G.R. No. 209287 - 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. CARLOS ISAGANI ZARATE, Bayan Muna Partylist Representative; RENATO M. REYES, JR., Secretary General of BAYAN; MANUEL K. DAYRIT, Chairman, and Kapatiran Party; VENCER MARI E. CRISOSTOMO, Chairperson, Anakbayan; and VICTOR VILLANUEVA, Convenor Youth Act Now v. BENIGNO SIMEON C. AQUINO III, President of the Republic of the Philippines; PAQUITO N. OCHOA, JR., Executive Secretary; and FLORENCIO B. ABAD, Secretary of the Department of Budget and Management.

G.R. No. 209135 - AUGUSTO L. SYJUCO, JR., Ph.D. v. FLORENCIO B. ABAD, in his capacity as the Secretary of Department of Budget and Management; and HON. FRANKLIN MAGTUNAO DRILON, in his capacity as Senate President of the Philippines.

G.R. No. 209136 - MANUELITO R. LUNA v. SECRETARY FLORENCIO ABAD, in his official capacity as Head of the Department of Budget and Management; and EXECUTIVE SECRETARY PAQUITO OCHOA, in his official capacity as Alter Ego of the President.

G.R. No. 209155 - ATTY. JOSE MALVAR VILLEGAS, JR. v. THE HONORABLE EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR.; and THE SECRETARY OF BUDGET AND MANAGEMENT FLORENCIO B. ABAD.

G.R. No. 209164 - PHILIPPINE CONSTITUTION ASSOCIATION (PHILCONSA), represented by DEAN FROILAN M. BACUNGAN, BENJAMIN E. DIOKNO and LEONOR M. BRIONES v. DEPARTMENT OF BUDGET AND MANAGEMENT and/or HON. FLORENCIO B. ABAD.

G.R. No. 209260 - INTEGRATED BAR OF THE PHILIPPINES (IBP) v. SECRETARY FLORENCIO B. ABAD OF THE DEPARTMENT OF BUDGET AND MANAGEMENT (DBM).

G.R. No. 209442 - GRECO ANTONIOUS BEDA B. BELGICA, BISHOP REUBEN M. ABANTE and REV. JOSE L. GONZALEZ v. 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.

G.R. No. 209517 – CONFEDERATION FOR UNITY, RECOGNITION AND ADVANCEMENT OF GOVERNMENT EMPLOYEES (COURAGE), represented by its 1st Vice President, SANTIAGO DASMARINAS, JR.; ROSALINDA NARTATES, 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) v. 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.

G.R. No. 209569 – VOLUNTEERS AGAINST CRIME AND CORRUPTION (VACC), represented by DANTE LA. JIMENEZ v. PAQUITO N. OCHOA, Executive Secretary, and FLORENCIO B. ABAD, Secretary of the Department of Budget and Management.

Promulgated:

July 1, 2014

x----------x

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 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

---

[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.*,

[2] On October 25, 2013, the Court issued a Resolution deferring the resolution of the petitioners' prayer for a Temporary Restraining Order until 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.

₱150 Billion or almost 15 times the PDAF case;[4] ***entanglement with the unconstitutional PDAF; 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 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]

---

[4] For 2011-2012, a total of P142.23 Billion was released for programs and projects identified through the DAP.

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/

[5] DAP Consolidated Cases Advisory for Oral Arguments of November 19, 2003.

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;

(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**.

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 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 insufficient and did not prevent the public's distrust (heretofore directed against the PDAF) from creeping into the DAP.[9]

---

[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/)

[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/

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, <u>through the DAP, the Executive effectively exercised the power of appropriation exclusively reserved by the Constitution to Congress</u>**.

I recall at this point that we ruled in *Belgica v. Executive Secretary*[10] that the PDAF system was unconstitutional because of the **<u>legislative intrusion</u>** 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 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] –

---

[10] G.R. No. 208566, November 19, 2013.

[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 P500 million in Presidential Development Assistance Fund (PDAF) or pork barrel was distributed to 11 senators in April

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 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] – 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]

2012. Senator Arroyo claims that after former Chief Justice Corona's conviction, another P1 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.

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.

xxx

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.

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.

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]

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.

---

[18] George Santayana, The Life of Reason: Reason in Common Sense, Scribner Publishing (1905).

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:

A. <u>Factual Antecedents</u>

1. The DAP and its origins

a. The Memoranda from DBM Secretary Florencio Abad to the President

B. <u>Preliminary Matters</u>

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
5. The Court's boundary-keeping role in times of political upheaval

C. <u>Substantive Matters</u>

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

---

[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.

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

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 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

---

[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 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-P50M),
- Sen. Manuel Villar (October 2012-P50M),
- Sen. Ramon Revilla (October 2012-P50M),
- Sen. Francis Pangilinan (October 2012-P30M),
- Sen. Loren Legarda (October 2012-P50M),
- Sen. Lito Lapid (October 2012-P50M),
- Sen. Jinggoy Estrada (October 2012-P50M),
- Sen. Alan Cayetano (October 2012-P50M),
- Sen. Edgardo Angara (October 2012-P50M),
- Sen. Ralph Recto (October 2012-P23M; December 2012-P27M),
- Sen. Koko Pimentel (October 2012-P25.5M; November 2012 –P5M; December 2012-P15M),
- Sen. Tito Sotto (October 2012-P11M; November 2012-P39M),
- Sen. Teofisto Guingona (October 2012-P35M; December 2012-P9M),
- Sen. Serge Osmeña (December 2012-P50M),
- Sen. Juan Ponce Enrile (October 2012-P92M)
- Sen. Frank Drilon (October 2012-P100M).

There were two earlier releases made in late August of that same year: Sen. Greg Honasan (P50M) and Sen. Francis Escudero (P99M). No releases were made in 2012 to Senators Ping Lacson, Joker Arroyo, Pia Cayetano, Bongbong Marcos and Miram Defensor-Santiago. In 2013, however, releases were made for funding requests from the office of Sen. Joker Arroyo (February 2013 – P47M) and Sen. Pia Cayetano (January 2013-P50M). 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 goverments' 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[.]

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
> 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 Infrastructure Program

---

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 P72.11 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/)

23 Respondent's 1st Evidence Packet, pp. 2-3.

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:

> **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]

---

[24] Id. at 4, 8.

[25] Omnibus Authority to Consolidate Savings/Unutilized Balances and its Realignment, Respondent's 1st Evidence Packet, pp. 13-16.

[26] Omnibus Authority to Consolidate Savings/Unutilized Balances and their Realignment.

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:

> Construction of the Legislative Library and Archive Building/Congressional E-Library
>
> This request from House Speaker Feliciano Belmonte, Jr. for the release of P250M 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 P320M. Of this amount, P70M shall be funded from the budget of HOR and P250M from the 2009 DPWH budget.
>
> The initial phase of the construction work (P67.7M) 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 P250M 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]

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:

---

[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 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.

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.

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 http://www.dbm.gov.ph/?page_id=7362

30 Omnibus Authority to Consolidate Savings/Unutilized balances and their Realignment to fund the Quarterly [DAP].

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.

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.

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**

---

[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.

[35] G.R. No. 204819, April 8, 2014.

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 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.

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.

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.

---

[36] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel*, 589 Phil. 463, 481 (2008).

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 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]

---

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 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/.

39 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/.

40 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/

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.

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***.

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*

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.

---

[44] Press Release, Department of Budget and Management, Frequently Asked Questions About the Disbursement Acceleration Program, http://www.dbm.gov.ph/?page_id=7362

[45] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel*, 589 Phil. 463, 481 (2008).

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 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

---

46 *Kilosbayan, Incorporated v. Guingona, Jr.*, G.R. No. 113375, May 5, 1994, 232 SCRA 110.

47 *Supra* note 10.

> 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:

> **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*

---

48 Id. at 43.

49 TSN, Oral Arguments, November 19, 2013, pp. 147-148.

was also a "practice" during the execution stage of a GAA and which was simply 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
>
> xxxx
>
> 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 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

---

[50] *Belgica v. Executive Secretary, supra* note 10, at 52.

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. 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.**

---

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.

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 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

---

[54] 63 Phil. 139, 156-157 (1936).

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**?

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. <u>Substantive Matters</u>

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 roles each branch of

---

55 G.R. No. 203766, April 2, 2013, 694 SCRA 477, 656.

56 335 Phil. 664, 676–680 (1997).

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 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

---

[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.

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 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

---

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).

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).

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, 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 – had the effect of ***allowing the Executive to encroach on the domain of Congress in the budgetary***

---

66 1987 Constitution, Article VI, Section 15.

67 1987 Constitution, Article VI, Section 26(2).

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 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

---

68 1987 Constitution, Article VI, Section 29.

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:

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.
>
> 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 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

---

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

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 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.

c. savings cannot be used to fund programs and projects not appropriated for by Congress

---

70 232 Phil. 222 (1987).
71 Id. at 229-230.
72 575 Phil. 428 (2008).
73 Id. at 454.

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 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:

---

74 Id. at 462-463.

75 *Supra* note 69, at 401-40

> **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 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 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.

---

[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.

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:

> 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 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

---

77 H. de Leon, Philippine Constitutional Law: Principles and Cases, Vol. 2 (2004 ed.), p. 233.

78 1987 Constitution, Article VII, Section 17.

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]

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

---

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.

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.

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

---

82 Section 28, Chapter 4, Book VI, E.O. No. 292.

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:

together, provide a guide on 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 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

---

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.

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:

> 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

---

[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.

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 <u>funds allotted</u> 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 **<u>allotted</u>** *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***."

---

[87] Section 2 (2), Chapter 1, Book VI, E.O. No. 292.

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 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 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

---

[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.

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 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

---

[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 provides for 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.

for economic conclusions. We are, after all, a 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 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

---

90 7th Evidence Packet p. 91

91 2nd Evidence Packet pp. 8-9.

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.

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

---

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.

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 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, 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

---

[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.

> 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]

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.

---

[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

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 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.

---

98 308 US 371, 318-319, 60 S. Ct. 317.

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).

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 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 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**.

---

102 G.R. No. L-21114, November 28, 1967.
103 137 Phil. 360 (1969).
104 148 Phil. 443 (1971).

> 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.**

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

---

105 Id. at 447-448.

106 *Supra* note 105.

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]

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.

---

[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.

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 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]

---

[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.
>
> 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"…

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.

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.

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]

> 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.

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:

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.

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 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.

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.*

ARTURO D. BRION
Associate Justice