**G.R. No. 208566 – GRECO ANTONIOUS BEDA B. BELGICA, JOSE M. VILLEGAS, JR., JOSE L. GONZALES, REUBEN M. ABANTE, and QUINTIN PAREDES SAN DIEGO vs. THE HONORABLE EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR., THE SECRETARY OF BUDGET AND MANAGEMENT FLORENCIO V. ABAD, THE NATIONAL TREASURER ROSALIA V. DE LEON, THE SENATE OF THE PHILIPPINES, REPRESENTED BY FRANKLIN M. DRILON, IN HIS CAPACITY AS SENATE PRESIDENT, AND THE HOUSE OF REPRESENTATIVES, REPRESENTED BY FELICIANO S. BELMONTE, JR., IN HIS CAPACITY AS SPEAKER OF THE HOUSE.**

**G.R. No. 208493 – SOCIAL JUSTICE SOCIETY (SJS) PRESIDENT SAMSON S. ALCANTARA vs. SENATE PRESENT FRANKLIN M. DRILON and SPEAKER OF THE HOUSE FELICIANO S. BELMON TE, JR.**

**G.R. No. 209251 – PEDRITO M. NEPOMUCENO vs. PRESIDENT BENIGNO AQUINO III AND SECRETARY FLORENCIO ABAD OF THE DEPARTMENT OF BUDGET AND MANAGEMENT.**

**Promulgated:**

NOVEMBER 19, 2013

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## CONCURRING AND DISSENTING OPINION

**BRION, *J.:***

## MY POSITIONS

I **concur** with the **conclusions** J. Estela Perlas-Bernabe reached in her *ponencia* on the **unconstitutionality of the PDAF**, but adopt the views and reasoning of J. Antonio T. Carpio in his Separate Concurring Opinion on the various aspects of PDAF, particularly on the need for the line-item approach in budget legislation.

I likewise agree with Justice Carpio's views on the unconstitutionality of the phrase *"for such other purposes as may be directed by the President"* in Section 8 of P.D. No. 910, but hold that the first part of this section relating to funds used for *"energy resource development and exploitation programs and projects"* is constitutionally infirm for being a discretionary lump sum appropriation whose purpose lacks specificity for the projects or undertakings contemplated, and that denies Congress of its constitutional prerogative to participate in laying down national policy on energy matters.

I submit my own reasons for the unconstitutionality of the portion relating to *"priority infrastructure projects"* under Section 12, P.D. No. 1869, which runs parallel to the positions of Justices Carpio and Perlas-Bernabe on the matter, and join in the result on the constitutionality of the financing of the *"restoration of damaged or destroyed facilities due to calamities"* but do so for a different reason.

Lastly I believe that this Court should DIRECT Secretary Florencio Abad of the Department of Budget and Management (*DBM*) to show cause why he should not be held in contempt of this Court and penalized for defying the TRO we issued on September 10, 2013.

## THE CASE

The petitioners come to this Court to question practices that the two other branches of government – the executive and the legislative departments – have put in place in almost a decade and a half of budgeting process. They raise constitutional questions that touch on our basic principles of governance; they raise issues, too, involving practices that might have led to monumental corruption at the highest levels of our government. These issues, even singly, raise deeply felt and disturbing questions that we must address quickly and completely, leaving no nagging residues behind.

I contribute this Opinion to the Court with the thought and the hope that, through our collective efforts, we can resolve the present dispute and restore to its proper track our constitutional budgetary process in the manner expected from this Court by the framers of our Constitution and by our quiet but internally seething citizenry.

## DISCUSSION OF THE ISSUES

### I. The Doctrine of Separation of Powers

The powers of government are generally divided into the executive, the legislative and the judicial, and are distributed among these three great branches under carefully defined terms, to ensure that no branch becomes so powerful that it can dominate the others, all for the good of the people that the government serves.[1]

This power structure – which serves as the basic foundation for the governance of the State under our republican system of government – is essentially made operational by two basic doctrines: the **doctrine of separation of powers**[2] and the **doctrine of checks and balances**.[3]

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1 *Angara v. The Electoral Commission*, 63 Phil. 139 (1936).

2 "The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution. Each department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere. " *Angara v. The Electoral Commission*, 63 Phil. 139, 156 (1936).

Governmental powers are distributed and made *distinctly separate from one another* so that these different branches may check and balance each other, again to ensure proper, balanced and accountable governance.[4]

A necessary corollary to this arrangement is that **no branch of government may delegate its constitutionally-assigned powers** and thereby disrupt the Constitution's carefully laid out plan of governance. Neither may one branch or any combination of branches **deny the other or others their constitutionally mandated prerogatives** – either through the exercise of sheer political dominance or through collusive practices – without committing a breach that must be addressed through our constitutional processes. To be sure, political dominance, whether the brazen or the benign kind, should be abhorred by our people for we should have learned our lessons by now.

Thus, Congress – the government's policy making body – may not delegate its constitutionally-assigned power to make laws and to alter and repeal them, in the same manner that the President – who enforces and implements the laws passed by Congress – cannot pass on to the Congress or to the Judiciary, its enforcement or implementation powers.

Nor can we in the Judiciary intrude into the domains of the other two branches except as called for by our assigned duties of interpreting the laws and dispensing justice. But when the call to duty is sounded, we cannot and should not shirk as no other entity in our system of governance except this Court is given the task of peacefully delineating governmental powers through constitutional interpretation.

In terms of congressional powers, the test to determine if an undue or prohibited delegation has been made is the **completeness test** which asks the question: **is the law complete in all its terms and conditions when it leaves the legislature such that the delegate is confined to its implementation and has no need to determine for and by himself or herself what the terms or the conditions of the law should be**?[5]

An aspect of implementation notably left for the delegate's determination is the question of *how* the law may be enforced. To cover the gray area that seemingly arises as a law transits from formulation to implementation, jurisprudence has established the rule that for as long as the law has provided sufficient implementation standards to guide the delegate, the latter may fill in the details that the law needs for its prompt, efficient

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[3] "But it does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely unrestrained and independent of each other. The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government." *Angara v. The Electoral Commission*, 63 Phil. 139, 156 (1936).

[4] See *Government of the Philippine Islands v. Springer*, 50 Phil. 259, 273-274 (1927).

[5] *Edu v. Ericta*, 146 Phil. 469, 485-488 (1970).

and orderly implementation. This is generally referred to as the **sufficient standard test**.[6]

The question in every case is whether there is or are adequate standards, guidelines or limitations in the law to map out the boundaries of the delegate's authority and thus prevent the delegation from spilling into the area that is essentially law or policy formulation. This statutory standard, which may be express or implied, defines legislative policy, marks its limits, maps out the boundaries of the law, and specifies the public agency to apply it; the standard indicates the circumstances or criterion under which the legislative purpose and command may be carried out.

## II. Legislative Power of Appropriation

Under our system of government, part of the legislative powers of Congress is the **power of the purse** which, broadly described, is the power to determine the areas of national life where government shall devote its funds; to define the amount of these funds and authorize their expenditure; and to provide measures to raise revenues to defray the amounts to be spent.[7] This power is regarded as the "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[8]

By granting Congress this power, the Constitution allows the Filipino people, through their representatives, to effectively shape the nation's future through the control of the funds that render the implementation of national plans possible. Consistent with the separation of powers and the check and balance doctrines, the power of the purse also allows Congress to ***control executive spending*** as the Executive actually disburses the money that Congress sets aside and determines to be available for spending.

Congress carries out the power of the purse through the appropriation of funds under a general appropriations law (titled as the *General Appropriations Act* or the GAA) that can easily be characterized as one of the most important pieces of legislation that Congress enacts each year. For this reason, the 1987 Constitution (and previous Constitutions) has laid down the general framework by which Congress and the Executive make important decisions on how public funds are raised and spent - from the policy-making phase to the actual spending phase, including the raising of revenues as source of government funds.

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[6] *Eastern Shipping Lines, Inc. v. Philippines Overseas Employment Administration (POEA),* 248 Phil. 762, 772 (1988).

**Administrative fact-finding** is another activity that the Executive may undertake (See *Lovina v. Moreno*, G.R. No. L-17821, November 29, 1963) but has purposely not been mentioned for lack of materiality to the issues raised.

[7] *Philippine Constitution Association v. Enriquez,* G.R. No. 113105, August 19, 1994, 235 SCRA 507, 522.

[8] Federalist No. 58, James Madison.

The Constitution expressly provides that *"[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law."*[9] The Administrative Code of 1987, on the other hand, defines **"appropriation"** as the authorization made by law or other legislative enactment, directing payment out of government funds under ***specified conditions or for specified purposes***.[10] It is the legislative act of setting apart or assigning public funds to a ***particular use.***[11] This power carries with it the power to specify the project or activity to be funded under the appropriation law and, necessarily, the amount that would be allocated for the purpose.

Significantly, the people themselves in their sovereign capacity, have cast in negative tenor the limitation on the executive's power over the budget when it provided in the Constitution that ***no money shall be paid out*** of the treasury, until their representatives, by law, have assigned and set aside the public revenues of the State for specific purposes.

The requirements – that Congress itself both identify a determined or determinable amount to be appropriated and the specific purpose or project to which the appropriation will be devoted – characterize an appropriations law to be purely legislative in nature. Consequently, to pass and allow an appropriation that fails to satisfy these requirements amounts to an illegal abdication of legislative power by Congress. For instance, when a law allows the President to dictate his will on an appropriation matter and thereby displaces the power of Congress in this regard, the arrangement cannot but be constitutionally infirm. Presidential Decree No. 1177 (the Budget Reform Decree of 1977) concretely expresses these requirements when it provides that *"[a]ll moneys appropriated for functions, activities, projects and programs shall be available solely for the **specific purposes** for which these are appropriated."*[12]

## III. Check and Balance Doctrine as Applied in the Budgeting Process

### *A. Budget Preparation & Proposal*

The budgeting process demonstrates, not only how the Constitution canalizes governmental powers to achieve its purpose of effective governance, but also how this separation checks and balances the exercise of powers by the different branches of government.

In this process, the Executive initially participates through its role in **budget preparation and proposal** which starts the whole process. It is the Executive who lays out the budget proposal that serves as basis for Congress

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9 Section 29 (1), Article VI, 1987 Constitution.
10 Section 2, Chapter 1, Book VI, Executive Order No. 292.
11 *Gonzales v. Raquiza*, 259 Phil. 736, 743 (1989).
12 See Section 37 of P.D. No. 1177 or the Budget Reform Decree of 1977.

to act upon. This function is expressed under the Constitution in the following terms:[13]

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

A notable feature of this provision that impacts on the present case is the requirement that revenue sources be reported to Congress. Notably, too, the President's recommended appropriations may not be increased by Congress pursuant to Section 25, Article VI of the Constitution[14] - a feature that immeasurably heightens the power and participation of the President in the budget process.

Arguably, Section 22 above refers only to the *general appropriations bill*[15] so that there may be no need to report all sources of government revenue, particularly those emanating from funds like the Malampaya Fund.[16] The power of Congress, however, will be less than plenary if this omission will happen as Congress would then be denied a complete picture of government revenues and would consequently be denied its rightful place in setting national policies on matters of national importance, among them energy matters. The Constitution would similarly be violated if Congress cannot also demand that the revenues of special funds (like the Malampaya Fund) be reported together with a listing of their items of expenditures. Since the denial would be by the Office of the President, the incapacity of Congress would be because of intrusive action by the Executive into what is otherwise a congressional preserve.

Already, it is reported that these funds (also called **off-budget accounts)** are sizeable and are not all subject to the annual appropriation exercise; have no need for annual appropriation by Congress; and whose receipts and expenditures are kept in separate book of accounts (357 accounts as of 2007) that are not commonly found in public records. While efforts have been made to consolidate them in a general account under the "one fund" concept, these efforts have not been successful. Attempts have been made as early as 1977 during the Marcos administration, and again during the Aquino and Estrada administrations without significant success up to the present time. Controls have reportedly not been very strict although the funds are already sizeable.[17]

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[13] Article VII. Section 22 of the 1987 Constitution.

[14] See footnote below.

[15] As contrasted to special purpose bills whose appropriations are not included in the general appropriations act.

[16] Section 8, P.D. No. 910

[17] Source: Off-Budget Accounts, July 2009, Management Systems International Corporate Services (the publication was made for the review of USAID). Accessed November 17, 2013 from http://incitegov.org/wp-content/uploads/2011/05/INCITEGov-Off-Budget-Accounts.pdf

Constitutionally, a disturbing aspect of these funds is that they are under the control of the President (as **presidential pork barrel**), as from this perspective, they are in defiance of what the Constitution prescribes under Section 25 and 27, Article VI, with respect to the handling of public funds, the authority of Congress to decide on the budget, and the congressional scrutiny and monitoring that should take place.[18] As of October 2013, the Malampaya Fund alone already amounts to Php137.288 billion.[19] **The COA, despite assurances during the oral arguments, have so far failed to provide a summary of the extent and utilization of the Malampaya Fund in the last three (3) years.**

### *B. Budget Legislation*

Actual appropriation or **budget legislation** is undertaken by Congress under the strict terms of Section 25, Article VI of the Constitution.[20] A theme

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[18] In an unpublished study on the Public Expenditure and Financial Accountability (PEFA) on the Philippine public financial management system, the World Bank determined that OBAs represent less than 5% of the national budget. Among the major OBAs are the following:

1. Municipal Development Fund. This is a loan revolving fund set up to provide credit to local government units. Every year, the national government appropriates additional money to the equity of the Fund, and this added equity is properly reflected as expenditure of the national government and income of the Fund. Loan repayments, however, are retained as Fund Balance and used as credit assistance to LGUs without being included in the national budget. The average amount disbursed out of loan repayments in 2006-2007 was P 380 million.

2. President's Social Fund. This is funded by fixed percentage contributions from the income of two (2) government corporations, namely, the Philippine Amusements and Gaming Corporation and the Philippine Charity Sweepstakes.

The Fund is used as a discretionary purse for various social advocacies of the President, including direct assistance to the poor. The amount disbursed annually depends on actual receipts. In 2007, more than P600 million was disbursed from the Fund.

3. Manila Economic and Cultural Office (MECO). MECO is a government entity with a private character. It was created during the Aquino Administration to perform consular functions in Taiwan in behalf of the government. MECO reports directly to the Office of the President and its funds are supposed to be used for various economic and cultural purposes. There is no publicly available record of MECO financial accounts. It is reported, however, that Taiwan has one of the busiest consular operations in Asia, earning at least P100 million per year for the national government.

4. NABCOR Trust Funds. The National Agribusiness Corporation was created during the Marcos Administration as the business arm of the Department of Agriculture (DA). Subsequently, it was used as a conduit for various appropriations of the DA to implement various projects. The circuitous way by which DA funds are utilized through NABCOR have been the subject of curiosity among DA watchers. Specifically, determining the actual use of NABCOR-administered funds poses an interesting challenge to accountants and analysts in the absence of publicly available data.

Source: Off-Budget Accounts, July 2009, Management Systems International Corporate Services (the publication was made for the review of USAID). Accessed November 17, 2013 from http://incitegov.org/wp-content/uploads/2011/05/INCITEGov-Off-Budget-Accounts.pdf

[19] "Treasury: P137.3-B Malampaya Fund intact," October 9, 2013, accessed November 18, 2013 from http://www.gov.ph/2013/10/09/btr-p137-3-b-malampaya-fund-intact/

[20] Article VI, Section 25 of the 1987 Constitution provides:
Section 25.

that runs through the various subdivisions of this provision is the Constitution's strict treatment of the budget process, apparently in its desire to plug all holes that have appeared through our years of constitutional history and to ensure that funds are used according to congressional intent.

Of special interest in the present case are Sections 25(2) which speaks of the need for particularity in an appropriation; Section 25(4) on special appropriation bill and its purpose; and Section 25(6) on discretionary funds and the special purpose they require.

### *C. Line-Item Veto*

Check and balance measures are evident in passing the budget as the President is constitutionally given the opportunity to exercise his line item veto, *i.e.*, the authority to reject specific items in the budget bill while approving the whole bill.[21]

The check and balance measure, of course, runs both ways. In the same manner that Congress cannot deny the President his authority to exercise his line veto power except through an override of the veto,[22] the President cannot also deny Congress its share in national policymaking by including lump sum appropriations in its recommended expenditure program. Lump sum appropriations, in the words of J. Perlas-Bernabe, is wrong as it leaves the President with "*no item*" to act on and denies him the exercise of his line item veto power.[23] The option when this happens and if

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(1) The Congress may not increase the appropriations recommended by the President for the operation of the Government as specified in the budget. The form, content, and manner of preparation of the budget shall be prescribed by law.
(2) No provision or enactment shall be embraced in the general appropriations bill unless it relates specifically to some particular appropriation therein. Any such provision or enactment shall be limited in its operation to the appropriation to which it relates.
(3) The procedure in approving appropriations for the Congress shall strictly follow the procedure for approving appropriations for other departments and agencies.
(4) A special appropriations bill shall specify the purpose for which it is intended, and shall be supported by funds actually available as certified by the National Treasurer, or to be raised by a corresponding revenue proposal therein.
(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.
(6) Discretionary funds appropriated for particular officials shall be disbursed only for public purposes to be supported by appropriate vouchers and subject to such guidelines as may be prescribed by law.
(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.

[21] Article VI, Section 27, paragraph 2 of the 1987 Constitution.

[22] Article VI, Section 27, paragraph 1 of the 1987 Constitution.

[23] As the *ponencia* points out in page 50:

> Moreover, even without its post-enactment legislative identification feature, the 2013 PDAF Article would remain constitutionally flawed since it would then operate as a prohibited form of lump-sum appropriation as above-characterized. xxx. This setup connotes that the appropriation law leaves the actual amounts and purposes of the appropriation for further

he rejects an appropriation, is therefore not the veto of a specific item but the veto of the whole lump sum appropriation.

A lump sum appropriation like the PDAF cannot and should not pass Congress unless the Executive and the Legislative branches collude, in which case, the turn of this Court to be an active constitutional player in the budget process comes into play. The PDAF, as explained in the Opinions of Justice Carpio and Bernabe, is a prime example of a lump sum appropriation that, over the years, for reasons beneficial to both branches of government, have successfully negotiated the congressional legislative process, to the detriment of the general public.

### *D. Budget Execution/Implementation*

Budget action again shifts to the Executive during the **budget execution phase**; the Executive implements the budget (**budget execution)** by handling the allocated funds and managing their releases. This is likewise a closely regulated phase, subject not only to the terms of the Constitution, but to the Administrative Code as well, and to the implementing regulations issued by the Executive as implementing agency.

Constitutionally, **Section 25(5)** on the transfer of appropriation (a practice that would technically subvert the will of Congress through the use of funds on a project or activity other than that intended, unless a constitutional exception is made under this provision), and **Section 25(6)** on discretionary funds and its disbursement, assume critical materiality.

### *E. Budget Accountability, Scrutiny and Investigation*

The last phase of the budgetary process is the **budget accountability** phase that Congress is empowered to enforce in order to check on compliance with its basic intents in allocating measured funds under the appropriation act.

At the budget hearings during the legislation phase, Congress already checks on the need for the recommended appropriations (as Congress may delete a recommended appropriation that it perceives to be unneeded), and on the propriety, efficiency and effectiveness of budget implementation, both past and impending. Technically, this portion of the budgetary exercise involves **legislative scrutiny** that is part of the overall **oversight powers** of Congress over the budget.

Another part of the oversight authority is **legislative investigation**. Former Chief Justice Puno expounded on this aspect of the budgetary process in his Separate Opinion in *Macalintal v. Commission on*

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determination and, therefore, not readily indicate a discernible item which may be subject to the President's power of item veto. *Ponencia*, p. 50.

*Elections*[24] and he best sums up the breadth and scope of this power, as follows:

> Broadly defined, the power of oversight embraces all activities undertaken by Congress **to enhance its understanding of and influence over the implementation of legislation** it has enacted. Clearly, oversight concerns post-enactment measures undertaken by Congress: (a) to monitor bureaucratic compliance with program objectives, (b) to determine whether agencies are properly administered, (c**) to eliminate executive waste and dishonesty, (d) to prevent executive usurpation of legislative authority**, and (d) to assess executive conformity with the congressional perception of public interest.
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> The power of oversight has been held to be intrinsic in the grant of legislative power itself and integral to the checks and balances inherent in a democratic system of government. Xxx
>
> Over the years, Congress has invoked its oversight power with increased frequency to check the perceived "exponential accumulation of power" by the executive branch. By the beginning of the 20th century, Congress has delegated an enormous amount of legislative authority to the executive branch and the administrative agencies. Congress, thus, uses its oversight power to make sure that the administrative agencies perform their functions within the authority delegated to them.

Compared with one another, the two modalities can be appreciated for their individual merits but operationally, the power of investigation[25] – which is a power mostly used after appropriations have been spent – cannot compare with legislative scrutiny made during budget hearings as all participating government officials in these hearings can attest. Legislative scrutiny is a timely intervention made *at the point of budget deliberations and approval*, and is consequently an effective intervention by Congress in the formulation of national policy. Legislative investigation, if at all and as the recent *Napoles* hearing at the Senate has shown, can at best examine compliance with legislative purposes and intent, with aid to future legislation as its goal, and may only possibly succeed if the legislators are truly minded to exercise their power of investigation purposefully, with firmness and political will.

If indeed specific monitoring is needed, two constitutional bodies readily fit the bill – the **Commission on Audit** which looks at specific expenditures from the perspective of legality, effectiveness and efficiency,[26]

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[24] 453 Phil 586, 743-744, July 10, 2003.

[25] An example of this post-enactment authority is creation of a Joint Congressional Oversight Committee in the GAA of 2012 to "primarily monitor that government funds are spent in accordance with the law." The Senate created its version of this Committee under Senate Resolution No. 18 dated September 1, 2010, to establish Oversight Committee on Public Expenditures.

[26] Article IX-D, Section 2 of the 1987 Constitution provides:

> Section 2. The Commission on Audit shall have the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any

and the **Ombudsman**, from the point of view of administrative and criminal liability.[27]

## IV. Assessment and Prognosis

On the whole, I believe the Constitution has provided the nation a reasonably effective and workable system of setting national policy through the budget process.

The President, true to constitutional intent, remains a powerful official who can respond to the needs of the nation through his significant participation on both national planning and implementation of policies; the budget process leaves him with the needed muscle to enforce the laws and implement policies without lacking funds, except only if revenue collection and the economy both falter.

Additionally, current practices that Congress has given him his own pork barrel – generally, lump sum funds that he can utilize at his discretion without passing through the congressional mill and without meaningful congressional scrutiny. As I have stated, **this is a constitutionally anomalous practice that requires Court intervention as the budgetary partners will allow matters to remain as they are unless externally restrained by legally binding actions.**

Congress, for its part, is given significant authority to decide on the projects and activities that will take place, and to allocate funds for these national undertakings. It has not at all complained about the loss of its budgeting prerogatives to the President; **it appeared to have surrendered these without resistance as it has been given its share in budget implementation as the current PDAF findings show. Thus, what confronts the Court is a situation where two partners happily scratch each other's back in the pork barrel system, although the Constitution prohibits, or at the very least, limits the practice.**

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of its subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations with original charters, and on a post- audit basis:

a. constitutional bodies, commissions and offices that have been granted fiscal autonomy under this Constitution;
b. autonomous state colleges and universities;
c. other government-owned or controlled corporations and their subsidiaries; and
d. such non-governmental entities receiving subsidy or equity, directly or indirectly, from or through the Government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. However, where the internal control system of the audited agencies is inadequate, the Commission may adopt such measures, including temporary or special pre-audit, as are necessary and appropriate to correct the deficiencies. It shall keep the general accounts of the Government and, for such period as may be provided by law, preserve the vouchers and other supporting papers pertaining thereto.

[27] Article XI, Section 13, paragraph 1 of the 1987 Constitution provides:
Section 13. The Office of the Ombudsman shall have the following powers, functions, and duties:

(1) Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

If, as current newspaper headlines and accounts now vividly banner and narrate, irregularities have transpired as a consequence of the budgetary process, these anomalies are more attributable to the officials acting in the process than to the system the Constitution designed; the men and women who are charged with their constitutional duties have simply not paid close attention to what their duties require.

Thus, as things are now, the budgetary process the Constitution provided the nation can only be effective if the basic constitutionally-designed safeguards, particularly the doctrines of separation of powers and checks and balances, are observed. Or, more plainly stated, **the aims of the budgetary process cannot be achieved, *to the eventual detriment of the people the government serves,* if intrusion into powers and the relaxation of built-in checks are allowed.**

With these ground rules plainly stated as premises, I now proceed to discuss the concrete issues. In doing so, I shall not belabor the points that my colleagues – Justices Carpio and Perlas-Bernabe – have covered on the constitutional status of PDAF, except only to state my observations or disagreements. But as I also stated at the start, I agree largely with the conclusion reached that the **PDAF is unconstitutional** as it subverts and can fatally strike at our constitutional processes unless immediately stopped; it is, in my view, a villain that "must be slain at sight."[28]

### *A. Constitutionality of Section 12 of P.D. No. 1869, as amended*

P.D. No. 1869 – whether under the 1973 or the 1987 Constitutions – is an appropriation law as it sets aside a determinable amount of money to be disbursed and spent for a stated public purpose. This presidential decree, prior to its amendment, made allocations to fund the following: "infrastructure and socio-civic projects within the Metropolitan Manila Area: (a) Flood Control (b) Sewerage and Sewage (c) Nutritional Control (d) Population Control (e) Tulungang Bayan Centers (f) Beautification (g) Kilusang Kabuhayan at Kaunlaran (KKK) projects." Additionally, it provided that the amount allocated "*may also be appropriated and allocated to fund and finance infrastructure and/or socio-civic projects throughout the Philippines as may be directed and authorized by the Office of the President of the Philippines.*"

As the decree then stood *i.e.*, prior to its amendment, the above italicized portion already rendered the authority given to the Office of the President of the Philippines of doubtful validity as it gave the President authority to designate and specify the projects to be funded without any clear guiding standards and fixed parameters. Only two things, to my mind, would have saved this provision from unconstitutionality.

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[28] *Banco Español-Filipino v. Palanca*, 37 Phil. 921, 949, March 26, 1918.

The ***first reason*** is the specification of the projects in Metro Manila to which the allocated funds could be devoted. This specification arguably identified the type of projects to which the President could apply the funds, limiting it to the types of infrastructure and socio-civic projects specified for Metro Manila. Thus, unconstitutionality would have occurred only if the funds had been applied to the projects that did not fall within the general class of the listed projects.

The ***second reason***, now part of Philippine and legal history, is the nature of the exercise of power of the Philippine President *at that time*. The decree was promulgated by then President Ferdinand E. Marcos in the exercise of his combined legislative and executive powers, which remained valid and binding even after the passage of the then 1973 Constitution. In strictly legal terms, there then existed a legal cover to justify its validity despite an arrangement where the *delegating authority* was himself the *delegate*.

Section 12 of P.D. No. 1869, however, **has since been amended by P.D. No 1973** and now reads:

> Sec. 12.Special Condition of Franchise. — After deducting five (5%) percent as Franchise Tax, the fifty (50%) percent share of the government in the aggregate gross earnings of the Corporation from this Franchise, or 60% if the aggregate gross earnings be less than P150,000,000.00, shall immediately be set aside and shall accrue to the General Fund **to finance the priority infrastructure development projects** and to finance the restoration of damaged or destroyed facilities due to calamities, **as may be directed and authorized by the Office of the President of the Philippines**.

Unlike its earlier wording, P.D. No. 1869, as amended, no longer identifies and specifies the "infrastructure and socio-civic projects that can serve as a model for the structures to which the fund shall be devoted. Instead, the decree now generally refers to "priority infrastructure development projects," unsupported by any listing that gave the previous unamended version a taint of specificity.

Thus, what these "priority infrastructure development projects" are, P.D. No. 1869 does not identify and state with particularity. This deficiency is rendered worse by the absence of defined legislative parameters, assuming that legislative purpose can be supplied through parameters. In fact, neither does P.D. No. 1869's *Whereas* clauses sufficiently disclose the decree's legislative purpose to save the objectionable portion of this law.

Even granting *arguendo* that these "infrastructure and development projects" may be validly determined by the President himself as part of his law-execution authority, the question of which "infrastructure and development projects" should receive "priority" treatment is a matter that the legislature itself has not determined. "Priority" is defined as a matter or concern that is more important than others, and that needs to be done or dealt

with first. Which infrastructure development project must be prioritized is a question that the President alone cannot decide. Strictly, it is a matter appropriate for national policy consideration since national funds are involved, and must have the imprimatur of Congress which has the power of the purse and is the repository of plenary legislative power.

From another perspective, while Congress' authority to identify the project or activity to be funded is indisputable. Contrary to the Court's ruling in *Philippine Constitution Association v. Enriquez* [29] (*Philconsa*), this authority cannot be "as broad as Congress wants it to be." If the President can exercise the **power to prioritize** at all, such power is limited to his choice of which *of the already identified projects* must be given preferential attention **in a situation *when there are not enough funds to allocate for each project because of budgetary shortfall***.[30]

Additionally, unlike President Marcos during his time, the present President, indisputably exercises only executive powers under the 1987 Constitution and now labors under the constitutional limits in the exercise of his executive powers, as discussed above. He cannot enjoy, therefore, the practically unlimited scope of governmental power that the former President enjoyed.

As matters now stand, the President would enjoy, under the amended P.D. No. 1869, the non-delegable aspect of the legislative power of appropriation that is denied him by the Constitution. Consequently, we have to strike down this aspect of the law.

Unlike the first portion of the law, the second portion referring to "*the restoration of damaged or restored facilities due to calamities*" does not need to be stricken down because it refers to particular objects that must be funded only when the required specific instances occur. These instances are the "***calamities***" that now enjoy, not only a dictionary meaning, but a distinct instinctive meaning in the minds of Filipinos. The President can only spend the PAGCOR FUNDS when these calamities come; he is even limited to the items he can use the public funds for – to the restoration of damaged or destroyed facilities.

From this perspective, the presidential exercise of discretion approaches the level of insignificance; the President only has to undertake a fact-finding to operationalize the expenditure of the funds at his disposal. Nor can the appropriation be objected to for being a lump sum amount. In the sense everybody can understand, rather than a whole lump sum, the President is effectively given an advance or standby fund to be spent when calamities occur. This can in no way be understood as an objectionable discretionary lump sum.

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29 G.R. No. 113105, August 19, 1994, 235 SCRA 507.

30 Ibid. at 522.

***B. Constitutionality of Section 8 of P.D. No. 910***

The Section 8, P.D. No. 910 funds or the Malampaya Fund consist of two components: the funds *"to be used to finance energy resource development and exploitation programs and projects,"* and the funds *"for such other purposes as may be…directed by the President."*

I join Justice Carpio in the view that the second "*for such other purposes*" component is a complete nullity as it is an undue delegation of legislative power. I submit that this is additionally objectionable for being a part of a constitutionally objectionable lump sum payment that violates the separation of powers doctrine. I will discuss this view under the first component of Section 8.

I vote to strike down the *"energy"* component of Section 8, P.D. No. 910 as it is a discretionary lump sum fund that is not saved at all by its *energy development and exploitation* purpose. It is a pure and simple pork barrel granted to the President under a martial law regime decree that could have escaped invalidity then under the 1973 Constitution and the prevailing unusual times, but should be struck down now for being out of step with the requirements of the 1987 Constitution.

As a fund, it is a prohibited lump sum because it consists of a fund of indefinite size that has now grown to gigantic proportions, whose accounts and accounting are far from the usual in government, and which is made available to the President for his disposition, from year to year, with very vague controls, and free from the legal constraints of the budget process now in place under the 1987 Constitution. Admittedly, it is a fund raised and intended for special purposes but the characterization "special purpose" is not reason enough and is not a magical abracadabra phrase that could whisk a fund out of the constitutional budget process, defying even common reason in the process.

While a provision exists in the Constitution providing for a special purpose fund, its main reason for being and its "special" appellation are traceable to its source and the intent to use its proceeds to replenish and replicate energy sources all over the country. This description at first blush can pass muster but must fail on deeper inspection and consideration.

As already mentioned, the legitimacy of the fund and its purpose were beyond question at the time the fund was created, but this status was mainly and largely due to the prevailing situation then. No reason exists to assume that its validity continued or would continue after the Marcos Constitution had been overtaken by the 1987 Constitution. Thus, now, it should be tested based on the new constitutional norms.

That it is a lump sum that **escapes the year to year congressional budget review** is indisputable. The fund is one indivisible amount that

keeps accumulating from its source and from interests earned from year to year.

That it is intended and has been **used for different projects**, now existing and yet to exist if the fund is maintained, cannot also be disputed. It is **not intended for one energy project alone but for many**, including those to occur in the future and are as yet unknown. In short, it is one big fund supporting or intended to support multiple projects.

Who determines the projects or activities to which the funds will be devoted is plain from the law itself. It is subject to the **sole discretion of the President, completely devoid of any participation from Congress**. In other words, we have here with us now a **major component of Philippine development** – for it cannot be doubted that energy is a major component of national life and economic development – that is **left to the will of one man** in terms of its growth, economic trajectory and future development. That the discretion is given to the President of the Philippines is not at all a valid argument, and the existence of a law allowing the grant of discretion is likewise not valid, simply because that legal situation should no longer be allowed under the 1987 Philippine Constitution that requires a valid appropriation by Congress for every use of the public fund. In fact, even the argument that there has been no abuse in the exercise of discretion cannot be acceptable as the grant should have justified its existence when the 1987 Constitution took effect.

Of course, the magical word "energy" is there to justify the lump sum grant, but as I said, that "energy" purpose cannot, by and of itself, be a valid justification. The other circumstances surrounding the fund must also be known, read and taken into account, particularly the non-participation of Congress in the formulation of major national policy on energy.

How the purpose is served and under what conditions this purpose is served should also be considered. For example, ***is the President's choice in the exercise of his discretion made under such neutral conditions that would approximate the choice and policy-making by Congress with policy inputs and recommendations from the President, or is it an exercise of discretion that can be made strictly along political lines with no effective control from anyone within the governmental hierarchy***? To be sure, this situation of dominance and unlimited exercise of power, particularly over a very sizeable sum of money (reportedly in the hundreds of billions), is one that the framers of the 1987 Constitution have frowned upon and which our people continue to reject. We will be less than faithful to our duties as a Court if we do not raise these questions.

**Why a very sizeable sum has to be kept under the control of one man also has to be explained**. Considering the nature of energy development and exploitation projects, they are best discussed at many levels that take into account political, technical, and economic

considerations, at the very least. Unlike calamities, these projects are subject to long gestation periods and do not at all require quick and ready responses in the way that a calamity does. There thus appears no reason why the Malampaya Fund are held as captive funds. The **constitutional alternative** of course is to subject this fund to regular budgetary process as this can be done without removing the "special" nature of the fund and while keeping it exclusive for particular uses, to be determined after due consideration by the constitutionally-assigned bodies. That we continue to accept the "energy" excuse, when the constitutional alternative is available and when the *status quo* has lapsed into illegality, remains a continuing enigma.

In sum, I question the legitimacy of the present status of the fund, particularly its purpose and lack of specificity; its lump sum nature and its disbursement solely at the discretion of one man, unchecked by any other; how and why a multi-project and multi-activity fund covering many projects and activities, now and in the future, should be held at the discretion of one man; and the legal situation where the power of Congress and its participation in national policymaking through the budget process is disregarded. All these can be encapsulated as violations of the doctrines of separation of powers and checks and balances which can be addressed and remedied if only the fund can be subjected to the usual budget processes, with adjustments that circumstances of the fund and its use would require.

Lest this conclusion be misunderstood, I do not *per se* take the position that all lump sum appropriations should be disallowed as this would be an extreme position that disregards the realities of national life. But the use of lump sums, to be allowed, should be within reason acceptable under the processes of the Constitution, respectful of the constitutional safeguards that are now in place, and understandable to the people based on their secular understanding of what is happening in government.

To cite two obvious examples, a sizeable amount, set aside under the budget as contingent advance to be **devoted to calamities**, cannot be objectionable despite its size if it is set aside under the regular budget process; if it is in the nature of an advance, reportable at the end of the year if no calamities occur, and subject to replenishment if, from year to year, it goes below a certain predetermined level. Of course, this is without prejudice to identifiable expenditures for calamity preparedness that can already be identified and for restoration and reconstruction activities for which specific budgetary items can be appropriated.

Another example is intelligence funds that by practice, usages and nature are confidential in character and cannot but be entrusted to specific individuals in government who keep information to themselves, with limited checks on the specific uses and other circumstances of the fund. Subject to reasonable safeguards (for again, no grant can be unlimited), the grant of a lump sum appropriation for intelligence purposes can be understandable and

reasonable unless the size and circumstances of use become scandalously unreasonable.

To recapitulate, the GAA is one of the most important pieces of legislation enacted by Congress each year. The constitutional grant to Congress of the power of appropriation; to scrutinize the budget submitted by the President; to prescribe the form, content, and manner of preparation of the budget; and to provide guidelines for the use of discretionary funds, all speak loudly of the Constitution's intent of preserving the corollary principle of checks and balances among the different branches of government to achieve a workable government for the ultimate benefit of the nation. All these considerations call for the striking down of Section 8 of P.D. No. 910.

## V. Violation of the TRO

In a Resolution dated September 10, 2013, the Court issued a temporary restraining order (TRO) *"enjoining the [DBM], the National Treasurer, the Executive Secretary, or any persons acting under their authority from releasing: (1) the remaining Priority Development Assistance Fund allocated to members of Congress under GAA of 2013..."*

Despite the Court's TRO, the DBM issued Circular Letter dated September 27, 2013, authorizing implementing agencies to continue with the implementation of PDAF projects and the disbursement of PDAF funds where the DBM has already issued a Special Allotment Order (*SARO*) and where the implementing agencies have already obligated the funds.

According to the *ponencia*, the Circular Letter is inconsistent with the DBM's own definition of what a SARO. In its website the DBM stated that *"the actual release of funds is brought about by the issuance of the [Notice of Cash Allocation or NCA]," not by the mere issuance of a SARO. Thus, unless an NCA has been issued, public funds [are not considered as] 'released.'"*

While I agree with the *ponencia* that an NCA is necessary before funds could be treated as 'released,' I disagree with its conclusion that the release of funds covered by obligated SAROs should be forbidden only at the time of this Decision's promulgation.[31]

The fact that public funds are not considered released until they have been issued an NCA, coupled with the language of the Court's TRO prohibiting the release of the 2013 PDAF funds, should point to four logical consequences:

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[31] *Ponencia*, p. 68.

***First***, the disbursement of 2013 PDAF funds covered only by a SARO has been provisionally prohibited by the TRO that the Court had issued on September 10, 2013;

***Second***, since the Court now finds that this provisional order should be made permanent, then the disbursement of 2013 PDAF funds without any NCA, and regardless of whether it had already been issued a SARO, should be permanently prohibited from the time the TRO was issued and not at the time of this Decision's promulgation;

***Third***, the 2013 PDAF funds released in violation of the TRO should be returned to the government's coffers; and

***Fourth***, the DBM secretary, in issuing the DBM Letter Circular in contravention of the TRO, should be directed to explain why he should not be held in contempt for issuing the DBM Letter Circular and penalized for disregarding the Court's TRO.

In issuing the TRO, the Court is obviously aware that should it decide to rule against the constitutionality of the pork barrel system, the doctrine of operative fact will play a significant role in determining the consequences of its ruling. This doctrine, however, is never meant to weaken the force and effectivity of a provisional order the Court has issued. The purpose of the TRO is to preserve and protect rights and interests during the pendency of an action.

In the present case, these "rights and interests" range from the public's right to prevent the misapplication and waste of public funds, to the right to demand accountability from its public officials as an express constitutional tenet and as a necessary consequence of holding public office.

While the DBM Circular Letter's resulting violation of the Court's TRO may seem innocuous on paper, the Court must not forget that its finding of the unconstitutionality of the system that created these funds is anchored on its violation of the fundamental doctrines on which our Constitution and our nation, rest.

That the funds that may have been released by virtue of the DBM Circular Letter may involve measly sums of money is beside the point: **public funds are merely held in trust by the government for the public good** and must be handled in accordance with law. Additionally, that the apparent violation may have been made by a high-ranking official of the government cannot serve as an excuse, for no one is above the law and the Constitution.

To gloss over this violation *despite a finding of the intrinsic unconstitutionality of the system from where funds (subject of the restraining order) came* may not speak well of the Court's regard for the constitutional

magnitude of this case and the staggering amounts that appear to have vanished.

The Court should be keenly aware that aside from its power, it also has the duty to enforce its authority, preserve its integrity, maintain its dignity, and ensure the effectiveness of the administration of justice. Specifically, courts have to penalize contempt, not simply because it has the power to do this, but because it carries this as a duty essential to its right to self-preservation.

Under the Rules of Court, contempt is classified into direct and indirect or constructive contempt. Direct contempt is misbehavior in the presence of or so near a court or judge as to obstruct or interrupt the proceedings before the same.[32] Where the act of contumacy is not committed in *facie curiae*, or "in the presence of or so near a court or judge, *i.e.*, perpetrated outside the sitting of the court, it is considered indirect or constructive contempt, and may include "disobedience of or resistance to a lawful writ, process, order judgment, or command of a court, or injunction granted by a court or judge," or "(a)ny abuse of or any unlawful interference with the process or proceedings of a court not constituting direct contempt," or "any improper conduct tending, directly, or indirectly to impede, obstruct or degrade the administration of justice."[33]

Based on this definition and classification, the issuance of the DBM Circular Letter is *prima facie* an indirect contempt for which the DBM Secretary himself should be liable unless he can show why he should not be punished.

As an element of due process, he must now be directed by resolution to explain why he should not be penalized for issuing and enforcing Circular Letter No. 2013-8 dated September 27, 2013 despite the Court's TRO.

**ARTURO D. BRION**
Associate Justice

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32 Rule 71, Section 1, Rules of Court.
33 Rule 71, Section 3, Rules of Court.