation toward the end of 2012. These fund releases have recently been touted as 'bribes,' 'rewards,' or 'incentives.' They were not. The releases, which were mostly for infrastructure projects, were

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part of what is called the Disbursement Acceleration Program (DAP) designed by the Department of Budget and Management (DBM) to ramp up spending and help accelerate economic expansion. To suggest that these funds were used as "bribes" is inaccurate at best and irresponsible at worst.

In 2012, most releases were made during the period October-December, based entirely on letters of request submitted to us by the Senators. Those who received releases during that period and their corresponding amounts were:

- Sen. Antonio Trillanes (October 2012-₱50M),
- Sen. Manuel Villar (October 2012-₱50M),
- Sen. Ramon Revilla (October 2012-₱50M),
- Sen. Francis Pangilinan (October 2012-₱30M),
- Sen. Loren Legarda (October 2012-₱50M),
- Sen. Lito Lapid (October 2012-₱50M),
- Sen. Jinggoy Estrada (October 2012-₱50M),
- Sen. Alan Cayetano (October 2012-₱50M),
- Sen. Edgardo Angara (October 2012-₱50M),
- Sen. Ralph Recto (October 2012-₱23M; December 2012-₱27M),
- Sen. Koko Pimentel (October 2012-P25.5M; November 2012 –₱5M; December 2012-₱15M),
- Sen. Tito Sotto (October 2012-₱11M; November 2012-₱39M),
- Sen. Teofisto Guingona (October 2012-₱35M; December 2012-₱9M),
- Sen. Serge Osmeña (December 2012-₱50M),
- Sen. Juan Ponce Enrile (October 2012-₱92M)
- Sen. Frank Drilon (October 2012-₱100M).

There were two earlier releases made in late August of that same year: Sen. Greg Honasan (₱50M) and Sen. Francis Escudero (₱99M). No releases were made in 2012 to Senators Ping Lacson, Joker Arroyo, Pia Cayetano, Bongbong Marcos and Miriam Defensor-Santiago. In 2013, however, releases were made for funding requests from the office of Sen. Joker Arroyo (February 2013 – ₱47M) and Sen. Pia Cayetano (January 2013-₱50M). The 24th Senator then, Benigno S. Aquino III, was already President.

This was not the first time that releases from DAP were made to fund project requests from legislators. In 2011, the DAP was instituted to ramp up spending after sluggish disbursements — resulting from the governmets' preliminary efforts to plug fund leakages and seal policy loopholes within key implementing agencies — caused the country's GDP growth to slow down to just 3.6%. During this period, the government also accommodated requests for project funding from legislators and local governments, GOCCs, and national government agencies to help ease the country's expenditure performance forward[.]

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fact, not the "first time that releases from DAP were made to fund project requests from legislators" because **the DAP had been in existence since the latter part of 2011.**

In the course of hearing these petitions, the respondents submitted "***evidence packets***" explaining how the DAP came into existence and how it operated. We can thus ***authoritatively and with sufficient factual bases*** discuss these points.

a. The Memoranda from Secretary Abad to the President

In a **Memorandum dated October 12, 2011**,[21] Secretary Abad sought and secured a ***formal confirmation of the President's approval of the DAP*** for a total of ***₱72.11 Billion***.[22] He identified the DAP's *fund sources* and *their description* as:

1. FY 2011 Unreleased Personal Services (PS) Appropriations – Unreleased [PS] appropriations which will lapse at the end of FY 2011
2. FY 2011 *Unreleased Appropriations* - Unreleased appropriations (**slow moving projects** and programs for discontinuance)
3. FY 2010 Unprogrammed Fund - Supported by the dividends of GFIs
4. FY 2010 Carryover Appropriation - Unreleased appropriations (**slow moving projects** and programs for discontinuance) and savings from Zero-based budgeting initiative

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[21] *FY 2011 Proposed Disbursement Acceleration Program (Projects and Sources of Fund).*

[22] According to the DBM, the Disbursement Acceleration Program *(DAP)* was approved by the President on October 12, 2011 upon the recommendation of the Development Budget Coordination Committee (*DBCC*) and the Cabinet Clusters. In the DBM's Press Release on October 12, 2011 released through the Official Gazette, the DBM Secretary stated that "President Aquino instructed his government" to implement a ₱72.11 billion in additional projects in order to fast-track disbursements and push economic growth." (http://www.gov.ph/2011/10/12/aquino-goverment-pursues-p72-11-b-disbursement-acceleration-plan/).

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5. FY 2011 Budget items for realignment - FY 2011 Agency Budget items that can be realigned within agency to fund new fast-disbursing projects: DPWH, DA, DOTC, DepEd.[23]

Among the DAP-funded *projects* for National Government Agencies (*NGA*) were: (**i**) the **Commission on Audit's (*COA's*) Infrastructure Program** and the **hiring of additional litigation experts**; and (**ii**) various **other local projects**. In the "*Project List: FY 2011 Disbursement Acceleration Plan*," the two listed projects were described as follows:

Agency	Amount (in million)	Details
xxx	xxx	xxx
2. Commission on Audit (COA)	144	Capacity Building Program of the COA. The Capacity Building program of the COA shall include the hiring of litigation experts, consultants and investigators' and the development of its IT Infrustructure program
xxx	xxx	xxx
22. PDAF (Various other local projects)	6,500	*For Augmentation*

The President approved these requests.[24]

Subsequently, Secretary Abad sent to the President another **Memorandum dated December 12, 2011**,[25] requesting for omnibus authority to consolidate savings/unutilized balances in fiscal year (*FY*) 2011 corresponding to completed or discontinued projects and their realignment. The DBM stated that the savings out of the 2011 GAA were to be pooled for the following purposes:

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[23] Respondent's 1st Evidence Packet, pp. 2-3.

[24] *Id.* at 4,8.

[25] Omnibus Authority to Consolidate savings /Unutilized Balances and its Realignment, Respondent's 1st Evidence Packet, pp. 13-16.

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1.1 to provide for **new activities which have not been anticipated during the preparation of the budget**;

1.2 to augment additional requirements of on-going priority projects

1.3 **to provide for deficiencies under the Special Purpose Funds, *e.g.*, PDAF,** Calamity Fund, Contingent Fund

1.4 to cover for the modifications of the original allotment class allocation as a result of on-going priority projects and **implementation of new activities** [underscoring supplied]

In yet another **Memorandum dated June 25, 2012,**[26] Secretary Abad asked the President for the grant of authority: (**i**) to consolidate savings/unutilized balances in FY 2012 corresponding to unfilled positions and completed or discontinued projects; and (**ii**) for the ***withdrawal and pooling of the available and unobligated balances,*** for both continuing and current allotments, ***of national government agencies as of June 30, 2012.***

The DBM stated that the savings out of the 2012 GAA corresponding to unfilled positions and to completed or discontinued projects were to be pooled for the following purposes:

1.1 to augment additional requirements of on-going priority projects

1.2 to provide for deficiencies under the Special Purpose Funds, e.g., PDAF, Calamity Fund, Contingent Fund

1.3 to cover for the modifications of the original allotment class allocation as a result of on-going priority projects and **implementation of new activities**[.] [underscoring and emphases supplied]

Among the "priority projects" identified was the construction of the **Legislative Library and Archive Building/ Congressional E-Library** with the House of Representative as the identified agency. This was described as:

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[26] Omnibus Authority to Consolidate Savings/Unutilized Balances and their Realignment.

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Construction of the Legislative Library and Archive Building/ Congressional E-Library

This request from House Speaker Feliciano Belmonte, Jr. for the release of ₱250M shall cover the completion of the construction of the Legislative Library and Archives Building at the Batasan Pambansa Complex. This construction project was approved in 2009 at an estimated cost of ₱320M. Of this amount, ₱70M shall be funded from the budget of HOR and ₱250M from the 2009 DPWH budget.

The initial phase of the construction work (₱67.7M) was completed in May 29, 2010. Recently, COA recommended that completion of the remaining works be undertaken to prevent deterioration of materials used in the initial work. The Lump-sum for the Construction of Public Biddings **under the DPWH budget where the request could be charged** cannot accommodate the ₱250M requirement. It is recommended that this be **charged against available savings**. [emphases supplied]

On June 27, 2012, the President also approved this request.[27]

Consistent with these memoranda, on July 8, 2012, the DBM issued **National Budget Circular (*NBC*) No. 541**, entitled "*Adoption of Operational Efficiency Measure – Withdrawal of Agencies' Unobligated Allotments as of June 30, 2012*."

Per the President's "directive" dated June 27, 2012, NBC No. 541 authorized Secretary Abad to **withdraw the unobligated allotments of agencies that had low level of obligations as of June 30, 2012**. These unobligated allotments under NBC No. 541 referred to two kinds of allotments: one is the continuing allotment that is charged against the GAA for FY 2011, and the other is the current allotment that is charged against the GAA of FY 2012.[28]

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[27] Respondent's 1st Evidence Packet, page 31, cf TSN of Oral Arguments dated Jan. 28, 2014, pp. 42-43.

[28] Based on NBC No. 541, the withdrawn allotments may be (i) **reissued** for the original programs or projects of the agency concerned; (ii) **re-aligned** to cover additional funding for other existing projects of the same agency; or (iii) **used to augment** existing programs and projects of any agency

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Based on the earlier memoranda and NBC No. 541, the DAP funds were sourced from: (**i**) "savings" generated by the government, as well as (**ii**) the Unprogrammed Fund. The savings were sourced from:

1. Unreleased appropriations for unfilled positions which will lapse at the end of the year;
2. Available balances from completed or discontinued projects;
3. **Unreleased appropriations of slow moving projects and discontinued projects**; and
4. **Withdrawn unobligated allotments** which have earlier been released to NGA.[29]

In a **May 20, 2013 Memorandum**,[30] the DBM stated that it had identified savings out of the 2011 GAA which could be pooled for the following purposes:

5.1 to augment additional requirements of on-going priority projects and other spending priorities;

5.2 **to provide for deficiencies under the Special Purpose Funds, *e.g.*, PDAF**, Calamity Fund, Contingent Fund;

5.3 to cover for the modifications of the original allotment class allocation as a result of on-going priority projects and **implementation of new activities** (*e.g.*, increase/decrease in PS, MOOE, and CO). [underscoring and emphases supplied]

According to the DBM, with the one-year validity of appropriations in the 2013 GAA, the DBM had to ensure the maximum use of the available allotment.

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and to fund priority programs and projects not considered in the 2012 budget." To avail of either of the first two options, the agency is required to submit to the DBM a Special Budget Request, supported by specified documents. However, the agency has only **until September 30, 2012** to comply therewith. Thereafter, the withdrawn allotments shall be pooled and form part of the overall savings of the government.

[29] http://www.dbm.gov.ph/?page_id=7362

[30] Omnibus Authority to Consolidate Savings/Unutilized balances and their Realignment to fund the Quarterly [DAP].

Accordingly, *all unobligated balances* ***at the end of every quarter***, both for continuing and current allotments, shall be withdrawn and pooled to fund fast moving programs/projects. The allotments to be withdrawn would be based on the list of slow moving projects to be identified by the agencies and their catch-up plans to be evaluated by the DBM.[31] ***The President likewise granted this request***.

Based on these antecedents, the petitioners uniformly claim that the DAP is **unconstitutional** for violating Section 25, paragraph 5[32] and Section 29, paragraph 1, Article VI,[33] as well as Section 17, Article VII[34] of the 1987 Constitution.

Discussions

B. Preliminary Matters

The challenges against the DAP's constitutionality were filed with the Court through petitions for *certiorari* and prohibition under Rule 65 of the Rules of Court. These are the modes of review that have been traditionally used by litigants to directly invoke the Court's power of judicial review.

Given these cited modes, it was not surprising that part of the respondents' procedural counter-arguments focused on the non-fulfillment of all the conditions that a Rule 65 petition requires. The remainder, on the other hand, focused on the petitioners' alleged failure to present a case for grave abuse of discretion against the respondents.

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[31] Respondents' 1st Evidence Packet, p. 79.

[32] (5) No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

[33] (1) No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.

[34] Section 17. The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.

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These opposing positions opportunely provide me the chance to reiterate the fresh approach I first developed in my Separate Opinion in *Imbong v. Executive Secretary*[35] to clarify the Court's approaches in giving due course to and reviewing constitutional cases.

As I explained in *Imbong*, the Court under the 1987 Constitution possesses three powers:

(1) the **traditional justiciable cases** involving actual disputes and controversies based *purely* on demandable and enforceable rights;

(2) the **traditional justiciable cases** as understood in (1), but ***additionally involving*** **jurisdictional and constitutional issues**;

(3) **pure constitutional disputes** attended by **grave abuse of discretion** in the process involved or in their result/s.

The present petitions allege that grave abuse of discretion and violations of the Constitution attended the DAP, from the perspectives of both its **creation and terms**, and **its sourcing and use of funds**. In these lights, the exercise of our expanded power of judicial review falls within the third kind above, *i.e.*, the duty to determine whether there has been grave abuse of discretion on the part of any governmental body (**in this case, by the Executive)** to ensure that the boundaries drawn by the Constitution have been and are respected and maintained.

That Rule 65 of the Rules of Court has been expressly cited, to my mind, is not a hindrance to our present review as the allegations of the petitions and the remedies sought, not their titles, determine our jurisdiction in the exercise of the power of judicial review.

1. The Court's expanded power of judicial review

In contrast with previous constitutions, the 1987 Constitution substantially fleshed out the meaning of "judicial power," not

[35] G.R. No. 204819, April 8, 2014.

only by confirming the meaning of the term as understood by jurisprudence up to that time, but by going beyond the accepted jurisprudential meaning of the term.

Section 1, Article VIII of the 1987 Constitution reads:

> Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power **includes** ***the duty of the courts of justice*** to settle ***actual controversies*** involving ***rights which are legally demandable and enforceable***, **AND** to determine whether or not there has been ***a grave abuse of discretion*** amounting to lack or excess of jurisdiction on the part of ***any branch or instrumentality of the Government***. (italics, emphases and underscore supplied)

Under these terms, the present Constitution not only integrates the **traditional definition of judicial power**, but introduces as well a **completely new power and duty** to the Judiciary under the last phrase — "to determine whether or not there has been ***a grave abuse of discretion*** amounting to lack or excess of jurisdiction on the part of ***any branch or instrumentality of the Government***."

This addition was apparently in response to the Judiciary's past experience of invoking the ***political question doctrine*** to avoid cases that had political dimensions but were otherwise justiciable. The addition responded as well to the societal disquiet that resulted from these past judicial rulings.

Under the expanded judicial power, justiciability ***expressly*** and ***textually*** depends ***only*** on the presence or absence of grave abuse of discretion, as distinguished from a situation where the issue of constitutional validity is raised within a "traditionally" justiciable case which demands that the requirement of actual controversy based on specific legal rights must exist. Notably, *even if the requirements under the traditional definition of judicial power are applied*, these requisites are complied with once grave abuse of discretion is *prima facie* shown to have taken place. The presence or absence of grave abuse of discretion is the justiciable issue to be resolved.

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Necessarily, ***a matter is ripe*** for adjudication under the expanded judicial power if the assailed law or rule is already in effect. If something *had already been accomplished or performed* by the Legislative and/or the Executive, and the petitioner sufficiently alleges the existence of an immediate or threatened injury to itself as a result of the challenged action, then the controversy cannot but already be ripe for adjudication.[36]

In the expanded judicial power, any citizen of the Philippines to whom the assailed law or rule is shown to apply necessarily has ***locus standi*** since a constitutional violation constitutes an affront or injury to the affected citizens of the country. If at all, a less stringent requirement of *locus standi* only needs to be shown to differentiate a justiciable case of this type from the pure or mere opinion that courts cannot render.

The traditional rules on ***hierarchy of courts*** and ***transcendental importance***, far from being grounds for the dismissal of the petition raising the question of unconstitutionality, are necessarily reduced to rules relating to the level of court that should handle the controversy, as directed by the Supreme Court.

Thus, all courts have the power of expanded judicial review, but only when a petition involves a matter of transcendental importance should it be directly filed before this Court. Otherwise, the Court may either dismiss the petition or remand it to the appropriate lower court, based on its consideration of the urgency, importance, or the evidentiary requirements of the case.

In other words, petitions – in order to successfully invoke the Court's power of expanded judicial review – must satisfy two essential requisites: ***first***, they must demonstrate a *prima facie* showing of grave abuse of discretion on the part of the governmental body's actions; and ***second***, they must prove that they relate to matters of transcendental importance to the nation.

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[36] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel*, 589 Phil. 463, 481 (2008).

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The first requirement establishes the need for the Court's exercise of expanded judicial review powers; the second requirement justifies direct recourse to the Court and a relaxation of standing requirements.

The present petitions clearly satisfy these requisites as explained below.

2. Prima facie showing of grave abuse of discretion

The respondents posit that the petitioners' allegations miserably failed to make a case of grave abuse of discretion considering the "insufficiency and uncertainty of the facts" alleged as they are *mostly based on newspaper clippings and media reports*.[37] Given the innumerable allotments and disbursements, they argue that the petitioners are required to establish with sufficient clarity the kinds of allotments and disbursements complained of in the petitions. On this basis, the respondents question the presence of an actual case or controversy in the petitions.

I cannot agree with the respondents' positions.

I note that aside from newspaper clippings showing the antecedents surrounding the DAP, the petitions are filled with ***quotations from the respondents themselves, either through press releases to the general public or as published in government websites***.[38] In fact, the petitions – quoting the press release published in the ***respondents' website – enumerated disbursements released through the DAP;***[39] ***it also included***

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[37] Comment, p. 5.

[38] The following had been published in the Official Gazette: Statement of Secretary Florencio Abad: On the releases to the senators as part of the Spending Acceleration Program, Official Gazette, Sept. 28, 2013, *available* 2013, *available at* http://www.gov.ph/2013/09/30/statement-the-secretary-of-budget-on-the-releases-to-senators/.

[39] Press Release, Department of Budget and Management, Aquino government pursues ₱72.11-B disbursement acceleration plan, (Oct. 12, 2013), http://www.gov.ph/2011/10/12/aquino-goverment-pursues-p72-11-b-disbursement-acceleration-plan/.

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admissions from no less than Secretary Abad regarding the use of funds from the DAP to fund projects identified by legislators on top of their regular PDAF allocations.[40]

Additionally, the respondents, in the course of the oral arguments, ***submitted details*** of the programs funded by the DAP,[41] and ***admitted in Court*** that the funding of Congress' e-library and certain projects in the COA came from the DAP.[42] They likewise stated in their submitted memorandum that the President "made available" to the Commission on Elections (*COMELEC*) the "savings" of his department upon request for funds.[43]

The mechanics by which funds were pooled together to create and fund the DAP are also evident from the statements published in the DBM website,[44] as well as in national budget circulars and approved memoranda implementing the DAP. ***The respondents also submitted a memo showing the President's approval of the DAP's creation***.

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[40] Statement of Secretary Florencio Abad: On the releases to the senators as part of the Spending Acceleration Program, Official Gazette, Sept. 28,

[41] The respondents submitted seven evidence packets containing the relevant memoranda and documents about the DAP's implementation.

[42] TSN, January 28, 2014, pp. 42-43.

[43] *Rollo* (G.R. No. 209287), p. 37, Memorandum for the Respondents); see also: Bersamin, at 75.

[44] Press Release, Department of Budget and Management, Frequently Asked Questions About the Disbursement Acceleration Program, http://www.dbm.gov.ph/?page_id=7362. *at* http://www.gov.ph/2013/09/30/statement-the-secretary-of-budget-on-the-releases-to-senators/; Press Release, Department of Budget and Management, Constitutional and legal bases for the Disbursement Acceleration Program (DAP), (Oct. 5, 2013), http://www.gov.ph/2013/10/05/constitutional-and-legal-bases-for-the-disbursement-acceleration-program-dap/; Press Release, Department of Budget and Management, Q&A on the Disbursement Acceleration Program (Oct. 7, 2013), http://www.gov.ph/2013/10/07/qa-on-the-disbursement-acceleration-program/; Press Release, Department of Budget and Management, Aquino government pursues ₱72.11-B disbursement acceleration plan, (Oct. 12, 2013), http://www.gov.ph/2011/10/12/aquino-goverment-pursues-p72-11-b-disbursement-acceleration-plan/.

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All of these cumulatively and sufficiently lead to a *prima facie* case of grave abuse of discretion by the Executive in the handling of public funds. In other words, these admitted pieces of evidence, taken together, support the petitioners' allegations and establish sufficient basic premises for the Court's action on the merits. While the Court, unlike the trial courts, does not conduct proceedings to receive evidence, **it must recognize as established the facts admitted or undisputedly represented by the parties themselves**.

First, the existence of the DAP itself, the justification for its creation, the respondent's legal characterization of the source of DAP funds (*i.e.*, unobligated allotments and unreleased appropriations for slow moving projects) and the various purposes for which the DAP funds would be used (*i.e.*, for PDAF augmentation and for "aiding" other branches of government and other constitutional bodies) are clearly and indisputably shown.

Second, the respondents' undisputed realignment of funds from one point to another inevitably raised questions that, as discussed above, are ripe for constitutional scrutiny.[45]

The established *prima facie* case means that without considering any contradicting evidence, the allegations, admissions, official statements and documentary evidence before the Court sufficiently show the existence of grave abuse of discretion. This situation, to my mind, is patent from the allegations in the petitions, read with the cited admissions and those obtained through the oral arguments, ***particularly* (1) *on how savings had been generated and their uses; and* (2) *on the transfer of funds budgeted for the Executive to the Legislative, the COA, and the COMELEC.***

a. ***The lack of audit findings does not negate grave abuse of discretion***

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[45] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel*, 589 Phil. 463, 481 (2008).

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The respondents additionally *deny the existence of an actual case* because the COA has yet to render its audit findings to determine whether the DAP-funded projects identified in the petitions are lawful or not, thus showing that the petitions may be premature.

I do not find this contention persuasive.

The issue of criminal, civil or administrative *liability,* determined on the basis, among others, of the COA's findings, does not and cannot preempt the issue of constitutionality. In fact, the Court's finding of unconstitutionality inevitably leads to the determination of the possibility of the commission of infractions that can give rise to different liabilities. The Court's findings too should be material in the appropriate proceedings where the liabilities arising from grave constitutional violations are properly determined.

The *prima facie* case, as established and shown in these proceedings, is sufficient to resolve the issue of whether the Executive committed grave abuse of discretion in creating and implementing the DAP. In other words, the absence of any COA finding on the validity of the disbursements under the DAP cannot render the present petitions premature.

To avoid any confusion, let me restate and clarify my view that while the COA can rule on the legality or regularity of an item of expense, it cannot rule on the constitutionality of the measure that made the expenditure possible. This issue remains for the courts, not for the COA, to decide upon.

On the same reasoning, the invocation of the presumption of constitutionality of legislative and executive acts immediately loses its appeal when it is considered that the ***presumption is never meant to shield government officials from challenges against their official actions (or from liability)*** where the violation of the Constitution is otherwise clear and unequivocal.

3. Transcendental importance of the issues presented by the petitions

The petitions likewise establish the second requirement of transcendental importance.

While the concept of transcendental importance has no doctrinal definition, former Supreme Court Justice Florentino P. Feliciano came up with the following determinants whose degree of presence or absence can guide the courts in determining whether a case is one of transcendental importance: (**1**) the character of the funds or other assets involved in the case; **(2)** the presence of a clear case of disregard of a constitutional or statutory prohibition by the public respondent agency or instrumentality of the government; and **(3)** the lack of any other party with a more direct and specific interest in raising the questions being raised.[46]

I submit that these determinants are all present in the cases before us.

For one, the Executive's undisputed creation and implementation of the DAP, ***which involves billions of taxpayers' money*** (and which potentially involves billions more unless halted), satisfy the first determinant. To point out a present obvious reality, the Executive is even now engaged in a "shame" campaign to prod people to pay their taxes. If taxes will continue to be faithfully paid, now and in the future, it is of transcendental importance for the people to know how their tax money is spent or misspent, and to be informed as well that they have this right.

For another, the petitioners' serious allegations of constitutional violation by the Executive — in transferring appropriations despite the non-existence of savings and the respondents' commission of grave abuse of discretion in disregarding the limitations of allowable transfer of appropriations under Section 25(5), Article VI of the Constitution ***as admitted by the respondents themselves*** — satisfy the second determinant. Based on the admissions made alone, the incidents of constitutional violations

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[46] *Kilosbayan, Incorporated v. Guingona, Jr.*, G.R. No. 113375, May 5, 1994, 232 SCRA 110.

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are clear, patent and of utmost gravity; they affect the very nature of our republican system of government.

Lastly, given the intrinsic nature of the petitions as taxpayers' suits (to prevent wastage and misapplication of funds by an unconstitutional executive act), there can really be no other party with a more direct and specific interest in raising the issue of constitutionality than the petitioners, suing as taxpayers and invoking a public right.

Over and above these determinants, the transcendental importance of these present cases lies in the ***complementary relation of their presented issues with those raised in the PDAF*** which the Court squarely ruled upon in the recent case of *Belgica v. Executive Secretary*.[47]

In *Belgica*, the Court declared the statutorily-created pork barrel system to be unconstitutional for violating the core doctrine of separation of powers. The Court ruled that the legislator's **post-enactment participation** in the areas of **project identification**, **fund release** and **fund realignment** or role in the **implementation** or **enforcement of the GAAs** are beyond Congress' oversight function, and are therefore unconstitutional. The Court pertinently ruled:

> Thus, for all the foregoing reasons, the Court hereby declares the 2013 PDAF Article as well as all other provisions of law which similarly allow legislators to wield any form of post-enactment authority in the implementation or enforcement of the budget, unrelated to congressional oversight, as violative of the separation of powers principle and thus unconstitutional. Corollary thereto, *informal practices, through which legislators have effectively intruded into the proper phases of budget execution, must be deemed as acts of grave abuse of discretion amounting to lack or excess of jurisdiction and, hence, accorded the same unconstitutional treatment.*[48]

In this light, the statement of the COA Chairperson during the oral arguments is particularly illuminating:

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[47] *Supra* note 10.

[48] *Id*. at 43.

Justice Bersamin: Alright, the next question Chairperson is this, do you remember if your office has in [sic] pass an audit any activity or any transfer of funds under the DAP?

Chairperson Pulido Tan: Under this particular administration, if I may say, Sir…

Justice Bersamin: DAP only, its existence came only in the last quarter of 2011, 541 was released only in the middle of 2012, so it is as recent as that, I do not talk about the previous administration.

Chairperson Pulido Tan: Your Honor, if I may, because **from the way we have looked at it so far, it is really nothing new. It's only called DAP now but in the past, the past administration has been doing this kind of using funds and appropriated appropriations**. In the past, we would account for them under what we call, what was called then "Reserved Controlled Account" *ang tawag po dun*, after a while and then eventually it became a very generic Pooled Savings Programs. In 2011 that was when it was called the "DAP" but the mechanism, Your Honor, is essentially the same, the items of funds or appropriations being put together practically the same and… we saw that happening even as far back as 2006. There were other releases because that was how it was [sic] been even in the past, Your Honor, and its [sic] only been called DAP now in 2011… it has been happening in the past, yes, we passed them on audit, as in the same way that we also disallowed some in audit. **And that is what is going to be the course of event also in the present, Your Honor**.[49]

The Court should find it significant that it was the COA Chairperson herself who spoke in this quoted transcript of the proceedings. Her statement lends credence to the respondents' claim that ***NBC No. 541 is not really the "face of the DAP." NBC No. 541 only formalized what the Executive had been doing even prior to its issuance***.

To point out the obvious, if a "practice" similar to the mechanism under the DAP already existed and was being observed by the Executive in the execution of the enacted budget *— in the same manner that the PDAF was also a "practice" during the execution stage of a GAA and which was simply*

[49] TSN, Oral Arguments, November 19, 2013, pp. 147-148.

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embodied in the GAA provisions — then there is every reason for the Court to squarely rule on the constitutionality of the Executive's action in light of the seriousness of the allegations of constitutional violations in the petitions.

In fact, the nature and amounts of the public funds involved are more than enough to sound alarm bells to this Court if we are to maintain fealty to our role as the guardian of the Constitution.

Secretary Abad's ***official, public and unrefuted statement*** that ***part of the releases of DAP funds in 2012*** was "based entirely on letters of request submitted to us by the Senators" should neither escape the Court's attention nor should the Court gloss over it. From the very start, his statement cast a ***much darker cloud*** on the validity of the DAP in light of our pronouncement in *Belgica* that –

> certain features embedded in some forms of Congressional Pork Barrel, among others the 2013 PDAF Article, has an effect on congressional oversight. The fact that individual legislators are given post-enactment roles in the implementation of the budget makes it difficult for them to become disinterested observers when scrutinizing, investigating or monitoring the implementation of the appropriation law. ***To a certain extent, the conduct of oversight would be tainted as said legislators, who are vested with post-enactment authority, would, in effect, be checking on activities in which they themselves participate.*** Also, it must be pointed out that this very same concept of post-enactment authorization runs afoul of Section 14, Article VI of the 1987 Constitution which provides xxx
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> xxx x x x xxx
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> Clearly, allowing legislators to intervene in the various phases of project implementation – a matter before another office of government renders them susceptible to taking undue advantage of their own office.[50]

This ruling effectively emphasizes that the transcendental importance of these cases alone renders it obligatory for this

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[50] *Belgica v. Executive Secretary, supra* note 10, at 52.

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Court to allow the direct invocation of its expanded judicial review powers and the relaxation of the strict application of procedural requirements.

4. Justiciability and Political Questions

Justiciability refers to the fitness or propriety of undertaking the judicial review of particular matters or cases; it describes the character of issues that are inherently *susceptible of being decided on grounds recognized by law*.[51]

In contradistinction, **political questions** refer to those that, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which ***full discretionary authority*** has been delegated to the legislative or executive branch of the government; it is concerned with issues dependent upon the *wisdom*, and not the legality of a particular measure.[52] Where the issues so posed are political, the Court normally cannot *assume jurisdiction* under the doctrine of separation of powers **except where the court finds that there are *constitutionally-imposed limits* on the exercise of the powers conferred on a political branch of the government**.[53]

In these cases, the petitioners have strongly shown the textual limits to the Executive's power over the implementation of the GAA, particularly in the handling and management of funds. Far from bordering on political questions, **the challenges raised in the present petitions against the constitutionality of the DAP are actually anchored on specific constitutional and statutory provisions** governing the realignment or transfer of funds.

The increase of government expenditures is a macroeconomic tool that is at the disposal of the country's policy-makers to stimulate the country's economy and improve economic growth.

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[51] *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618 (2000).

[52] *Tañada v. Cuenco*, 103 Phil 1051, 1068 (1957).

[53] Separate Opinion of Justice Puno in *Integrated Bar of the Philippines v. Zamora*, *supra* note 46.

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From this perspective, constitutional provisions touching on economic matters are understandably broadly worded to accommodate competing needs and to give policy-makers (and even the Court) the necessary flexibility to decide policy questions or disputes on a case-to-case basis.

A broad formulation and interpretation of this guiding principle, however, cannot be used to override plain and clear provisions of the Constitution (and relevant laws) that are in place under the wide umbrella of the rule of law. While the three goals of the economy under Section 1, Article XIII of the 1987 Constitution - as a legal translation of the Executive's economic justification for the DAP – are addressed to the political branches of the government, sole reliance on these objectives would ignore the constitutional limitations applicable to the *means* for achieving them. **These legal limitations are precisely at the core of the issues presented to us in these challenges to the constitutionality of the DAP's creation and implementation; the issues before us are legal ones, not economic or political.**

For this reason, I have brushed aside as beyond our authority to consider and rule upon the views in other Opinions justifying the issuance of the DAP for largely economic practicality reasons.

5. The Court's boundary-keeping role in times of political upheaval

As a final note on the procedural aspects, I believe that the present case provides us with an excellent opportunity to revisit our role as boundary-keeper, a role assigned to us to ensure that the limits set by the Constitution between and among the different branches of government are observed.

As early as *Angara v. Electoral Commission*,[54] this Court has identified itself as the mediator in demarcating the constitutional limits in the exercise of power by each branch of government. We then observed that these constitutional boundaries tend to be forgotten or marred in times of societal

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[54] 63 Phil. 139, 156-157 (1936).

disquiet or political excitement, and it is the Court's role to clarify and reinforce the proper allocation of powers so that the different branches of government would not act outside their respective spheres of influence. We clarified that although we may, in effect, nullify governmental actions abhorrent to the Constitution, we do not undertake this role because of "judicial supremacy" but because this duty has been assigned to us by the Constitution.

Time and again, we have looked back to our *Angara* ruling when cases of national interest reach the Court, and have used its guiding principles to determine whether or not to act on the cases before us.

Since *Angara*, things have changed because of developments in our political history. Since then, the Court has been granted expanded jurisdiction to determine not only the traditional justiciable controversies that led to *Angara*, but also the existence of grave abuse of discretion by any agency or instrumentality of the government. Thus, our jurisdiction has been expanded to the extent of the new grant, in the process affecting the traditional justiciability requirements developed since *Angara*.

The principles in *Angara*, to be sure, still carry a lot of truth and relevance, but these principles now have to be adjusted to make way for the expanded jurisdiction that this landmark ruling did not contemplate.

We still are the mediators between competing claims for authority but the 1987 Constitution has taken it one step further: we now also determine the presence or absence of grave abuse of discretion on the part of any government agency or instrumentality, regardless of the presence of political questions that may have come with the controversy. This expansion necessarily gives rise to a host of questions: **does our constitutional duty end with the determination of the presence or absence of grave abuse of discretion and the decision on the constitutional status of a challenged governmental action? To what extent can we, acting within our judicial power and the power of judicial review, clarify the consequences of our decision**?

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Recent jurisprudence shows that we have been providing guidance to the bench and the bar, to clarify the application of the law and of our decisions to future situations not squarely covered by the presented facts and issues, but which may possibly arise again because of the complexity and character of the issues involved. We have set guidelines, for instance, on how to apply our ruling in *Atong Paglaum v. Comelec*[55] on the requirements to qualify as a partylist under the partylist system. As well, we provided guidelines in *Republic v. CA and Molina*[56] on how to interpret and apply Article 36 of the Family Code.

It is in these lights that I favorably view the Court's resolve to clarify the application of the operative fact doctrine to the issue of the DAP's constitutionality and the potential consequences under a ruling of unconstitutionality. It is in this spirit that I discuss these topics below.

C. Substantive Matters

1. The DAP violates the principles of checks and balances and the separation of powers that the 1987 Constitution integrated in the budgetary process

a. The principles of separation of powers and checks and balances in the budgetary process

The recent *Belgica* ruling gave this Court the opportunity to discuss and deliberate on the principle of separation of powers as applied in the budgetary process. We there held that the post-enactment measures in the PDAF allowed senators and members of the House of Representatives to wield and encroach on the item veto power of the President.

In so doing, we likewise discussed the budgetary process embodied in the Constitution, as well as the delineation of the

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[55] G.R. No. 203766, April 2, 2013, 694 SCRA 477, 656.

[56] 335 Phil. 664, 676-680 (1997).

roles each branch of government plays in the formulation, enactment, and implementation of the national budget, and in the accountability for its proper handling.

As I explained in my Concurring and Dissenting Opinion in *Belgica*, the budgetary process — *painstakingly detailed in the 1987 Constitution* —embodies the general principle of separation of powers and checks and balances under which the Legislative, the Executive, and the Judiciary operate. It also provides the specific limitations on what the Executive and Legislature can and cannot do to ensure that neither branch of government steps beyond its own area and into another's constitutionally-assigned role; any intrusive step violates the separation of powers and the checks and balances on which our republican system of government is founded.

In the context of the enactment and implementation of the national budget, the ***legislature has been assigned the power of the purse*** – it determines the taxes necessary to fund government activities, the programs where these public funds shall be spent, as well as the amount of funding under which each program shall operate. On the other hand, the ***Executive is given the duty to ensure that the laws that Congress enacted are followed and fully enforced.*** The roles of these two branches of government are reflected in the provisions governing their operations. These roles also serve as the limit of their inherent plenary powers.

The 1987 Constitution, recognizing the importance of the national budget, provided not only the general framework for its enactment, implementation and accountability; it also set forth specific limits in the exercise of the respective powers by the Executive and the Legislative, all the time clearly separating them so that they would not overstep into each other's pre-assigned domain.

Thus, Congress is granted the power of appropriations under the framework provided in the Constitution, while the Executive is granted the power to implement the programs funded by these appropriations, also based on the same constitutional

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framework. It is in this manner that the separation of powers principle operates in the budgetary process.

Under the complementary principle of checks and balances, as applied to the budget process, both the Executive and the Legislative play constitutionally-defined roles.

At the ***budget preparation and proposal stage, the Executive is given the initiative***; it starts the budgetary process by submitting to Congress, within 30 days from the opening of every regular session, a budget[57] of expenditures and sources of financing that becomes the basis for the general appropriations bill. ***This budget contains the appropriations recommended by the President for the operation of the government***.[58]

While the President undertakes the planning and recommendation, the Constitution requires him to comply with the form, content and manner of its preparation as prescribed by law.[59] The ***Constitution relents to the President's judgment in preparing the budget by prohibiting Congress from increasing the budget recommended by the Executive for the next fiscal year***.

But while Congress is so limited, to it is given – as the body directly representing the people - the authority to ultimately determine the country's policy and spending priorities, both in terms of the public purpose that an item of expenditure seeks to achieve and the extent of the amount it sees fit to achieve that purpose. To carry out this intent, ***the Constitution mandates that no money shall be paid out of the treasury except in pursuance of an appropriation***[60] ***made by law***.[61] ***Also, the Constitution prohibits the transfer of appropriations, with***

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[57] ***Budget*** refers to a financial plan that reflects national objectives, strategies and programs. Section 2(3), Book VI, Chapter I, E.O. No. 292; See also Sections 14 and 15, Book VI, Chapter I, E.O. No. 292.

[58] See 1987 Constitution, Article VI, Section 25 (1).

[59] See Book VI, Chapter 3, Section 12, E.O. No. 292.

[60] ***Appropriation***, on the other hand, refers to an authorization made by law, directing payment out of government funds under specified conditions or for specified purposes.

[61] 1987 Constitution, Article VI, Section 29 (1).

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specified exceptions, in order to ensure that the power of appropriation remains exclusively with Congress.[62]

Aside from the prohibition on the transfer of appropriations, the Constitution also requires that the procedure in approving appropriations for Congress shall strictly follow the procedure for approving appropriations for other departments and agencies. Section 25(3), Article VII of the Constitution seeks to ensure that while Congress is given the power of appropriation, it must undergo the same process before its budget is approved.[63]

Once Congress has spoken through the passage of the general appropriations bill based on the budget submitted by the President, the Constitution authorizes the President to exercise some degree of control over an appropriation legislation by allowing him to exercise an ***item-veto power***.[64] ***As a counter-balance, Congress may override the President's veto by a vote of 2/3 of all its members***.[65]

Upon passage of the general appropriations bill into law (either by presidential approval or inaction allowing the bill to lapse into a law), none of the three branches of government and the constitutional bodies can thwart congressional budgetary will by crossing constitutional boundaries through the transfer of appropriations or funds across departmental borders. This is the added precautionary measure thrown in to secure the painstakingly designed check-and-balance mechanisms.

In the end, what appears clear from all the carefully-designed plan is that the Legislative and the Executive check and counter-check one another, so that no one branch achieves predominance in the operations of the government. The Constitution, in effect,

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[62] Section 2(1), Book VI, Chapter I, E.O. No. 292. Presidential Decree No. 1177 (the Budget Reform Decree of 1977) also provides that all moneys appropriated for functions, activities, projects and programs shall be available solely for the specific purposes for which these are appropriated.

[63] See also E.O. No. 292, Book VI, Chapter 3, Section 11, par. 2.

[64] 1987 Constitution, Article VI, Section 27 (2).

[65] 1987 Constitution, Article VI, Section 27 (1).

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holds the vision that all these measures shall result in balanced governance, to the benefit of the governed, with enough flexibility to respond and adjust to the myriad situations that may transpire in the course of governance (such as the provision allowing the transfer of appropriations within very narrow constitutionally-defined limits).

Beyond the internal flexibility measures, the Constitution also provides for an external measure, specifically, the authority of the President to call Congress to special session at any time,[66] and his authority to certify a bill (including a special budget bill) for immediate enactment to meet a public calamity or emergency.[67]

By these measures, the Constitution envisions governance to be effective and responsive, even in times of calamities and emergencies, while maintaining the carefully-designed separation and checking principles integrated in the budgetary process. These measures, of course, cannot wholly address stresses brought about by human frailties such as inefficiencies and malicious designs, which are management functions for the Executive to handle *within the defined parameters of the constitutional structure.*

b. How the DAP violates these principles

Under this carefully laid-out constitutional system, the DAP violates the principles of separation of powers and checks and balances on two (2) counts: ***first***, **by pooling funds that cannot at all be classified as savings; and *second*, by using these funds to finance projects outside the Executive or for projects with no appropriation cover.** The details behind these transgressions and their constitutional status are further discussed below.

These violations – in direct violation of the "no transfer" proviso of Section 25(5) of Article VI of the Constitution –

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[66] 1987 Constitution, Article VI, Section 15.

[67] 1987 Constitution, Article VI, Section 26(2).

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had the effect of ***allowing the Executive to encroach on the domain of Congress in the budgetary process***. By facilitating the use of funds not classified as savings to finance items other than for which they have been appropriated, the DAP in effect allowed the President to circumvent the constitutional budgetary process and to veto items of the GAA without subjecting them to the 2/3 overriding veto that Congress is empowered to exercise.

Additionally, this practice ***allows the creation of a budget within a budget***: the use of funds not otherwise classifiable as savings disregards the items for which these funds had been appropriated, and allows their use for items for which they had not been appropriated.

Worse, the violation becomes even graver when, as the oral arguments and admissions later showed, the funds provided to finance appropriations in the Executive Department had been used for projects in the Legislature and other constitutional bodies. In short, ***the violation allowed the constitutionally-prohibited transfer of funds across constitutional boundaries***.

Through these violations of the express terms of Section 25(5), Article VI of the 1987 Constitution, the DAP directly contravened the principles of separation of powers and checks and balances that the Constitution built into the budgetary process.

2. The DAP violates the prohibition against the transfer of appropriations

a. the power to augment is a very narrow exception to the general prohibition against the transfer of appropriations

Section 25(5), Article VI of the 1987 Constitution prohibits the enactment of any law authorizing the transfer of appropriations:

5. ***No law shall be passed authorizing any transfer of appropriations;*** however, the President, the President of the Senate, the Speaker of

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the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations. [italics, emphasis and underscore ours]

This general prohibition against the transfer of funds is related to, and supports, the constitutional rule that "No money shall be paid out of the Treasury except in pursuance of an appropriation made by law."[68] Public funds cannot be used for projects and programs other than what they have been intended for, as expressed in appropriations made by law. Likewise, appropriated funds cannot, through transfers, be withheld from the use for which they have been intended.

These two provisions, in tandem, seek to ensure that the power of appropriation remains with the Legislature. Under the doctrine of separation of powers, the power of appropriation falls within the domain of the legislative branch of government: what item/s of expenditure will be given priority in a limited budget and for what amount/s, and the public purposes they seek to serve, are matters within the discretion of the representatives of the people to determine.

But recognizing that unforeseeable events may transpire in the actual implementation of the budget, the Constitution allowed a narrow exception to Article VI, Section 25(5)'s general prohibition: **it allowed a transfer of funds allocated for a particular appropriation**, once these have become savings, to augment items in other appropriations within the same branch of government.

To ensure that this exception does not become the rule, the *Constitution provided a catch*: a transfer of appropriations may only be exercised **if Congress authorizes it by law**. The authority to legislate an exception, however, is not a plenary; it must be exercised within the parameters and conditions set by the Constitution itself, as follows:

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[68] 1987 Constitution, Article VI, Section 29.

First, the transfer may be allowed only when appropriations have become savings;

Second, the transfer may be exercised only by specific public officials (*i.e.*, by the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions);

Third, these savings may only be used to augment and only existing items in the GAA can be augmented; and

Fourth, these items must be found within each branch of government's respective appropriations.

Viewed in this manner, it at once becomes clear that the authority to transfer funds that Congress may grant by law, can only be **a very narrow exception to the general prohibition against the transfer of funds**; all the requisites must fall in place before any transfer of funds allotted in the GAA may be made.

Significantly, this reading of how the requisites for the application of Section 25(5) and the treatment of its exception is not at all new to the Court as we have previously ruled on this point in *Nazareth v. Villar*.[69] We then said:

> In the funding of current activities, projects, and programs, the general rule should still be that the budgetary amount contained in the appropriations bill is the extent Congress will determine as sufficient for the budgetary allocation for the proponent agency. The only exception is found in Section 25(5), Article VI of the Constitution, by which the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions are authorized to transfer appropriations *to augment* any item in the GAA for their respective offices from the savings in other items of their respective appropriations. The plain language of the constitutional restriction leaves no room for the petitioner's posture, which we should now dispose of as untenable.

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[69] G.R. No. 188635, January 29, 2013, 689 SCRA 385, 402-404.

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It bears emphasizing that the exception in favor of the high officials named in Section 25(5), Article VI of the Constitution limiting the authority to transfer savings only to augment another item in the GAA is strictly but reasonably construed as exclusive. As the Court has expounded in *Lokin, Jr. v. Commission on Elections*:

> When the statute itself enumerates the exceptions to the application of the general rule, the exceptions are strictly but reasonably construed. The exceptions extend only as far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exceptions. Where the general rule is established by a statute with exceptions, none but the enacting authority can curtail the former. Not even the courts may add to the latter by implication, and it is a rule that an express exception excludes all others, although it is always proper in determining the applicability of the rule to inquire whether in a particular case, it accords with reason and justice.
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> The appropriate and natural office of the exception is to exempt something from the scope of the general words of a statute, which is otherwise within the scope and meaning of such general words. Consequently, the existence of an exception in a statute clarifies the intent that the statute shall apply to all cases not excepted. Exceptions are subject to the rule of strict construction; hence, any doubt will be resolved in favor of the general provision and against the exception. Indeed, the liberal construction of a statute will seem to require in many circumstances that the exception, by which the operation of the statute is limited or abridged, should receive a restricted construction.

b. the need for "actual savings" before the power to augment may be exercised

In several cases, the Court ruled that actual savings must exist before the power to augment, under the exception in Section 25, Article VI of the Constitution, may be exercised.

In ***Demetria v. Alba***,[70] the Court struck down paragraph 1, Section 44 of Presidential Decree No. 1177 (that allowed the President to "transfer any fund" appropriated for the Executive

[70] 232 Phil. 222 (1987).

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Department under the GAA "to any program, project or activity of any department, bureau, or office included in the General Appropriations Act") as unconstitutional for directly colliding with the constitutional prohibition on the transfer of an appropriation from one item to another.

The Court ruled that this provision authorizes an "[i]ndiscriminate transfer [of] funds xxx without regard as to whether or not the funds to be transferred are actually savings in the item from which the same are to be taken, or whether or not the transfer is for the purpose of augmenting the item to which said transfer is to be made"[71] in violation of Section 16(5), Article VIII of the 1973 Constitution (presently Section 25(5), Article VI of the 1987 Constitution).

In *Demetria*, the Court noted that the leeway granted to public officers in using funds allotted for appropriations to augment other items in the GAA is limited since Section 16(5), Article VIII of the 1973 Constitution (likewise adopted *in toto* in the 1987 Constitution) has specified the purpose and conditions for the transfer of appropriations. A transfer may be made only if there are savings from another item in the appropriation of the government branch or constitutional body.

We reiterated this ruling in ***Sanchez v. Commission of Audit***,[72] further emphasizing that "**[a]ctual savings** is a *sine qua non* to a valid transfer of funds from one government agency to another."[73]

Thus, two essential requisites must be present for a transfer of appropriation to be validly carried out. ***First***, there must be savings in the programmed appropriation of the transferring agency. ***Second***, there must be an existing item, project or activity with an appropriation in the receiving agency to which the savings will be transferred.

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[71] *Id*. at 229-230.

[72] 575 Phil. 428 (2008).

[73] *Id*. at 454.

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c. savings cannot be used to fund programs and projects not appropriated for by Congress

Neither can savings be used to fund programs and projects not appropriated for by Congress.

In ***Sanchez v. Commission on Audit***,[74] we noted that the illegality of the transfer of funds from the Department of Interior and Local Government (*DILG*) to the Office of the President stems not only from the lack of actual savings, but from the lack of an appropriation that authorizes the use of funds for the "ad hoc task force" to which the funds were transferred.

We reiterated this ruling in ***Nazareth v. Villar***[75] where we upheld the COA's decision to disapprove the use of the Department of Science and Technology's *(DOST's*) savings to fund its employees' benefits under the Magna Carta for Scientists, Engineers, Researchers, and other Science and Technology Personnel in Government. We said that although the source of funds, *i.e.*, the DOST savings, was legal, its use to fund benefits for which no appropriation had been provided in the GAAs in the years they were released, violated Sections 29 and 25(5), Article 29 of the 1987 Constitution.

Thus, savings cannot be used to augment non-existent items in the GAA. Where there are no appropriations for capital outlay in a specific agency or program, for example, savings cannot be used to buy capital equipment for that program. Neither can savings be used to fund the hiring of personnel, where a program's appropriation does not specify an item for personnel services.

d. additional limitations imposed by Congress under the GAA

Aside from the limitations for exercising the power to augment under the 1987 Constitution, Congress also provided even ***stricter***

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[74] *Id*. at 462-463.

[75] *Supra* note 69, at 401-40.

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and tighter limitations before a transfer of appropriations may take place in the GAAs for FYs 2010, 2011 and 2012. These congressional limitations are as follows:

i. definition of savings

The GAAs of 2010, 2011 and 2012 all have identical provisions on the definition of savings and augmentation; on the terms under which their use may be prioritized; and on how they may be used. Section 61 of the 2010 GAA, Section 60 of the 2011 GAA and Section 54 of the 2012 GAA all similarly provided that:

Meaning of Savings xxx. **Savings** refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are:

(i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized;

(ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and

(iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus, enabled agencies to meet and deliver the required or planned targets, programs, and services approved in this Act at a lesser cost.

Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.

These provisions effectively limit the Executive's exercise of the power to augment, as they strictly define when funds may be considered as savings and when funds may be used to augment other items in the GAA. From these provisions, the

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existence of "savings" required the concurrence of the following statutory requirements:

1. That there be a programmed appropriation.
2. That there be an unexpended amount (available balance) from this programmed appropriation.
3. That the available balance be due to, or must arise from, any of the following:
    a. A work, activity or purpose under a programmed appropriation is **completed**, **finally discontinued or abandoned** OR
    b. The unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; OR
    c. The implementation of measures that resulted in improved systems and efficiencies, enabling agencies to meet and deliver the required or planned targets, programs, and services at a lesser cost.
4. That the available balance be unobligated or unencumbered.

When the Executive decides to finally discontinue or abandon a project or activity under a programmed appropriation, the Executive must necessarily stop the expenditure and thereby reduce or retain the funds. The available balance from a project that is completed, finally discontinued or abandoned, by clear definition of law, becomes "savings" that may be used to augment a deficient item of appropriation in the GAA.

ii. two-year period within which appropriations for Capital Outlay and MOOE may be spent

Aside from specifying the terms under which funds may be considered savings, Congress also deemed it appropriate to

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extend the period of validity of the appropriations in the GAA. To ensure that funds are spent as appropriated, the GAAs of FYs 2010, 2011 and 2012 provided that MOOE and capital outlays shall be available for release and obligation for a period extending *one FY after* the end of the year in which these items were appropriated.[76]

Thus, funds appropriated for the capital outlays and MOOE in FY 2010 were allowed to be allotted, obligated and released until FY 2011; funds for FY 2011 until FY 2012; and funds for FY 2012 until FY 2013. The extended period was in recognition of the exigencies that could occur in implementing an appropriation. In effect, these provisions qualified the definition of savings, as they extended the period within which a program or project could be completed, discontinued or abandoned. They also further limited the instances when funds could be used to augment other items in the GAA.

Notably, the provisions effectively granted the Executive flexibility in implementing the GAA, and also ensured that public funds shall be spent as appropriated. They were valid policy decisions that Congress made and, hence, must be fully respected.

iii. general prohibition against impoundment of releases

Lastly, in addition to limiting when funds may be used to augment other items in the GAA, Congress also prohibited the deduction and retention of their release. Sections 64 and 65 of the GAAs of 2010, 2011 and 2012 provided that:

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[76] Section 65 of the 2011 GAA and Section 63 of the 2012 GAA read: Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act **shall be available for release and obligation for the purpose specified, and under the same special provisions applicable thereto, for a period extending to one fiscal year after the end of the year in which such items were appropriated:** PROVIDED, That appropriations for MOOE and capital outlays under R.A. No. 9970 shall be made available up to the end of FY 2011: PROVIDED, FURTHER, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations.

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Sec. 64. Prohibition Against Impoundment of Appropriations. **No appropriations** authorized under this Act **shall be impounded through retention or deduction**, unless in accordance with the rules and regulations to be issued by the DBM: **PROVIDED, That all the funds appropriated for the purposes, programs, projects, and activities authorized under this Act**, except those covered under the Unprogrammed Fund**, shall be released pursuant to Section 33 (3)**, Chapter 5, Book VI of E.O. No. 292.

Sec. 65. Unmanageable National Government Budget Deficit. **Retention or deduction** of appropriations authorized in this Act **shall be effected *only* in cases where there is an unmanageable National Government budget deficit**. Unmanageable National Government budget deficit as used in this section shall be construed to mean that: (i) the actual National Government budget deficit has exceeded the quarterly budget deficit targets consistent with the full-year target deficit as indicated in the FY 2011 BESF submitted by the President and approved by Congress pursuant to Section 22, Article VII of the Constitution; or (ii) there are clear economic indications of an impending occurrence of such condition, as determined by the Development Budget Coordinating Committee and approved by the President.

Read together, these provisions clearly set out Congress' intent that the appropriations in the GAA could be released and used only as programmed. This is the general rule. As an exception, the President was given the power to retain or reduce **appropriations only in case of an unmanageable National Government budget deficit.** A very narrow exception has to prevail in reading these provisions as the general rule came from the command of the Constitution itself.

The Constitution expressly provides that no money shall be paid out of the Treasury except in pursuance of an appropriation made by law. As an authorization to the Executive, the constitutional provision actually serves as a legislative check on the disbursing power of the Executive.[77] It carries into effect

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[77] H. de Leon, *Philippine Constitutional Law: Principles and Cases*, Vol. 2 (2004 ed.), p. 233.

the rule that the President has no inherent authority to countermand what Congress has decreed since the Executive's constitutional duty is to ensure the faithful execution of the laws.[78] Impounding appropriations is an action contrary to the President's duty to ensure that all laws are faithfully executed. As appropriations in the GAA are part of a law, the President is duty bound to implement them; any suspension or deduction of these appropriations amounted to a refusal to execute the provisions of a law.

The GAA, however, in consideration of unforeseeable circumstances that might render the implementation of all of its appropriations impracticable or impossible, authorized the President to impound appropriations in cases of an unmanageable national budget deficit.

Impoundment refers to the refusal by the President, for whatever reason, to spend funds made available by Congress. It is the failure to spend or obligate budgetary authority of any type.[79] The President may conceivably impound appropriated funds in order to avoid wastage of public funds without ignoring legislative will (routine impoundments) or because he disagrees with congressional policy (policy impoundments).

In the United States (as well as in the Philippines), presidential impoundment does not enjoy any express or implied constitutional support.[80] Thus, **unless supported by the appropriating act itself, the impoundment of appropriated funds by the Executive is improper.** On the other hand, if a statute providing for a specific appropriation for the expenditure of the designated funds is non-mandatory, the President does not exceed his or her statutory authority by withholding a portion of the appropriated funds.[81]

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[78] 1987 Constitution, Article VII, Section 17.

[79] *Philconsa v. Enriquez*, G.R. No. 113105, August 19, 1994.

[80] Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974, 63 Tex. L. Rev. 693, citing *Kendall v. United States ex rel. Stokes.*

[81] 77 Am Jur 2d United States § 20.

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In the Philippines, the only instance when retention and reduction of appropriation is allowed is in the case of **reserves.** This exception is based on Section 37, Chapter 5, Book VI of the Administrative Code of 1987 which, by it terms, is not strictly an impoundment provision.

Section 37. *Creation of Appropriation Reserves.* - The Secretary may establish **reserves against appropriations** to provide **for contingencies and emergencies** which may arise later in the calendar year and which would otherwise require deficiency appropriations.

The establishment of appropriation reserves shall not necessarily mean that such portion of the appropriation will not be made available for expenditure. Should conditions change during the fiscal year justifying the use of the reserve, necessary adjudgments may be made by the Secretary when requested by the department, official or agency concerned.

Under this provision, retention or deduction may be made from appropriations by creating reserves for contingency and emergency purposes to be determined by the DBM Secretary, which reserves must still be spent within the GAA's FY. Otherwise, they shall revert back to the General Fund and would be unavailable for expenditure unless covered by a subsequent legislative enactment.[82]

e. the sources of DAP funds cannot qualify as savings

i. unobligated allotments

As I earlier emphasized, funds allotted for particular appropriations may only be used to augment other items in the GAA when there are actual savings. The DAP, by pooling funds together to fast-track priority projects of the government, violated this critical requirement as the sources of DAP funds cannot qualify as savings.

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[82] Section 28, Chapter 4, Book VI, E.O. No. 292.

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In pooling together "unobligated allotments"[83] to augment other items in the GAA, the DAP used funds that had already been allotted but had yet to be obligated or spent for its intended purpose. I fully agree with *J.* Carpio that these funds cannot be considered as savings, as well as in the distinction he made on when appropriations for CO and MOOE may be considered as savings.

NBC No. 541 states that it shall cover the **withdrawal of unobligated allotments as of June 30, 2012** of all national government agencies charged against FY 2011 Continuing Appropriation (R.A. No. 10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to

3.1.1 Capital Outlays (CO);

3.1.2 Maintenance and Other Operating Expenses (MOOE) related to the implementation of programs and projects, as well as capitalized MOOE[.]

This withdrawal is contrary to the intent and language of Section 61 of the 2011 GAA, and Section 65[84] which extends the availability of an appropriation up to the next year, *i.e.*, FY 2012. [85] The two provisions, read together, provide a guide on

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[83] Unobligated allotment refers to the portion of released appropriations which has not been expended or committed. Annex A, June 25, 2012 Memorandum to the President, Respondents' 1st Evidence Packet.

[84] The 2012 GAA also provides a substantially similar provision. It states:

Sec. 63. Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act **shall be available for release and obligation for the purpose specified, and under the same special provisions applicable thereto, for a period extending to one fiscal year after the end of the year in which such items were appropriated:** PROVIDED, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations, either in printed form or by way of electronic document.

[85] Section 65 of the 2011 GAA reads:

Sec. 65. Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act **shall be available for release and obligation for the purpose specified, and under the same special**

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when an appropriation for an MOOE and a CO may exactly be considered as savings. Section 61 enumerates instances when funding for an appropriation may be discontinued or abandoned, while Section 65 provides the deadline up to when an appropriation under the 2011 GAA may be spent.

Thus, under Section 65 of the 2011 GAA, appropriations for CO and MOOE may be released and spent until the end of FY 2012. Funding for CO and MOOE appropriations, in the meantime, may be discontinued or abandoned during its two year lifespan for any of the reasons enumerated in Section 61. Appropriations for CO and MOOE may be stopped when the PAPs they fund get completed, finally discontinued, or abandoned, and the excess funds left, if any, will be considered as savings.

Applying these concepts to the MOOE and CO leads us to the distinctions Justice Carpio set in his Separate Concurring Opinion. By its very nature, appropriations for the MOOE lapse monthly, and thus any fund allotted for the month left unused qualifies as savings, with two exceptions: (1) MOOE which **under the GAA can be declared as savings only in the last quarter** of the FY and (2) **expenditures for Business-type activities**, which under the GAA cannot be realigned.

Funds appropriated for CO, on the other hand, cannot be declared as savings unless the PAP it finances gets completed, finally discontinued or abandoned, and there are excess funds allotted for the PAP. Neither can **it be declared as savings unless there is no more time for public bidding to obligate the allotment within its two-year period of availability.**

Thus, NBC 541 cannot validly declare CO as savings in the middle of the FY, long before the end of the two-year period

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provisions applicable thereto, for a period extending to one fiscal year after the end of the year in which such items were appropriated: PROVIDED, That appropriations for MOOE and capital outlays under R.A. No. 9970 shall be made available up to the end of FY 2011: PROVIDED, FURTHER, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations.

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when such funds could still be obligated. And while MOOE for FY 2012 from January to June 2012 may be considered savings, the MOOE for a future period does not qualify as such.

In this light, NBC No. 541 fostered a constitutional illegality: the premature withdrawal of unobligated allotments pertaining to capital outlays and MOOE as of June 30, 2012 under the presidential directive clearly amounted to a presidential amendment of the 2011 GAA and a unilateral veto of an item of the GAA without giving Congress the opportunity to override the veto as prescribed by Section 27, Article VI of the Constitution.[86]

i.1 final discontinuance or abandonment

I likewise agree with J. Carpio's characterization of the final discontinuance, on one hand, and the abandonment, on the other hand, that would result in savings. The GAA itself provides an illustration of the impossibility or non-feasibility of a project that justified its discontinuance or abandonment:

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[86] Section 27, Article VI of the 1987 Constitution reads:

Section 27.

1) Every bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same he shall sign it; otherwise,he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the Members of such House shall agree to pass the bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law. In all such cases, the votes of each House shall be determined by yeas or nays, and the names of the Members voting for or against shall be entered in its Journal. The President shall communicate his veto of any bill to the House where it originated within thirty days after the date of receipt thereof, otherwise, it shall become a law as if he had signed it.

2) The President shall have the power to veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto shall not affect the item or items to which he does not object.

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Sec. 61. Realignment/Relocation of Capital Outlays. The amount appropriated in this Act for acquisition, construction, replacement, rehabilitation and completion of various Capital Outlays may be realigned/relocated in cases of **imbalanced allocation of projects within the district, duplication of projects, overlapping of funding source and similar cases**: PROVIDED, That such realignment/ relocation of Capital Outlays shall be done only upon prior consultation with the representative of the legislative district concerned.

Unless the respondents, however, can actually show that the reallocation of unobligated allotments pertaining to capital outlays was made with prior consultation with the legislative district representative concerned under the terms of above-quoted Section 61, they cannot claim any legitimate basis to come under its terms.

i.2 use of Section 38 as justification

I likewise find the respondents' invocation of Section 38, Chapter 5, Book VI of the Administrative Code to justify the withdrawal and pooling of unobligated allotments and unreleased appropriations for slow moving projects to be misplaced. This provision reads:

Section 38. *Suspension of Expenditure of Appropriations.* - **Except as otherwise provided in the General Appropriations Act** and whenever in his judgment the public interest so requires, **the President**, upon notice to the head of office concerned, **is authorized to suspend or otherwise stop further expenditure of funds allotted for any agency,** or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees.

Since the actual execution of the budget could meet unforeseen contingencies, this provision delegated to the President the power to suspend or otherwise stop further expenditure of **allotted funds** based on a broad legislative standard of public interest.

By its clear terms, the authority granted is to stop or suspend the ***expenditure of allotted funds***. Funds are only considered

allotted *when the DBM has authorized an agency to incur obligation for specified amounts contained in an appropriation law*.[87] Unlike an appropriation which is made by the legislative, an **allotment** is an executive authorization to the different departments, bureaus, offices and agencies that obligations may now be incurred. Allotment is part of the President's power to execute an appropriations law and **it is this power that he can suspend or reverse, not the will of Congress expressed through the appropriations law**.

Thus, the President cannot exercise the power to suspend or stop expenditure under Section 38 towards appropriations, as funds for it have yet to be released and allotted. Neither can the President use Section 38 to justify the withdrawal of unobligated allotments under the terms of NBC 541 and its treatment as savings.

Section 38 authorizes the President to either suspend or stop an expenditure. Suspension of expenditures connotes a temporary executive action, while the stoppage of funds requires finality, and must comply with the GAA provision on savings. NBC 541 cannot be deemed a suspension of expenditure under Section 38. Suspension involves a temporary stoppage while the pooling of unobligated allotments under the DAP was intended to create savings, which involves the final discontinuance or abandonment of PAPs. Neither can the withdrawal of unobligated allotments be justified under the authority to stop expenditures in Section 38, as NBC 541 provides that these allotments can still be reissued. **That the withdrawn allotments can be reissued back to the "original program or project from which it was withdrawn**" ***only means that the original program or project has not really been "completed or abandoned" so as to qualify the funds therefor as "savings."***

In other words, Section 38 authorizes the suspension or stoppage of expenditures; it does not allow the President to stop an expenditure, use it as savings to augment another item, and then change his mind and re-issue it back to the original

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[87] Section 2 (2), Chapter 1, Book VI, E.O. No. 292.

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program. Once a program is finally discontinued or abandoned, its funding is stopped permanently. Suspended expenditures, on the other hand, cannot be used as savings to augment other items, as savings connote finality.

f. the DAP violates the prohibition against impoundment

To restate, Section 38 of the Administrative Code covers stoppage or suspension of expenditure of allotted funds. This provision cannot be used as basis to justify the withdrawal and pooling of unreleased appropriations[88] for slow-moving projects.

The Executive does not have any power to impound appropriations (where otherwise appropriable) except on the basis of an **unmanageable budget deficit** or as **reserve for purposes of meeting contingencies and emergencies**. None of these exceptions, however, were ever invoked as a justification for the withdrawal of unreleased appropriations for slow-moving projects. As the records show, these appropriations were withdrawn simply on the basis of the pace of the project as a slow-moving project. This executive action does not only directly contravene the GAA that the President is supposed to implement; more importantly, **it is a presidential action that the Constitution does not allow**.

Some members of the Court argue that no impoundment took place because the DAP was enforced to facilitate spending, and not to prevent it. It must be noted, however, that **the funds used to spend on DAP projects were funds impounded from other projects**. In order to increase funding on the projects it funded, the DAP had to create savings that would be used to finance these increases. The process by which DAP created these savings involved the impoundment of

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[88] Unreleased appropriation refers to the balances of programmed authorizations / appropriations pursuant to law (*e.g.* General Appropriations Act) or other legislative enactment, still available for release. Annex A,June 25, 2012 Memorandum to the President, Respondents' 1st Evidence Packet.

unreleased appropriations for slow-moving projects. As I have earlier explained, impoundment refers to the refusal by the President, for whatever reason, to spend funds for appropriations made by Congress. Through the DAP, funds that were meant to finance appropriations for slow-moving projects were not released, allotted and spent for the appropriations they were meant to cover. They were impounded. That these funds were used to finance other appropriations is inconsequential, as the impoundment had already taken place. Thus, in so far as unreleased appropriations for slow-moving programs are concerned, these had been impounded, in violation of the clear prohibition against it in the GAA.

g. Qualifications to the President's flexibility in budget execution

The *ponencia*, in characterizing the Executive's actions in formulating the DAP, pointed out that (*1*) the DAP is within the President's power and prerogative to formulate and implement; and (*2*) the President should be given proper flexibility in budget execution. If the DAP had been within the President's authority to formulate and implement, and is within the flexibility given to the Executive in budget execution, then how come a majority of this Court is inclined to believe it to be unconstitutional?

To answer this query, allow me to clarify the scope and context of the Executive's prerogative in budget execution. Flexibility in the budget execution means implementing the provisions of the GAA and exercising the discretion this entails ***within the limits provided by the GAA and the Constitution***. It does not mean a wholesale authority to choose which appropriations should get funding, which appropriations should have less or more, and which should have none at all. Allowing the President this kind of prerogative robs Congress of its power of the purse, because whatever changes it may make in the budget legislation phase would still be subject to changes by the President in budget implementation.

The framers of our Constitution, as well as Congress, however, recognized that there could be unforeseen instances that would

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make it unreasonable to implement all the items found in the GAA. Thus, the Constitution provided for the power of augmentation as an exception to the general prohibition against transfers of appropriation.

Congress, on the other hand, allowed the President under the Administrative Code to temporarily suspend or stop the expenditure of funds, subject to certain conditions. Congress also saw it fit to authorize the President to impound unreleased appropriations in the GAA of 2011 and 2012, but subject to strict conditions.

These are flexibilities given to the President by the Constitution and by Congress, and which had been ***over-extended*** through the DAP. To reiterate, the DAP exceeded these flexibilities because it did not comply with the requisites necessary before both the power of augmentation and the power of impoundment can be lawfully exercised.

With respect to these two prerogatives, a distinction should be made between *(1)* the transfer of funds from one purpose (project/program/activity) to another where both purposes are covered by the same item of expenditure authorized in the GAA, and *(2)* the transfer of funds from one purpose to another where the other purpose is already covered by a different item of expenditure authorized in the GAA.

With the first, no constitutional objection can be raised. Given that the government, more often than not, operates on a budget deficit than on a budget surplus, the President has the inherent power to create a policy-system that would govern the spending priority of the Executive in implementing the appropriations law.

The respondents correctly assert that this power is rooted on the constitutional authority of the President to faithfully execute the laws, among them, the GAA which is a budgetary statute. Since both purposes fall within the same item of expenditure authorized by law, then from the constitutional perspective, no transfer of appropriation is really made.

However, ***with the second***, the general rule against transfer of appropriation applies. While the President concededly has policy-making power in the exercise of his function of law implementation, his policy-making power does not exist independently of the policies laid down in the law itself (however broad they may be) that the President is tasked to execute. Much less can the President's power exist outside of the limitations of the fundamental law that he is sworn to protect and defend.[89] Since the transfer of funds is for a purpose no longer within the coverage of the original item of appropriation, this transfer clearly constitutes a transfer of appropriation beyond the constitutional limitation.

In sum, while the President has flexibility in pushing for priority programs and crafting policies that he may deem fit and necessary, the DAP exceeded and over-extended what the President can legitimately undertake. Specifically, several sources of funding used to facilitate the DAP, as well as the programs that the DAP funded, went beyond the allowed flexibility given to the President in budget execution.

That the DAP resulted in economic advances for the Philippines does not validate its component actions that over-stepped the flexibilities allowed in budget execution, as the ends can never justify the illegal means. Worthy of note, too, is that the Court is not a competent authority for economic speculations, as these are matters best left to economists and pundits – many of whom are never in unison and cannot be considered as *the* sole authority for economic conclusions. We are, after all, a

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[89] The government's power to cut on taxes to address a recessionary level of and stimulate the economy is not a discretionary power that is lodged solely with the President in the exercise of his policy-making power because the power of taxation is an exercise of legislative power. While the power of taxation is inherent in the state, the Constitution providesfor certain limitations in its exercise. In the same vein, the decision on whether to pursue an expansionary policy by increasing government spending (as in the case of the DAP) must adhere not only to what Congress provided in the law itself but more importantly with what the Constitution provided as a limitation or prohibition.

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court of law bound to make its decisions based on legal considerations, albeit, admittedly, these decisions have societal outcomes, including consequences to the economy.

h. the DAP, in funding items not found in the GAA, violated the Constitution

I agree with the *ponencia's* conclusion that the DAP, in funding items that are not in the GAA, violated the Constitution. The *ponencia's* exhaustive review of the evidence packets submitted by the OSG shows that some of the projects and programs that the DAP funded had no appropriation.

Thus, the *ponencia* correctly observed that the DAP funded items which had no appropriation cover, to wit: (i) personnel services and capital outlay under the DOST's Disaster Risk, Exposure, Assessment and Mitigation (*DREAM*) project; (ii) capital outlay for the COA's "IT Infrastructure Program and hiring of additional litigation experts";[90] (iii) capital outlay for the Philippine Air Force's "On-Base Housing Facilities and Communications Equipment";[91] and (iv) capital outlay for the Department of Finance's "IT Infrastructure Maintenance Project."

For instance, the DAP facilitated funding for the DOST's DREAM project through an appropriation under the DOST central office, *i.e.*, its appropriation for "Generation of new knowledge and technologies and research capability building in priority areas identified as strategic to National Development." The appropriation for the DREAM had no item for Capital Outlay and Personnel Services; Congress provided only ₱537,910,000.00 for MOOE. The DAP, in contravention of the constitutional rules on transfer, funded a non-existing item of the appropriation by adding ₱43,504,024.00 for Personnel Services and ₱391,978,387.00 for Capital Outlay.

Following the doctrine established in ***Nazareth***, the items for Personnel Services and capital outlays under the DREAM

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[90] 7th Evidence Packet p. 91.

[91] 2nd Evidence Packet pp. 8-9.

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project were illegal transfers and use of public funds. Since Congress did not provide anything for personnel services and capital outlays under the appropriation "Generation of new knowledge and technologies and research capability building in priority areas identified as strategic to National Development," then these cannot be funded in the guise of a valid transfer of savings and augmentation of appropriations.

The same argument applies to the DAP's funding of capital outlay for the COA's appropriation for "IT Infrastructure Program and hiring of additional litigation experts,"[92] capital outlay for the Department of Finance's "IT Infrastructure Maintenance Project"[93] and capital outlay for the Philippine Air Force's "On-Base Housing Facilities and Communication Equipment."[94] None of the appropriations which fund these projects had an item for capital outlay, and yet, the DAP introduced funding for capital outlay in these projects.

Since these expenditures were not given congressional appropriation, the transfer of funds under the DAP to fund these items cannot be justified even under the exception to the general prohibition under Section 25(5), Article VI of the 1987 Constitution.

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[92] The DAP, in order to finance the "IT Infrastructure Program and hiring of additional expenses" of the Commission on Audit in 2011 increased the latter's appropriation for "General Administration and Support." DAP increased the appropriation by adding ₱5.8 million for MOOE and ₱137.9 million for CO. The COA's appropriation for General Administration and Support during the GAA of 2011, however, does not contain any item for CO.

[93] The DAP financed the Department of Finance's "IT Infrastructure Maintenance Project" by augmenting its "A.II.c1. Electronic data management processing" appropriation with capital outlay worth ₱192.64 million. This appropriation, however, does not have any item for CO.

[94] To finance the Philippine Airforce's "On-Base Housing Facilities and Communication Equipment," the DAP augmented several appropriations of the Philippine Airforce with capital outlay totaling to ₱29.8 million. None of these appropriations had an item for CO.

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For emphasis, for the power of augmentation to be validly exercised, the item to be augmented must be an item that has an appropriation under the GAA; if the item funded under the DAP through savings did not receive any funding from Congress under the GAA, the Executive cannot provide funding; it may not countermand legislative will by "augmenting" an item that is not existing and therefore can never be "deficient."

3. The DAP violates the special conditions for the release of the Unprogrammed Fund in the 2011 and 2012 GAAs

I agree with the *ponencia* and Justice Carpio's arguments that the DAP facilitated the unlawful release of the Unprogrammed Fund in the 2011 and 2012 GAAs. As an aside, allow me to cite the legislative history of the provision limiting the release of the Unprogrammed Fund only when original revenue targets have been exceeded to support their conclusion.

The Unprogrammed Fund in both the 2011 and the 2012 GAAs requires as a condition *sine qua non* for its release that the revenue collections exceed the original revenue targets for that year. This requirement had been worded in an exactly the same phraseology in Special Provision No. 1 in the 2011 GAA and in Special Provision No. 1 in the 2012 GAA:

1. Release of Fund. **The amounts authorized herein shall be released *only* when the revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, xxx

Both Special Provisions in the 2011 and 2012 GAAs contain, also in the same language, a proviso authorizing the use of collections arising from sources not considered in the original revenue targets, *viz*.:

PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund: xxx

Both the *ponente* and Justice Carpio conclude that this proviso allows the use of sources not considered in the original revenue

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targets, but only if the first condition, *i.e.*, the original targets having been exceeded, was first complied with. Justice Del Castillo, on the other hand, contends that the proviso was meant to act as an exception to the general rule, and that windfall revenue may be used to cover appropriations in the Unprogrammed Fund even if the original targets had not been exceeded.

The proviso allowing the use of sources not considered in the original revenue targets to cover releases from the Unprogrammed Fund was not intended to prevail over the general provision requiring that revenue collections first exceed the original revenue targets. In the interpretation of statutes, that which implements the entire statute should be applied, as against an interpretation that would render some of its portions ineffectual.[95] Neither should a proviso be given an interpretation that renders the general phrase it qualifies entirely inutile. If we are to follow Justice Del Castillo's argument that Special Provision No. 1 allows the use of collections arising from sources not considered in the original revenue targets even without these targets first being met and exceeded, **then the very restrictive language allowing the release of the Unprogrammed Fund only when collections exceed original revenue targets would be rendered useless**.

This concern was manifested in the President's Veto Message in 2009, when the release of Unprogrammed Fund was first conditioned upon exceeding the original revenue targets and accompanied by the proviso allowing for the use of sources not considered in the original targets:

> Congress revised the first sentence of this special provision so that the release of funds appropriated under the Unprogrammed Fund shall be made only when the revenue collections for the entire year exceed the original revenue targets. Allow me to emphasize,

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[95] This principle is expressed in the maxim *Ut magis valeat quam pereat*, that is, we choose the interpretation which gives effect to the whole of the statute – its every word. *Inding v. Sandiganbayan*, G.R. No. 143047, 14 July 2004, 434 SCRA 388, 403, as cited in *Philippine Health Care Providers v. CIR*, G.R. No. 167330, September 18, 2009.

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however, that **reference to revenue collections for the entire year under this special provision pertain only to regular income sources or those covered by the same set of assumptions used in setting the computation of revenue targets for the year as reflected in the BESF**. ***It should not, therefore, include new sources of income not considered nor identified in the original revenue projections***. Neither should it cover sources of income not contemplated under the original assumptions used in setting the revenue targets.[96]

Thus, as it was first intended and implemented, the special provision requiring that the Unprogrammed Fund be released only when original revenue targets had been met, and sources not considered in the original revenue targets shall not even be included in determining whether the original revenue targets had been exceeded. It follows, then, that the only time the sources of revenue not considered in the original revenue targets may be used is when the original revenue targets had been exceeded. Otherwise, there is no point in excluding sources not considered in the original revenue targets to determine whether revenue collections had exceeded these targets, when a proviso would subsequently allow the use of outside sources even without the targets first being met.

Verily, had it been the intention of Congress to allow the use of sources of funds not considered in the original revenue targets even if the latter had not been met, then it could have stated it in a language clearly pointing towards that intent, as some members of the House of Representatives attempted to do in House Bill No. 5116, *viz*.:

Section 1. Appropriation of Funds. The following sums, or so much as thereof as may be necessary, are **hereby appropriated out of any funds in the National Treasury of the Philippines not otherwise appropriated,** for the operation of the Government of the Republic of the Philippines from January one to December thirty-one, two thousand nine, except where otherwise specifically provided herein: (General Observation: President's Veto Message, March 12, 2009, page 1269, RA No. 9524).[97]

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[96] President's Veto Message, March 16, 2009, Official Gazette Volume 105 No. 1, p. 264, *available at* http://www.dbm.gov.ph/wp-content/uploads/GAA/GAA2009/Pveto/pveto.pdf.

[97] House Bill No. 5116, Fourteenth Congress, *available at* http://www.dbm.gov.ph/wp-content/uploads/GAA/GAA2009/prelim2.pdf.

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House Bill No. 5116 was an attempt by several members of the House of Representatives to override the President's interpretation and implementation of Special Provision No. 1 in the 2009 GAA. That this attempt had not succeeded, and that the implementation of the Special Provision No. 1 in the 2009 continued as the Executive construed it to be meant that the latter's interpretation of this Special Provision was the true interpretation of Congress. This interpretation was carried into the language of Special Provision No. 1 when it was re-enacted in the subsequent years, including the GAAs of 2011 and 2012; thus, it should be the interpretation that should prevail in this case.

4. The operative fact doctrine: concept, limits, and application to the DAP's unconstitutionality.

I generally agree with *J.* Bersamin's conclusion on the operative fact doctrine and, for greater clarity, discuss its application below for the Court's consideration and understanding. I dwell most particularly on the concept of the doctrine and the element of "good faith" that, under the doctrine, assumes a specialized meaning.

To appreciate the circumstances or situations when the doctrine of operative fact may be applied, I find it useful to review its development in jurisprudence.

a. The Doctrine: Roots and Concept

The **doctrine of operative fact** is American in origin, and was discussed in the 1940 case of *Chicot County Drainage Dist. v. Baxter State Bank et al.*:[98]

The effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling

[98] 308 US 371, 318-319, 60 S. Ct. 317.

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as to invalidity may have to be considered in various aspects, with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts x x x and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. [emphasis supplied]

The doctrine was a departure from the old and long established rule (known as the **void *ab initio* doctrine**) that an "unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[99] By shifting from retroactivity to prospectivity, the US courts took a ***pragmatic and realistic approach*** in assessing ***the effects*** of a declaration of unconstitutionality of a statute.[100]

Incorporation of the doctrine into our legal system came in the 1950s when, in several cases,[101] the Court considered ***the effects*** of the declaration of unconstitutionality of the Moratorium laws on contracts and obligations. Despite the invalidity of the Moratorium laws, the Court recognized that they interrupted the running of the period of prescription while they were in effect; creditors who were unable to institute their claims during the suspension were, thus, accorded relief.

In *Fernandez v. Cuerva & Co.*,[102] a 1967 case, the Court ruled that the invalidation of a statute conferring jurisdiction to

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[99] The void *ab initio* doctrine was first used in the case of *Norton v. Shelby County*, 118 US 425, 6 S. Ct. 1121, 30 L. Ed. 178 (1886).

[100] Kristin Grenfell, *California Coastal Commission: Retroactivity of a Judicial Ruling of Unconstitutionality*, 14 Duke Envtl. L. & Pol'y F. 245, 256.

[101] See the following cases of *Montilla v. Pacific Commercial*, 98 Phil. 133 (1956) and *Manila Motor Company, Inc. v. Flores*, 99 Phil. 738 (1956).

[102] G.R. No. L-21114, November 28, 1967.

an executive department over claims for unpaid salaries should not prejudice an employee who had previously instituted a claim with the department. The filing of his claim, *albeit* with a department later found to be without jurisdiction, nonetheless tolled the running of the prescriptive period, and the nullification of the statute did not revive it.

In the 1969 case of *Municipality of Malabang, Lanao del Sur v. Benito*,[103] the Court affirmed the "dissolution" of the Municipality of Balabagan, which was created pursuant to an unconstitutional statute. Despite the municipality's dissolution, the Court assuaged fears that the acts done in the exercise of the municipality's corporate powers would also be voided by referring to the *Chicot County* case and acknowledging that the municipality's acts were done relying on the validity of the statute; prior to its dissolution, its exercise of corporate powers produced effects.

Perhaps the most cited case on the application of the operative fact doctrine is the 1971 case of *Serrano de Agbayani v. Philippine National Bank*.[104] As in the earlier Moratorium cases, *Serrano* involved the effect of the declaration of the unconstitutionality of the Moratorium law on claims of prescription of actions for collections of debts and foreclosures of mortgages. Speaking for the Court, Justice Fernando explained the rationale for the doctrine:

> It does not admit of doubt that prior to the declaration of nullity such challenged legislative or executive act must have been in force and had to be complied with. **This is so as until after the judiciary, in an appropriate case, declares its invalidity, it is entitled to obedience and respect**. Parties may have acted under it and may have changed their positions. What could be more fitting than that in a subsequent litigation regard be had to what has been done while such legislative or executive act was in operation and presumed to be valid in all respects. It is now accepted as a doctrine that **prior to its being nullified, its existence as a fact must be reckoned with**. This is merely to reflect awareness that precisely because **the judiciary**

[103] 137 Phil. 360 (1969).

[104] 148 Phil. 443 (1971).

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is the governmental organ which has the final say on whether or not a legislative or executive measure is valid, a period of time may have elapsed before it can exercise the power of judicial review that may lead to a declaration of nullity. It would be to deprive the law of its quality of fairness and justice then, if there be no recognition of what had transpired prior to such adjudication.

In the language of an American Supreme Court decision: "The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official."[105] (emphases supplied)

Planters Products, Inc. v. Fertiphil Corporation[106] further explained this rationale, as follows:

The doctrine of operative fact, as an exception to the general rule, only applies as a matter of equity and fair play. It nullifies the effects of an unconstitutional law by recognizing that the existence of a statute prior to a determination of unconstitutionality is an operative fact and **may have consequences which cannot always be ignored.** The past cannot always be erased by a new judicial declaration.

The doctrine is applicable **when a declaration of unconstitutionality will impose an undue burden on those who have *relied on the invalid law***. [emphasis ours]

But as we also ruled in this same case, **the operative fact doctrine does not always apply** and is not a necessary consequence of every declaration of constitutional invalidity. It can only be invoked in situations where the nullification of the effects of what used to be a valid law would result in **inequity** and **injustice**. **Where no such resulting effects would ensue, the general rule that an unconstitutional law is totally ineffective should apply.**

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[105] *Id.* at 447-448.

[106] *Supra* note 105.

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Additionally, the strictest kind of scrutiny should be accorded to those who may claim the benefit of the operative fact doctrine as it draws no direct strength or reliance from an express provision of the Constitution and should not be applied in case of doubt or conflict with a constitutional or statutory provision.

In these cited cases, the Court, beyond the consideration of **prejudice to the parties, also considered reliance in good faith on the unconstitutional laws prior to their declaration of unconstitutionality**. The "reliance" requirement underscored the rule that the doctrine is applied only as a matter of **equity**, in the interest of **fair play**, and as a **practical reality**. The doctrine limits the retroactive application of the law's nullification to recognize that prior to its nullification, it was a legal reality that governed past acts or omissions. "Whatever was done while the legislative or the executive act was in operation should be duly recognized and presumed to be valid in all respects"[107] so as not to impose an undue burden on those who have relied on the invalid law. The question in every case is whether parties who ***reasonably relied in good faith on the old rule prior to its invalidation*** have acquired interests that justify restricting the retroactive application of a new rule because to declare otherwise would cause hardship and unfairness on those parties.[108] Good faith becomes a necessity as he who comes to court must come with clean hands.[109]

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[107] Brandley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions,* 26 Harv. J.L. & Pub. Pol'y 811.

[108] See Kristin Grenfell, California Coastal Commission: Retroactivity of a Judicial Ruling of Unconstitutionality, 14 Duke Envtl. L & Policy F. 245 (Fall 2003).

[109] It is a general principle in equity jurisprudence that "he who comes to equity must come with clean hands." *North Negros Sugar Co. v. Hidalgo*, 63 Phil. 664, as cited in *Rodulfa v. Alfonso*, G.R. No. L-144, February 28, 1946. A court which seeks to enforce on the part of the defendant uprightness, fairness, and conscientiousness also insists that, if relief is to be granted, it must be to a plaintiff whose conduct is not inconsistent with the standards he seeks to have applied to his adversary. Concurring Opinion of *J.* Laurel in *Kasilag v. Rodriguez, et al.,* G.R. No. 46623, December 7, 1939.

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Essentially, the concept of the doctrine is ***effect*-focused**, *i.e.*, whether the effect/s of a party's reliance on the invalidated law are compelling enough to exempt him or her from the retroactive application of the new law. **The Court never looked far back enough to address the *cause* of the invalidity, for which reason we find nothing in our jurisprudence that extended the operative fact doctrine to validate the invalidated law itself or to absolve its proponents**.

b. Application

Given the jurisprudential meaning of the operative fact doctrine, a first consideration to be made under the circumstances of this case is the application of the doctrine: **(1)** to the programs, works and projects the DAP funded in relying on its validity; **(2)** to the officials who undertook the programs, works and projects; and **(3)** to the public officials responsible for the establishment and implementation of the DAP.

With respect to the programs, works and projects, **I fully agree with *J*. Bersamin** that the ***DAP-funded programs, works and projects*** can no longer be undone; practicality and equity demand that they be left alone as they were undertaken relying on the validity of the DAP funds at the time these programs, works and projects were undertaken.

The ***persons and officials***, on the other hand, ***who merely received or utilized the budgetary funds in the regular course*** and without knowledge of the DAP's invalidity, would suffer prejudice if the invalidity of the DAP would affect them. Thus, they should not incur any liability for utilizing DAP funds, unless they committed criminal acts in the course of their actions other than the use of the funds in good faith.

The doctrine, on the other hand, cannot simply and generally be extended to the ***officials who never relied on the DAP's validity and who are merely linked to the DAP because they were its authors and implementors***. A case in point is the case of the DBM Secretary who formulated and sought the approval of NBC No. 541 and who, as author, cannot be

said to have relied on it in the course of its operation. Since he did not rely on the DAP, ***no occasion exists to apply the operative fact doctrine to him and there is no reason to consider his "good or bad faith" under this doctrine.***

This conclusion should apply to all others whose only link to the DAP is as its authors, implementors or proponents. If these parties, for their own reasons, would claim the benefit of the doctrine, then the burden is on them to prove that they fall under the coverage of the doctrine. As claimants seeking protection, they must actively show their good faith reliance; good faith cannot rise on its own and self-levitate from a law or measure that has fallen due to its unconstitutionality. Upon failure to discharge the burden, then the general rule should apply – the DAP is a void measure which is deemed never to have existed at all.

The good faith under this doctrine should be ***distinguished from the good faith considered from the perspective of liability***. It will be recalled from our above finding that the respondents, through grave abuse of discretion, committed a constitutional violation by withdrawing funds that are not considered savings, pooling them together, and using them to finance projects outside of the Executive branch and to support even the PDAF allocations of legislators.

When transgressions such as these occur, the ***possibility for liability for the transgressions committed*** inevitably arises. It is a basic rule under the law on public officers that public accountability potentially imposes ***a three-fold liability – criminal, civil and administrative – against a public officer***. A ruling of this kind can only come from a tribunal with direct or original jurisdiction over the issue of liability and where the good or bad faith in the performance of duty is a material issue. This Court is not that kind of tribunal in these proceedings as we merely decide the question of the DAP's constitutionality. If we rule beyond pure constitutionality at all, it is only to expound on the question of the consequences of our declaration of unconstitutionality, in the manner that we do when we define the application of the operative fact doctrine. Hence, any ruling

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we make implying the existence of the presumption of good faith or negating it, is only for the purpose of the question before us – the constitutionality of the DAP and other related issuances.

To go back to the case of Secretary Abad as an example, we cannot make any finding on good faith or bad faith ***from the perspective of the operative fact doctrine*** since, as author and implementor, he did not rely in good faith on the DAP.

Neither can we make any pronouncement on his criminal, civil or administrative liability, *i.e.*, *based on his performance of duty*, since we do not have the jurisdiction to make this kind of ruling and we cannot do so without violating his due process rights. In the same manner, given our findings in this case, we should not identify this Court with a ruling that seemingly clears the respondents from liabilities for the transgressions we found in the DBM Secretary's performance of duties when the evidence before us, at the very least, shows that his actions negate the presumption of good faith that he would otherwise enjoy in an assessment of his performance of duty.

To be specific about this disclaimer, aside from the many admissions outlined elsewhere in the Opinion, there are indicators showing that the DBM Secretary might have established the DAP knowingly aware that it is tainted with unconstitutionality.

Consider, for example, that during the oral arguments, the DBM Secretary admitted that he has an extensive knowledge of both the legal and practical operations of the budget, as the transcript of my questioning of the DBM Secretary shows.[110]

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[110] During the oral arguments, Sec. Abad admitted to having an extensive knowledge of both the legal and practical operation of the budget, as the following raw transcript shows:

Justice Brion: And this was not a sole budget circular, there were other budget circular[s]?

Secretary Abad: There were, Your Honor.

Justice Brion: We were furnished copies of Budget Circular 541, 542, all the way up to 547, right?

Secretary Abad: That's correct, Your Honor.

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Justice Brion: And in the process of drafting a budget circular, I would assume that you have a sequent [sic.] assistant secretary for legal?

Secretary Abad: That's correct, Your Honor.

Justice Brion: And an undersecretary for legal?

Secretary Abad: Well, not exclusively for legal, but they do cover that particular area.

Justice Brion: They do legal work?

Secretary Abad: Yes.

Justice Brion: And you yourself, you are a lawyer?

Secretary Abad: That's correct, Your Honor.

Justice Brion: And you were also a congressman, you were a congressman?

Secretary Abad: That's also true, Your Honor.

Justice Brion: And in fact, how many years were you in Congress?

Secretary Abad: For 12 years, Your Honor.

Justice Brion: And were you also involved in budget work, or work in the budget process while you were in Congress?

Secretary Abad: Well, I once had the privileged [sic.] of sharing [sic] the appropriations committee, Your Honor.

Justice Brion: So the budget was nothing, or is nothing new to you?

Secretary Abad: Well, from the, it was different from the perspective of the legislature, Your Honor. It's a mordacious [sic] work from the perspective of the Executive.

Justice Brion: Yes, but in terms of, in terms of concepts, in terms of processes, you have been there, you knew how to carry the budget from the beginning up to the very end.

Secretary Abad: Well, we were exercising over side [sic.] function much more than actually engaged in budget preparation, budget execution and budget monitoring. So it's a very different undertaking your Honor.

Justice Brion: When you issued National Budget Circular No. 541, it was you as budget secretary who signed the national budget circular, right?

Secretary Abad: That's correct, Your Honor.

Justice Brion: And I would assume that because this was prepared by your people there were a lot of studies that went in the preparation of this budget circular?

Secretary Abad: Yeah, it was actually an expression via an issuance of a directive from the President as was captured by the phrase "use it or lose it"…

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The exchange, to my mind, negates any claim by the respondent DBM Secretary that he did not know the legal implications of what he was doing. As a lawyer and with at least 12 years of experience behind him as a congressman who was even the Chairman of the House Appropriations Committee, it is inconceivable that he did not know the illegality or unconstitutionality that tainted his brainchild. Consider, too, in this regard that *all appropriation, revenue and tariff bills emanate from the Lower House*[111] so that the Chair of the Appropriations Committee cannot but be very knowledgeable about the budget, its processes and technicalities. In fact, the Secretary likewise knows budgeting from the other end, *i.e.*, from the user end as the DBM Secretary.

Justice Brion: But that, that point in time you had been doing this expedited thing for almost a year, right?

Secretary Abad: That's correct, Your Honor.

Justice Brion: And when you drafted this Budget Circular this was [sic], you were using very technical term[s] because your people are veterans in this thing. For example, you were using the term "savings," right? And I would assume that when you used the term "savings" then you had, at the back of your mind, the technical term of the, the technical meaning of that term "savings."

Secretary Abad: As defined in the General Provisions, Your Honor.

Justice Brion: And also the term "augment," right?

Secretary Abad: Yes, Your Honor.

Justice Brion: And the term "unobligated allotment."

Secretary Abad: Yes, Your Honor.

Justice Brion: So this was not drafted by, by neophytes?

Secretary Abad: Yes, Your Honor.

Justice Brion: And you also had at the back of your mind presumably all the constitutional and statutory limitations in budgeting, right?

Secretary Abad: We had hope so, Your Honor.

Justice Brion: So every word, every phrase in this National Budget Circular was intended for what it wanted to convey and to achieve?

Secretary Abad: Yes, Your Honor.

Oral Arguments on the DAP dated January 28, 2014 TSN, pp. 120 to 128.

[111] 1987 Constitution, Article VI, Section 24.

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Armed with all these knowledge, it is not hard to believe that he can run circles around the budget and its processes, and did, in fact, purposely use this knowledge for the administration's objective of gathering the very sizeable funds collected under the DAP.

J. Carpio, for his part, in one of the exchanges in this Court's consideration of the present case, had occasion to cite examples of why Secretary Abad could not have been in good faith.[112] With *J.* Carpio's permission, I cite the following instances he cited:

> 1) The Court has already developed jurisprudence on savings and the power to realign. The DBM cannot feign ignorance of these rulings since it was a respondent in these cases. Thus, it implemented the DAP knowing full well that it contradicts jurisprudence.
>
> 2) The DBM was not candid with this Court when it claimed that the Bureau of Treasury had certified that revenue collections for the FYs 2011, 2012 and 2013 exceeded original revenue targets. On the contrary, it failed to present evidence establishing this claim.

J. Bersamin likewise had his share of showing that the respondent DBM Secretary knew of the constitutional provisions that the DAP was violating. This came out during his questioning of the DBM Secretary on cross-border transfers during the oral arguments when the DBM Secretary admitted knowing the transfers made to the COA and the House of Representatives despite his awareness of the restrictions under Section 29(1) and Section 25(5), Article VI of the 1987 Constitution.[113]

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[112] Draft Opinion of Justice Carpio circulated in the 2014 Baguio Summer Session.

[113] The clarity of the language of the constitutional provisions against cross-border transfer of funds was admitted by Sec. Abad while questioned by Justice Bersamin on this point during the oral arguments:

Justice Bersamin:

No, appropriations before you augmented because this is a cross border and the tenor or text of the Constitution is quite clear as far as I am concerned. It says here, "The power to augment may only be made to

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increase any item in the General Appropriations Law for their respective offices." Did you not feel constricted by this provision?

Secretary Abad:

Well, as the Constitution provides, the prohibition we felt was on the transfer of appropriations, Your Honor. What we thought we did was to transfer savings which was needed by the Commission to address deficiency in an existing item in both the Commission as well as in the House of Representatives; that's how we saw… (interrupted)

Justice Bersamin:

So your position as Secretary of Budget is that you could do that?

Secretary Abad:

In an extreme instances (sic) because… (interrupted)

Justice Bersamin:

No, no, in all instances, extreme or not extreme, you could do that, that's your feeling.

Secretary Abad:

Well, in that particular situation when the request was made by the Commission [on Audit] and the House of Representatives, we felt that we needed to respond because we felt… (interrupted)

Justice Bersamin:

Alright, today, today, do you still feel the same thing?

Secretary Abad:

Well, unless otherwise directed by this Honorable Court and we respect your wisdom in this and we seek your guidance…

Justice Bersamin:

Alright, you are yourself a lawyer who is a Secretary, may I now direct your attention to the screen, paragraph 5. Let us just focus on that part, "… be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations." What do you understand by the phraseology of this provision, that one, the second?

Secretary Abad:

It means, Your Honor, that savings of a particular branch of government… the…a head of a department is only authorized to augment… (interrupted)

Justice Bersamin:

Is it the first time for you to read this provision?

Secretary Abad:

It's not, Your Honor. A head of the department is authorized to augment savings within its own appropriations, Your Honor, so it's just within.

Oral Arguments on the DAP dated January 28, 2014 TSN, pp. 42 – 43.

In these lights, we should take the utmost care in what we declare as it can have far reaching effects. Worse for this Court, any advocacy or mention of presumption of good faith may be characterized as an undue and undeserved deference to the Executive, implying that the rule of law, separation of powers, and checks and balances may have been compromised in this country. This impression, to be sure, will not help the reputation of this Court or the stability of our country.

To be very clear about our positions, we can only apply the operative fact doctrine ***to the programs, projects and works that can no longer be undone and where the beneficiaries relied in good faith on the validity of the DAP.***

The authors, proponents and implementors of DAP are not among those who can seek coverage under the doctrine; their link to the DAP was merely to establish and implement the terms that we now find unconstitutional.

The matter of their good faith in the performance of duty (or its absence) and their liability therefor, if any, can be made only by the proper tribunals, not by this Court in the present case.

Based on these premises, I concur that the DAP is unconstitutional and should be struck down. I likewise concur in the application of the Operative Fact Doctrine, as I have explained above and adopted by the *ponencia.*

SEPARATE CONCURRING OPINION

PERLAS-BERNABE, *J.*:

I concur in the *ponencia*'s result, but find it necessary to clarify certain points surrounding the concepts of appropriation, realignment, and augmentation in relation to the Disbursement Acceleration* Program (DAP).

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* As corrected.

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This Opinion essentially stems from perceived misconceptions in the usage of the term "augmentation." The actions and/or practices taken under the DAP should not entirely be taken as augmentations. This is because the "withdrawal of allotments" and "pooling of funds" by the Executive Department for realignment (in case of suspension under Section 38 *infra*) and/or simple utilization for projects without sufficient funding due to fiscal deficits (in case of stoppage under Section 38 *infra*) is not "augmentation" in the constitutional sense of the word. The concept of augmentation pertains to the delegated legislative authority, conferred **by law** (as Section 25[5], Article VI of the 1987 Philippine Constitution [Constitution] cited below reads), to the various heads of government to **transfer appropriations** within their respective offices:

> (5) No law shall be passed authorizing any **transfer of appropriations**; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, **by law**, be authorized to augment any item in the general appropriations law for their **respective offices** from **savings** in other items of their **respective appropriations**. (Emphases supplied)

The term "appropriation" merely relates to the authority given by legislature to proper officers to apply a distinctly specified sum from a designated fund out of the treasury in a given year for a specific object or demand against the State. In other words, it is "**nothing more than the legislative authorization prescribed by the Constitution that money be paid out of the Treasury**."[1] Borne from this core premise that an appropriation is essentially a legislative concept, the process of a "transfer of appropriations" should then be understood to pertain to **changes in the legislative parameters** found in selected items of appropriations, whereby the statutory value of one increases, and another decreases.

To expound, it is first essential to remember that an appropriation is basically made up of two (2) legislative

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[1] *Gonzalez v. Raquiza*, G.R. No. L-29627, December 19, 1989, 180 SCRA 254, 260. See also *Ponencia*, pp. 48-49.

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parameters, namely: (*a*) the amount to be spent (or, in other words, the statutory value); and (*b*) the purpose for which the amount is to be spent (or, in other words, the statutory purpose). The word "augmentation," in common parlance, means "[t]he action or process of making or becoming greater in size or amount."[2] Accordingly, by the import of this word "augmentation," the process under Section 25(5) *supra* would then connote changes in the selected appropriation items' statutory values, and not of its statutory purposes. As earlier stated, augmentation would lead to the increase of the statutory value of one appropriation item, and a decrease in another.

How does the increase and decrease of statutory values work in the process of augmentation?

The query brings us to the concept of savings.

The incremental value coming from one appropriation item to effectively and actually increase the statutory value of another appropriation item is what Section 25(5) *supra* refers to as "savings." The General Appropriations Acts (GAA)[3] define savings as those "portions or balances of any programmed appropriation x x x **free from any obligation or encumbrance** x x x." A programmed appropriation item produces "portions or balances" "free from any obligation and encumbrance" when the said item becomes defunct, thereby "freeing-up" either totally or partially the funds initially allotted thereto. Because an appropriation item is passed at the beginning of the year, the reality and effect of supervening events hardly figure into the initial budget picture. According to the GAAs,[4] the following supervening events would render an appropriation item defunct: (*a*) completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized

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[2] <http://www.oxforddictionaries.com/definition/english/augmentation> (last visited June 11, 2014).

[3] See General Provisions of 2011 GAA, Section 60; 2012 GAA, Section 54; and 2013 GAA, Section 53.

[4] See *id*.

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(this may happen, when, take for instance, a project, activity or program [PAP] is determined to be illegal or involves irregular, unnecessary, excessive, extravagant, or unconscionable expenditures or uses of government funds and properties); (*b*) regarding employee compensation, vacancy of positions and leaves of absence without pay; and (*c*) implementation of measures resulting in improved systems and efficiencies, thus enabling agencies to meet and deliver required or planned targets, programs, and services. When any of these events happen, an appropriation item – meaning, the statutory license to spend – becomes defunct and the funds allotted therefor become idle. Envisioning this predicament, the Constitution allows augmentation as a form of re-appropriation so that the various heads of government may, **by law**, work with existing but defunct items of appropriation and practically utilize the funds allotted therefor as "savings" in order to augment another appropriation item which has been established to be deficient – meaning, the statutory license to spend is not enough to carry out or achieve the purposes of the PAP to be implemented or under implementation. The requirement that an item be deficient for it to be augmented may be gleaned from the GAA's definition of augmentation which "**implies** the existence x x x of program, activity or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be **deficient**."[5]

As earlier stated, the term "appropriation" properly refers to the statutory authority to spend. Although practically related, said term is conceptually different from the term "funds" which refers to the tangible public money that are allotted, disbursed, and spent. Appropriation is the province of Congress. The President, in full control of the executive arm of government, in turn, implements the legislative command in the form of appropriation items pursuant to his constitutional mandate to faithfully execute the laws.[6] The Executive Department controls

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[5] See *id*.

[6] See CONSTITUTION, Art. VII, Sec. 17.

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all phases of budget execution;[7] it acts according to and carries out the directive of Congress. Hence, the constitutional mandate that "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law."[8] It is hornbook principle that when the appropriation law is passed, the role and participation of Congress, except for the function of legislative oversight, ends, and the Executive's begins.[9] Based on the foregoing, it is then clear that it is the Executive's job to deal with the actual allotment and disbursement of public funds, whereas Congress' job is to pass the statutory license sanctioning the Executive's courses of action.

When the Executive Department exercises its power of fiscal management through, for instance, withdrawing unobligated allotments and pooling them under Sections 38 and 39, Chapter 5, Book VI of the Administrative Code of 1987[10] (Administrative Code), which respectively state that:

SECTION 38. Suspension of Expenditure of Appropriations.—Except as otherwise provided in the General Appropriations Act and **whenever in his judgment the public interest so requires,** the President, upon notice to the head of office concerned, is authorized to **suspend or otherwise stop further expenditure of funds** allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees.

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[7] "3. *Budget Execution*. Tasked on the Executive, the third phase of the budget process covers the various *operational* aspects of budgeting. The establishment of obligation authority ceilings, the evaluation of work and financial plans for individual activities, the continuing review of government fiscal position, the regulation of funds releases, the implementation of cash payment schedules, and other related activities comprise this phase of the budget cycle." (*Guingona, Jr. v. Caragueˌ* 273 Phil. 443, 461 [1991].)

[8] CONSTITUTION, Art. VI, Sec. 29(1).

[9] See *Belgica v. Executive Secretary*, G.R. No. 208566, G.R. No. 208493, and G.R. No. 209251, November 19, 2013.

[10] Executive Order No. 292 (dated July 25, 1987).

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SECTION 39. Authority to Use Savings in Appropriations to Cover Deficits.—Except as otherwise provided in the General Appropriations Act, any **savings** in the regular appropriations authorized in the General Appropriations Act for programs and projects of any department, office or agency, may, with the approval of the President, be used to **cover a deficit** in any other item of the regular appropriations: Provided, that the creation of new positions or increase of salaries shall not be allowed to be funded from budgetary savings except when specifically authorized by law: Provided, further, that whenever authorized positions are transferred from one program or project to another within the same department, office or agency, the corresponding amounts appropriated for personal services are also deemed transferred, without, however increasing the total outlay for personal services of the department, office or agency concerned. (Emphases supplied)

the President acts within his sphere of authority for he is merely managing the execution of the budget taking into account existing fiscal deficits as well as the circumstances that occur during actual PAP implementation (the matter of fiscal deficits and implementation circumstances will be expounded on in the succeeding discussion). However, he must always observe and comply with existing constitutional and statutory limitations when doing so – that is, his directives in such respect should not authorize or allow expenditures for an un-appropriated purpose nor sanction overspending or the modification of the purpose of the appropriation item, or even the suspension or stoppage of any expenditure without satisfying the public interest requirement, else he would be substituting his will over that of Congress and thereby violate the separation of powers principle, not to mention, act against his mandate to faithfully execute the laws.

An appropriation item's statutory value is a threshold limit to spend. Meaning, the Executive can allot, disburse, and/or spend x amount of money for x project for as long as the allotment, disbursement or expenditure is within the value limit and only for the project provided in the appropriation item. When the Executive implements an appropriation item, it is not always the case that it automatically and completely allots, disburses,

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and spends the specified amount of public funds to the full extent of that statutory limit. There are two reasons for this: ***first***, the usual existence of fiscal deficits; and, ***second***, the present circumstances surrounding the implementation of the PAP for which the appropriation item authorizes the Executive's allotment, disbursement, and expenditure of public funds. Fiscal deficits connote that not all appropriation items are automatically matched with corresponding available funding. The circumstances of implementation determine whether actual allotments, disbursements, and expenditures would be needed to be made either immediately or at a later time (in case of suspension), or not at all (in case of stoppage). Being part of budget execution, the President, after the GAA is passed, deals with these two realities by exercising his discretion of fiscal management which must always be consistent with his constitutional mandate to faithfully execute the laws. In the execution of the budget, he is guided by Section 3, Chapter 2, Book VI of the Administrative Code which states:

> **SECTION 3.** Declaration of Policy.—It is hereby declared the policy of the State to formulate and implement a National Budget that is an instrument of national development, reflective of national objectives, strategies and plans. The budget shall be supportive of and consistent with the socio-economic development plan and shall be oriented towards the achievement of explicit objectives and expected results, to ensure that funds are utilized and operations are conducted effectively, economically and efficiently. The national budget shall be formulated within the context of a regionalized government structure and of the totality of revenues and other receipts, expenditures and borrowings of all levels of government and of government-owned or controlled corporations. The budget shall likewise be prepared within the context of the national long-term plan and of a long-term budget program.

When conducting fiscal management through suspending and realigning expenditures under Section 38 *supra*, the President is not technically "augmenting" according to Section 25(5) *supra* since he is not changing the legislative parameters of the appropriation items (through decreasing and increasing their statutory values). This is because, despite the suspension of

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expenditures and their realignment (which are matters that connote temporariness), the legislative parameters of the appropriation items still remain the same; hence, no savings are generated nor are savings needed. On the contrary, when he permanently stops expenditures under Section 38 *supra* in the interest of the public, he, in relation to the first GAA parameter on completion, final discontinuance and abandonment, generates savings. The permanent stoppage of expenditures may then be treated as a precursor act for either: (*a*) augmentation, when the statutory value of the target appropriation item resultantly increases (in this case, savings are used under Section 39 *supra* in relation to Section 25[5] *supra* to address a deficiency in the appropriation item itself, and not only the funds allocated therefor) ; or (*b*) for simple utilization, when the statutory value of the target appropriation item is not increased and the PAP covered by the said item only needs sufficient funding (in this case, savings are used under Section 39 *supra* only to address a fiscal deficit – that is, the actual funds allocated for the item to be implemented or under implementation were initially inadequate, which is why the funds allocated to the defunct item [now, as savings] would be utilized for the former). Notably, the budget deliberations prior to the GAA's passage only account for projected revenues, and, hence, do not reflect the government's actual financial position throughout the course of the year. This is why **when the public interest so requires** – taking cue, for instance, from the realities of fiscal deficits and implementation circumstances – the President, under the authority of Section 38 *supra*, is given the power to suspend/stop expenditures which, to stress a previous crucial point, **must always be exercised consistent with his constitutional mandate to faithfully execute the laws**. Any arbitrary or capricious exercise of the same will effectively negate Congress' power of control over the purse and, hence, can never be warranted.

When the President approves the wholesale withdrawal of unobligated allotments by invoking the **blanket authority** of Section 38 *supra vis-à-vis* the **general** policy impetus to ramp up government spending, without any discernible explanation behind a **particular** PAP expenditure's suspension or stoppage,

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or any clarification as to whether the funds withdrawn then pooled would be used either for realignment or only to cover a fiscal deficit, or for augmentation (in this latter case, necessitating therefor the determination of whether said funds are savings or not), a constitutional conundrum arises. What results is a pooling of funds, from which a multitude of executive options is opened. Under its broad context and the government's presentment thereof, the observation I make is that the DAP actually constitutes an amalgam of executive actions and/or practices whereby augmentations may be undertaken, and/or funds realigned or utilized to address fiscal deficits. Thus, with this in mind, I concur with the *ponencia*'s limited conclusion that the withdrawal of unobligated allotments not considered as savings for the purposes of augmentation, or, despite the funds being considered as savings, the augmentation of items cross-border or the funding of PAPs without an existing appropriation cover are unconstitutional acts and/or practices taken under the DAP. I also maintain a similar position with respect to the *ponencia*'s pronouncement on the Unprogrammed Fund considering the absence of any proof that the general or exceptive conditions[11] for its use had been duly complied with. Ultimately, notwithstanding any confusion as to the DAP's actual

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[11] Special Provisions, Item 1 of 2011 GAA and 2012 GAA respectively state:

1. Release of Fund. The amounts authorized herein shall be released only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, including savings generated from programmed appropriations for the year: PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund: PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds: PROVIDED, FURTHERMORE, That if there are savings generated from the programmed appropriations for the first two quarters of the year, the DBM may, subject to the approval of the President, release the pertinent appropriations under the Unprogrammed Fund corresponding to only fifty percent (50%) of the said savings net of revenue shortfall: PROVIDED FINALLY, That the release of the balance of the total savings from

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workings or the laudable intentions behind the same, the one guiding principle to which the Executive should be respectfully minded is that no policy or program of government can be adopted as an avenue to wrest control of the power of the purse from Congress, for to do so would amount to a violation of the provisions on appropriation and augmentation as well as an aberration of the faithful execution clause engraved and enshrined in our Constitution.

ACCORDINGLY, I concur with the *ponencia* that the following acts and/or practices taken under the Disbursement Acceleration[**] Program, implemented through National Budget Circular No. 541 and other related executive issuances, are **UNCONSTITUTIONAL**:

(*a*) the withdrawal of unobligated allotments from the implementing agencies not considered as savings for the purposes of augmentation, the transfer of the savings of the Executive to augment appropriations of other offices outside the Executive, and the augmentation of items without any existing appropriation covers to the extent that said acts and/or practices violated Section 25(5) of the 1987 Philippine Constitution; and

(*b*) the use of the Unprogrammed Fund despite the absence of any proof that the general condition for its use under the relevant GAAs, *i.e.*, revenue collections were in excess of the original revenue targets, was complied with, and without any justification that the exceptive conditions for such use did concur.

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programmed appropriations for the tear shall be subject to fiscal programming and approval of the president.

1. Release of Fund. The amounts authorized herein shall be released only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, including savings generated from programmed appropriations for the year: PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund: PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.

[**] As corrected.

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CONCURRING OPINION

LEONEN, *J.*:

I concur in the result.

I agree that some acts and practices covered by the Disbursement Acceleration Program as articulated in National Budget Circular No. 541 and in related executive issuances and memoranda are unconstitutional. We declare these principles for guidance of bench and bar considering that the petitions were mooted. The application of these principles to the 116 expenditures contained in the "evidence packet" submitted by the Solicitor General as well as the application of the doctrine of operative fact should await proper appraisal in the proper forum.

I

Isolated from their political color and taking the required sterile juridical view, the petitions consolidated in this case ask us to define the limits of the constitutional discretion of the President to spend in relation to his duty to execute laws passed by Congress. Specifically, we are asked to decide whether there has been grave abuse of discretion in the promulgation and implementation of the Disbursement Acceleration Program (DAP).

The DAP was promulgated and implemented in response to the slowdown in economic growth in 2011.[1] Economic growth in 2011 was within the forecasts of the National Economic Development Authority but below the growth target of 7% expected by other agencies and organizations.[2] The Senate

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[1] The economy slowed from 7.6 percent growth in 2010 to 3.7 percent in 2011. *Senate Economic Planning Office Economic Report*, March 2012, ER-12-01, p. 1 < http://www.senate.gov.ph/publications/ER%202012-01%20-%20March%202012.pdf> (visited May 23, 2014).

[2] *Senate Economic Planning Office Economic Report*, March 2012, ER-12-01, p. 1 < http://www.senate.gov.ph/publications/ER%202012-01%20-%20March%202012.pdf> (visited May 23, 2014). These agencies include the Development Budget Coordination Committee as well as the Asian Development Bank and the World Bank.

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Economic Planning Office Report of March 2012 cited government's underspending, specially in infrastructure, as one of the factors that contributed to the weakened economy.[3] This was a criticism borne during the early part of this present administration.[4]

On July 18, 2012, National Budget Circular No. 541 was issued. This circular recognized that the spending targets were not met for the first five months of the year.[5] The reasons can be deduced from a speech delivered by the President on October 23, 2013, wherein he said:

> I remember that in 2011, I addressed you for the first time as President of the Republic. Back then, we had to face a delicate balancing act. As we took a long hard look at the contracts and systems we inherited, and set about to purge them of opportunities for graft, the necessary pause led to a growing demand to pump prime the economy.[6]

During the oral arguments of this case, Secretary Florencio Abad of the Department of Budget and Management (DBM) confirmed that they discovered leakages that resulted in the weakened capacity of agencies in implementing projects when President Aquino assumed office.[7] Spending was hampered. Economic growth slowed down.

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[3] *Senate Economic Planning Office Economic Report*, March 2012, ER-12-01, p. 2 < http://www.senate.gov.ph/publications/ER%202012-01%20-%20March%202012.pdf> (visited May 23, 2014).

[4] *See* K. J. Tan, *Senators question [government] underspending in 2011*, August 9, 2011 <http://www.gmanetwork.com/news/story/228895/economy/senators-question-govt-underspending-in-2011> (visited May 23, 2014).

[5] DBM NBC No. 541 (2012), 1.0.

[6] President Benigno S. Aquino III's Speech at the Annual Presidential Forum of the Foreign Correspondents Association of the Philippines (FOCAP), October 23, 2013 <http://www.pcoo.gov.ph/speeches2013/speech2013_oct23.htm> (visited May 23, 2014).

[7] TSN, January 28, 2014, p. 10.

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To address the underspending resulting from that "pause," "measures ha[d] to be implemented to optimize the utilization of available resources"[8] and "to accelerate spending and sustain the fiscal targets during the year."[9] The President authorized withdrawals from the agencies' unobligated allotments.[10] National Budget Circular (NBC) No. 541, thus, stated its purposes as:

a. To provide the conditions and parameters on the withdrawal of unobligated allotments of agencies as of June 30, 2012 to fund priority and/or fast-moving programs/projects of the national government;

b. To prescribe the reports and documents to be used as bases on the withdrawal of said unobligated allotments; and

c. To provide guidelines in the utilization or reallocation of the withdrawn allotments.[11]

The Department of Budget and Management describes the Disbursement Acceleration Program, which petitioners associate with NBC No. 541, as "a **stimulus package** under the Aquino administration **designed to fast-track public spending and push economic growth**. This covers high-impact budgetary programs and projects which will be augmented out of the savings generated during the year and additional revenue sources."[12]

According to Secretary Abad, the Disbursement Acceleration Program "is not just about the use of savings and unprogrammed funds, it is a package of reformed interventions to de-clog processes, improve the absorptive capacities of agencies and mobilize funds for priority social and economic services."[13]

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[8] DBM NBC No. 541 (2012), 1.0.

[9] DBM NBC No. 541 (2012), 1.0.

[10] DBM NBC No. 541 (2012), 1.0.

[11] DBM NBC No. 541 (2012), 2.1-2.3.

[12] Frequently Asked Questions about the Disbursement Acceleration Program (DAP) <http://www.dbm.gov.ph/?page_id=7362> (visited May 23, 2014).

[13] TSN, January 28, 2014, p. 11.

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The President explained in the cited 2013 speech that the "stimulus package" was successful in ensuring that programs delivered the greatest impact in the most efficient manner.[14] According to the President, the stimulus package's contribution of 1.3% percentage points to gross domestic product (GDP) growth in the last quarter of 2011 was recognized by the World Bank in one of its quarterly reports.[15]

The subject matter of this constitutional challenge is unique. As ably clarified in the ponencia, the DAP is not covered by National Budget Circular No. 541 alone or by a single legal issuance.[16] Furthermore, respondents manifested that it has already served its purpose and is no longer being implemented.[17]

II

The Disbursement Acceleration Program (DAP) is indeed a label for a fiscal management policy.[18]

Several activities and programs are included within this policy. To implement this policy, several internal memoranda requesting for the declaration of savings and specific expenditures[19] as

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[14] President Benigno S. Aquino III's Speech at the Annual Presidential Forum of the Foreign Correspondents Association of the Philippines (FOCAP), October 23, 2013 <http://www.pcoo.gov.ph/speeches2013/speech2013_oct23.htm> (visited May 23, 2014).

[15] President Benigno S. Aquino III's Speech at the Annual Presidential Forum of the Foreign Correspondents Association of the Philippines (FOCAP), October 23, 2013 <http://www.pcoo.gov.ph/speeches2013/speech2013_oct23.htm> (visited DATE HERE); See also *Philippines Quarterly Update: From Stability to Prosperity for All*, March 2012 <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/06/12/000333037_20120612011744/Rendered/PDF/698330WP0P12740ch020120FINAL0051012.pdf> (visited May 23, 2014).

[16] *Ponencia*, pp. 35-47.

[17] Respondents' memorandum, pp. 30-33.

[18] See *ponencia*, pp. 35-36.

[19] Memoranda for the President dated October 12, 2011; December 12, 2011; June 25, 2012; September 4, 2012; December 19, 2012; May 20, 2013 and September 25, 2013. *See ponencia*, pp. 37-42.

well as the DBM's National Budget Circular No. 541 were issued. DAP — as a label — served to distinguish the activities of a current administration from other past fiscal management policies.[20]

It is for this reason that we cannot make a declaration of constitutionality or unconstitutionality of the DAP. Petitions filed with this court should be more specific in the acts of respondents — other than the promulgation of policy and rules — alleged to have violated the Constitution.[21] Judicial review should not be wielded pursuant to political motives; rather, it is a discretion that should be wielded with deliberation, care, and caution. Our pronouncements should be narrowly tailored to the facts of the case to ensure that we do not unduly transgress into the province of the other departments.[22] *Ex facto jus oritur.* Law arises only from facts.

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[20] See TSN, November 19, 2013, pp. 147–148.

[21] As I have previously stated:

> Generally, we are limited to an examination of the legal consequences of law as applied. This presupposes that there is a specific act which violates a demonstrable duty on the part of the respondents. This demonstrable duty can only be discerned when its textual anchor in the law is clear. In cases of constitutional challenges, we should be able to compare the statutory provisions or the text of any executive issuance providing the putative basis of the questioned act *vis-a-vis* a clear constitutional provision. Petitioners carry the burden of filtering events and identifying the textual basis of the acts they wish to question before the court. This enables the respondents to tender a proper traverse on the alleged factual background and the legal issues that should be resolved.
>
> Petitions filed with this Court are not political manifestos. They are pleadings that raise important legal and constitutional issues.
>
> Anything short of this empowers this Court beyond the limitations defined in the Constitution. It invites us to use our judgment to choose which law or legal provision to tackle. We become one of the party's advisers defeating the necessary character of neutrality and objectivity that are some of the many characteristics of this Court's legitimacy. – *J.* Leonen's concurring opinion in *Belgica v. Hon. Secretary Paquito N. Ochoa*, G.R. No. 208566, November 19, 2013, pp. 4-5 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2013/november2013/208566.pdf> [Per J. Perlas-Bernabe, *En Banc*].

[22] Dissenting opinion of *J.* Leonen in *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014, pp. 2 and 7 [Per *J.* Mendoza, *En Banc*].

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III

We also run into several technical problems that can cause inadvisable precedents should we proceed to make declarations on DBM NBC No. 541 alone.

First, this circular is addressed to agencies and meant to define the procedures for adopting and achieving operational efficiency in government.[23] Hence, it is a set of rules internal to the executive. Our jurisdiction begins only when these rules are the basis for actual expenditure of funds. Even so, the petitions that were filed with us should specify which expenditures should be appraised in relation to existing law and the Constitution.[24]

Second, there are laudable provisions in this circular that are not subject to controversy. These include the exhortation that government agencies should effectively and efficiently use their funds within the soonest possible time so that they become relevant to the purposes for which they had been allotted.[25] To declare the whole of the circular unconstitutional confuses and detracts from the constitutional commitment that we should use our power of judicial review cautiously and effectively. We have to wield our powers deliberately but with precision. Narrowly tailored constitutional doctrines are better guides to future behavior. These doctrines will not stifle innovative and creative approaches to good governance.

Third, on its face, the circular covers only appropriations in fiscal years 2011 and 2012.[26] However, from the "evidence packets" which were submitted by the Solicitor General, there were expenditures pertaining to the DAP even after the expiration of the circular. Any blanket declaration of constitutionality of this circular, therefore, will be misdirected.

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[23] DBM NBC No. 541 (2012), 3.0-3.2, 5.0-5.2.

[24] Dissenting opinion of *J.* Leonen in *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014, pp. 6-7 [Per *J.* Mendoza, *En Banc*].

[25] DBM NBC No. 541 (2012), 1.0, 2.0, 5.2-5.8.

[26] DBM NBC No. 541 (2012), 3.1.

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IV

In the spirit of deliberate precision, I agree with the *ponencia*'s efforts to clearly demarcate the discretion granted by the Constitution to the legislature and the executive. I add some qualifications.

The budget process in the ponencia is descriptive,[27] not normative. That is, it reflects what is happening. It should not be taken as our agreement that the present process is fully compliant with the Constitution.

For instance, I am of the firm view that the treatment of departments and offices granted fiscal autonomy should be different.[28] Levels of fiscal autonomy among various constitutional organs can be different.[29]

For example, the constitutional protection granted to the judiciary is such that its budget cannot be diminished below the amount appropriated during the previous year.[30] Yet, we submit our items for expenditure to the executive through the DBM year in and year out. This should be only for advice and accountability; not for approval.

In the proper case, we should declare that this constitutional provision on fiscal autonomy means that the budget for the judiciary should be a lump sum corresponding to the amount appropriated during the previous year.[31] This may mean that as a proportion of the national budget and in its absolute amount, the judiciary's budget cannot be reduced. Any additional appropriation for the judiciary should cover only new items for amounts greater than what have already been constitutionally appropriated. Public accountability on our expenditures will

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[27] *Ponencia,* pp. 27-34.

[28] *See for example,* CONST., Art. VIII, Sec. 3, Art. IX-A, Sec. 5, Art. XI, Sec. 14, and Art. XIII, Sec. 17 (4).

[29] *Id*.

[30] CONST., Art. VIII, Sec. 3.

[31] CONST., Art. VIII, Sec. 3.

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be achieved through a resolution of the Supreme Court *En Banc* detailing the items for expenditure corresponding to that amount.

The *ponencia* may inadvertently marginalize this possible view of how the Constitution requires the judiciary's budget to be prepared. It will also make it difficult for us to further define fiscal autonomy as constitutionally or legally mandated for the other constitutional offices.

With respect to the discretions in relation to budget execution: ***The legislature has the power to authorize a maximum amount to spend per item,***[32] ***and the executive has the power to spend for the item up to the amount limited in the appropriations act.***[33] The metaphor that Congress has "the power of the purse" does not fully capture this distinction. It only captures part of the dynamic between the executive and the legislature.

Any expenditure beyond the maximum amount provided for the item in the appropriations act is an augmentation of that item.[34] It amounts to a transfer of appropriation. This is generally prohibited except for instances when "upon implementation or subsequent evaluation of needed resources, [the appropriation for a program, activity or project existing in the General Appropriations Act] is determined to be deficient."[35] In which

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[32] CONST., Art. VI, Sec. 24, 25 (5), and 29.

[33] CONST., Art. VII, Sec. 1.

[34] CONST., Art. VI, Sec. 25 (5).

[35] General Appropriations Act (2012), Sec. 54

Sec. 54. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.

case, all the conditions provided in Article VI, Section 25 (5) of the Constitution must first be met.

The limits defined in this case only pertain to the power of the President — and by implication, other constitutional offices — to augment items of appropriation. There is also the power of the President to realign allocations of funds to another item — ***without augmenting that item*** — whenever revenues are insufficient in order to meet the priorities of government.

V

The President's power or discretion to spend up to the limits provided by law is inherent in executive power. It is essential to his exercise of his constitutional duty to "ensure that the laws be faithfully executed"[36] and his constitutional prerogative to "have control of all the executive departments."[37]

The legislative authority to spend up to a certain amount for a specific item does not mean that the President must spend that full amount. The President can spend less due to efficiency.[38] He may also recall any allocation of unobligated funds to control an executive agency.[39] The expenditure may turn out to be irregular, extravagant, unnecessary, or illegal.[40] It is always

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Augmentation implies the existence in this Act of a program, activity, or program with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determinied to be deficient. In no case shall a non-existent program, activity or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.

See also General Appropriations Act (2013), Sec. 53, and General Appropriations Act (2011), Sec. 60.

[36] CONST., Art. VII, Sec. 17.

[37] CONST., Art. VII, Sec. 17.

[38] *See* Exec. Order No. 292, book VI, chap. 2, Sec. 3.

[39] Exec. Order No. 292, book VI, chap. 5, Sec. 38; CONST., Art. VII, Sec. 17.

[40] *See* Pres. Decree No. 1445 (1978), Sec. 33; Government Accounting and Auditing Manual, vol. 1, book III, title 3, Art. 2, Sec. 162.

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possible that there are contemporary circumstances that would lead to these irregularities that could not have been seen by Congress.

Congress authorizes a budget predicting the needs for an entire fiscal year.[41] But the President must execute that budget based on the realities that he encounters.

Parenthetically, because of the constitutional principle of independence, the power to spend is also granted to the judiciary.[42] The President does not have the discretion to withhold any amount pertaining to the judiciary. The Constitution requires that all appropriations for it shall be "automatically and regularly released."[43] The President's power to implement the laws[44] and the existence of provisions on automatic and regular release of appropriations[45] of independent constitutional branches and bodies support the concept that the President's discretion to spend up to the amount allowed in the appropriations act inherent in executive power is exclusively for offices within his department.

VI

Congress appropriates based on projected revenues for the fiscal year.[46] Not all revenues are available at the beginning of the year. The budget is planned, and the General Appropriations Act (GAA) is enacted, before the actual generation and collection of government funds. Revenue collection happens all throughout the year. Taxes and fees, for instance, still need to be generated.

The appropriations act is promulgated, therefore, on the basis of hypothetical revenues of government in the coming fiscal

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[41] Exec. Order No. 292, book VI, chap. 2, Sec. 4.

[42] Const., Art. VIII, Sec. 3.

[43] Const., Art. VIII, Sec. 3.

[44] Const., Art. VII, Sec. 1.

[45] *See for example,* CONST., Art. VIII, Sec. 3, Art. IX-A, Sec. 5, Art. XI, Sec. 14, and Art. XIII, Sec. 17 (4).

[46] *See* Exec. Order No. 292, book VI, chap. 2, Sec. 11.

year. While hypothetical, it is the best educated, economic, and political collective guess of the President and Congress.

Projected expenditures may not be equal to what will actually be collected. Hence, there is no prohibition from enacting budgets that may result in a deficit spending. There is no requirement in the Constitution that Congress pass only balanced budgets.[47]

Ever since John Maynard Keynes introduced his theories of macroeconomic accounts, governments have accepted that a certain degree of deficit spending (more expenditures than income) is acceptable to achieve economic growth that will also meet the needs of an increasing population.[48] The dominant economic paradigm is that developmental goals cannot be achieved without economic growth,[49] *i.e.*, that the amount of products and services available are greater than that measured in the prior years.

Economic growth is dependent on many things.[50] It is also the result of government expenditures.[51] The more that the government spends, the more that businesses and individuals are able to raise revenues from their transactions related to

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[47] Total projected revenues equals expenditures, thus, the concept of "unprogrammed funds".

[48] *See* John Maynard Keynes, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1935). For a comparison on the Keynesian model with alternate models, s*ee also* B. Douglas Bernheim, *A NEOCLASSICAL PERSPECTIVE ON BUDGET DEFICITS*, 3 Journal of Economic Perspectives 55 (1989).

[49] See also D. Perkins, *et al*., *Economics of Development*, 6th Ed., 60 (2006). There are, however, opinions that it is possible to develop with zero growth. *See also* Herman E. Daly, Beyond Growth: *The Economics of Sustainable Development* (1997), but this is not the economic theory adopted by our budget calls.

[50] The macroeconomic formula is Y = C + I + G + (X-M). Y is income. C is personal consumption. I is Investment. G is government expenditures. X is exports. M is imports.

[51] *Id*.

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these expenditures.[52] The monies paid to contractors in public infrastructure projects will also be used to allow these contractors to purchase materials and equipment as well as to pay their workers.[53] These workers will use their income to purchase services and products and so on.[54] The possibility that value will be used to create more value is what makes the economy grow.

Theoretically, the more the economy grows, the more that government is able to collect in the form of taxes and fees.

It is necessary for the government to be able to identify the different factors limiting the impact of expenditures on economic growth.[55] It is also necessary that it makes the necessary adjustments consistent with the country's short-term and long-term goals.[56] The government must be capable of making its own priorities so that resources could be shifted in accordance with the country's actual needs.

Thus, it makes sense for economic managers to recommend that government expenditures be used efficiently: *Scarce resources must be used for the project that will have the most impact at the soonest time*. While Congress contributes by putting the frame through the Appropriations Act, actual economic impact will be decided by the executive who attends to present needs.

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[52] *See* John Maynard Keynes, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1935), Chapter 10: The Marginal Propensity to Consume and the Multiplier.

[53] *See* John Maynard Keynes, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1935), Chapter 10: The Marginal Propensity to Consume and the Multiplier.

[54] *See* John Maynard Keynes, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1935), Chapter 10: The Marginal Propensity to Consume and the Multiplier.

[55] *See* Exec. Order No. 292, book VI, chap. 3, Sec. 12 (1).

[56] *See* Exec. Order No. 292, book VI, chap. 2, Sec. 3-4.

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The executive may aim for better distribution of income among the population or, simply, more efficient ways to build physical and social infrastructure so that prosperity thrives. Certainly, good economic management on the part of our government officials means being concerned about projects or activities that do not progress in accordance with measured expectations. At the beginning of the year or at some regular intervals, the executive should decide on resource allocations reviewing prior ones so as to achieve the degree of economic efficiency required by good governance.[57] These allocations are authorities to start the process of obligation. To obligate means the process of entering into contract for the expenditure of public money.[58]

However, disbursement of funds is not automatic upon allocation or allotment. There are procurement laws to contend with.[59] Funds are disbursed only after the government enters into a contract, and a notice of cash allocation is issued.[60]

At any time before disbursement of funds, the President may again deal with contingencies. Inherent in executive power is also the necessary power for the President to decide on priorities without violating the law. How and when the President reviews these priorities are within his discretion. The Constitution should not be viewed with such awkward academic restrictions that will constrain, in practice, the ability of the President to respond. Constitutional interpretation may be complex, but it is not unreasonable. It should always be relevant.

Congress has the constitutional authority to determine the maximum levels of expenditures per item in the budget.[61] It

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[57] *See* Exec. Order No. 292, book VI, chap. 6, Sec. 51.

[58] *See Budget Advocacy Project, Philippine Governance Forum, Department of Budget and Management, Frequently Asked Questions: National Government Budget* 13 (2002); *Budget Execution* <http://budgetngbayan.com/budget-101/budget-execution/> (visited May 9, 2014).

[59] *See for example* Rep. Act No. 9184, Government Procurement Reform Act (2002).

[60] *Budget Execution* <http://budgetngbayan.com/budget-101/budget-execution/> (visited May 9, 2014).

[61] CONST., Art. VI, Secs. 24-5, 29.

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is not Congress, however, that decides when and how, in fact, the resources are to be actually spent. Congress cannot do so because it is a collective deliberative body designed to create policy through laws.[62] It cannot and does not implement the law.[63] Parenthetically, this was one of the principal reasons why we declared the Priority Development Assistance Fund (PDAF) as unconstitutional.[64]

Since the President attends to realities and decides according to priorities, our constitutional design is to grant him the flexibility to make these decisions subject to clear legal limitations.

Hence, changes in the allotment of funds are not prohibited transfers of appropriations if these changes are still consistent with the maximum allowances under the GAA. They are merely manifestations of changing priorities in the use of funds. They are still in line with the President's duty to implement the General Appropriations Act.

Thus, if revenues have not been fully collected at a certain time but there is a need to fully spend for an item authorized in the appropriations act, the President should be able to move the funds from an agency, which is not effectively and efficiently using its allocation, to another agency. *This is the concept of realignment of funds as differentiated from augmentation of an item.*

VII

Realignment of the allocation of funds is different from the concept of augmentation contained in Article VI, Section 25 (5) of the Constitution.

In realignment of allocation of funds, the President, upon recommendation of his subalterns like the Department of Budget and Management, finds that there is an item in the appropriations

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[62] CONST., Art. VI, Sec. 1.

[63] Const., Art. VII, Sec. 1.

[64] *Belgica v. Hon. Secretary Paquito N. Ochoa*, G.R. No. 208566, November 19, 2013 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2013/november2013/208566.pdf> [Per *J.* Perlas-Bernabe, *En Banc*].

act that needs to be funded. However, it may be that the allocated funds for that targeted item are not sufficient. He, therefore, moves allocations from another budget item to that item ***but only to fund the deficiency: that is, the amount needed to fill in so that the maximum amount authorized to be spent for that item in the appropriations act is actually spent.***

The appropriated amount is not increased. It is only filled in order that the item's purpose can be fully achieved with the amount provided in the appropriations law. There is no augmentation that happens.

In such cases, there is no need to identify savings. The concept of savings is only constitutionally relevant as a requirement for augmentation of items. It is the executive who needs to fully and faithfully implement sundry policies contained in many statutes and needs to decide on priorities, given actual revenues.

The flexibility of realignment is required to allow the President to fully exercise his basic constitutional duty to faithfully execute the law and to serve the public "with utmost responsibility . . . and efficiency."[65]

Unlike in augmentation, which deals with increases in appropriations, realignment involves determining priorities and deals with allotments without increases in the legislated appropriation. In realignment, therefore, there is no express or implied amendment of any of the provisions of the Appropriations Act. The actual expenditure is only up to the amount contained in the law.

For purposes of adapting to the country's changing needs, the President's power to realign expenditures necessarily includes the power to withdraw allocations that were previously made for projects that are not effectively and efficiently moving or that, in his discretion, are not needed at the present.[66]

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[65] CONST., Art. VII, Sec. 5 and Art. XI, Sec. 1.

[66] *See* Exec. Order No. 292, book VI, chap. 2, Sec. 3; Exec. Order No. 292, book VI, chap. 5, Sec. 38.

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These concepts are implicit in law. Thus, Book VI, Chapter 5, Section 3 of the Administrative Code provides:

> Section 3. Declaration of Policy. — It is hereby declared the policy of the State to formulate and implement a National Budget that is an instrument of national development, reflective of national objectives, strategies and plans. *The budget shall be supportive of and consistent with the socio-economic development plan and shall be oriented towards the achievement of explicit objectives and expected results, to ensure that funds are utilized and operations are conducted effectively, economically, and efficiently.* (Emphasis supplied)

To set priorities is to favor one project over the other given limited resources available. Thus, there is a possibility when resources are wanting, that some projects or activities authorized in the General Appropriations Act may be suspended.

Justice Carpio's interpretation of Section 38, Chapter 5, Book VI of the Administrative Code is that the power to suspend can only be exercised by the President for appropriated funds that were obligated.[67] If the funds were appropriated but not obligated, the power to suspend under Section 38 is not available.[68] Justice Carpio reasons that to allow the President to suspend or stop the expenditure of unobligated funds is equivalent to giving the President the power of impoundment.[69] If, in the opinion of the President, there are unsound appropriations in the proposed General Appropriations Act, he is allowed to exercise his line item veto power.[70] Once the GAA is enacted into law, the President is bound to faithfully execute its provisions.[71]

I disagree.

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[67] *J.* Carpio, separate concurring opinion, p. 21.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

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When there are reasons apparent to the President at the time when the General Appropriations Act is submitted for approval, then he can use his line item veto. However, at a time when he executes his priorities, suspension of projects is a valid legal remedy.

Suspension is not impoundment. Besides, the prohibition against impoundment is not yet constitutional doctrine.

It is true that the General Appropriations Act provides for impoundment.[72] *Philconsa v. Enriquez*[73] declined to rule on its constitutional validity.[74] Until a ripe and actual case, its constitutional contours have yet to be determined. Certainly, there has been no specific expenditure under the umbrella of the Disbursement Allocation Program alleged in the petition and properly traversed by respondents that would allow us the proper factual framework to delve into this issue. Any definitive pronouncement on impoundment as constitutional doctrine will

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[72] *See e.g.* General Appropriations Act (2011), Sec. 66.

Section 66. Prohibition Against Impoundment of Appropriations. No appropriations authorized under this Act shall be impounded through retention or deduction, unless in accordance with the rules and regulations to be issued by the DBM: PROVIDED, That all the funds appropriated for the purposes, programs, projects and activities authorized under this Act, except those covered under the Unprogrammed Fund, shall be released pursuant to Section 33(3), Chapter 5, Book VI of E.O. No. 292.

Section 33(3), Chapter 5, Book VI of E.O. No. 292 provides:

CHAPTER 5

Budget Execution

SECTION 33. Allotment of Appropriations.—Authorized appropriations shall be allotted in accordance with the procedure outlined hereunder:. . .

(3) Request for allotment shall be approved by the Secretary who shall ensure that expenditures are covered by appropriations both as to amount and purpose and who shall consider the probable needs of the department or agency for the remainder of the fiscal year or period for which the appropriation was made.

[73] G.R. No. 113105, August 19, 1994, 235 SCRA 506 [Per *J.* Quiason, *En Banc*].

[74] *Id.* at 545-546.

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be premature, advisory, and, therefore, beyond the province of review in these cases.[75]

Impoundment is not mentioned in the Constitution. At best, it can be derived either from the requirement for the President to faithfully execute the laws with reference to the General Appropriations Act.[76] Alternatively, it can be implied as a limitation imposed by the legislature in relation to the preparation of a budget. The constitutional authority that will serve as the standpoint to carve out doctrine, thus, is not yet clear.

To be constitutionally sound doctrine, impoundment should refer to a willful and malicious withholding of funds for a legally mandated and funded project or activity. The difficulty in making broad academic pronouncements is that there may be instances where it is necessary that some items in the appropriations act be unfunded.

The President, not Congress, decides priorities when actual revenue collections during a fiscal year are not sufficient to fund all authorized expenditures. In doing so, the President may have to leave some items with partial or no funding. Making priorities for spending is inherently a discretion within the province of the executive. Without priorities, no legal mandate may be fulfilled. It may be that refusing to fund a project in deficit situations is what is needed to faithfully execute the other mandates provided in law. In such cases, attempting to partially fund all projects may result in none being implemented.

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[75] See *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, G.R. No. 183591,October 14, 2008, 568 SCRA 402, 450 [Per *J*. Carpio-Morales, *En Banc*], *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, October 5, 2010, 632 SCRA 146, 176-179 [Per *J*. Carpio-Morales, *En Banc*], and *J*. Leonen's concurring opinion in *Belgica v. Hon. Secretary Paquito N. Ochoa*, G.R. No. 208566, November 19, 2013, pp. 6-7 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2013/november2013/208566.pdf> [Per *J*. Perlas-Bernabe, *En Banc*].

[76] CONST., Art. VII, Sec. 5.

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Of course, even if there is a deficit, impoundment may exist if there is evidence of willful and malicious conduct on the part of the executive to withdraw funding from a specific item other than to make priorities. Whether that situation is present in the cases at bar is not clear. It has neither been pleaded nor proven. The contrary has not been asserted by petitioners. They have filed broad petitions unarmed with the specifics of each of the expenditures. They have also failed to traverse the "evidence packets" presented by respondents.

Impoundment, as a constitutional doctrine, therefore, becomes clear and salient under conditions of surpluses; that is, that the revenue actually collected and available exceeds the expenditures that have been authorized. Again, this situation has neither been pleaded nor proven.

Justice Carpio highlights Prof. Laurence Tribe's position on impoundment.[77] While I have the highest admiration for Laurence Tribe as constitutional law professor, I understand that his dissertation is on American Constitutional Law. I maintain the view that the decisions of the United States Supreme Court and the analysis of their observers are not part of our legal order. They may enlighten us or challenge our heuristic frames in our reading of our own Constitution. But, in no case should we capitulate to them by implying that they are binding precedent. To do so would be to undermine our own sovereignty.

Thus, with due respect to Justice Carpio's views, the discussions in *Philconsa v. Enriquez*[78] could not have been rendered outdated by US Supreme Court decisions. They can only be outdated by the discussions and pronouncements of this court.

VIII

Of course, there are instances when the President must mandatorily withhold allocations and even suspend expenditure

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[77] *J.* Carpio, separate concurring opinion, pp. 22-24.

[78] G.R. No. 113105, August 19, 1994, 235 SCRA 506, 545-546 [Per *J.* Quiason, *En Banc*].

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in an obligated item. This is in accordance with the concept of "fiscal responsibility": a duty imposed on heads of agencies and other government officials with authority over the finances of their respective agencies.

Section 25 (1) of Presidential Decree No. 1445,[79] which defines the powers of the Commission on Audit, states:

> Section 25. Statement of Objectives. –
>
> x x x x x x x x x
>
> (1) To determine whether or not the fiscal responsibility that rests directly with the head of the government agency has been properly and effectively discharged;
>
> x x x x x x x x x

This was reiterated in Volume I, Book 1, Chapter 2, Section 13 of the Government Accounting and Auditing Manual,[80] which states:

> **Section 13. The Commission and the fiscal responsibility of agency heads. –** One primary objective of the Commission is to determine whether or not the fiscal responsibility that rests directly with the head of the government agency has been properly and effectively discharged.
>
> The head of an agency and all those who exercise authority over the financial affairs, transaction, and operations of the agency, shall take care of the management and utilization of government resources

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[79] Pres. Decree No. 1445 (1978), otherwise known as the Government Auditing Code of the Philippines. *See also* CONST., Art. IX-D, Sec. 2; Exec. Order No. 292 s. (1987), book V, title I, subtitle B, chap. 4.

[80] The Government Accounting and Auditing Manual (GAAM) was issued pursuant to Commission on Audit Circular No. 91-368 dated December 19, 1991. The GAAM is composed of three volumes: Volume I – Government Auditing Rules and Regulations; Volume II – Government Accounting; and Volume III – Government Auditing Standards and Principles and Internal Control System. In 2002, Volume II of the GAAM was replaced by the New Government Accounting System as per Commission on Audit Circular No. 2002-002 dated June 18, 2002.

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in accordance with law and regulations, and safeguarded against loss or wastage to ensure efficient, economical, and effect operations of the government.

Included in fiscal responsibility is the duty to prevent irregular, unnecessary, excessive, or extravagant expenses. Thus:

> Section 33. Prevention of irregular, unnecessary, excessive, or extravagant expenditures of funds or uses of property; power to disallow such expenditures. The Commission shall promulgate such auditing and accounting rules and regulations as shall prevent irregular, unnecessary, excessive, or extravagant expenditures or uses of government funds or property.

The provision authorizes the Commission on Audit to promulgate rules and regulations. But, this provision also guides all other government agencies *not to make any expenditure that is "irregular, unnecessary, excessive, or extravagant."*[81] The President should be able to prevent unconstitutional or illegal expenditure based on any allocation or obligation of government funds.

Volume I, Book III, Title 3, Article 2 of the Government Accounting and Auditing Manual defines irregular, unnecessary, excessive, extravagant, and unconscionable expenditures as:

> **Section 162. Irregular expenditures.** – The term "irregular expenditure" signifies an expenditure incurred without adhering to established rules, regulations, procedural guidelines, policies, principles or practices that have gained recognition in law. Irregular expenditures are incurred without conforming with prescribed usages and rules of discipline. There is no observance of an established pattern, course, mode of action, behavior, or conduct in the incurrence of an irregular expenditure. A transaction conducted in a manner that deviates or departs from, or which does not comply with standards set, is deemed irregular. An anomalous transaction which fails to follow or violate appropriate rules of procedure is likewise irregular. Irregular expenditures are different from illegal expenditures since the latter would pertain to expenses incurred in violation of the law whereas

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[81] Pres. Decree No. 1445, Sec. 33.

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the former in violation of applicable rules and regulations other than the law.

Section 163. Unnecessary expenditures. – The term "unnecessary expenditures" pertains to expenditures which could not pass the test of prudence or the obligations of a good father of a family, thereby non-responsiveness to the exigencies of the service. Unnecessary expenditures are those not supportive of the implementation of the objectives and mission of the agency relative to the nature of its operation. This could also include incurrence of expenditure not dictated by the demands of good government, and those the utility of which cannot be ascertained at a specific time. An expenditure that is not essential or that which can be dispensed with without loss or damage to property is considered unnecessary. The mission and thrusts of the agency incurring the expenditure must be considered in determining whether or not the expenditure is necessary.

Section 164. Excessive expenditures. – The term "excessive expenditures" signifies unreasonable expense or expenses incurred at an immoderate quantity or exorbitant price. It also includes expenses which exceed what is usual or proper as well as expenses which are unreasonably high, and beyond just measure or amount. They also include expenses in excess of reasonable limits.

Section 165. Extravagant expenditures. – The term "extravagant expenditures" signifies those incurred without restraint, judiciousness and economy. Extravagant expenditures exceed the bounds of propriety. These expenditures are immoderate, prodigal, lavish, luxurious, wasteful, grossly excessive, and injudicious.

Section 166. Unconscionable expenditures. – The term "unconscionable expenditures" signifies expenses without a knowledge or sense of what is right, reasonable and just and not guided or restrained by conscience. These are unreasonable and immoderate expenses incurred in violation of ethics and morality by one who does not have any feeling of guilt for the violation.

These are sufficient guidelines for government officials and heads of agencies to determine whether a particular program, activity, project, or any other act that involves the expenditure of government funds should be approved or not.

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The constitutional framework outlined and the cited statutory provisions should be the context for interpreting Section 38, Chapter 5, Book VI of the Administrative Code:

> Section 38. Suspension of Expenditure of Appropriations. — Except as otherwise provided in the General Appropriations Act and whenever in his judgment the public interest so requires, the President, upon notice to the head of office concerned, is authorized to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees.

The General Appropriations Act for Fiscal Years 2011, 2012, and 2013 also uniformly provide:

> [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.

The President can withhold allocations from items that he deems will be "irregular, unnecessary, excessive or extravagant."[82] ***Viewed in another way, should the President be confronted with an expenditure that is clearly "irregular, unnecessary, excessive or extravagant,"***[83] ***it may be an abuse of discretion for him not to withdraw the allotment or withhold or suspend the expenditure.***

For purposes of augmenting items — as opposed to realigning funds — the President should be able to treat such

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[82] Pres. Decree No. 1445, Sec. 33.

[83] Pres. Decree No. 1445, Sec. 33.

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amounts resulting from otherwise "irregular, unnecessary, excessive or extravagant" expenditures as savings.

IX

The Constitution mentions "savings" in Article VI, Section 25 (5) in relation to the power of the heads of government branches and constitutional commissions to augment items in their appropriations. Thus:

> Sec. 25.
>
> x x x x x x x x x
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> 5. No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.
>
> x x x x x x x x x

The existence of savings in one item is a fundamental constitutional requirement for augmentation of another item.[84] Augmentation modifies the maximum amount provided in the General Appropriations Act appropriated for an item by way of increasing such amount.[85] The power to augment items allows heads of government branches and constitutional commissions to exceed the limitations imposed on their appropriations, through their savings, to meet the difference between the actual and authorized allotments.[86]

The law provides for the definition of savings. The law mentioned in Article VI, Section 25 (5) refers not only to the General Appropriations Act's general provisions but also to

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[84] CONST., Art. VI, Sec. 25 (5).

[85] *Id*. There is no legal provision that prohibits spending less than the amount provided.

[86] *Id*.

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other statutes such as the Administrative Code and the Auditing Code contained in Presidential Decree No. 1445.

The clause in the General Appropriations Act for Fiscal Years 2011, 2012, and 2013, subject to our interpretation for purposes of determination of savings, is as follows:

> [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrances which are (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized. . . .[87]

The *ponencia*,[88] Justice Antonio Carpio,[89] Justice Arturo Brion,[90] and Justice Estela Perlas-Bernabe[91] drew attention to this GAA provision that qualified "savings" as "free from any

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[87] The entire provision reads: General Appropriations Act (2012), Sec. 54

> Sec. 54. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.
>
> Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. In no case shall a non-existent program, activity or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.

See also General Appropriations Act (2013), Sec. 53 and General Appropriations Act (2011), Sec. 60, containing the same provision. These conditions are not, however, relevant to this case.

[88] *Ponencia*, p. 59.

[89] *J.* Carpio, separate concurring opinion, p. 8.

[90] *J.* Brion, separate opinion, p. 38.

[91] *J.* Perlas-Bernabe, separate concurring opinion, p. 3.

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obligation or encumbrances." The phrase, "free from any obligation or encumbrances," however, provides for three situations namely: (1) completion; (2) final discontinuance; or (3) abandonment. The existence of any of these three situations should constitute an appropriation as free from obligation.

These words are separated by "or" as a conjunctive. Thus, "final discontinuance" should be given a meaning that is different from "abandonment."

The only logical reading in relation to the other provisions of law is that "abandonment" may be discontinuance in progress. This means that a project is temporarily stopped because to continue would mean to spend in a manner that is "irregular, unnecessary, excessive or extravagant." When the project is remedied to prevent the irregularity in these expenditures, then the project can further be funded. When the project is not remedied, then the executive declares a "final discontinuance" of the project.

In these cases, it makes sense for the President to withdraw or withhold allocation or further obligation of the funds. It is in this light that the Administrative Code provides that the President may suspend work or the entire program when, based on his judgment, public interest requires it.[92]

To further comply with the duty to use funds "effectively, economically and efficiently,"[93] the President should be able to realign or reallocate these funds. The allocations withdrawn for any of these purposes should be available either for realignment or as savings to augment certain appropriation items.

National Budget Circular No. 541 was issued because of the executive's concern about the number of "slow-moving projects."[94] The slow pace of implementation may have been due to irregularities or illegalities. It could be that it was due

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[92] Exec. Order No. 292, book VI, chap. 5, Sec. 38.

[93] *See* Exec. Order No. 292, book VI, chap. II, Sec. 3.

[94] DBM NBC No. 541 (2012), 1.0-2.0.

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to inefficiencies, or it could be that there were simply projects which the executive refused to implement.

X

There are other species of legitimate savings for purposes of augmentation of appropriation items that justify withdrawal of allocations.

"Final discontinuance" or "abandonment" can occur when, even with the exercise of good faith by officials of the executive departments, there are unforeseen events that make it improbable to complete the procurement and obligation of an item within the time period allowed in the relevant General Appropriations Act.

DBM NBC No. 541 provides an implicit deadline of June 30, 2012 for unobligated but allocated items.[95] There is a mechanism of consultation with the agencies concerned.[96] For instance, the 5th Evidence Packet submitted by the Office of the Solicitor General shows a copy of Department of Transportation and Communication Secretary Joseph Abaya's letter to the Department of Budget and Management, recommending withdrawal of funds from certain projects,[97] which they were having difficulties in implementing.[98]

In Section 5.4 of Circular No. 541, the bases for the deadline are:

> 5.4.1 The departments/agencies' approved priority programs and projects are assumed to be implementation ready and doable during the given fiscal year; and
>
> 5.4.2 The practice of having substantial carry over appropriations may imply that the agency has a slower-than-programmed implementation capacity or agency tends to implant projects within a two-year timeframe.

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[95] DBM NBC No. 541 (2012), Sec. 2.1, 3.1, and 5.4.

[96] DBM NBC No. 541 (2012), Sec. 5.4 and 5.5.

[97] 5th Evidence Packet, p. 1.

[98] TSN, January 28, 2014, p. 23.

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These assumptions as well as the determination of a deadline are consistent with the President's power to control "all the executive departments, bureaus and offices."[99] It is also within the scope of his power to fully and faithfully execute laws. Judicial review of the deadline as well as its policy basis will only be possible if there is a clear and convincing showing by a petitioner that grave abuse of discretion is present. Generally, the nature of the expenditure, the time left to procure, and the efforts both of the agency concerned and the Department of Budget and Management to meet the obstacles to meet the procurement plans would be relevant. But in most instances, this is really a matter left to the judgment of the President.

To this extent, I disagree with the proposal of Justice Carpio on our declaration of the timelines for purposes of determining when there can be savings. Justice Carpio is of the view that there is a need to declare as unconstitutional:

> Disbursements of unobligated allotments for Capital Outlay as savings and their realignment to other items in the GAA, prior to the last two months of the fiscal year if the period to obligate is one year, or prior to the last two months of the second year if the period to obligate is two years.[100]

It is not within the scope of our powers to insist on a specific time period for all expenditures given the nuances of executing a budget. To so hold would be to impinge on the ability of the President to execute laws and exercise his control over all executive departments.

XI

Article VI, Section 25 (5) requires that for any augmentation to be valid, it must be for an existing item. Furthermore, with respect to the President, the augmentation may only be for items within the executive department.[101]

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[99] CONST., Art. VII, Sec. 17.

[100] *J.* Carpio, separate concurring opinion, p. 33.

[101] CONST., Art. VI, Sec. 25 (5).

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The power to augment under this provision is qualified by the words, "respective offices." This means that the President and the other officials enumerated can only augment items within their departments. In other words, augmentation of items is allowed provided that the source department and the recipient department are the same.

Transfer of funds from one department to other departments had already been declared as unconstitutional in *Demetria v. Alba.*[102] Moreover, a corollary to our pronouncement in *Gonzales v. Macaraig, Jr.*[103] that "[t]he doctrine of separation of powers is in no way endangered because the transfer is made within a department (or branch of government) and not from one department (branch) to another"[104] is that transfers across departments are unconstitutional for being violative of the doctrine of separation of powers.

There are admissions in the entries contained in the evidence packets that presumptively show that there have been at least two (2) instances of augmentation by the executive of items outside its department.[105] If these are indeed validated upon the proper audit to have been actually expended, then such acts are unconstitutional.

The Solicitor General suggests that we stay our hand to declare these transfers as unconstitutional since the Congress has acquiesced to these transfers of funds and have not prohibited them in the next budget period.[106] Alternatively, respondents

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[102] 232 Phil. 222, 229–230 (1987) [Per *J.* Fernan, *En Banc*].

[103] G.R. No. 87636, November 19, 1990, 191 SCRA 452 [Per *J.* Melencio-Herrera, *En Banc*].

[104] *Id.* at 472.

[105] In the 1st Evidence Packet, p. 4 shows that the Commission on Audit received DAP funds for its IT Infrastructure Program and for the hiring of additional IT experts. On p. 38, the House of Representatives received DAP funding for the "Construction of the Legislative Library and Archive/ Building/Congressional E-Library."

[106] TSN, January 28, 2014, p. 16.

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also suggest that the transfers were necessary because of contingencies or for interdepartmental cooperation.[107]

Acquiescence of an unconstitutional act by one department of government can never be a justification for this court not to do its constitutional duty.[108] The Constitution will fail to provide for the neutrality and predictability inherent in a society thriving within the auspices of the rule of law if this court fails to act in the face of an actual violation. The interpretation of the other departments of government of their powers under the Constitution may be persuasive on us,[109] but it is our collective reading which is final. The constitutional order cannot exist with acquiescence as suggested by respondents.

Furthermore, the residual powers of the President exist only when there are plainly ambiguous statements in the Constitution. If there are instances that require more funds for a specific item outside the executive agencies, a request for supplemental appropriation may be made with Congress. Interdependence is not proscribed but must happen in the context of the rule of law. No exigent circumstances were presented that could lead to a clear and convincing explanation why this constitutional fiat should not be followed.

XII

Definitely, Section 5.7.3 of DBM NBC No. 541 is not an ideal example of good rule writing. By this provision, withdrawn allotments may be:

> 5.7.3 Used to augment existing programs and projects of any agency and to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year.

This provision is too broad. It appears to sanction the unconstitutional act of augmenting a non-existing item in the

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[107] Office of the Solicitor General's memorandum, p. 35.

[108] Const., art. VIII, sec. 1.

[109] *See J.* Leonen, dissenting opinion, p. 8, in *Umali v. COMELEC*, April 22, 2014 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/203974.pdf>.

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general appropriations acts (GAAs) or any supplemental appropriations law.

The Solicitor General suggests that this provision should be read broadly so as to skirt any constitutional infirmity, thus:

> 76. Paragraph 5.7.3 of NBC No. 541 makes no mention of items or appropriations. Instead, it refers to '. . .existing programs and projects of any agency and . . . priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year.' On questioning from the Chief Justice, respondents submitted that 'programs and projects' do not refer to items of appropriation (as they appear in the GAA) but to specific activities, the specific details and particular justifications for which may not have been considered by Congress, but are necessarily included in the broad terms used in the GAA. Activities need not be enumerated for consideration of Congress, as they are already encapsulated in the broader terms 'programs' or 'projects'. This finds statutory support in the Revised Administrative Code which defines 'programs' as 'functions and activities for the performance of a major purpose for which a government agency is established' and 'project' as a 'component of a program covering a homogenous group of activities that results in the accomplishment of an identifiable output.'[110]

Every presumption in interpreting a provision of law should indeed be granted so as to allow constitutionality in any provision in law or regulation.[111] This presumption applies to facial reviews of provisions. However, it is unavailing in the face of actual facts that clearly and convincingly show a breach of the constitutional provision. Such facts must be established through the rules of evidence.

The Solicitor General himself submitted "evidence packets" which admit projects benefiting from the DAP.[112] Based on respondent's allegations, the projects have "appropriations

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[110] Memorandum of Solicitor General, pp. 27–28.

[111] *People v. Vera*, 65 Phil. 56, 95 (1937) [Per *J.* Laurel, *En Banc*].

[112] The Solicitor General submitted seven (7) evidence packets detailing the DAP-funded projects.

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cover."[113] Petitioners were unable to refute these allegations. Perhaps, it was because it was the first time that they encountered this full accounting of the DAP.

In my view, it is not in this petition for *certiorari* and prohibition that the proper traverse of factual allegations can be done. We cannot go beyond guidance that any allocation — or augmentation — for an activity not covered by any item in any appropriation act is both unconstitutional and illegal.

XIII

I agree with the assessment on the constitutionality of using unprogrammed funds as appropriations cover.[114] An increase in the dividends coming from government financial institutions and government-owned and -controlled corporations is not the condition precedent for using revenues for items allowed to be funded from unplanned revenues. The provisions of the General Appropriations Act clearly provide that the actual revenues exceed the projected revenues presented and used in the approval of the current law.[115]

I agree with Justice Bernabe's views relating to the pooling of funds.[116] There are many laudable intentions in the Disbursement Acceleration Program (DAP). But its major problem lies in the concept of pooled funds. That is, that there is a lump sum from various sources used both to realign allocation and to augment appropriations items. It is unclear whether augmentation of one item is done with funds that are legitimately savings from another. It is difficult to assess each and every source as well as whether each and every expenditure has appropriations cover.

It would have been better if the executive just augmented an item and was clear about its source for savings. What

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[113] Memorandum of Solicitor General, pp. 25–26.

[114] *Ponencia*, pp. 77–82.

[115] *See* General Appropriations Act (2011), XLV, A (1); General Appropriations Act (2012), XLVI, A (1).

[116] *J.* Perlas-Bernabe, separate concurring opinion, pp. 6–7.

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happened was that there was an intermediary mechanism of commingling and pooling funds. Thus, there was the confusion as to whether DAP was the source or ultimately only the mechanism to create savings. Besides, access to information, clarity, and simplicity of governmental acts can ensure public accountability. When the information cannot be accessed freely or when access is too sophisticated, public doubt will not be far behind.

In view of this, I, therefore, agree to lay down the basic principles in the fallo of our decision so that the expenditures can be properly audited.

XIV

Thus, there are factual issues that need to be determined before some or all of the 116 projects[117] contained in the evidence packets admitted by respondents to have benefitted from the DAP can be nullified:

First, whether the transfers of funds were in the nature of realignment of allocations or augmentation of items;

Second, whether the withdrawal of allocations, under the circumstances and considering the nature of the work, activity, or project, was consistent with the definition of savings in the General Appropriations Act, the Administrative Code, and the Auditing Code;

Third, whether the transfer of allotments and the corresponding expenditures were proper augmentations of existing items;

Fourth, whether there were actual expenditures from savings that amounted to augmentation of items outside the executive;

Fifth, whether there were actual expenditures justified with unprogrammed funds as the appropriations cover.

The accounts submitted by the Solicitor General should be assessed and audited in a proper proceeding that will allow those involved to traverse the factual issues, thereby ensuring

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[117] TSN, January 28, 2014, p. 17.

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all parties a full opportunity to be heard. The 116 projects claimed as part of the Disbursement Allocation Program (DAP) were not alleged by petitioners but were raised as part of the oral arguments of respondents. The details of each project need to be further examined. Each of the expenditure involved in every project may, therefore, be the subject of more appropriate procedure such as a special audit by the Commission on Audit or the proper case filed by any interested party to nullify any specific transfer based on evidence that they can present.

XV

The general rule is that a declaration of unconstitutionality of any act means that such act has no legal existence: It is *null and void ab initio*.[118]

The existing exception is the doctrine of operative facts. The application of this doctrine should, however, be limited to situations where (a) there is a showing of good faith in the acts involved or (b) where in equity we find that the difficulties that will be borne by the public far outweigh rigid application to the effect of legal nullity of an act.

The doctrine saves only the effects of the unconstitutional act. It does not hint or even determine whether there can be any liability arising from such acts. Whether the constitutional violation is in good faith or in bad faith, or whether any administrative or criminal liability is forthcoming, is the subject of other proceedings in other forums.

Likewise, to rule that a declaration of unconstitutionality *per se* is the basis for determining liability is a dangerous proposition. It is not proper that there are suggestions of administrative or criminal liability even before the proper charges are raised, investigated, and filed.

Any discussion on good faith or bad faith is, thus, premature. But, in our jurisdiction, the presumption of good faith is a universal

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[118] See also *Yap v. Thenamaris Ship's Management,* G.R. No. 179532, May 30, 2011, 649 SCRA 369, 380 [Per *J.* Nachura, Second Division].

one. It assures the fundamental requisites of due process and fairness. It frames a judicial attitude that requires us to be impartial.

Certiorari and prohibition as remedies are, thus, unavailing for these questions where the factual conditions per expense item cannot be convincingly established and where the regulations have become moot and academic. This is definitely not the proper case to assess the effects of each of the 116 projects under the DAP.

Our decision today should not be misinterpreted as authority to undo infrastructure built or expenditures made under the DAP. Nor should it be immediately used as basis for saying that any or all officials or beneficiaries are either liable or not liable. Each expenditure must be audited in accordance with our ruling.

FINAL NOTE

Cases invested with popular and contemporary political interest are difficult. Sustained public focus is assured because of the effect of this decision on the current balance of political power. It makes for good stories both in traditional and social media. The public's interest can be captivated because the protagonists live in the here and now.

In the efforts to win over an audience, there are a few misguided elements who offer unverified and illicit peeks into our deliberations. Since they do not sit in our chamber, they provide snapshots culled from disjointed clues and conversations. Some simply move to speculation on the basis of their simplified and false view of what motivates our judgments. We are not beholden to the powers that appoint us. There are no factions in this court. Unjustified rumors are fanned by minds that lack the ability to appreciate the complexity of our realities. This minority assumes that their stories or opinions will be well-received by the public as they imagine it to be. Those who peddle stereotypes and prejudice fail to see the Filipino as they are. They should follow the example of many serious media practitioners and opinion leaders who help our people as they

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engage in serious and deep analytical discussion of public issues in all forms of public media.

The justices of this court are duty-bound to deliberate. This means that we are all open to listening to the views of others. It is possible that we take tentative positions to be refined in the crucible of collegial discussion and candid debate. We benefit from the views of others: each one shining their bright lights on our own views as we search for disposition of cases that will be most relevant to our people.

We decide based on the actual facts in the cases before us as well as our understanding of the law and our role in the constitutional order. We are aware of the heavy responsibilities that we bear. Our decisions will guide and affect the future of our people, not simply those of our public officials.

DAP is a management program that appears to have had been impelled with good motives. It generally sought to bring government to the people in the most efficient and effective manner. I entertain no doubt that not a few communities have been inspired or benefited from the implementation of many of these projects.

A government of the people needs to be efficient and effective. Government has to find ways to cause change in the lives of people who have lived in our society's margins: whether this be through well thought out infrastructure or a more egalitarian business environment or addressing social services or ensuring that just peace exists. The amount and timing of funding these activities, projects, or programs are critical.

But, the frailty of the human being is that our passion for results might blind us from the abuses that can occur. In the desire to meet social goals urgently, processes that similarly congeal our fundamental values may have been overlooked. After all, "*daang matuwid*" is not simply a goal but more importantly, the auspicious way to get to that destination.

The Constitution and our laws are not obstacles to be hurdled. They assure that the best for our people can be done in the

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right way. In my view, the Constitution is a necessary document containing our fundamental norms and values that assure our people that this government will be theirs and will always be accountable to them. It is to that faith that we have taken our oaths. It is in keeping with that faith that we discharge our duties.

We can do no less.

ACCORDINGLY, for guidance of the bench and bar, I vote to declare the following acts and practices under the Disbursement Acceleration Program (DAP); National Budget Circular No. 541 dated July 18, 2012; and related executive issuances as unconstitutional:

(a) any implementation of Section 5.7.3 insofar as it relates to activities not related to any existing appropriation item even if in anticipation of future projects;

(b) any augmentation by the President of items appropriated for offices outside the executive branch;

(c) any augmentation of any item, even within the executive department, which is sourced from funds withdrawn from activities which have not yet been (1) completed, (2) finally discontinued, or (3) abandoned; and

(d) any use of unprogrammed funds without all the conditions in the General Appropriations Act being present.

Let a copy of this decision be served on all the officers covered in Article VI, Section 25 (5) of the 1987 Constitution for their guidance.

The evidence packets submitted by respondents should also be transmitted to the Commission on Audit for their appropriate action.

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CONCURRING AND DISSENTING

DEL CASTILLO, *J.*:

The present case comes before us at the heels of immense public outrage that followed the discovery of alleged abuses of the Priority Development Assistance Fund (PDAF) committed by certain legislators involving billions of pesos in public funds. In the seminal case of *Belgica v. Ochoa, Jr.*,[1] the Court declared as unconstitutional, in an unprecedented all-encompassing tenor, the PDAF and its precursors as well as all issuances and practices, past and present, appurtenant thereto, for violating the principles of separation of powers and non-delegability of legislative power as well as the constitutional provisions on the prescribed procedure of presentment of the budget, presidential veto, public accountability and local autonomy. The declaration of unconstitutionality elicited the jubilation of a grateful nation.

While the various investigations relative to the PDAF scandal were taking place, public outrage re-emerged after a legislator alleged that the President utilized the then little known Disbursement Acceleration Program (DAP), which was perceived by the public to be another *specie* of the PDAF, involving comparably large amounts of public funds, to favor certain legislators.

Thus, petitioners come to this Court seeking to have the DAP likewise declared as unconstitutional.

Amidst the emergent public distrust on the alleged irregular utilization of huge amounts of public funds, the Court is called upon to determine the constitutional and statutory validity of the DAP. As in the PDAF case, we must fulfill this solemn duty guided by a singular purpose or consideration: to defend and uphold the Constitution.

This case affords us the opportunity to look into the nature and scope of Article VI, Section 25(5) of the Constitution relative to the power of the President, the President of the Senate, the

[1] G.R. Nos. 208566, 208493, and 209251, November 19, 2013.

Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of the constitutional bodies (hereinafter "heads of offices") to use savings to augment the appropriations of their respective offices. Though the subject constitutional provision seems plain enough, our interpretation and application thereof relative to the DAP has far-reaching consequences on (1) the limits of this power to augment various budgets in order to prevent the abuse and misuse thereof, and (2) the capability of the three co-equal branches of the government and the constitutional bodies to use such power as a tool to promote the general welfare. The proper matrix, then, in determining the constitutional validity of the power to augment, as exercised by the President through the DAP, must of necessity involve the balancing of these State interests in (1) the prevention of abuse or misuse of this power, and (2) the promotion of the general welfare through the use of this power.

With due respect, I find that the theories thus far expressed relative to this case have not adequately and accurately taken into consideration these paramount State interests. Such theories, if adopted by the Court, will affect not only the present administration but future administrations as well. They have serious implications on the very workability of our system of government. It is no exaggeration to say that our decision today will *critically* determine the capacity or ability of the government to fulfill its core mandate to promote the general welfare of our people.

This case must be decided beyond the prevailing climate of public distrust on the expenditure of huge public funds generated by the PDAF scandal. It must be decided based on the Constitution, not public opinion. It must be decided based on reason, not fear or passion. *It must, ultimately, be decided based on faith in the moral strength, courage and resolve of our people and nation.*

I first discuss the relevant constitutional provisions and principles as well as the statutes implementing them before assessing the constitutional and statutory validity of the DAP.

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Nature, scope and rationale of Article VI, Section 25(5) of the Constitution

Article VI, Section 25(5) of the Constitution provides:

> No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

The subject constitutional provision prohibits the transfer of appropriations. Congress cannot pass a law authorizing such transfer. However, it is allowed to enact a law to authorize the heads of offices to transfer savings from one item to another provided that the items fall within the appropriations of the same office: the President relative to the Executive Department, the Senate President with respect to the Senate, the Speaker relative to the House of Representatives, the Chief Justice with respect to the Judicial Department, and the heads of the constitutional bodies relative to their respective offices. The purpose of the subject constitutional provision is to afford considerable flexibility to the heads of offices in the use of public funds and resources.[2] For a transfer of savings to be valid under Article VI, Section 25(5), four (4) requisites must concur: (1) there must be a law authorizing the heads of offices to transfer savings for augmentation purposes, (2) there must be savings from an item/s in the appropriations of the office, (3) there must be an item requiring augmentation in the appropriations of the office, and (4) the transfer of savings should be from one item to another of the appropriations within the same office.

While the members of the Constitutional Commission did not extensively discuss or debate the salient points of the subject constitutional provision, the deliberations do reveal its rationale which is crucial to the just disposition of this case:

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[2] See *Demetria v. Alba*, 232 Phil. 222, 229 (1987).

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MR. NOLLEDO. I have two more questions, Madam President, if the sponsor does not mind. The first question refers to Section 22, subsection 5, page 12 of the committee report about the provision that "No law shall be passed authorizing any transfer of appropriations." This provision was set forth in the 1973 Constitution, inspired by the illegal fund transfer of ₱26.2 million that Senator Padilla was talking about yesterday which was made by President Marcos in order to benefit the Members of the Lower House so that his pet bills would find smooth sailing. I am concerned about the discretionary funds being given to the President every year under the budget. Do we have any provision setting forth some guidelines for the President in using these discretionary funds? I understand Mr. Marcos abused this authority. He would transfer a fund from one item to another in the guise of using it to suppress insurgency. What does the sponsor say about this?

MR. DAVIDE. If Mr. Marcos was able to do that, it was precisely because of the general appropriations measure allowing the President to transfer funds. And even under P.D. No. 1177 where the President was also given that authority, technically speaking, the provision of the proposed draft would necessarily prevent that. Mr. Marcos was able to do it because of the decrees which he promulgated, but the Committee would welcome any proposal at the proper time to totally prevent abuse in the disbursements of discretionary funds of the President.[3]

In another vein, the deliberations of the Constitutional Commission clarified the extent of this power to augment:

MR. SARMIENTO. I have one last question. Section 25, paragraph (5) authorizes the Chief Justice of the Supreme Court, the Speaker of the House of Representatives, the President, the President of the Senate to augment any item in the General Appropriations Law. Do we have a limit in terms of percentage as to how much they should augment any item in the General Appropriations Law?

MR. AZCUNA. The limit is not in percentage but "from savings." So it is only to the extent of their savings.[4]

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[3] II RECORD, CONSTITUTIONAL COMMISSION 88 (July 22, 1986).

[4] II RECORD, CONSTITUTIONAL COMMISSION 111 (July 22, 1986).

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Two observations may be made on the above.

First, the principal motivation for the inclusion of the subject provision in the Constitution was to prevent the President from consolidating power by transferring appropriations to the other branches of government and constitutional bodies in exchange for undue or unwarranted favors from the latter. Thus, the subject provision is an integral component of the system of checks and balances under our plan of government. It should be noted though, based on the broad language of the subject provision, that the check is not only on the President, even though the bulk of the budget is necessarily appropriated to the Executive Department, because the other branches and constitutional bodies can very well commit the afore-described transgression although to a much lesser degree.

Second, the deliberations of the Constitutional Commission on the limits of the power to augment portray the considerable latitude or leeway given the heads of offices in exercising the power to augment. The framers saw it fit not to set a limit based on percentage but on the amount of savings of a particular office, thus, affording heads of offices sufficient flexibility in exercising their power to augment.

Equally important, though not directly discussed in the deliberations of the Constitutional Commission, it is fairly evident from the wording of the subject provision that the power to augment is intended to prevent wastage or underutilization of public funds. In particular, it prevents savings from remaining idle when there are other important projects or programs within an office which suffer from deficient appropriations upon their implementation or evaluation. Thus, by providing for the power to augment, the Constitution espouses a policy of effective and efficient use of public funds to promote the common good.

In sum, the power to augment under Article VI, Section 25(5) of the Constitution serves two principal purposes: (1) negatively, as an integral component of the system of checks and balances under our plan of government, and (2) positively, as a fiscal management tool for the effective and efficient use of public funds to promote the common good. For these reasons,

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as preliminarily intimated, the just resolution of this case hinges on the balancing of two paramount State interests: (1) the prevention of abuse or misuse of the power to augment, and (2) the promotion of the general welfare through the power to augment.

I now proceed to discuss the statutes implementing Article VI, Section 25(5) of the Constitution.

Authority to augment

As earlier noted, Article VI, Section 25(5) of the Constitution states that the power to augment must be authorized "by law." Thus, it has become standard practice to include in the annual general appropriations act (GAA) a provision granting the power to augment to the heads of offices. As pertinent to this case, the 2011, 2012 and 2013 GAAs provide, respectively—

> Section 59. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to augment any item in this Act from savings in other items of their respective appropriations.[5]

> Section 53. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to augment any item in this Act from savings in other items of their respective appropriations.[6]

> Section 52. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to use savings in the respective appropriations to augment actual deficiencies incurred for the current year in any item of their respective appropriations.[7]

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[5] General Provisions, 2011 GAA.

[6] General Provisions, 2012 GAA.

[7] General Provisions, 2013 GAA.

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I do not subscribe to the view that the above-quoted grant of authority to augment under the 2011 and 2012 GAAs contravenes the subject constitutional provision. The reason given for this view is that the subject provisions in the 2011 and 2012 GAAs effectively allows the augmentation of any item in the GAA, including those that do not belong to the items of the appropriations of the office from which the savings were generated.

The subject GAAs are duly enacted laws which enjoy the presumption of constitutionality. Thus, they are to be construed, if possible, to avoid a declaration of unconstitutionality. The rule of long standing is that, as between two possible constructions, one obviating a finding of unconstitutionality and the other leading to such a result, the former is to be preferred.[8] In the case at bar, the 2011 and 2012 GAAs can be so reasonably interpreted by construing the phrase "of their respective appropriations" as qualifying the phrase "to augment any item in this Act." Under this construction, the authority to augment is, thus, limited to items within the appropriations of the office from which the savings were generated. Hence, no constitutional infirmity obtains.

Definition of savings and augmentation

The Constitution does not define "savings" and "augmentation" and, thus, the power to define the nature and scope thereof resides in Congress under the doctrine of necessary implication. To elaborate, the power of the purse or to make appropriations is vested in Congress. In the exercise of the power to augment, the definition of "savings" and "augmentation" will necessarily impact the appropriations made by Congress because the power to augment effectively allows the transfer of a portion of or even the whole appropriation made in one item in the GAA to another item within the same office provided that the definitions of "savings" and "augmentation" are met. Thus, the integrity of the power to make appropriations vested in Congress can only be preserved if the power to define "savings" and "augmentation" is in Congress as well. Of course, the power to define "savings" and "augmentation" cannot be exercised in contravention of the

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[8] *Paredes v. Executive Secretary*, 213 Phil. 5, 9 (1984).

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tenor of Article VI, Section 25(5) so as to effectively defeat the objectives of the aforesaid constitutional provision. In the case at bar, petitioners do not question the validity of the definitions of "savings" and "augmentation" relative to the 2011, 2012 and 2013 GAAs.

The definition of "savings" and "augmentation" is uniform for the 2011, 2012 and 2013 GAAs, to wit:

> [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrances which are**: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized;** (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.
>
> Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, **which upon implementation or subsequent evaluation of needed resources**, is determined to be deficient. In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized by this Act.[9] (Emphasis supplied)

Pertinent to this case is the first type of "savings" involving portions or balances of any programmed appropriation in the GAA that is free from any obligation or encumbrances and which are still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized. Thus, for "savings" of this type to arise the following requisites must be met:

1. The appropriation[10] must be a programmed[11] appropriation in the GAA;

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[9] *See* Sections 60, 54 and 52 of the 2011, 2012 and 2013 GAAs, respectively.

[10] An appropriation is "an authorization made by law or other legislative enactment, directing payment out of government funds under specified conditions or for specified purposes." [Administrative Code, Book VI, Chapter 1, Section 2(1)].

[11] As contradistinguished from the Unprogrammed Fund in the GAA.

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2. The appropriation must be free from any obligation or encumbrances;

3. The appropriation must still be available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized.

The portion or balance of the appropriation, when the above requisites are met, thus, constitutes the first type of "savings."

On the other hand, for "augmentation" to be valid, in accordance with the Article VI, Section 25(5) in relation to the relevant GAA provision thereon, the following requisites must concur:

1. The program, activity, or project to be augmented by savings must be a program, activity, or project in the GAA;

2. The program, activity, or project to be augmented by savings must refer to a program, activity, or project within or under the same office from which the savings were generated;

3. Upon implementation or subsequent evaluation of needed resources, the appropriation of the program, activity, or project to be augmented by savings must be shown to be deficient.

Notably, the law permits augmentation even before the program, activity, or project is implemented if, through subsequent evaluation of needed resources, the appropriation for such program, activity, or project is determined to be deficient.

The power to finally discontinue or abandon the work, activity or purpose for which the appropriation is authorized.

As pertinent to this case, the third requisite of the first type of "savings" in the GAA deserves further elaboration. Note that the law contemplates, among others, the final discontinuance

or abandonment of the work, activity or purpose for which the appropriation is authorized. Implicit in this provision is the recognition of the possibility that the work, activity or purpose may be finally discontinued or abandoned. The law, however, does not state (1) who possesses the power to finally discontinue or abandon the work, activity or purpose, (2) how such power shall be exercised, and (3) when or under what circumstances such power shall or may be exercised.

Under the doctrine of necessary implication, it is reasonable to presume that the power to finally discontinue or abandon the work, activity or purpose is vested in the person given the duty to implement the appropriation (*i.e.*, the heads of offices), like the President with respect to the budget of the Executive Department.

As to the manner it shall be exercised, the silence of the law, as presently worded, allows the exercise of such power to be express or implied. Since there appears to be no particular form or procedure to be followed in giving notice that such power has been exercised, the Court must look into the particular circumstances of a case which tend to show, whether expressly or impliedly, that the work, activity or purpose has been finally abandoned or discontinued in determining whether the first type of "savings" arose in a given case.

This lack of form, procedure or notice requirement is, concededly, *a weak point of this law* because (1) it creates ambiguity when a work, activity or purpose has been finally discontinued or abandoned, and (2) it prevents interested parties from looking into the government's justification in finally discontinuing or abandoning a work, activity or purpose. *Indubitably, it opens the doors to abuse of the power to finally discontinue or abandon which may lead to the generation of illegal "savings."* Be that as it may, the Court cannot remedy the perceived weakness of the law in this regard *for this properly belongs to Congress to remedy or correct.* The particular circumstances of a case must, thus, be looked into in order to determine if, indeed, the power to finally discontinue or abandon the work, activity or purpose was validly effected.

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Anent the conditions as to when or under what circumstances a work, activity or purpose in the GAA may or shall be finally discontinued or abandoned, again, the law does not clearly spell out these conditions, which is, again, *a weak point of this law*. The parties to this case have failed to identify such conditions and the GAAs themselves, in their other provisions, do not appear to specify these conditions. Nonetheless, the power to finally discontinue or abandon the work, activity or purpose recognized in the definition of "savings" in the GAAs cannot be exercised with unbridled discretion because it would constitute an undue delegation of legislative powers; it would allow the person possessing such power to determine whether the appropriation will be implemented or not. Again, the law enjoys the presumption of constitutionality and it must, therefore, be construed, if possible, in such a way as to avoid a declaration of nullity.

Consequently, considering that the GAA (1) is the implementing legislation of the constitutional provisions on the enactment of the national budget under Article VI, and (2) is governed by Book VI ("National Government Budgeting") of the Administrative Code, there is no obstacle to locating the standards that will guide the exercise of the power to finally discontinue or abandon the work, activity or purpose in the Constitution and Administrative Code.[12] As previously discussed, the implicit public policy enunciated under the power to augment in Article VI, Section 25(5) of the Constitution is the effective and efficient use of public funds for the promotion of the common good. The same policy is expressly articulated in Book VI, Chapter 5 ("Budget Execution"), Section 3 of the Administrative Code:

> SECTION 3. Declaration of Policy. — It is hereby declared the policy of the State to formulate and implement a National Budget that is an instrument of national development, reflective of national objectives, strategies and plans. The budget shall be supportive of and consistent with the socio-economic development plan and shall be oriented towards the achievement of explicit objectives and expected results, **to ensure that funds are utilized and operations**

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[12] See *Santiago v. Comelec*, 336 Phil. 848, 915 (1997), Puno *J.*, Concurring and Dissenting.

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are conducted effectively, economically and efficiently. The national budget shall be formulated within the context of a regionalized government structure and of the totality of revenues and other receipts, expenditures and borrowings of all levels of government and of government-owned or controlled corporations. The budget shall likewise be prepared within the context of the national long-term plan and of a long-term budget program. (Emphasis supplied)

Prescinding from the above, the power to finally discontinue or abandon the work, activity or purpose, before savings may arise, should, thus, be circumscribed by the standards of effectivity, efficiency and economy in the utilization of public funds. For example, if a work, activity or purpose is found to be tainted with anomalies, the head of office can order the final discontinuance of the work, activity or purpose because public funds are being fraudulently dissipated contrary to the standard of effectivity in the utilization of public funds.

The power of the President to suspend or otherwise stop further expenditure of funds under Book VI, Chapter V, Section 38 of the Administrative Code.

The power to finally discontinue or abandon the work, activity or purpose for which the appropriation is authorized in the GAA should be related to the power of the President to suspend or otherwise stop further expenditure of funds, relative to the appropriations of the Executive Department, under Book VI, Chapter V, Section 38 (hereinafter "Section 38") of the Administrative Code*:*

SECTION 38. Suspension of Expenditure of Appropriations. — Except as otherwise provided in the General Appropriations Act and whenever in his judgment the public interest so requires, the President, upon notice to the head of office[13] concerned, is authorized

[13] The term "head of office" here refers to an officer under the Executive Department who functions like a Cabinet Secretary with respect to his or her office. This should not be confused with "heads of office" which, for convenience, I used in this Opinion to refer to the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of the constitutional bodies.

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to suspend or **otherwise stop further expenditure** of funds allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees. (Emphasis supplied)

Section 38 contemplates two different situations: (1) to suspend expenditure, and (2) **to otherwise stop further expenditure**.

"Suspend" means "to cause to stop temporarily; to set aside or make temporarily inoperative; to defer to a later time on specified conditions";[14] "to stop temporarily; to discontinue or to cause to be intermitted or interrupted."[15]

On the other hand, "stop" means "to cause to give up or change a course of action; to keep from carrying out a proposed action";[16] "to bring or come to an end."[17]

While "suspending" also connotes "stopping," the former does not mean that a course of action is to end completely since to suspend is to stop *with an expectation or purpose of resumption*. On the other hand, "stop" when used as a verb means "to bring or come to an end." Thus, "stopping" *brings an activity to its* ***complete*** *termination*.

As a general rule, in construing words and phrases used in a statute and in the absence of a contrary intention, they should be given their plain, ordinary and common usage meaning. They should be understood in their natural, ordinary, commonly-accepted and most obvious signification because words are presumed to have been used by the legislature in their ordinary and common use and acceptation.[18]

That the two phrases are found in the same sentence further bears out the logical conclusion that *they do not refer to the*

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[14] http://www.merriam-webster.com/dictionary/suspend last visited May 16, 2014.

[15] *Samalio v. Court of Appeals*, 494 Phil. 456, 467 (2005).

[16] http://www.merriam-webster.com/dictionary/stop?show=0&t=1400223671 last visited May 16, 2014.

[17] http://www.thefreedictionary.com/stop last visited May 16, 2014.

[18] *Spouses Alcazar v. Arante*, G.R. No. 177042, December 10, 2012, 687 SCRA 507, 518-519.

same thing. Otherwise, one of the said phrases would be rendered meaningless and a mere surplusage or redundant. This could not have been the intention of the legislature.[19]

Hence, as used in the first phrase in Section 38, "to suspend" expenditure means to temporarily stop the same with the intention to resume once the reason for the suspension is resolved or the conditions for the resumption are met. On the other hand, "to otherwise stop further expenditure," as used in the second phrase in Section 38, means to stop expenditure *without any intention of resuming*, or simply stated, to terminate it *completely, finally, permanently* or *definitively*.

Consequently, if the President orders the stoppage of further expenditure of funds, pursuant to the second phrase in Section 38, the work, activity or purpose is **completely**, **finally, permanently** or **definitively** put to an end or terminated because there is no intention to resume and thus, no further work or activity can be done without the needed funds. The **net effect** is that the work, activity or purpose is ***finally discontinued or abandoned***. In other words, through the power to ***permanently*** stop expenditure, pursuant to the second phrase of Section 38, the President is effectively given the power to finally discontinue or abandon a work, activity or purpose under a *broader*[20] standard of "public interest." When the President exercises this power thusly, the first type of "savings" in the GAA, as previously discussed, is necessarily generated.

Moreover, Section 38 states in broad and categorical terms that the power of the President to suspend (*i.e.*, temporary stoppage) or to otherwise stop further expenditure (*i.e.*, permanent stoppage) refers to "funds **allotted** for any agency, or any

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[19] In addition, the use of the qualifier "otherwise" *vis-à-vis* the word "stop" in the second phrase, *i.e.*, "to *otherwise* stop further expenditure,"provides greater reason to conclude that the second phrase, when read in relation to the first phrase, does not refer to suspension of expenditure.

[20] As compared to the narrower standards of effectivity, efficiency and economy previously discussed.

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other expenditure authorized in the General Appropriations Act, x x x."[21] Book VI, Chapter 5, Section 2(2) of the Administrative Code defines "allotment" as follows:

> SECTION 2. Definition of Terms. — When used in this Book:
>
> x x x x x x x x x
>
> (2) "Allotment" refers to an authorization issued by the Department of Budget to an agency, **which allows it to incur obligations** for specified amounts contained in a legislative appropriation. (Emphasis supplied)

When read in relation to the above definition of "allotment," the phrase "funds allotted" in Section 38, therefore, refers to ***both*** unobligated ***and*** obligated allotments for, precisely, an unobligated allotment refers to an authorization to incur obligations issued by the Department of Budget and Management (DBM). The law says "to suspend or otherwise stop further expenditure of funds allotted for any agency" *without qualification*, and *not* "to suspend or otherwise stop further expenditure of obligated allotments for any agency." The power of the President to suspend or to permanently stop expenditure in Section 38 is, thus, broad enough to cover both unobligated and obligated allotments.

A contrary interpretation will lead to absurdity. This would mean that the President can only permanently stop an expenditure *via* Section 38 if it involves an obligated allotment. But, in a case where anomalies have been uncovered or where the accomplishment of the project has become impossible, and the allotment for the project is partly unobligated and partly obligated (as is the usual practice of releasing the funds in tranches for long-term projects), the logical course of action would be to stop the expenditure relative to both unobligated and obligated allotments in order to protect public interest. Thus, the unobligated allotment may be withdrawn while the obligated allotment may be de-obligated. But, if the President can only permanently stop an expenditure *via* Section 38 if it involves an obligated

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[21] Emphasis supplied.

allotment, then in this scenario, the President would have to first obligate the unobligated allotment (*e.g.*, conduct public biddings) and then order the now obligated allotments to be de-obligated in view of the anomalies that attended the project or the impossibility of its accomplishment. The law could not have intended such an absurdity.

Moreover, there is, again, nothing in Section 38 that requires that the project has already begun before the President may permanently order the stoppage of expenditure. To illustrate, if reliable information reaches the President that anomalies will attend the execution of an item in the GAA or that the project is no longer feasible, then it makes no sense to prevent the President from permanently stopping the expenditure, by withdrawing the unobligated allotments, *precisely* to prevent the commencement of the project. The government need not wait for it to suffer actual injury before it takes action to protect public interest nor should it waste public funds in pursuing a project that has become impossible to accomplish. In both instances, Section 38 empowers the President to withdraw the unobligated allotments and thereby permanently stop expenditure thereon in furtherance of public interest.

To recapitulate, that the project has already been started or the allotted funds has already been obligated is not a pre-condition for the President to be able to order the permanent stoppage of expenditure, through the withdrawal of the unobligated allotment, pursuant to the second phrase of Section 38. Under Section 38, the President ***can*** order the permanent stoppage of expenditure relative to both an unobligated and obligated allotment, if public interest so requires. Once the President orders the **permanent** stoppage of expenditure, the logical and necessary consequence is that the project is **finally** discontinued and abandoned. Hence, savings is generated under the GAA provision on final discontinuance and abandonment of the work, activity or purpose *to the extent of the unused portion or balance of the appropriation*.

I, therefore, do not subscribe to the view that: (1) Section 38 only refers to the suspension of expenditures, (2) Section 38 does not authorize the withdrawal of unobligated allotments, (3) Section 38 only refers to obligated allotments, and (4) Section 38 only refers to a project that has already begun.

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Was the withdrawal of the unobligated allotments from slow-moving projects, under Section 5 of NBC 541, equivalent to the final discontinuance or abandonment of these slow-moving projects which gave rise to "savings" under the GAA?

This brings us to the first pivotal issue in this case: was the withdrawal of the unobligated allotments, under Section 5 of National Budget Circular No. 541 (NBC 541), equivalent to the final discontinuance or abandonment of the covered slow-moving projects which gave rise to "savings" under the GAA?

As previously discussed, the GAA is silent as to the manner or prescribed form when a work, activity or purpose is deemed to have been finally discontinued or abandoned for purposes of determining whether "savings" validly arose. Thus, the exercise of such power may be express or implied.

In the case at bar, NBC 541 does not categorically state that the withdrawal of the unobligated allotments from slow-moving projects will result to the final discontinuance or abandonment of the work, activity or purpose. However, because executive actions enjoy presumptive validity, NBC 541 should be interpreted in a way that, if possible, will avoid a declaration of nullity. The Court may reasonably conceive any set of facts which may sustain its validity.[22]

Here, I find that the mechanism adopted under NBC 541 may be viewed wholistically in order to *partially* uphold its constitutionality or validity.

The relevant provisions of NBC 541 state:

> 5.4 All released allotments in FY 2011 charged against R.A. No. 10147 which remained unobligated as of June 30, 2012 **shall be immediately considered for withdrawal**. This policy is based on the following considerations:

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[22] *Manila Memorial Park, Inc. v. Secretary of Social Welfare and Development*, G.R. No. 175356, December 3, 2013.

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5.4.1 The departments/agencies' approved priority programs and projects are assumed to be implementation-ready and doable during the given fiscal year; and

5.4.2 The practice of having substantial carryover appropriations may imply that the agency has a slower-than-programmed implementation capacity **or** [that the] agency tends to implement projects within a two-year timeframe.

5.5 Consistent with the President's directive, the DBM shall, based on evaluation of the reports cited above and results of consultations with the departments/agencies, withdraw the unobligated allotments as of June 30, 2012 through issuance of negative Special Allotment Release Orders (SAROs).

x x x x x x x x x

5.7 The withdrawn allotments may be:

5.7.1 Reissued for the **original** programs and projects of the agencies/OUs concerned, from which the allotments were withdrawn;

5.7.2 Realigned to cover additional funding for **other existing** programs and projects of the agency/OU; or

5.7.3 Used to augment existing programs and projects of **any agency** and to fund priority programs and projects **not considered** in the 2012 budget but expected to be started or implemented during the current year. (Emphasis in the original)

When NBC 541 states that the released but unobligated allotments of projects as of June 30, 2012 shall be immediately **considered** for withdrawal, this may be reasonably taken to mean that the Executive Department has made an ***initial*** determination that a project is slow-moving. Upon evaluation of the reports and consultation with the concerned departments/ agencies by the DBM, as per Section 5.5 of NBC 541 quoted above, the withdrawn unobligated allotments may, among others, thereafter be reissued to the same project as per Section 5.7.1.

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As a result, when the withdrawn allotments are reissued or ploughed back to the same project, this may be reasonably interpreted to mean that the Executive Department has made a ***final*** determination that the project is not slow-moving and, thus, should not be discontinued in order to spur economic growth.

Because of the broad language of Section 5.7 of NBC 541, the amount of withdrawn allotments that may be reissued or ploughed back to the same project may be: (1) zero, (2) the same amount as the unobligated allotment previously withdrawn in that project, (3) more than the amount of the unobligated allotment previously withdrawn in that project, and (4) less than the amount of the unobligated allotment previously withdrawn in that project.

In scenario (1), where no withdrawn unobligated allotments are reissued or ploughed back to the project, this may be construed as an implied exercise of the power to finally discontinue or abandon a work, activity or purpose because the withdrawal *had the effect of permanently preventing the completion thereof*. Resultantly, there arose "savings" from the discontinuance or abandonment of these slow-moving projects to the extent of the withdrawn unobligated allotments therefrom. Thus, the withdrawn unobligated allotments from these slow-moving projects, as afore-described, ***may*** be validly treated as "savings" under the pertinent provisions of the GAA.

In scenario (2), where the same amount as the unobligated allotment previously withdrawn from the project is reissued or ploughed back to the same project, no constitutional or statutory breach is apparent because the project is merely continued with its original allotment intact.

In scenario (3), two possible cases may arise. If the withdrawn allotments were merely transferred to another project within the same item or another item within the Executive Department, without exceeding the appropriation set by Congress for that item, then no constitutional or statutory breach occurs because the funds are merely realigned. However, if the withdrawn allotments were transferred to another project within the same

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item or in another item within the Executive Department, the result of which is to exceed the appropriation set by Congress for that item, then an augmentation effectively occurs. Thus, its validity would depend on whether the augmentation complied with the constitutional and statutory requisites on "savings" and "augmentation," as previously discussed. Here, absent actual proof showing non-compliance with such requisites, it would be premature to make such a declaration.

In scenario (4), a constitutional and statutory breach would be present. If the withdrawn unobligated allotment for a particular project is ***partially*** reissued or ploughed back to the same project, then the project is not actually finally discontinued or abandoned. And if the project is not actually finally discontinued or abandoned, then no "savings" can validly be generated pursuant to the GAA definition of "savings." However, in scenario (4), the project now suffers from a reduction of its original allotment which, under NBC 541, is treated and used as "savings." This cannot be validly done for it would contravene the definition of "savings" under the GAA and, thus, circumvent the constitutional power of appropriation vested in Congress. As a result, in scenario (4), any use of the portion of the withdrawn unobligated allotment, not reissued or ploughed back to the same project, as "savings" to augment other items in the appropriations of the Executive Department would be unconstitutional and illegal.

Hence, I find that Sections 5.4, 5.5 and 5.7 of NBC 541 are unconstitutional insofar as they (1) allowed the withdrawal of unobligated allotments from slow-moving projects, which were not finally discontinued or abandoned, and (2) authorized the use of such withdrawn unobligated allotments as "savings." In other words, these sections are void insofar as they permit scenario (4) to take place.

It should be noted, however, that whether there were actual instances when scenario (4) occurred involve factual matters not properly litigated in this case. Thus, I reserve judgment on the constitutionality of the actual implementation of NBC 541 should a proper case be filed. The limited finding, for now, is that the wording of Sections 5.4, 5.5 and 5.7 of NBC 541 is

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partially unconstitutional insofar as it permits: (1) the withdrawal of unobligated allotments from slow-moving projects, which were not finally discontinued or abandoned, and (2) authorizes the use of such withdrawn unobligated allotments as "savings."

Did the President validly order the final discontinuance or abandonment of the subject slow-moving projects pursuant to his power to permanently stop expenditure under Section 38 of the Administrative Code?

When the President ordered the withdrawal of the unobligated allotments of slow-moving projects, under Section 5 of NBC 541, pursuant to his power to permanently stop expenditure under the second phrase of Section 38 of the Administrative Code, he made a categorical determination that the continued expenditure on such slow-moving projects is inimical to public interest.

This brings us to the second pivotal issue in this case: did the President validly order the final discontinuance or abandonment of the subject slow-moving projects pursuant to his power to permanently stop expenditure under Section 38 of the Administrative Code? Or, more to the point, did he comply with the "public interest" standard in Section 38 when he ordered the permanent stoppage of expenditure on the subject slow-moving projects?

I answer in the affirmative.

The challenged act enjoys the presumption of constitutionality. The burden of proof rests on petitioners to show that the permanent stoppage of expenditure on slow-moving projects does not meet the "public interest" standard under Section 38.

Petitioners failed to carry this burden. They did not clearly and convincingly show that the DAP was a mere subterfuge by the government to frustrate the legislative will as expressed in the GAA; or that the finally discontinued slow-moving projects were not actually slow-moving and that the discontinuance thereof was motivated by malice or ill-will; or that no actual and legitimate

public interest was served by the DAP; or some other proof clearly showing that the requisites for the exercise of the power to stop expenditure in Section 38 were not complied with or the exercise of the power under Section 38 was done with grave abuse of discretion.

It is **undisputed** that, at the time the DAP was put in place, our nation was facing serious economic woes due to considerable government under spending. The President, thus, sought to speed up government spending through the DAP by, among others, permanently discontinuing slow-moving projects and transferring the savings generated therefrom to fast-moving, high impact priority projects. It is, again, **undisputed** that the DAP achieved its purpose and significantly contributed to economic growth. Thus, on its face, and absent clear and convincing proof that the DAP did not serve public interest or was pursued with grave abuse of discretion, the Court must sustain the validity of the President's actions.

It should also be noted that, as manifested by the Solicitor General and not disputed by petitioners, the DAP *has been discontinued* in the last quarter of 2013,[23] after the causes of the low level of spending or under spending of the government, specifically, the systemic problems in the implementation of projects by the concerned government agencies were presumably addressed. It, thus, appears that the DAP was instituted to meet an economic exigency which, after being fully addressed, resulted in the discontinuance thereof. This is significant because it demonstrates that the DAP was a temporary measure. It negates the existence of an unjustifiable permanent or continuing pattern or policy of discontinuing slow-moving projects in order to pursue fast-moving projects under the GAA which, if left unabated, would effectively defeat the legislative will as expressed in the GAA. At the very least, the move by the Executive Department to solve the systemic problems in the implementation of its projects shows good faith in seeking to abide by the appropriations set by Congress in the GAA. This provides added

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[23] Memorandum for the Solicitor General, p. 30.

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reason to uphold the determination by the President that public interest temporarily necessitated the implementation of the DAP.

This is not to say, however, that the alleged abuse or misuse of the DAP funds should be condoned by the Court. If indeed such anomalies attended the implementation of the DAP, then the proper recourse is to prosecute the offenders ***with the full force of the law***. However, the present case involves only the constitutional and statutory validity of the DAP, specifically, NBC 541 which was partly used to generate the savings utilized under the DAP. Insofar as this limited issue is concerned, the Court must stay within the clear meaning and import of Section 38 which allows the President to permanently stop expenditures, when public interest so requires.

Concededly, the "public interest" standard is broad enough to include cases when anomalies have been uncovered in the implementation of a project or when the accomplishment of a project has become impossible. However, there may be other cases, not now foreseeable, which may fall within the ambit of this standard, as is the case here where the exigencies of spurring economic growth prompted the Executive Department to finally discontinue slow-moving projects. Verily, in all instances that the power to suspend or to permanently stop expenditure under Section 38 is exercised by the President, ***the "public interest" standard must be met and, any challenge thereto, will have to be decided on a case-to-case basis***, as was done here. As previously noted, petitioners have failed to prove that the final discontinuance of slow-moving projects and the transfer of savings generated therefrom to high-impact, fast-moving projects in order to spur economic growth did not serve public interest or was done with grave abuse of discretion. On the contrary, it is not disputed that the DAP significantly contributed to economic growth and achieved its purpose during the limited time it was put in place.

Hence, I find that the President validly exercised his power to permanently stop expenditure under Section 38 in relation to NBC 541, absent sufficient proof to the contrary.

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The power to permanently stop further expenditure under Section 38 and, hence, finally discontinue or abandon a work, activity or purpose vis-à-vis the two-year availability for release of appropriations under the GAA.

I do not subscribe to the view that the provisions[24] in the GAAs giving the appropriations on Maintenance and Other Operating Expenses (MOOE) and Capital Outlays (CO) a life-span of two years prohibit the President from withdrawing the unobligated allotments covering such items.

The availability for release of the appropriations for the MOOE and CO for a period of two years simply means that the work or activity *may be pursued* within the aforesaid period. It does not follow that the aforesaid provision prevents the President from finally discontinuing or abandoning such work, activity or purpose, through the exercise of the power to permanently stop further expenditure, if public interest so requires, under the second phrase of Section 38 of the Administrative Code.

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[24] Section 65 (General Provisions), 2011 GAA:

Section 65. Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act shall be available for release and obligation for the purpose specified, and under the same special provisions applicable thereto, for a period extending to one fiscal year after the end of the year in which such items were appropriated: PROVIDED, That appropriations for MOOE and capital outlays under R.A. No. 9970 shall be made available up to the end of FY 2011: PROVIDED, FURTHER, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations.

Section 65 (General Provisions), 2012 GAA:

Section 65. Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act shall be available for release and obligation for the purpose specified, and under the same special provisions applicable thereto, for a period extending to one fiscal year after the end of the year in which such items were appropriated: PROVIDED, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations, either in printed form or by way of electronic document.

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It should be emphasized that Section 38 requires that the power of the President to suspend or to permanently stop expenditure must be *expressly* abrogated by a *specific provision* in the GAA in order to prevent the President from stopping a specific expenditure:

> SECTION 38. Suspension of Expenditure of Appropriations. – **Except as otherwise provided in the General Appropriations Act** and whenever in his judgment the public interest so requires, the President, upon notice to the head of office concerned, is authorized to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees. (Emphasis supplied)

This is the clear import and meaning of the phrase "except as otherwise provided in the General Appropriations Act." Plainly, there is nothing in the afore-quoted GAA provision on the availability for release of the appropriations for the MOOE and CO for a period of two years which expressly provides that the President cannot exercise the power to suspend or to permanently stop expenditure under Section 38 relative to such items.

That the funds should be made available for two years does not mean that the expenditure cannot be permanently stopped prior to the lapse of this period, if public interest so requires. For if this was the intention, the legislature should have so stated in more clear and categorical terms given the *proviso* (*i.e.*, "except as otherwise provided in the General Appropriations Act") in Section 38 which requires that the power to suspend or to permanently stop expenditure must be expressly abrogated by a provision in the GAA. In other words, we *cannot* imply from the wording of the GAA provision, on the availability for release of appropriations for the MOOE and CO for a period of two years, that the power of the President under Section 38 to suspend or to permanently stop expenditure is specifically withheld. A more express and clear provision must so provide. The legislature must be presumed to know the wording of the *proviso* in Section 38 which requires an express abrogation of such power.

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It should also be noted that the power to suspend or to permanently stop expenditure under Section 38 is *not* qualified by any timeframe for good reason. Fraud or other exceptional circumstances or exigencies are no respecters of time; they can happen in the early period of the implementation of the GAA which may justify the exercise of the President's power to suspend or to permanently stop expenditure under Section 38. As a result, such power can be exercised *at any time* even a few days, weeks or months from the enactment of the GAA, when public interest so requires. Otherwise, this means that the release of the funds and the implementation of the MOOE and CO must continue until the lapse of the two-year period even if, for example, prior thereto, grave anomalies have already been uncovered relative to the execution of these items or their execution have become impossible.

An illustration may better highlight the point. Suppose Congress appropriates funds to build a bridge between island A and island B in the Philippine archipelago. A few days before the start of the project, when no portion of the allotment has yet to be obligated, the water level rises due to global warming. As a result, islands A and B are completely submerged. If the two-year period is not qualified by Section 38, then the President cannot order the permanent stoppage of the expenditure, through the withdrawal of the unobligated allotment relative to this project, until after the lapse of the two-year period. Rather, the President must continue to make available and authorize the release of the funds for this project despite the impossibility of its accomplishment. Again, the law could not have intended such an absurdity.

In sum, the GAA provision on the availability for release and obligation of the appropriations relative to the MOOE and CO for a period of two years is not a ground to declare the DAP invalid because the power of the President to permanently stop expenditure under Section 38 is not expressly abrogated by this provision. Hence, the President's order to withdraw the unobligated allotments of slow-moving projects, pursuant to NBC 541 in conjunction with Section 38, did not violate the

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aforesaid GAA provision considering that, as previously discussed, the power to permanently stop expenditure was validly exercised in furtherance of public interest, absent sufficient proof to the contrary.

The power to permanently stop expenditure under Section 38 and the prohibition on impoundment under Sections 64 and 65 of the GAA

To my mind, the crucial issue in this case is the relationship between the power to permanently stop expenditure under the second phrase of Section 38 of the Administrative Code *vis-à-vis* the prohibition on impoundment under Sections 64 (hereinafter "Section 64") and 65 of the 2012 GAA.

For convenience, I reproduce Section 38 below:

SECTION 38. Suspension of Expenditure of Appropriations. — **Except as otherwise provided in the General Appropriations Act** and whenever in his judgment the public interest so requires, the President, upon notice to the head of office concerned, is authorized to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees. (Emphasis supplied)

While Sections 64 and 65 of the 2012 GAA provide:

Section 64. Prohibition Against Impoundment of Appropriations. **No appropriations authorized under this Act shall be impounded through retention or deduction** unless in accordance with the rules and regulations to be issued by the DBM: PROVIDED, That all the funds appropriated for the purposes, programs, projects, and activities authorized under this Act, except those covered under the Unprogrammed Fund, shall be released pursuant to Section 33(3), Chapter 5, Book VI of E.O. No. 292.

Section 65. Unmanageable National Budget Deficit. Retention or deduction of appropriations authorized in this Act shall be effected only in cases where there is an unmanageable National Government budget deficit. x x x (Emphasis supplied)

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In American legal literature, impoundment has been defined "as action, or inaction, by the President or other offices of U.S. Government, that precludes the obligation or expenditure of budget authority by Congress."[25] In *Philippine Constitution Association v. Enriquez*,[26] we had occasion to expound on this subject:

> This is the first case before this Court where the power of the President to impound is put in issue. Impoundment refers to a refusal by the President, for whatever reason, to spend funds made available by Congress. It is the failure to spend or obligate budget authority of any type (Notes: *Impoundment of Funds*, 86 Harvard Law Review 1505 [1973]).
>
> Those who deny to the President the power to impound argue that once Congress has set aside the fund for a specific purpose in an appropriations act, it becomes mandatory on the part of the President to implement the project and to spend the money appropriated therefor. The President has no discretion on the matter, for the Constitution imposes on him the duty to faithfully execute the laws.
>
> In refusing or deferring the implementation of an appropriation item, the President in effect exercises a veto power that is not expressly granted by the Constitution. As a matter of fact, the Constitution does not say anything about impounding. The source of the Executive authority must be found elsewhere.
>
> Proponents of impoundment have invoked at least three principal sources of the authority of the President. Foremost is the authority to impound given to him either expressly or impliedly by Congress. Second is the executive power drawn from the President's role as Commander-in-Chief. Third is the Faithful Execution Clause which ironically is the same [provision] invoked by petitioners herein.
>
> The proponents insist that a faithful execution of the laws requires that the President desist from implementing the law if doing so would prejudice public interest. An example given is when through efficient and prudent management of a project, substantial savings are made. In such a case, it is sheer folly to expect the President to spend the entire amount budgeted in the law (Notes: Presidential Impoundment

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[25] *Black's Law Dictionary*, 6th Edition (1990), p. 756.

[26] G.R. No. 113105, August 19, 1994, 235 SCRA 506.

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Constitutional Theories and Political Realities, 61 Georgetown Law Journal 1295 [1973]; Notes Protecting the Fisc: Executive Impoundment and Congressional Power, 82 Yale Law Journal 1686 [1973]).

We do not find anything in the language used in the challenged Special Provision that would imply that Congress intended to deny to the President the right to defer or reduce the spending, much less to deactivate 11,000 CAFGU members all at once in 1994. But even if such is the intention, the appropriation law is not the proper vehicle for such purpose. Such intention must be embodied and manifested in another law considering that it abrades the powers of the Commander-in-Chief and there are existing laws on the creation of the CAFGU's to be amended. Again we state: a provision in an appropriations act cannot be used to repeal or amend other laws, in this case, P.D. No. 1597 and R.A. No. 6758.[27]

The problem may be propounded in this manner.

As earlier noted, under Section 38, the President's power to permanently stop expenditure, if public interest so requires, is qualified by the phrase "[e]xcept as otherwise provided in the General Appropriations Act." Thus, if the GAA expressly provides that the power to permanently stop expenditure under Section 38 is withheld, the President is prohibited from exercising such power. The question then arises as to whether Section 64 falls within the ambit of the phrase "[e]xcept as otherwise provided in the General Appropriations Act."

The question is novel and not an easy one.

Section 64 indirectly defines "impoundment" as retention or deduction of appropriations. "Impoundment" in the GAA may, thus, be defined as the refusal or failure to wholly (*i.e.*, retention of appropriations) or partially (*i.e.*, deduction of appropriations) spend funds appropriated by Congress. But note the all-encompassing tenor of Section 64 referring as it does to the prohibition on impoundment of *all* appropriations under the GAA, specifically, the appropriations to the three great branches of government and the constitutional bodies.

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[27] *Id*. at 545-546.

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It may be observed that the term "impoundment" is broad enough to include the power of the President to permanently stop expenditure, relative to the appropriations of the Executive Department, if public interest so requires, under Section 38. The reason is that the permanent stoppage of expenditure under Section 38 effectively results in the retention or deduction of appropriations, as the case may be. Thus, a broad construction of the prohibition on impoundment will lead to the conclusion that Section 64 has rendered Section 38 wholly inoperative. If that be the case, there arises the more difficult question of whether the President has an inherent power of impoundment and whether he can be deprived of such power by statutory command. In *Philippine Constitution Association*, as afore-quoted, although the issue of impoundment was not decisive therein, the Court had occasion to outline the opposing views on this subject.

After much reflection, it is my considered view that, for the moment, as our laws are so worded, there is no imperative need to settle the question on whether the President has an inherent power of impoundment and whether he can be deprived of such power by statutory fiat for the following reasons:

First, it is a settled rule of statutory construction that implied repeals are not favored. Note that Section 64, in prohibiting impoundment of appropriations, made reference to Section 33(3) of the Administrative Code in its final sentence. The legislature must be presumed to have been aware of Section 38 in the Administrative Code so much so that if the prohibition on impoundment in Section 64 was intended to render Section 38 wholly inoperative, then the law should have so stated in clearer terms. But it did not.

Second, because implied repeals are not favored, courts shall endeavor to harmonize two apparently conflicting laws, if possible, so as not to render one wholly inoperative.

In the case at bar, Sections 64 and 38 can be harmonized for two reasons.

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First, the scope of Section 64 and Section 38 substantially differs. Section 64 covers all appropriations relative to the three great branches of government and the constitutional bodies while Section 38 refers only to the appropriations of the Executive Department. In other words, Section 64 is broader in scope while Section 38 has limited applicability. As a consequence, under Section 64, the President cannot impound the appropriations of the whole government bureaucracy and must authorize the release of all allotments therefor unless there is an unmanageable national government budget deficit as per Section 65. Once all allotments have been released, however, there arises the power of the President under Section 38 to suspend or to permanently stop expenditure, if public interest so requires, relative to the appropriations in the GAA of the Executive Department.

And second, as afore-quoted, "impoundment" is defined in *Philippine Constitution Association* as the "refusal by the President, **for whatever reason**, to spend funds made available by Congress."[28] We must reasonably presume that the legislature was aware of, and intended this meaning when it used such term in Section 64. In contrast, Section 38 provides a clear standard for the exercise of the power of the President to permanently stop expenditure to be valid, that is, when public interest so requires. It, thus, precludes the President from exercising such power arbitrarily, capriciously and whimsically, or with grave abuse of discretion. Hence, Section 38 may be read as an exception to Section 64.

The practical effects or results of the above construction may be re-stated and summarized as follows:

1. The President is prohibited from impounding appropriations, through retention or deduction, pursuant to Section 64 unless there is an unmanageable national government budget deficit as defined in Section 65. Consequently, the President must authorize the release orders of allotments of all appropriations in the GAA

[28] Emphasis supplied.

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relative to the three great branches of government and the constitutional bodies.[29]

2. However, once the allotments have been released, the President possesses the power to suspend or to permanently stop expenditure, relative to the appropriations of the Executive Department, if public interest so requires, pursuant to Section 38 of the Administrative Code.

3. The power to suspend or to permanently stop expenditure, under Section 38, must comply with the public interest standard, that is, there must be a sufficiently compelling public interest that would justify such suspension or permanent stoppage of expenditure.

4. Because the President's determination of the existence of public interest justifying such suspension or permanent stoppage of expenditure enjoys the presumption of constitutionality, the burden of proof is on the challenger to show that the public interest standard has not been met. If brought before the courts, compliance with the public interest standard will, thus, have to be decided on a case-to-case basis.

As a necessary consequence of the above, the power to permanently stop expenditure under Section 38 is not rendered inoperative by Section 64. Hence, the actions taken by the

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[29] This interpretation of Section 64, involving the mandatory release of all allotments relative to the appropriations of the other branches of government and constitutional bodies, is in consonance with the constitutional principles on separation of powers and fiscal autonomy. Interestingly, these principles are expressly recognized in the 2011 GAA but do not appear in the 2012 and 2013 GAAs. Section 69 of the 2011 GAA provides:

Sec. 69. Automatic and Regular Release of Appropriations. Notwithstanding any provision of law to the contrary, the appropriations authorized in this Act for the Congress of the Philippines, the Judiciary, the Civil Service Commission, the Commission on Audit, the Commission on Elections, the Office of the Ombudsman and the Commission on Human Rights shall be automatically and regularly released.

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President, pursuant to Section 38 in relation to NBC 541, as previously discussed, are valid notwithstanding the prohibition on impoundment under Section 64.

Section 38, insofar as it allows the President to permanently stop expenditures, is a valid legislative grant of the power of impoundment to the President.

As previously noted, Section 38, insofar as it allows the President to permanently stop expenditures, may be treated as an effective grant of the power of impoundment by the legislature because the permanent stoppage of expenditure effectively results in the retention or deduction of appropriations, as the case may be. However, its nature and scope is limited in that: (1) it only covers the appropriations of the Executive Department, and (2) it is circumscribed by the "public interest" standard, thus, precluding an unbridled exercise of such power.

Assuming *arguendo* that the President has no inherent or implied power of impoundment under the Constitution, Section 38 is valid and constitutional because it constitutes an ***express legislative grant*** of the power of impoundment. Indeed, in *Kendall v. United States*,[30] the U.S. Supreme Court categorically ruled that the President cannot countermand the act of Congress directing the payment of claims owed to a private corporation. In so ruling, it found that the President has no inherent or implied power to forbid the execution of laws. However, *Kendall* did ***not*** involve a statutory grant of the power of impoundment. It is important to note that while there is no inherent or implied power of impoundment granted to the President in American constitutional law, *there exist express* ***legislative*** *grants of such power in the aforesaid jurisdiction*.

A helpful overview of the meaning of impoundment and its history in U.S. jurisdiction is quoted below:

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[30] 37 U.S. 524 (1838).

Impoundment

An action taken by the president in which he or she proposes not to spend all or part of a sum of money appropriated by Congress.

The current rules and procedures for impoundment were created by the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C.A. § 601 *et seq*.), which was passed to reform the congressional budget process and to resolve conflicts between Congress and President Richard M. Nixon concerning the power of the Executive Branch to impound funds appropriated by Congress. Past presidents, beginning with Thomas Jefferson, had impounded funds at various times for various reasons, without instigating any significant conflict between the executive and the legislative branches. At times, such as when the original purpose for the money no longer existed or when money could be saved through more efficient operations, Congress simply acquiesced to the president's wishes. At other times, Congress or the designated recipient of the impounded funds challenged the president's action, and the parties negotiated until a political settlement was reached.

Changes During the Nixon Administration

The history of accepting or resolving impoundments broke down during the Nixon administration for several reasons. First, President Nixon impounded much greater sums than had previous presidents, proposing to hold back between 17 and 20 percent of controllable expenditures between 1969 and 1972. Second, Nixon used impoundments to try to fight policy initiatives that he disagreed with, attempting to terminate entire programs by impounding their appropriations. Third, Nixon claimed that as president, he had the constitutional right to impound funds appropriated by Congress, thus threatening Congress's greatest political strength: its power over the purse. Nixon claimed, "The Constitutional right of the President of the United States to impound funds, and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear."

In the face of Nixon's claim to impoundment authority and his refusal to release appropriated funds, **Congress in 1974 passed the Congressional Budget and Impoundment Control Act, which reformed the congressional budget process and established rules and procedures for presidential impoundment**. In general, the provisions

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of the act were designed to curtail the power of the president in the budget process, which had been steadily growing throughout the twentieth century.[31] (Emphasis supplied)

The conditions and procedure through which the President may impound appropriations under the Impoundment Control Act in U.S. jurisdiction are described as follows:

§ 44 Impoundment Control Act

Congress enacted the Congressional Budget and Impoundment Control Act of 1974. Under the Act, whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided, or that such budget authority should be rescinded for fiscal policy or other reasons, or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President is required to send a special message to both houses of Congress, and any amount of budget authority proposed to be rescinded or that is to be reserved will be made available for obligation unless, within 45 days, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved. Funds made available for obligation under such procedure may not be proposed for rescission again. The contents of the special message are set forth in the statute."

The Impoundment Control Act of 1974 further provides that the President, the Director of the Office or Management and Budget, the head of any department or agency of the Government, or any officer or employee of the United States may propose a deferral of any budget authority provided for a specific purpose or project by transmitting a special message to Congress. Deferrals are permissible only to: (1) provide for contingencies; (2) achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law. Moreover, the provisions on deferrals are inapplicable to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message.

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[31] http://legal-dictionary.thefreedictionary.com/impoundment last visited on June 5, 2014.

If fund budget authority that is required to be made available for obligation is not made available, the Comptroller General is authorized to bring a civil action to require such budget authority to be made available for obligation. However, no such action may be brought until the expiration of 25 days of continuous session of Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the contemplated action has been filed with Congress.[32]

As can be seen, it is well within the powers of Congress to grant to the President the power of impoundment. The reason for this is not difficult to discern. If Congress possesses the power of appropriation, then it can set the conditions under which the President may alter or modify these appropriations subject to guidelines or limitations that Congress itself deems necessary and expedient. Admittedly, the legislative grant of the power of impoundment in U.S. jurisdiction is more sophisticated and contains strict guidelines in order to prevent the President from abusing such power. However, the point remains that Congress ***may*** grant the President the power of impoundment.

For these reasons, I find that Section 38 ***is*** an express legislative grant of such power. ***And the Court cannot deny the President of that power***. *Whether this legislative grant of the power of impoundment under Section 38 is, however, wise or prudent is an altogether different matter.* The remedy lies with Congress to repeal or amend Section 38 in order to set more stringent safeguards and guidelines. I will return to this important point later.

But, as it now stands, Section 38 is a valid grant of such power because, as already discussed, it complies with the sufficiency of standard test. For we have long ruled that "public interest" is a sufficient standard, when read in relation to the goals on effectivity, efficiency and economy in the execution of the budget under the Administrative Code, thus, precluding a finding of undue delegation of legislative powers.[33] Further,

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[32] 63C Am Jur 2d Public Funds § 44.

[33] See *People v. Rosenthal,* 68 Phil. 328 (1939).

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as previously and extensively discussed, Section 38 can be harmonized with Section 64 in that Section 38 is an exception to the general prohibition on the power of the President to impound appropriations under Section 64. Consequently, even if we concede that the President has no inherent or implied power of impoundment under the Constitution, he possesses that power by virtue of Section 38 which is an express legislative grant of the power of impoundment.

The power to finally discontinue or abandon a work, activity or purpose in the GAA vis-à-vis Section 38

At this juncture, I find it necessary to further discuss the power to finally discontinue or abandon a work, activity or purpose in the GAA in relation to Section 38. Recall that the GAA definition of "savings" partly provides—

> [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrances which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; x x x

However, the GAA does not expressly state under what conditions or standards the power to finally discontinue or abandon a work, activity or purpose may be validly exercised. As I previously observed, because of the silence of the GAA on this point, the standards may be found elsewhere such as the Constitution and Administrative Code which expressly set the standards of effectivity, efficiency and economy in the execution of the national budget. Additionally, I agree with Justice Leonen that the "irregular, unnecessary, excessive, extravagant or unconscionable" standards under the Constitution[34] and pertinent

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[34] Article IX-D, Section 2(2) of the Constitution provides:

> The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties.

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laws may be resorted to in delimiting this power to finally discontinue or abandon a work, activity or purpose authorized under the GAA.

It should be noted, however, that the power to finally discontinue or abandon a work, activity or purpose implicitly granted and recognized under the GAA's definition of "savings" is ***independent*** and ***separate*** from the power of the President to permanently stop expenditures under Section 38 of the Administrative Code. As I previously noted, the power to finally discontinue or abandon a work, activity or purpose under the GAA may be exercised by all heads of offices, and not the President alone.

Why is this significant?

Because even if we were to concede that the President could not have validly ordered the permanent stoppage of expenditure on slow-moving projects under Section 38 in relation to NBC 541, he would still possess this power under his power to finally discontinue or abandon a work, activity or purpose under the GAA. The lack of specific standards in the GAA and the resort to the broad standards of "effectivity, efficiency and economy" as well as the "irregular, unnecessary, excessive, extravagant or unconscionable" standards, as aforementioned, in the Constitution and pertinent laws permit this result. In particular, the ineffective and inefficient use of funds on slow-moving projects would easily satisfy the aforementioned standards. From this perspective, the GAA itself has provided for a limited grant of the power of impoundment through the power to finally discontinue or abandon the work, activity or purpose.

The above, again, demonstrates the weaknesses of our current laws in ***lacking*** proper procedures and safeguards in the exercise of the power to finally discontinue or abandon a work, activity or purpose implicitly granted and recognized in the GAA, thus, opening the doors to the abuse and misuse of such power.

The enormous powers of the President to: (a) permanently stop expenditures under Section 38 and (b) to finally discontinue or abandon a work, activity

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or purpose under the GAA definition of "savings."

The ramifications of the positions taken thus far in this case are wide-ranging because they incalculably affect the powers and prerogatives of the presidency. The net effect of the views expressed in this case is to ***effectively deny*** to the President (1) the power to permanently stop expenditure, when public interest so requires, under Section 38, and (2) the power to finally discontinue or abandon a work, activity or purpose implicitly granted and recognized in the GAA. I have taken the contrary position.

With these powers, in the hands of an able and just President, much good can be accomplished. But, in the hands of a weak or corrupt President, much damage can be wrought. Truly, we are adjudicating here, to a large extent, the very capability of the President, as chief implementer of the national budget, to effectively chart our nation's destiny.

The underlying rationale of the view I take in this case is not an original one. I fall back on an age-old axiom of constitutional law: a law cannot be declared invalid nor can a constitutional provision be rendered inoperative because of the possibility or fear of its abuse. We do not possess that power. For us to rule based on the possibility or fear of abuse will result in judicial tyranny because virtually all constitutional and statutory provisions conferring powers upon agents of the State can be abused. In the timeless words of Justice Laurel, "[t]he possibility of abuse is not an argument against the concession of the power as there is no power that is not susceptible of abuse."[35]

The remedy is and has always been constant unwavering vigilance. The remedy is and has always been to prosecute instances when the power has been abused ***with the full force of the law***. The remedy is and has always been ***to put in place sufficient safeguards***, through remedial legislation and the proper exercise of the legislative oversight powers, to prevent the abuse

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[35] *Angara v. Electoral Commission*, 63 Phil. 139, 177 (1936).

and misuse of these powers while giving the holder of the power sufficient flexibility in pursuing the common good.

The task does not belong to the courts alone. It resides in the criminal justice system. It resides in Congress and the other governmental bodies (like the Commission on Audit) under our system of checks and balances. ***And, ultimately, it resides in the moral strength, courage and resolve of our people and nation***. That alone can stop abuse of power. Not deprivation or curtailment of powers, out of fear or passion in these turbulent times in the life of our nation, that the laws specifically grant to the President and which serve a legitimate and vital State interest; powers that are an essential and integral component of the design of our government in order for it to respond to various exigencies in the pursuit of the common good.

It is noteworthy that there have been legislative efforts to redefine "savings" in the GAA. The view has been expressed that the prevailing definition of "savings" in the GAA is highly susceptible to abuse.[36] In this regard, information is the key, information on, among others, how funds are spent, how savings are generated, what projects are suspended or permanently stopped, what projects are benefitted by augmentations, the extent of such augmentations, and, most of all, the valid justifications for such actions on the part of the government. The remedy lies largely with the legislature, through its oversight functions and through remedial legislation, in making the details of, and the justifications for all governmental actions and transactions more transparent and accessible to the people. ***In fine, information is the light that will scatter the darkness where abuse of power interminably lurks and thrives.*** Further, as previously noted, there is an urgent necessity to set the proper procedures and safeguards in the exercise of the power to

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[36] *See*, for instance, House Bill No. 4992 (AN ACT DEFINING THE TERM "SAVINGS" AS USED IN THE NATIONAL BUDGET AND PROVIDING GUIDELINES FOR ITS USE AND EXPENDITURE, AND FOR OTHER PURPOSES) introduced by Representative Lorenzo R. Tañada III [http://www.erintanada.com/component/content/article/19-budget-reform/240-budget-sacings-act.html last visited May 22, 2014]

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finally discontinue or abandon a work, activity or purpose implicitly granted and recognized under the GAA's definition of "savings."

Anent Section 38, the model followed in U.S. jurisdiction provides meaningful and useful guidance on how the vast power to impound allotted funds granted to the President under Section 38 can be adequately limited while giving him the flexibility to pursue the common good. We would do well to study and learn from their experience. Indubitably, ***there is an imperative need to provide greater or stricter safeguards and guidelines on how or under what conditions or limitations the vast power granted to the President under Section 38 is to be exercised***. The remedy, again, lies with the legislature in achieving the delicate balance of preventing the abuse and misuse of the power under Section 38 while allowing the President to pursue the common good.

The question of whether the power has been abused is entirely separate and distinct from the question as to whether the power exists. An affirmative answer to the first gives rise to administrative, civil and/or criminal liabilities. To the second, we need only look at our Constitution and laws for the answer. Here, as already stated, the power is clearly and unequivocally conferred on the President who must exercise it, not with an unbridled discretion, but as circumscribed by the standard of public interest.

In the case at bar, it is not disputed that the power was exercised to serve or pursue an important and legitimate State interest *albeit* temporary in nature, *i.e.*, the urgent necessity to spur economic growth for the promotion of the general welfare. That it achieved this purpose is also not in dispute. And while there have been claims that part of the DAP funds were fraudulently misused or abused, such claims, if true, necessitate that the government prosecutes the offenders with the full force of the law. But, certainly, they preclude the Court from depriving the President of the power to permanently stop expenditures, when public interest so requires, until and unless Section 38 is amended or repealed.

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Our solemn duty is to defend and uphold the Constitution. We cannot arrogate unto ourselves the power to repeal or amend Section 38 for this properly belongs to the legislature. We must stay the course of constitutional supremacy. That is our sacred trust.

On the use of unreleased appropriations under the DAP

NBC 541, which was the source of savings under the DAP, categorically refers to unobligated *allotments* of programmed appropriations as the sources of the savings generated therefrom:

> 3.0 **Coverage**
>
> 3.1 These guidelines shall cover the withdrawal of unobligated allotments as of June 30, 2012 of all national government agencies (NGAs) charged against FY 2011 Continuing Appropriation (R.A. No. 10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to:
>
> 3.1.1 Capital Outlays (CO);
>
> 3.1.2 Maintenance and Other Operating Expenses (MOOE) related to the implementation of programs and projects, as well as capitalized MOOE; and
>
> 3.1.3 Personal Services corresponding to unutilized pension benefits declared as savings by the agencies concerned based on their updated/validated list of pensioners.
>
> 3.2 The withdrawal of unobligated allotments may cover the identified programs, projects and activities of the departments/agencies reflected in the DBM list shown as **Annex A** or specific programs and projects as may be identified by the agencies. (Emphasis in the original; underline supplied)

Thus, under NBC 541, the "savings" component of the DAP was not sourced from "unreleased appropriations," in its strict

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and technical sense, but from unobligated allotments which were already released to the various departments or agencies. The implementing executive issuance, NBC 541, is clear and categorical, unobligated allotments (and *not* unreleased appropriations) were the sources of the "savings" component of the DAP. Consequently, it does not contravene the definition of savings under the pertinent provisions of the GAA for, precisely, an unobligated allotment is an appropriation that is "free from any obligation or encumbrances."

Further, to reiterate, the withdrawal of unobligated allotments in the present case should not be taken in isolation of the reason for its withdrawal. The withdrawal was brought about by the determination of the President that the continued implementation of slow-moving projects, under NBC 541, is inimical to public interest because it significantly dampened economic growth. It is, therefore, inaccurate to state that the subject unobligated allotments were indiscriminately declared as savings considering that there was a legitimate State interest involved in ordering their withdrawal and the burden of proof was on petitioners to show that such State interest failed to comply with the "public interest" standard in Section 38. Again, petitioners failed to carry this *onus*. With the permanent stoppage of expenditure on these slowing projects and, hence, their final discontinuance or abandonment, savings were generated pursuant to the definition of "savings" in the GAA.

On the augmentation of project, activity or program (PAP) not covered by any appropriations in the pertinent GAAs

Preliminarily, the view has been expressed that the DAP was used to authorize the augmentations of items in the GAA many times over their original appropriations. While the magnitude of these supposed augmentations are, indeed, considerable, it must be recalled that Article VI, Section 25(5) of the Constitution purposely did not set a limit, in terms of percentage, on the power to augment of the heads of offices:

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MR. SARMIENTO. I have one last question. Section 25, paragraph (5) authorizes the Chief Justice of the Supreme Court, the Speaker of the House of Representatives, the President, the President of the Senate to augment any item in the General Appropriations Law. Do we have a limit in terms of percentage as to how much they should augment any item in the General Appropriations Law?

MR. AZCUNA. The limit is not in percentage but "from savings." So it is only to the extent of their savings.[37]

Consequently, even if Congress appropriated only one peso for a particular PAP in the appropriations of the Executive Department, and the Executive Department, thereafter, generated savings in the amount of ₱1B, it is, theoretically, possible to augment the aforesaid one peso PAP appropriation with ₱1B. The intent to give considerable leeway to the heads of offices in the exercise of their power to augment allows this result.

Verily, the sheer magnitude of the augmentation, *without more*, is not a ground to declare it unconstitutional. For it is possible that the huge augmentations were legitimately necessitated by the prevailing conditions at the time of the budget execution. On the other hand, it is also possible that the aforesaid augmentations may have breached constitutional limitations. But, in order to establish this, the burden of proof is on the challenger to show that the huge augmentations were done with grave abuse of discretion, such as where it was merely a veiled attempt to defeat the legislative will as expressed in the GAA, or where there was no real or actual deficiency in the original appropriation, or where the augmentation was motivated by malice, ill will or to obtain illicit political concessions. Here, none of the petitioners have proved grave abuse of discretion nor have the beneficiaries of these augmentations been properly impleaded in order for the Court to determine the justifications for these augmentations, and thereafter, rule on the presence or absence of grave abuse of discretion.

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[37] II RECORD, CONSTITUTIONAL COMMISSION 111 (July 22, 1986).

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The Court cannot speculate or surmise, by the sheer magnitude of the augmentations, that a constitutional breach occurred. Clear and convincing proof must be presented to nullify the challenged executive actions because they are presumptively valid. Concededly, it is difficult to mount such a challenge based on grave abuse of discretion, but it is not impossible. It will depend primarily on the particular circumstances of a case, hence, as previously noted, the necessity of remedial legislation making access to information readily available to the people relative to the justifications on the exercise of the power to augment.

Further, assuming that the power to augment has become prone to abuse, because it is limited only by the extent of actual savings, then the remedy is a constitutional amendment; or remedial legislation subjecting the power to augment to strict conditions or guidelines as well as strict real time monitoring. Yet, it cannot be discounted that limiting the power to augment, based on, say, a set percentage, would unduly restrict the effectivity of this fiscal management tool. As can be seen, these issues go into the wisdom of the subject constitutional provision which is not proper for judicial review. As it stands, the substantial augmentations in this case, without more, cannot be declared unconstitutional absent a clear showing of grave abuse of discretion for the necessity of such augmentations are presumed to have been legitimate and *bona fide*.

In the main, with respect to the PAPs which were allegedly not covered by any appropriation under the pertinent GAA, I find that such finding is premature on due process grounds. In particular, it appears that the Solicitor General was not given an opportunity to be heard relative to the alleged lack of appropriation cover of the DOST's DREAM project and the augmentation to the DOST-PCIEETRD because these were culled from the entries in the evidence packets submitted by the Solicitor General to the Court *in the course of the oral arguments of this case*. I find that the proper procedure is to contest the entries in the evidence packets in a proper case

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filed for that purpose where the government is given an opportunity to be heard.

Also, with respect to the augmentations relative to the DOST-PCIEETRD, aside from prematurity on due process grounds as afore-discussed, I note that the GAA purposely describes items, in certain instances, in general or broad language. Thus, a new activity may be subsumed in an item, like "Research and Management Services," for as long as it is reasonably connected to such item. Again, whether this was the case here is something that should be litigated, if the parties are so minded, in a proper case, in order to give the DOST an opportunity to be heard.

On cross-border transfer of savings

The Solicitor General admits[38] that the President made available to the Commission on Audit (COA), House of Representatives and Commission on Elections (Comelec) a portion of the savings of the Executive Department in order to address certain exigencies, to wit:

1. The COA requested for funds to implement an infrastructure program and to strengthen its regulatory capabilities;
2. The House of Representatives requested for funds to complete the construction of its e-library in order to prevent the deterioration of the work already done on the aforesaid project; and
3. The Comelec requested for funds to augment its budget for the purchase of the Precinct Count Optical Scan (PCOS) machines for the May 2013 elections to avert a return to the manual counting system.

The Solicitor General presents an interesting argument to justify these cross-border transfers. He claims that the power to augment, under Article VI, Section 25(5) of the Constitution, merely prohibits *unilateral* inter-departmental transfer of

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[38] Memorandum for the Solicitor General, p. 35.

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savings. In the above cases, the other department or constitutional commission requested for the funds, thus, they are not covered by this constitutional prohibition. Moreover, once the funds were given, the President had no say as to how the funds were going to be used.

The theory is novel but untenable.

Article VI, Section 25(5) clearly prohibits cross-border transfer of savings regardless of whether the recipient office requested for the funds. For if we uphold the Solicitor General's theory, nothing will prevent the other heads of offices from subsequently flooding the Executive Department with requests for additional funds. This would spawn the evil that the subject constitutional provision precisely seeks to prevent because it would make the other offices beholden to the Executive Department in view of the funds they received. It would, thus, undermine the principle of separation of powers and the system of checks and balances under our plan of government.

The Solicitor General further argues that the aforesaid transfers were rare and far between, and, more importantly, they were necessitated by exigent circumstances. Thus, it would have been impracticable to wait for Congress to pass a supplemental budget to address the aforesaid exigencies.

I disagree for the following reasons.

First, Article VI, Section 25(5) is clear, categorical and absolute. It admits of no exception. The lack of means and time to pass a supplemental budget is not an exception to the rule prohibiting the cross-border transfer of savings from one branch or constitutional body to another branch or constitutional body. (Parenthetically, it was not even clearly demonstrated that it was impracticable to pass a supplemental budget or that the reasons for not resorting to the passage of a supplemental budget to address the aforesaid exigencies was not due to the fault or negligence of the concerned government agencies.)

Second, the Court cannot allow a relaxation of the rule in Article VI, Section 25(5) on the pretext of extreme urgency

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and/or exigency for this would invite intermittent violations of this rule, which is intended to preserve and protect the integrity and independence of the three great branches of government as well as the constitutional bodies. The constitutional value at stake is one of a high order that cannot and should not be perfunctorily disregarded.

Third, the power to make appropriations is constitutionally vested in Congress; the Executive Department cannot usurp or circumvent this power by transferring its savings to another branch or constitutional body. It must follow the procedure laid down in the Constitution for the passage of a supplemental budget if it so desires to aid or help another branch or constitutional body which is in dire need of funds. The assumption is that Congress will see for itself the extreme urgency and necessity of passing such a supplemental budget and there is no reason to assume that Congress will not swiftly and decisively act, if the circumstances warrant.

Fourth, even if we assume that grave consequences would have befallen our people and nation had the aforesaid cross-border transfers of savings not been undertaken because a supplemental budget would not have been timely passed to address such exigencies, still, this would not justify the relaxation of the rule under Article VI, Section 25(5). The possibility of not being able to pass a supplemental budget to timely and adequately address certain exigencies is one of the unavoidable risks or costs of this mechanism adopted under our plan of government. If grave consequences should befall our people and nation as a result thereof, the people themselves must hold our government officials accountable for the failure to timely pass a supplemental budget, if done with malice or negligence, should such be the case. The ballot and/or the filing of administrative, civil or criminal cases are the constitutionally designed remedies in such a case.

In the final analysis, until and unless the absolute prohibition on cross-border transfer of savings in our Constitution is amended, we must follow its letter, and any deviation therefrom must necessarily suffer from the vice of unconstitutionality. For these

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reasons, I find that the three aforesaid transfers of savings are unconstitutional.

On the Unprogrammed Fund

I do not subscribe to the view that there was an unlawful release of the Unprogrammed Fund through the DAP. The reason given for this view is that the government was not able to show that revenue collections exceeded the original revenue targets submitted by the President to Congress relative to the 2011, 2012 and 2013 GAAs.

I find that the resolution of the issue, as to whether the release of the Unprogrammed Fund under the DAP is unlawful, is premature.

The Unprogrammed Fund provisions under the 2011, 2012 and 2013 GAAs, respectively, state:

2011 GAA (Article XLV):

1. Release of Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, including savings generated from programmed appropriations for the year: **PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund: PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds: PROVIDED, FURTHERMORE, That if there are savings generated from the programmed appropriations for the first two quarters of the year, the DBM may, subject to the approval of the President release the pertinent appropriations under the Unprogrammed Fund corresponding to only fifty percent (50%) of the said savings net of revenue shortfall: PROVIDED, FINALLY, That the release of the balance of the total savings from programmed appropriations for the year shall be subject to fiscal programming and approval of the President.**

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2012 GAA (Article XLVI)

1. Release of Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution: **PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund: PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.**

2013 GAA (Article XLV)

1. Release of Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, **including collections arising from sources not considered in the original revenue targets**, as certified by the Btr: **PROVIDED, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.** (Emphasis supplied)

As may be gleaned from the afore-quoted provisions, in the 2011 GAA, there are three *provisos,* to wit:

1. PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund,

2. PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds,

3. PROVIDED, FURTHERMORE, That if there are savings generated from the programmed appropriations for the first two quarters of the year, the DBM may, subject to the approval of the President, release the pertinent appropriations under the Unprogrammed Fund corresponding to only fifty percent (50%) of the said savings net of

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revenue shortfall: PROVIDED, FINALLY, That the release of the balance of the total savings from programmed appropriations for the year shall be subject to fiscal programming and approval of the President.[39]

In the 2012 GAA, there are two *provisos*, to wit:

1. PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund:

2. PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.

And, in the 2013 GAA, there is one *proviso*, to wit:

1. PROVIDED, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.

These *provisos* should be reasonably construed as exceptions to the general rule that revenue collections should exceed the original revenue targets because of the plain meaning of the word "provided" and the tenor of the wording of these *provisos*. Further, in both the 2011 and 2012 GAA provisions, the phrase "may be used to cover releases from appropriations in this Fund" in the first *proviso* is essentially of the same meaning as the phrase "shall be sufficient basis for the issuance of a SARO covering the loan proceeds" in the second *proviso* because, precisely, the SARO is the authority to incur obligations. In other words, both phrases pertain to the authorization to release funds under the Unprogrammed Fund when the conditions therein are met even if revenue collections do not exceed the original revenue targets.

I now discuss the above *provisos* in greater detail.

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[39] The last two *provisos* in the 2011 GAA may be lumped together because they are interrelated.

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The first *proviso*, found in both the 2011 and 2012 GAAs, states that "collections arising from sources not considered in the aforesaid original revenue targets **may be used to cover releases from appropriations in this Fund.**"[40] As previously discussed, a reasonable interpretation of this *proviso* signifies that, *even if the revenue collections do not exceed the original revenue targets*, funds from the Unprogrammed Fund ***can still be released*** to the extent of the collections from sources not considered in the original revenue targets. Why does the law permit this exception?

The national budget follows a matching process: revenue targets are matched with the proposed expenditure level. Revenue targets are the expected level of revenue collections for a given year. These targets are made based on previously identified and expected sources of revenues like taxes, fees or charges to be collected by the government. By providing for this *proviso*, the law recognizes that revenues may be generated from sources not considered in the original budget preparation and planning. These revenues from *unexpected* sources then become the funding for the items under the Unprogrammed Fund.

But why does the law not require that these revenues from *unexpected* sources be first used for the programmed appropriations if the circumstances warrant (such as when there is a budget deficit)?

The rationale seems to be that Congress expects the Executive Department to meet the needed revenue, based on the identified sources of the original revenue targets, in order to fund its programmed appropriations for the given year so much so that revenues from *unexpected* sources are not to be used for programmed appropriations and are, instead, reserved for items under the Unprogrammed Fund. If the Executive Department fails to achieve the original revenue targets for that year from expected sources, then it suffers the consequences by having inadequate funds to fully implement the programmed appropriations. In other words, the *proviso* is a disincentive to

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[40] Emphasis supplied.

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the Executive Department to rely on revenues from *unexpected* sources to fund its programmed appropriations. Verily, the Court cannot look into the wisdom of this system; it can only interpret and apply what it clearly provides. It may be noted though that in the 2013 GAA, the subject *proviso* has been omitted altogether, perhaps, in recognition of the possible ill effects of this *proviso* because it effectively allows the release of the Unprogrammed Fund even if there is a budget deficit (*i.e.*, when revenue collections do not exceed the original revenue targets).

I now turn to the next *proviso*, found in the 2011, 2012 and 2013 GAAs, which states that "in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds." This *proviso*, again, permits the release of funds from the Unprogrammed Fund, to the extent of the loan proceeds, *even if the revenue collections do not exceed the original revenue targets*. Why does the law allow this exception?

One conceivable basis is that the loans may specifically provide, as a condition thereto, that the proceeds thereof will be used to fund items under the Unprogrammed Fund categorized as foreign-assisted projects. Again, the wisdom of this *proviso* is beyond judicial review.

The last *proviso*, found only in the 2011 GAA, states that "if there are savings generated from the programmed appropriations for the first two quarters of the year, the DBM may, subject to the approval of the President release the pertinent appropriations under the Unprogrammed Fund corresponding to only fifty percent (50%) of the said savings net of revenue shortfall." Here, again, is another exception to the general rule that funds from the Unprogrammed Fund can only be released if revenue collections exceed the original revenue targets. Whether these conditions were met and whether funds from the Unprogrammed Fund were released pursuant thereto are matters that were not squarely and specifically litigated in this case.

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Based on the foregoing, it is erroneous and premature to rule that the Executive Department made unlawful releases from the Unprogrammed Fund of the 2011, 2012 and 2013 GAAs merely because the DBM was unable to submit a certification that the revenue collections exceeded the original revenue targets for these years considering that the funds so released may have been authorized under the afore-discussed *provisos* or exception clauses of the respective GAAs.

It may also be noted that the 2013 GAA states—

> **2013 (Article XLV)**
>
> 1. Release of Fund. The amounts authorized herein shall be released only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, **including collections arising from sources not considered in the original revenue targets**, as certified by the Btr: PROVIDED, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds. (Emphasis supplied)

Under the 2013 GAA, the condition, therefore, which will trigger the release of the funds from the Unprogrammed Fund, as a general rule, is that the revenue collections, *including collections arising from sources not considered in the original revenue targets*, exceed the original revenue targets, and *not* revenue collections exceed the original revenue targets.

In view of the foregoing, a becoming respect to a co-equal branch of government should prompt us to defer judgment on this issue for at least three reasons:

First, as afore-discussed, funds from the Unprogrammed Fund can be lawfully released even if revenue collections do not exceed the original revenue targets provided they fall within the applicable *provisos* or exception clauses in the relevant GAAs. Hence, the failure of the DBM to submit certifications, as directed by the Court, showing that revenue collections exceed

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the original revenue targets relative to the 2011, 2012 and 2013 GAAs *does not conclusively demonstrate* that there were unlawful releases from the Unprogrammed Fund.

Second, while the Solicitor General did not submit the certifications showing that revenue collections exceed the original revenue targets relative to the 2011, 2012 and 2013 GAAs, he did submit certifications showing that, for various periods in 2011 to 2013, the actual dividend income received by the National Government exceeded the programmed dividend income as well as income from the sale of the right to build and operate the NAIA expressway.[41] However, the Solicitor General did not explain why these certifications justify the release of funds under the Unprogrammed Fund.

Be that as it may, the certifications imply or seem to suggest that the Executive Department is invoking the *proviso* "That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from

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[41] A. March 4, 2011 Certification signed by Gil S. Beltran, Undersecretary of the Department of Finance:

This is to certify that under the Budget for Expenditures and Sources of Financing for 2011, the programmed income from dividends from shares of stock in government-owned and controlled corporations is ₱5.5 billion.

This is to certify further that based on the records of the Bureau of Treasury, the National Government has recorded dividend income amount of ₱23.8 billion as of 31 January 2011.

B. April 26, 2012 Certification signed by Roberto B. Tan, Treasurer of the Philippines:

This is to certify that the actual dividend collections remitted to the National Government for the period January to March 2012 amount to ₱19.419 billion compared to the full year program of ₱5.5 billion for 2012.

C. July 3, 2013 Certification signed by Rosalia V. De Leon, Treasurer of the Philippines:

This is to certify that the actual dividend collections remitted to the National Government for the period January to May 2013 amounted to ₱12.438 billion compared to the full year program of ₱10.0 billion for 2013.

Moreover, the National Government accounted for the sale of right to build and operate the NAIAA expressway amounting to ₱11.0 billion in June 2013.

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appropriations in this Fund" to justify the release of funds under the Unprogrammed Fund considering that these dividend incomes and income from the aforesaid sale of the right to build and operate are in excess or outside the scope of the programmed dividends or revenues. However, I find it premature to make a ruling to uphold this proposition.

It is not sufficient to establish that these revenues are in excess or outside the scope of the programmed dividends or revenues but rather, it must be shown that these collections arose from sources not considered in the original revenue targets. It must first be established what sources were considered in the original revenue targets and what sources were not before we can determine whether these collections fall within the subject *proviso*. These pre-conditions have not been duly established in a proper case where factual litigation is permitted.

Thus, while I find that the failure of the DBM to submit the aforesaid certifications, showing that revenue collections exceed the original revenue targets relative to the 2011, 2012 and 2013 GAAs, does not conclusively demonstrate that there were unlawful releases from the Unprogrammed Fund, I equally find that the certifications submitted by the Solicitor General to be inadequate to rule that the releases from the Unprogrammed Fund were lawful.

Third, and more important and decisive, much of the difficulty in resolving this issue, as already apparent from the previous points, arose from the unusual way this issue was litigated before us. Whether the Executive Department can validly invoke the general rule or exceptions to the release of funds under the Unprogrammed Fund necessarily involves factual matters that were attempted to be litigated before this Court *in the course of the oral arguments of this case*. This is improper not only because this Court is not a trier of facts but also because petitioners were effectively prevented from controverting the authenticity and veracity of the documentary evidence submitted by the Solicitor General. It would not have mattered if the facts in dispute were admitted, like the afore-discussed cross-border transfers of savings, but on this particular issue on the

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Unprogrammed Fund, the facts remain in dispute and inadequate to establish that the general rule and exceptions were not complied with. Consequently, it is improper for us to resolve this issue, in this manner, considering that: (1) the issue is highly factual which should first be brought before the proper court or tribunal, (2) the factual matters have not been adequately established by both parties in order for the Court to properly rule thereon, and (3) the indispensable parties, such as the Bureau of Treasury and other government bodies or agencies, which are the custodians and generators of the requisite information, were not impleaded hereto, hence, the authenticity and veracity of the factual data needed to resolve this issue were not properly established. Due process requirements should not be lightly brushed aside for they are essential to a fair and just resolution of this issue. We cannot run roughshod over fundamental rights.

Thus, I find that the subject issue, as to whether the releases of funds from the Unprogrammed Fund relative to the relevant GAAs were unlawful, is not yet ripe for adjudication. The proper recourse, if the circumstances so warrant, is to establish that the afore-discussed general rule ***and*** exceptions were not met insofar as the releases from the Unprogrammed Fund in the 2011, 2012 and 2013 GAAs, respectively, are concerned. This should be done in a proper case where all indispensable parties are properly impleaded. There should be no obstacle to the acquisition of the requisite information upon the filing of the proper case pursuant to the constitutional right to information.

In another vein, I do not subscribe to the view that the DAP utilized the Unprogrammed Fund as a source of "savings."

First, the Executive Department did not claim that the funds released from the Unprogrammed Fund are "savings." What it stated is that the funds released from the Unprogrammed Fund were *one of the sources of funds* under the DAP. In this regard, the DBM website states—

C. Sourcing of Funds for DAP

1. How were funds sourced?

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> Funds used for programs and projects identified through DAP were sourced from savings generated by the government, the reallocation of which is subject to the approval of the President; **as well as the Unprogrammed Fund** that can be tapped when government has windfall revenue collections, *e.g.*, unexpected remittance of dividends from the GOCCs and Government Financial Institutions (GFIs), sale of government assets.[42] (Emphasis supplied)

As can be seen, the Unprogrammed Fund was treated as a separate and distinct source of funds from "savings." Thus, the Executive Department can make use of such funds as part of the DAP for as long as their release complied with the afore-discussed general rule or exceptions and, as previously discussed, it has not been conclusively shown that the afore-discussed requisites were not complied with.

Second, the Solicitor General maintains that all funds released under the DAP have a corresponding appropriation cover. In other words, they were released pursuant to a legitimate work, activity or purpose for which they were authorized. For their part, petitioners failed to prove that funds from the Unprogrammed Fund were released to finance projects that did not fall under the specific items on the GAA provision on the Unprogrammed Fund. Absent proof to the contrary, the presumption that the funds from the Unprogrammed Fund were released by virtue of a specific item therein must, in the meantime, prevail in consonance with the presumptive validity of executive actions.

For these reasons, I find that there is no basis, as of yet, to rule that the Unprogrammed Fund was unlawfully released.

On Section 5.7.3 of NBC 541

Section 5.7.3 of NBC 541 provides:

5.7 The withdrawn allotments may be:

x x x x x x x x x

5.7.3 Used to augment existing programs and projects of **any agency** and to fund priority programs and projects **not considered**

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[42] http://www.dbm.gov.ph/?page_id=7362 last visited May 16, 2014.

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in the 2012 budget but expected to be started or implemented during the current year. (Emphasis in the original)

Petitioners argue that the phrase "not considered" allows the Executive Department to transfer the withdrawn allotments to non-existent programs and projects in the 2012 GAA.

The Solicitor General counters that the subject phrase has technical underpinnings familiar to the intended audience (*i.e.*, budget bureaucrats) of the subject Circular and assures this Court that the phrase is not intended to refer to non-existent programs and projects in the 2012 GAA. He further argues that the phrase "to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year" means "to fund priority programs and projects not considered ***priority*** in the 2012 budget but expected to be started or implemented during the current year." Hence, the subject phrase suffers from no constitutional infirmity.

I disagree with the Solicitor General.

Evidently, the Court cannot accept such an argument. If the meaning of a phrase would be made to depend on the meaning in the minds of the intended audience of a challenged issuance, then virtually no issuance can be declared unconstitutional since every party will argue that, in their minds, the language of the challenged issuance conforms to the Constitution. Naturally, the Court can only look into the plain meaning of the word/s of a challenged issuance. If the words in the subject phrase truly partake of a technical meaning that obviates constitutional infirmity, then respondents should have pointed the Court to such relevant custom, practice or usage with which the subject phrase should be understood rather than arguing based on a generalized claim that in the minds of the intended audience of the subject Circular, the subject phrase pertains to items existing in the relevant GAA.

The argument that the phrase "to fund priority programs and projects not considered in the 2012 budget" should be understood as "to fund priority programs and projects not

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considered ***priority*** in the 2012 budget" is, likewise, untenable. Because if this was the intended meaning, then the subject Circular should have simply so stated. But, as it stands, the meaning of "not considered" is equivalent to "not included" and is, therefore, void because it allows the augmentation, through savings, of programs and projects not found in the relevant GAA. This clearly contravenes Article VI, Section 29(1) of the Constitution and Section 54 of the 2012 GAA, to wit:

> Section 29. (1) No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.
>
> Section 54. x x x
>
> Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. **In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized by this Act.** (Emphasis supplied)

Of course, the Solicitor General impliedly argues that, despite the defective wording of Section 5.7.3 of NBC 541, no non-existent program or project was ever funded through the DAP. Whether that claim is true necessarily involves factual matters that are not proper for adjudication before this Court. In any event, petitioners may bring suit at the proper time and place should they establish that non-existent programs or projects were funded through the DAP by virtue of Section 5.7.3 of NBC 541.

On the applicability of the operative fact doctrine

I find that the operative fact doctrine is applicable to this case for the following reasons:

First, it must be recalled that, based on the preceding disquisitions, I do not find the DAP to be wholly unconstitutional, and limit my finding of unconstitutionality to (1) Sections 5.4, 5.5 and 5.7 of NBC 541, insofar as it authorized the withdrawal of unobligated allotments from slow-moving projects that were

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not finally discontinued or abandoned, (2) Section 5.7.3 of NBC 541, insofar as it authorized the augmentation of appropriations not found in the 2012 GAA, and (3) the three afore-discussed cross-border transfers of savings. Hence, my discussion on the applicability of operative fact doctrine is limited to the effects of the declaration of unconstitutionality relative to the above enumerated.

Second, indeed, the general rule is that an unconstitutional executive or legislative act is void and inoperative; conferring no rights, imposing no duties, and affording no protection. As an exception to this rule, the doctrine of operative fact recognizes that the existence of an executive or legislative act, prior to a determination of its unconstitutionality, is an operative fact and may have consequences that cannot always be ignored.[43] In other words, under this doctrine, the challenged executive or legislative act remains unconstitutional, but its effects may be left undisturbed as a matter of equity and fair play. It is applicable when a declaration of unconstitutionality will impose an undue burden on those who have relied in good faith on the invalid executive or legislative act.[44]

As a rule of equity, good faith and bad faith are of necessity relevant in determining the applicability of this doctrine. Thus, in one case, the Court did not apply the doctrine relative to a party who benefitted from the unconstitutional executive act because the party acted in bad faith.[45] The good faith or bad faith of the beneficiary of the unconstitutional executive act was the one held to be decisive.[46] The reason, of course, is that, as previously stated, the doctrine seeks to protect the interests of those who relied in good faith on the invalid executive or legislative act. Consequently, the point of inquiry should be

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[43] *Planters Products, Inc. v. Fertiphil Corporation*, 572 Phil. 270, 301-302 (2008).

[44] *Id*. at 302.

[45] *Chavez v. National Housing Authority*, 557 Phil. 29, 117 (2007) citing *Chavez v. PEA*, 451 Phil. 1 (2003).

[46] *Id*.

the good faith or bad faith of those who benefitted from the afore-discussed unconstitutional acts.

Third, as earlier discussed, the declaration of unconstitutionality relative to Sections 5.4, 5.5, and 5.7 as well as Section 5.7.3 of NBC 541 was premised on their defective wording. Hence, absent proof of a slow-moving project that was not finally discontinued or abandoned but whose unobligated allotments were partially withdrawn, or a program or project augmented through savings which did not exist in the relevant GAA, the discussion on the applicability of the operative fact doctrine relative thereto is premature.

Fourth, this leaves us with the question as to the applicability of the doctrine relative to the aforesaid cross-border transfers of savings. Here, the point of inquiry, as earlier noted, must be the good faith or bad faith of the beneficiaries of the unconstitutional executive act, specifically, the House of Representatives, COA and Comelec. In the case at bar, there is no evidence clearly showing that these entities acted in bad faith in requesting funds from the Executive Department which were part of the latter's savings or that they received the aforesaid funds knowing that these funds came from an unconstitutional or illegal source. The lack of proof of bad faith is understandable because this issue was never squarely raised and litigated in this case as it developed only during the oral arguments of this case. Thus, as to these entities, the presumption of good faith and regularity in the performance of official duties must, in the meantime, prevail. Further, it cannot be doubted that an undue burden will be imposed on these entities which have relied in good faith on the aforesaid invalid transfers of savings, if the operative fact doctrine is not made to apply thereto.

Given these considerations, I find that the operative fact doctrine applies to the aforesaid cross-border transfers of savings. Hence, the effects of the unconstitutional cross-border transfers of savings can no longer be undone. *It is hoped, however, that no constitutional breach of this tenor will occur in the future given the clear and categorical ruling*

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of the Court on the unconstitutionality of cross-border transfer of savings.

Because of the various views expressed relative to the impact of the operative fact doctrine on the potential administrative, civil and/or criminal liability of those involved in the implementation of the DAP, I additionally state that any discussion or ruling on the aforesaid liability of the persons who authorized and the persons who received the funds from the aforementioned unconstitutional cross-border transfers of savings, is premature. The doctrine of operative fact is limited to the effects of the declaration of unconstitutionality on the executive or legislative act that is declared unconstitutional. Thus, it is improper for this Court to discuss or rule on matters not squarely at issue or decisive in this case which affect or may affect their alleged liabilities without giving them an opportunity to be heard and to raise such defenses that the law allows them in a proper case where their liabilities are properly at issue. Due process is the bedrock principle of our democracy. Again, we cannot run roughshod over fundamental rights.

Conclusion

I now summarize my findings by discussing the constitutional and statutory requisites for "savings" and "augmentation" as applied to the DAP.

As stated earlier, for "savings" to arise, the following requisites must concur:

1. The appropriation must be a programmed appropriation in the GAA;
2. The appropriation must be free from any obligation or encumbrances;
3. The appropriation must still be available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized.

Relative to the DAP, these requisites were *generally* met because:

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1. The DAP, as partially implemented by NBC 541, covers only programmed appropriations;
2. The covered appropriations refer specifically to unobligated allotments;
3. The President made a categorical determination to permanently stop the expenditure on slow-moving projects through the withdrawal of their unobligated allotments which resulted in the final discontinuance or abandonment thereof. The slow manner of spending on such projects was found to be inimical to public interest in view of the vital need at the time to spur economic growth through faster government spending. Thus, the power was validly exercised pursuant to Section 38 absent clear and convincing proof to the contrary. With the final discontinuance or abandonment of such projects, there remained a balance of the appropriation equivalent to the amount of the unobligated allotments which may be validly considered as savings.

As an *exception* to the above, I find that, because of the broad language of NBC 541, Sections 5.4, 5.5 and 5.7 thereof are void insofar as they (1) allowed the withdrawal of unobligated allotments from slow-moving projects which were not finally discontinued or abandoned, and (2) authorized the use of such withdrawn unobligated allotments as "savings."

On the other hand, for "augmentation" to be valid, the following requisites must be satisfied:

1. The program, activity, or project to be augmented by savings must be a program, activity, or project in the GAA;
2. The program, activity, or project to be augmented by savings must refer to a program, activity, or project within or under the same office from which the savings were generated;
3. Upon implementation or subsequent evaluation of needed resources, the appropriation of the program, activity,

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or project to be augmented by savings must be shown to be deficient.

As applied to the DAP, these requisites were, again, *generally* met:

1. The DAP, as partially implemented by NBC 541, augmented projects within the GAA;

2. It augmented projects within the appropriations of the Executive Department;

3. The acts of the Executive Department enjoy presumptive constitutionality. Section 5.5 of NBC 541 mandates the evaluation of reports of, and consultations with the concerned departments/agencies by the DBM to determine which projects are slow-moving and fast-moving. The DBM enjoys the presumption of regularity in the performance of its official duties. Thus, it may be reasonably presumed that, in the process, the determination of which fast-moving projects required augmentation was also made. Petitioners did not prove otherwise.

As *exceptions* to the above, I find that: (1) the admitted cross-border transfers of savings from the Executive Department, on the one hand, to the Commission on Audit, House of Representatives and Commission on Elections, respectively, on the other, are void for violating the second requisite, and (2) the phrase "to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year" in Section 5.7.3 of NBC 541 is void for violating the first requisite.

In sum, I vote to limit the declaration of unconstitutionality to the afore-discussed for the following reasons:

First, I am of the view that the Court should not make a broad and sweeping declaration of unconstitutionality relative to acts or practices that were not actually proven in this case. Hence, I limit the declaration of unconstitutionality to the three admitted cross-border transfers of savings. To rule otherwise

would transgress the actual case and controversy requirement necessary to validly exercise the power of judicial review.

Second, I find it improper to declare the DAP unconstitutional without specifying the provisions of the implementing issuances which transgressed the Constitution. The acts or practices declared unconstitutional by the majority relative to the DAP are a restatement of existing constitutional and statutory provisions on the power to augment and the definition of savings. These do not identify the provisions in the implementing issuances of the DAP which allegedly violated the Constitution and pertinent laws. Again, it transgresses the actual case and controversy requirement.

Third, I do not subscribe to the view of the majority relative to the interpretation and application of Section 38 of the Administrative Code, and the GAA provisions on savings, impoundment, the two-year availability for release of appropriations and the unprogrammed fund, for reasons already extensively discussed. While I find the wording of these laws to be highly susceptible to abuse and even unwise and imprudent, the Court has no recourse but to interpret and apply them based on their plain meaning, and not to accord them an interpretation that lead to absurd results or render them inoperative.

Last, I find that the remedy in this case is not solely judicial but largely legislative in that imperative reforms are needed in, among others, the limits of Section 38, the definition of "savings," the transparency of the exercise of the power to augment, the safeguards and limitations on this power, and so on. How this is to be done belongs to Congress which must balance the State interests in curbing abuse *vis-à-vis* flexibility in fiscal management.

Ultimately, however, the remedy resides in the people: to press for needed reforms in the laws that currently govern the enactment and execution of the national budget and to be vigilant in the prosecution of those who may have fraudulently abused or misused public funds. In fine, I am of the considered view that the abuse or misuse of the power to augment will persist if the needed reforms in the subject laws are not promptly

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instituted. Hence, the necessity of calling upon the moral strength, courage and resolve of our people and nation to address these weaknesses in our laws which have, to a large extent, precipitated the present controversy.

ACCORDINGLY, I vote to **PARTIALLY GRANT** the petitions:

The Disbursement Acceleration Program is **PARTIALLY UNCONSTITUTIONAL:**

1. Sections 5.4, 5.5 and 5.7 of National Budget Circular No. 541 are **VOID** insofar as they (1) allowed the withdrawal of unobligated allotments from slow-moving projects which were not finally discontinued or abandoned, and (2) authorized the use of such withdrawn unobligated allotments as "savings" for violating the definition of "savings" under the 2011, 2012 and 2013 general appropriations acts.

2. The admitted cross-border transfers of savings from the Executive Department, on the one hand, to the Commission on Audit, House of Representatives and Commission on Elections, respectively, on the other, are **VOID** for violating Article VI, Section 25(5) of the Constitution.

3. The phrase "to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year" in Section 5.7.3 of National Budget Circular No. 541 is **VOID** for contravening Article VI, Section 29(1) of the Constitution and Section 54 of the 2012 General Appropriations Act.