G.R. No. 209135 – *Augusto L. Syjuco, Jr., Ph.D., petitioner v. Florencio B. Abad, in his capacity as the Secretary of the Department of Budget and Management, Hon. Franklin Magtunao Drilon, in his capacity as the Senate President of the Republic of the Philippines, respondents;*

G.R. No. 209136 – *Manuelito R. Luna, petitioner v. Secretary Florencio B. Abad, in his official capacity as Head of the Department of Budget and Management, and Executive Secretary Paquito N. Ochoa, Jr., in his official capacity as Alter Ego of the President, respondents;*

G.R. No. 209155 – *Atty. Jose Malvar Villegas, petitioner v. The Honorable Secretary Paquito N. Ochoa, Jr. and The Secretary of Budget and Management Florencio B. Abad, respondents;*

G.R. No. 209164 – *Philippine Constitution Association (PHILCONSA), represented by Dean Froilan M. Bacungan, and Benjamin E. Diokno and Leonor M. Briones, petitioners v. The Department of Budget and Management and/or Hon. Florencio B. Abad, respondents;*

G.R. No. 209260 – *Integrated Bar of the Philippines (IBP), petitioner v. Secretary Florencio B. Abad of the Department of Budget and Management, respondent;*

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. Terry L. Ridon, Kabataan Partylist Representative, Rep. Carlos Isagani Zarate, Bayan Muna Partylist Representative, Renato M. Reyes, Jr., Secretary General of BAYAN, Manuel K. Dayrit, Chairman, Ang Kapatiran Party, Vencer Mari E. Crisostomo, Chairperson, Anakbayan, Victor L. Villanueva, Convenor, Youth Act Now, petitioners v. Benigno Simeon C. Aquino III, President of the Republic of the Philippines, Paquito B. Ochoa, Jr., Executive Secretary, and Florencio B. Abad, Secretary of the Department of Budget and Management, respondents;*

G.R. No. 209442 – *Greco Antonious Beda B. Belgica, Bishop Reuben M. Abante and Rev. Jose L. Gonzales, petitioners 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 Paquito N. Ochoa, Jr.; The Department of Budget and Management, Represented by Secretary Florencio Abad; The Department of Finance, Represented by Secretary Cesar Purisima; and The Bureau of Treasury, Represented by Rosalia V. de Leon, respondents;*

G.R. No. 209517 – *Confederation for Unity, Recognition and Advancement of Government Employees [COURAGE], et al., petitioners v. Benigno Simeon C. Aquino, et al., respondents, and*

G.R. No. 209569 – *Volunteers Against Crime and Corruption (VACC), represented by Dante LA. Jimenez, petitioner v. Paquito N. Ochoa, Executive Secretary, and Florencio B. Abad, Secretary of the Department of Budget and Management, respondents.*

Promulgated: July 1, 2014

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CONCURRING AND DISSENTING

DEL CASTILLO, *J.*:

The present case comes before us at the heels of immense public outrage that followed the discovery of alleged abuses of the Priority Development Assistance Fund (PDAF) committed by certain legislators involving billions of pesos in public funds. In the seminal case of *Belgica v. Ochoa, Jr.*,[1] the Court declared as unconstitutional, in an unprecedented all-encompassing tenor, the PDAF and its precursors as well as all issuances and practices, past and present, appurtenant thereto, for violating the principles of separation of powers and non-delegability of legislative power as well as the constitutional provisions on the prescribed procedure of presentment of the budget, presidential veto, public accountability and local autonomy. The declaration of unconstitutionality elicited the jubilation of a grateful nation.

While the various investigations relative to the PDAF scandal were taking place, public outrage re-emerged after a legislator alleged that the President utilized the then little known Disbursement Acceleration Program (DAP), which was perceived by the public to be another *specie* of the PDAF, involving comparably large amounts of public funds, to favor certain legislators.

Thus, petitioners come to this Court seeking to have the DAP likewise declared as unconstitutional.

Amidst the emergent public distrust on the alleged irregular utilization of huge amounts of public funds, the Court is called upon to determine the constitutional and statutory validity of the DAP. As in the PDAF case, we must fulfill this solemn duty guided by a singular purpose or consideration: to defend and uphold the Constitution.

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[1] G.R. Nos. 208566, 208493, and 209251, November 19, 2013.

This case affords us the opportunity to look into the nature and scope of Article VI, Section 25(5) of the Constitution relative to the power of the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of the constitutional bodies (hereinafter "heads of offices") to use savings to augment the appropriations of their respective offices. Though the subject constitutional provision seems plain enough, our interpretation and application thereof relative to the DAP has far-reaching consequences on (1) the limits of this power to augment various budgets in order to prevent the abuse and misuse thereof, and (2) the capability of the three co-equal branches of the government and the constitutional bodies to use such power as a tool to promote the general welfare. The proper matrix, then, in determining the constitutional validity of the power to augment, as exercised by the President through the DAP, must of necessity involve the balancing of these State interests in (1) the prevention of abuse or misuse of this power, and (2) the promotion of the general welfare through the use of this power.

With due respect, I find that the theories thus far expressed relative to this case have not adequately and accurately taken into consideration these paramount State interests. Such theories, if adopted by the Court, will affect not only the present administration but future administrations as well. They have serious implications on the very workability of our system of government. It is no exaggeration to say that our decision today will *critically* determine the capacity or ability of the government to fulfill its core mandate to promote the general welfare of our people.

This case must be decided beyond the prevailing climate of public distrust on the expenditure of huge public funds generated by the PDAF scandal. It must be decided based on the Constitution, not public opinion. It must be decided based on reason, not fear or passion. *It must, ultimately, be decided based on faith in the moral strength, courage and resolve of our people and nation.*

I first discuss the relevant constitutional provisions and principles as well as the statutes implementing them before assessing the constitutional and statutory validity of the DAP.

Nature, scope and rationale of Article VI, Section 25(5) of the Constitution

Article VI, Section 25(5) of the Constitution provides:

> No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of

> Representatives, the Chief Justice of the Supreme Court, and the Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

The subject constitutional provision prohibits the transfer of appropriations. Congress cannot pass a law authorizing such transfer. However, it is allowed to enact a law to authorize the heads of offices to transfer savings from one item to another provided that the items fall within the appropriations of the same office: the President relative to the Executive Department, the Senate President with respect to the Senate, the Speaker relative to the House of Representatives, the Chief Justice with respect to the Judicial Department, and the heads of the constitutional bodies relative to their respective offices. The purpose of the subject constitutional provision is to afford considerable flexibility to the heads of offices in the use of public funds and resources.[2] For a transfer of savings to be valid under Article VI, Section 25(5), four (4) requisites must concur: (1) there must be a law authorizing the heads of offices to transfer savings for augmentation purposes, (2) there must be savings from an item/s in the appropriations of the office, (3) there must be an item requiring augmentation in the appropriations of the office, and (4) the transfer of savings should be from one item to another of the appropriations within the same office.

While the members of the Constitutional Commission did not extensively discuss or debate the salient points of the subject constitutional provision, the deliberations do reveal its rationale which is crucial to the just disposition of this case:

> MR. NOLLEDO. I have two more questions, Madam President, if the sponsor does not mind. The first question refers to Section 22, subsection 5, page 12 of the committee report about the provision that "No law shall be passed authorizing any transfer of appropriations." This provision was set forth in the 1973 Constitution, inspired by the illegal fund transfer of ₱26.2 million that Senator Padilla was talking about yesterday which was made by President Marcos in order to benefit the Members of the Lower House so that his pet bills would find smooth sailing. I am concerned about the discretionary funds being given to the President every year under the budget. Do we have any provision setting forth some guidelines for the President in using these discretionary funds? I understand Mr. Marcos abused this authority. He would transfer a fund from one item to another in the guise of using it to suppress insurgency. What does the sponsor say about this?
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> MR. DAVIDE. If Mr. Marcos was able to do that, it was precisely because of the general appropriations measure allowing the President to transfer

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[2] *See Demetria v. Alba*, 232 Phil. 222, 229 (1987).

> funds. And even under P.D. No. 1177 where the President was also given that authority, technically speaking, the provision of the proposed draft would necessarily prevent that. Mr. Marcos was able to do it because of the decrees which he promulgated, but the Committee would welcome any proposal at the proper time to totally prevent abuse in the disbursements of discretionary funds of the President.[3]

In another vein, the deliberations of the Constitutional Commission clarified the extent of this power to augment:

> MR. SARMIENTO. I have one last question. Section 25, paragraph (5) authorizes the Chief Justice of the Supreme Court, the Speaker of the House of Representatives, the President, the President of the Senate to augment any item in the General Appropriations Law. Do we have a limit in terms of percentage as to how much they should augment any item in the General Appropriations Law?
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> MR. AZCUNA. The limit is not in percentage but "from savings." So it is only to the extent of their savings.[4]

Two observations may be made on the above.

First, the principal motivation for the inclusion of the subject provision in the Constitution was to prevent the President from consolidating power by transferring appropriations to the other branches of government and constitutional bodies in exchange for undue or unwarranted favors from the latter. Thus, the subject provision is an integral component of the system of checks and balances under our plan of government. It should be noted though, based on the broad language of the subject provision, that the check is not only on the President, even though the bulk of the budget is necessarily appropriated to the Executive Department, because the other branches and constitutional bodies can very well commit the afore-described transgression although to a much lesser degree.

Second, the deliberations of the Constitutional Commission on the limits of the power to augment portray the considerable latitude or leeway given the heads of offices in exercising the power to augment. The framers saw it fit not to set a limit based on percentage but on the amount of savings of a particular office, thus, affording heads of offices sufficient flexibility in exercising their power to augment.

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3 II RECORD, CONSTITUTIONAL COMMISSION 88 (July 22, 1986).
4 II RECORD, CONSTITUTIONAL COMMISSION 111 (July 22, 1986).

Equally important, though not directly discussed in the deliberations of the Constitutional Commission, it is fairly evident from the wording of the subject provision that the power to augment is intended to prevent wastage or underutilization of public funds. In particular, it prevents savings from remaining idle when there are other important projects or programs within an office which suffer from deficient appropriations upon their implementation or evaluation. Thus, by providing for the power to augment, the Constitution espouses a policy of effective and efficient use of public funds to promote the common good.

In sum, the power to augment under Article VI, Section 25(5) of the Constitution serves two principal purposes: (1) negatively, as an integral component of the system of checks and balances under our plan of government, and (2) positively, as a fiscal management tool for the effective and efficient use of public funds to promote the common good. For these reasons, as preliminarily intimated, the just resolution of this case hinges on the balancing of two paramount State interests: (1) the prevention of abuse or misuse of the power to augment, and (2) the promotion of the general welfare through the power to augment.

I now proceed to discuss the statutes implementing Article VI, Section 25(5) of the Constitution.

Authority to augment

As earlier noted, Article VI, Section 25(5) of the Constitution states that the power to augment must be authorized "by law." Thus, it has become standard practice to include in the annual general appropriations act (GAA) a provision granting the power to augment to the heads of offices. As pertinent to this case, the 2011, 2012 and 2013 GAAs provide, respectively—

> Section 59. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to augment any item in this Act from savings in other items of their respective appropriations.[5]
>
> Section 53. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal

[5] General Provisions, 2011 GAA.

> autonomy, and the Ombudsman are hereby authorized to augment any item in this Act from savings in other items of their respective appropriations.[6]
>
> Section 52. Use of Savings. The President of the Philippines, the Senate President, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions enjoying fiscal autonomy, and the Ombudsman are hereby authorized to use savings in the respective appropriations to augment actual deficiencies incurred for the current year in any item of their respective appropriations.[7]

I do not subscribe to the view that the above-quoted grant of authority to augment under the 2011 and 2012 GAAs contravenes the subject constitutional provision. The reason given for this view is that the subject provisions in the 2011 and 2012 GAAs effectively allows the augmentation of any item in the GAA, including those that do not belong to the items of the appropriations of the office from which the savings were generated.

The subject GAAs are duly enacted laws which enjoy the presumption of constitutionality. Thus, they are to be construed, if possible, to avoid a declaration of unconstitutionality. The rule of long standing is that, as between two possible constructions, one obviating a finding of unconstitutionality and the other leading to such a result, the former is to be preferred.[8] In the case at bar, the 2011 and 2012 GAAs can be so reasonably interpreted by construing the phrase "of their respective appropriations" as qualifying the phrase "to augment any item in this Act." Under this construction, the authority to augment is, thus, limited to items within the appropriations of the office from which the savings were generated. Hence, no constitutional infirmity obtains.

Definition of savings and augmentation

The Constitution does not define "savings" and "augmentation" and, thus, the power to define the nature and scope thereof resides in Congress under the doctrine of necessary implication. To elaborate, the power of the purse or to make appropriations is vested in Congress. In the exercise of the power to augment, the definition of "savings" and "augmentation" will necessarily impact the appropriations made by Congress because the power to augment effectively allows the transfer of a portion of or even the whole appropriation made in one item in the GAA to another item within the same office provided that the definitions of "savings" and "augmentation" are met. Thus, the integrity of the power to make appropriations vested in Congress can only be preserved if the

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6 General Provisions, 2012 GAA.
7 General Provisions, 2013 GAA.
8 *Paredes v. Executive Secretary*, 213 Phil. 5, 9 (1984).

power to define "savings" and "augmentation" is in Congress as well. Of course, the power to define "savings" and "augmentation" cannot be exercised in contravention of the tenor of Article VI, Section 25(5) so as to effectively defeat the objectives of the aforesaid constitutional provision. In the case at bar, petitioners do not question the validity of the definitions of "savings" and "augmentation" relative to the 2011, 2012 and 2013 GAAs.

The definition of "savings" and "augmentation" is uniform for the 2011, 2012 and 2013 GAAs, to wit:

> [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrances which are**: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized;** (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.
>
> Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, **which upon implementation or subsequent evaluation of needed resources**, is determined to be deficient. In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized by this Act.[9] (Emphasis supplied)

Pertinent to this case is the first type of "savings" involving portions or balances of any programmed appropriation in the GAA that is free from any obligation or encumbrances and which are still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized. Thus, for "savings" of this type to arise the following requisites must be met:

1. The appropriation[10] must be a programmed[11] appropriation in the GAA;

2. The appropriation must be free from any obligation or encumbrances;

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9 *See* Sections 60, 54 and 52 of the 2011, 2012 and 2013 GAAs, respectively.

10 An appropriation is "an authorization made by law or other legislative enactment, directing payment out of government funds under specified conditions or for specified purposes." [Administrative Code, Book VI, Chapter 1, Section 2(1)].

11 As contradistinguished from the Unprogrammed Fund in the GAA.

3. The appropriation must still be available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized.

The portion or balance of the appropriation, when the above requisites are met, thus, constitutes the first type of "savings."

On the other hand, for "augmentation" to be valid, in accordance with the Article VI, Section 25(5) in relation to the relevant GAA provision thereon, the following requisites must concur:

1. The program, activity, or project to be augmented by savings must be a program, activity, or project in the GAA;

2. The program, activity, or project to be augmented by savings must refer to a program, activity, or project within or under the same office from which the savings were generated;

3. Upon implementation or subsequent evaluation of needed resources, the appropriation of the program, activity, or project to be augmented by savings must be shown to be deficient.

Notably, the law permits augmentation even before the program, activity, or project is implemented if, through subsequent evaluation of needed resources, the appropriation for such program, activity, or project is determined to be deficient.

The power to finally discontinue or abandon the work, activity or purpose for which the appropriation is authorized.

As pertinent to this case, the third requisite of the first type of "savings" in the GAA deserves further elaboration. Note that the law contemplates, among others, the final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized. Implicit in this provision is the recognition of the possibility that the work, activity or purpose may be finally discontinued or abandoned. The law, however, does not state (1) who possesses the power to finally discontinue or abandon the work, activity or purpose, (2) how such power shall be exercised, and (3) when or under what circumstances such power shall or may be exercised.

Under the doctrine of necessary implication, it is reasonable to presume that the power to finally discontinue or abandon the work, activity or purpose is vested in the person given the duty to implement the appropriation (*i.e.*, the heads of offices), like the President with respect to the budget of the Executive Department.

As to the manner it shall be exercised, the silence of the law, as presently worded, allows the exercise of such power to be express or implied. Since there appears to be no particular form or procedure to be followed in giving notice that such power has been exercised, the Court must look into the particular circumstances of a case which tend to show, whether expressly or impliedly, that the work, activity or purpose has been finally abandoned or discontinued in determining whether the first type of "savings" arose in a given case.

This lack of form, procedure or notice requirement is, concededly, *a weak point of this law* because (1) it creates ambiguity when a work, activity or purpose has been finally discontinued or abandoned, and (2) it prevents interested parties from looking into the government's justification in finally discontinuing or abandoning a work, activity or purpose. *Indubitably, it opens the doors to abuse of the power to finally discontinue or abandon which may lead to the generation of illegal "savings."* Be that as it may, the Court cannot remedy the perceived weakness of the law in this regard *for this properly belongs to Congress to remedy or correct.* The particular circumstances of a case must, thus, be looked into in order to determine if, indeed, the power to finally discontinue or abandon the work, activity or purpose was validly effected.

Anent the conditions as to when or under what circumstances a work, activity or purpose in the GAA may or shall be finally discontinued or abandoned, again, the law does not clearly spell out these conditions, which is, again, *a weak point of this law*. The parties to this case have failed to identify such conditions and the GAAs themselves, in their other provisions, do not appear to specify these conditions. Nonetheless, the power to finally discontinue or abandon the work, activity or purpose recognized in the definition of "savings" in the GAAs cannot be exercised with unbridled discretion because it would constitute an undue delegation of legislative powers; it would allow the person possessing such power to determine whether the appropriation will be implemented or not. Again, the law enjoys the presumption of constitutionality and it must, therefore, be construed, if possible, in such a way as to avoid a declaration of nullity.

Consequently, considering that the GAA (1) is the implementing legislation of the constitutional provisions on the enactment of the national budget under Article VI, and (2) is governed by Book VI ("National Government Budgeting") of the Administrative Code, there is no obstacle to locating the standards that will

guide the exercise of the power to finally discontinue or abandon the work, activity or purpose in the Constitution and Administrative Code.[12] As previously discussed, the implicit public policy enunciated under the power to augment in Article VI, Section 25(5) of the Constitution is the effective and efficient use of public funds for the promotion of the common good. The same policy is expressly articulated in Book VI, Chapter 5 ("Budget Execution"), Section 3 of the Administrative Code:

> SECTION 3. Declaration of Policy. — It is hereby declared the policy of the State to formulate and implement a National Budget that is an instrument of national development, reflective of national objectives, strategies and plans. The budget shall be supportive of and consistent with the socio-economic development plan and shall be oriented towards the achievement of explicit objectives and expected results, **to ensure that funds are utilized and operations are conducted effectively, economically and efficiently**. The national budget shall be formulated within the context of a regionalized government structure and of the totality of revenues and other receipts, expenditures and borrowings of all levels of government and of government-owned or controlled corporations. The budget shall likewise be prepared within the context of the national long-term plan and of a long-term budget program. (Emphasis supplied)

Prescinding from the above, the power to finally discontinue or abandon the work, activity or purpose, before savings may arise, should, thus, be circumscribed by the standards of effectivity, efficiency and economy in the utilization of public funds. For example, if a work, activity or purpose is found to be tainted with anomalies, the head of office can order the final discontinuance of the work, activity or purpose because public funds are being fraudulently dissipated contrary to the standard of effectivity in the utilization of public funds.

The power of the President to suspend or otherwise stop further expenditure of funds under Book VI, Chapter V, Section 38 of the Administrative Code.

The power to finally discontinue or abandon the work, activity or purpose for which the appropriation is authorized in the GAA should be related to the power of the President to suspend or otherwise stop further expenditure of funds, relative to the appropriations of the Executive Department, under Book VI, Chapter V, Section 38 (hereinafter "Section 38") of the Administrative Code:

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[12] *See Santiago v. Comelec*, 336 Phil. 848, 915 (1997), Puno J., Concurring and Dissenting.

> SECTION 38. Suspension of Expenditure of Appropriations. — Except as otherwise provided in the General Appropriations Act and whenever in his judgment the public interest so requires, the President, upon notice to the head of office[13] concerned, is authorized **to suspend** or **otherwise stop further expenditure** of funds allotted for any agency, or any other expenditure authorized in the General Appropriations Act, except for personal services appropriations used for permanent officials and employees. (Emphasis supplied)

Section 38 contemplates two different situations: (1) to suspend expenditure, and (2) **to otherwise stop further expenditure**.

"Suspend" means "to cause to stop temporarily; to set aside or make temporarily inoperative; to defer to a later time on specified conditions;"[14] "to stop temporarily; to discontinue or to cause to be intermitted or interrupted."[15]

On the other hand, "stop" means "to cause to give up or change a course of action; to keep from carrying out a proposed action";[16] "to bring or come to an end."[17]

While "suspending" also connotes "stopping," the former does not mean that a course of action is to end completely since to suspend is to stop *with an expectation or purpose of resumption*. On the other hand, "stop" when used as a verb means "to bring or come to an end." Thus, "stopping" *brings an activity to its* ***complete*** *termination*.

As a general rule, in construing words and phrases used in a statute and in the absence of a contrary intention, they should be given their plain, ordinary and common usage meaning. They should be understood in their natural, ordinary, commonly-accepted and most obvious signification because words are presumed to have been used by the legislature in their ordinary and common use and acceptation.[18]

That the two phrases are found in the same sentence further bears out the logical conclusion that *they do not refer to the same thing*. Otherwise, one of the

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[13] The term "head of office" here refers to an officer under the Executive Department who functions like a Cabinet Secretary with respect to his or her office. This should not be confused with "heads of office" which, for convenience, I used in this Opinion to refer to the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of the constitutional bodies.

[14] http://www.merriam-webster.com/dictionary/suspend last visited May 16, 2014.

[15] *Samalio v. Court of Appeals*, 494 Phil. 456, 467 (2005).

[16] http://www.merriam-webster.com/dictionary/stop?show=0&t=1400223671 last visited May 16, 2014.

[17] http://www.thefreedictionary.com/stop last visited May 16, 2014.

[18] *Spouses Alcazar v. Arante*, G.R. No. 177042, December 10, 2012, 687 SCRA 507, 518-519.

said phrases would be rendered meaningless and a mere surplusage or redundant. This could not have been the intention of the legislature.[19]

Hence, as used in the first phrase in Section 38, "to suspend" expenditure means to temporarily stop the same with the intention to resume once the reason for the suspension is resolved or the conditions for the resumption are met. On the other hand, "to otherwise stop further expenditure," as used in the second phrase in Section 38, means to stop expenditure *without any intention of resuming*, or simply stated, to terminate it *completely*, *finally*, *permanently* or *definitively*.

Consequently, if the President orders the stoppage of further expenditure of funds, pursuant to the second phrase in Section 38, the work, activity or purpose is **completely**, **finally, permanently** or **definitively** put to an end or terminated because there is no intention to resume and thus, no further work or activity can be done without the needed funds. The **net effect** is that the work, activity or purpose is ***finally discontinued or abandoned***. In other words, through the power to ***permanently*** stop expenditure, pursuant to the second phrase of Section 38, the President is effectively given the power to finally discontinue or abandon a work, activity or purpose under a *broader*[20] standard of "public interest." When the President exercises this power thusly, the first type of "savings" in the GAA, as previously discussed, is necessarily generated.

Moreover, Section 38 states in broad and categorical terms that the power of the President to suspend (*i.e.*, temporary stoppage) or to otherwise stop further expenditure (*i.e.*, permanent stoppage) refers to "funds **allotted** for any agency, or any other expenditure authorized in the General Appropriations Act, x x x."[21] Book VI, Chapter 5, Section 2(2) of the Administrative Code defines "allotment" as follows:

> SECTION 2. Definition of Terms. — When used in this Book:
>
> x x x x
>
> (2) "Allotment" refers to an authorization issued by the Department of Budget to an agency, **which allows it to incur obligations** for specified amounts contained in a legislative appropriation. (Emphasis supplied)

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[19] In addition, the use of the qualifier "otherwise" vis-à-vis the word "stop" in the second phrase, *i.e.*, "to *otherwise* stop further expenditure," provides greater reason to conclude that the second phrase, when read in relation to the first phrase, does not refer to suspension of expenditure.

[20] As compared to the narrower standards of effectivity, efficiency and economy previously discussed.

[21] Emphasis supplied.

When read in relation to the above definition of "allotment," the phrase "funds allotted" in Section 38, therefore, refers to ***both*** unobligated ***and*** obligated allotments for, precisely, an unobligated allotment refers to an authorization to incur obligations issued by the Department of Budget and Management (DBM). The law says "to suspend or otherwise stop further expenditure of funds allotted for any agency" *without qualification*, and *not* ""to suspend or otherwise stop further expenditure of obligated allotments for any agency." The power of the President to suspend or to permanently stop expenditure in Section 38 is, thus, broad enough to cover both unobligated and obligated allotments.

A contrary interpretation will lead to absurdity. This would mean that the President can only permanently stop an expenditure *via* Section 38 if it involves an obligated allotment. But, in a case where anomalies have been uncovered or where the accomplishment of the project has become impossible, and the allotment for the project is partly unobligated and partly obligated (as is the usual practice of releasing the funds in tranches for long-term projects), the logical course of action would be to stop the expenditure relative to both unobligated and obligated allotments in order to protect public interest. Thus, the unobligated allotment may be withdrawn while the obligated allotment may be de-obligated. But, if the President can only permanently stop an expenditure *via* Section 38 if it involves an obligated allotment, then in this scenario, the President would have to first obligate the unobligated allotment (*e.g.*, conduct public biddings) and then order the now obligated allotments to be de-obligated in view of the anomalies that attended the project or the impossibility of its accomplishment. The law could not have intended such an absurdity.

Moreover, there is, again, nothing in Section 38 that requires that the project has already begun before the President may permanently order the stoppage of expenditure. To illustrate, if reliable information reaches the President that anomalies will attend the execution of an item in the GAA or that the project is no longer feasible, then it makes no sense to prevent the President from permanently stopping the expenditure, by withdrawing the unobligated allotments, *precisely* to prevent the commencement of the project. The government need not wait for it to suffer actual injury before it takes action to protect public interest nor should it waste public funds in pursuing a project that has become impossible to accomplish. In both instances, Section 38 empowers the President to withdraw the unobligated allotments and thereby permanently stop expenditure thereon in furtherance of public interest.

To recapitulate, that the project has already been started or the allotted funds has already been obligated is not a pre-condition for the President to be able to order the permanent stoppage of expenditure, through the withdrawal of the unobligated allotment, pursuant to the second phrase of Section 38. Under Section

38, the President ***can*** order the permanent stoppage of expenditure relative to both an unobligated and obligated allotment, if public interest so requires. Once the President orders the **permanent** stoppage of expenditure, the logical and necessary consequence is that the project is **finally** discontinued and abandoned. Hence, savings is generated under the GAA provision on final discontinuance and abandonment of the work, activity or purpose *to the extent of the unused portion or balance of the appropriation*.

I, therefore, do not subscribe to the view that: (1) Section 38 only refers to the suspension of expenditures, (2) Section 38 does not authorize the withdrawal of unobligated allotments, (3) Section 38 only refers to obligated allotments, and (4) Section 38 only refers to a project that has already begun.

Was the withdrawal of the unobligated allotments from slow-moving projects, under Section 5 of NBC 541, equivalent to the final discontinuance or abandonment of these slow-moving projects which gave rise to "savings" under the GAA?

This brings us to the first pivotal issue in this case: was the withdrawal of the unobligated allotments, under Section 5 of National Budget Circular No. 541 (NBC 541), equivalent to the final discontinuance or abandonment of the covered slow-moving projects which gave rise to "savings" under the GAA?

As previously discussed, the GAA is silent as to the manner or prescribed form when a work, activity or purpose is deemed to have been finally discontinued or abandoned for purposes of determining whether "savings" validly arose. Thus, the exercise of such power may be express or implied.

In the case at bar, NBC 541 does not categorically state that the withdrawal of the unobligated allotments from slow-moving projects will result to the final discontinuance or abandonment of the work, activity or purpose. However, because executive actions enjoy presumptive validity, NBC 541 should be interpreted in a way that, if possible, will avoid a declaration of nullity. The Court may reasonably conceive any set of facts which may sustain its validity.[22]

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[22] *Manila Memorial Park, Inc. v. Secretary of Social Welfare and Development*, G.R. No. 175356, December 3, 2013.

Here, I find that the mechanism adopted under NBC 541 may be viewed wholistically in order to *partially* uphold its constitutionality or validity.

The relevant provisions of NBC 541 state:

> 5.4 All released allotments in FY 2011 charged against R.A. No. 10147 which remained unobligated as of June 30, 2012 **shall be immediately considered for withdrawal**. This policy is based on the following considerations:
>
> 5.4.1 The departments/agencies' approved priority programs and projects are assumed to be implementation-ready and doable during the given fiscal year; and
>
> 5.4.2 The practice of having substantial carryover appropriations may imply that the agency has a slower-than-programmed implementation capacity **or** [that the] agency tends to implement projects within a two-year timeframe.
>
> 5.5 Consistent with the President's directive, the DBM shall, based on evaluation of the reports cited above and results of consultations with the departments/agencies, withdraw the unobligated allotments as of June 30, 2012 through issuance of negative Special Allotment Release Orders (SAROs).
>
> x x x x
>
> 5.7 The withdrawn allotments may be:
>
> 5.7.1 Reissued for the **original** programs and projects of the agencies/OUs concerned, from which the allotments were withdrawn;
>
> 5.7.2 Realigned to cover additional funding for **other existing** programs and projects of the agency/OU; or
>
> 5.7.3 Used to augment existing programs and projects of **any agency** and to fund priority programs and projects **not considered** in the 2012 budget but expected to be started or implemented during the current year. (Emphasis in the original)

When NBC 541 states that the released but unobligated allotments of projects as of June 30, 2012 shall be immediately **considered** for withdrawal, this may be reasonably taken to mean that the Executive Department has made an ***initial*** determination that a project is slow-moving. Upon evaluation of the reports and consultation with the concerned departments/agencies by the DBM, as per Section 5.5 of NBC 541 quoted above, the withdrawn unobligated allotments may, among others, thereafter be reissued to the same project as per Section 5.7.1. As a result, when the withdrawn allotments are reissued or ploughed back to the same project, this may be reasonably interpreted to mean that the Executive

Department has made a ***final*** determination that the project is not slow-moving and, thus, should not be discontinued in order to spur economic growth.

Because of the broad language of Section 5.7 of NBC 541, the amount of withdrawn allotments that may be reissued or ploughed back to the same project may be: (1) zero, (2) the same amount as the unobligated allotment previously withdrawn in that project, (3) more than the amount of the unobligated allotment previously withdrawn in that project, and (4) less than the amount of the unobligated allotment previously withdrawn in that project.

In scenario (1), where no withdrawn unobligated allotments are reissued or ploughed back to the project, this may be construed as an implied exercise of the power to finally discontinue or abandon a work, activity or purpose because the withdrawal *had the effect of permanently preventing the completion thereof*. Resultantly, there arose "savings" from the discontinuance or abandonment of these slow-moving projects to the extent of the withdrawn unobligated allotments therefrom. Thus, the withdrawn unobligated allotments from these slow-moving projects, as afore-described, ***may*** be validly treated as "savings" under the pertinent provisions of the GAA.

In scenario (2), where the same amount as the unobligated allotment previously withdrawn from the project is reissued or ploughed back to the same project, no constitutional or statutory breach is apparent because the project is merely continued with its original allotment intact.

In scenario (3), two possible cases may arise. If the withdrawn allotments were merely transferred to another project within the same item or another item within the Executive Department, without exceeding the appropriation set by Congress for that item, then no constitutional or statutory breach occurs because the funds are merely realigned. However, if the withdrawn allotments were transferred to another project within the same item or in another item within the Executive Department, the result of which is to exceed the appropriation set by Congress for that item, then an augmentation effectively occurs. Thus, its validity would depend on whether the augmentation complied with the constitutional and statutory requisites on "savings" and "augmentation," as previously discussed. Here, absent actual proof showing non-compliance with such requisites, it would be premature to make such a declaration.

In scenario (4), a constitutional and statutory breach would be present. If the withdrawn unobligated allotment for a particular project is ***partially*** reissued or ploughed back to the same project, then the project is not actually finally discontinued or abandoned. And if the project is not actually finally discontinued

or abandoned, then no "savings" can validly be generated pursuant to the GAA definition of "savings." However, in scenario (4), the project now suffers from a reduction of its original allotment which, under NBC 541, is treated and used as "savings." This cannot be validly done for it would contravene the definition of "savings" under the GAA and, thus, circumvent the constitutional power of appropriation vested in Congress. As a result, in scenario (4), any use of the portion of the withdrawn unobligated allotment, not reissued or ploughed back to the same project, as "savings" to augment other items in the appropriations of the Executive Department would be unconstitutional and illegal.

Hence, I find that Sections 5.4, 5.5 and 5.7 of NBC 541 are unconstitutional insofar as they (1) allowed the withdrawal of unobligated allotments from slow-moving projects, which were not finally discontinued or abandoned, and (2) authorized the use of such withdrawn unobligated allotments as "savings." In other words, these sections are void insofar as they permit scenario (4) to take place.

It should be noted, however, that whether there were actual instances when scenario (4) occurred involve factual matters not properly litigated in this case. Thus, I reserve judgment on the constitutionality of the actual implementation of NBC 541 should a proper case be filed. The limited finding, for now, is that the wording of Sections 5.4, 5.5 and 5.7 of NBC 541 is partially unconstitutional insofar as it permits: (1) the withdrawal of unobligated allotments from slow-moving projects, which were not finally discontinued or abandoned, and (2) authorizes the use of such withdrawn unobligated allotments as "savings."

Did the President validly order the final discontinuance or abandonment of the subject slow-moving projects pursuant to his power to permanently stop expenditure under Section 38 of the Administrative Code?

When the President ordered the withdrawal of the unobligated allotments of slow-moving projects, under Section 5 of NBC 541, pursuant to his power to permanently stop expenditure under the second phrase of Section 38 of the Administrative Code, he made a categorical determination that the continued expenditure on such slow-moving projects is inimical to public interest.

This brings us to the second pivotal issue in this case: did the President validly order the final discontinuance or abandonment of the subject slow-moving projects pursuant to his power to permanently stop expenditure under Section 38

of the Administrative Code? Or, more to the point, did he comply with the "public interest" standard in Section 38 when he ordered the permanent stoppage of expenditure on the subject slow-moving projects?

I answer in the affirmative.

The challenged act enjoys the presumption of constitutionality. The burden of proof rests on petitioners to show that the permanent stoppage of expenditure on slow-moving projects does not meet the "public interest" standard under Section 38.

Petitioners failed to carry this burden. They did not clearly and convincingly show that the DAP was a mere subterfuge by the government to frustrate the legislative will as expressed in the GAA; or that the finally discontinued slow-moving projects were not actually slow-moving and that the discontinuance thereof was motivated by malice or ill-will; or that no actual and legitimate public interest was served by the DAP; or some other proof clearly showing that the requisites for the exercise of the power to stop expenditure in Section 38 were not complied with or the exercise of the power under Section 38 was done with grave abuse of discretion.

It is **undisputed** that, at the time the DAP was put in place, our nation was facing serious economic woes due to considerable government under spending. The President, thus, sought to speed up government spending through the DAP by, among others, permanently discontinuing slow-moving projects and transferring the savings generated therefrom to fast-moving, high impact priority projects. It is, again, **undisputed** that the DAP achieved its purpose and significantly contributed to economic growth. Thus, on its face, and absent clear and convincing proof that the DAP did not serve public interest or was pursued with grave abuse of discretion, the Court must sustain the validity of the President's actions.

It should also be noted that, as manifested by the Solicitor General and not disputed by petitioners, the DAP *has been discontinued* in the last quarter of 2013,[23] after the causes of the low level of spending or under spending of the government, specifically, the systemic problems in the implementation of projects by the concerned government agencies were presumably addressed. It, thus, appears that the DAP was instituted to meet an economic exigency which, after being fully addressed, resulted in the discontinuance thereof. This is significant

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[23] Memorandum for the Solicitor General, p. 30.

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

This is not to say, however, that the alleged abuse or misuse of the DAP funds should be condoned by the Court. If indeed such anomalies attended the implementation of the DAP, then the proper recourse is to prosecute the offenders ***with the full force of the law***. However, the present case involves only the constitutional and statutory validity of the DAP, specifically, NBC 541 which was partly used to generate the savings utilized under the DAP. Insofar as this limited issue is concerned, the Court must stay within the clear meaning and import of Section 38 which allows the President to permanently stop expenditures, when public interest so requires.

Concededly, the "public interest" standard is broad enough to include cases when anomalies have been uncovered in the implementation of a project or when the accomplishment of a project has become impossible. However, there may be other cases, not now foreseeable, which may fall within the ambit of this standard, as is the case here where the exigencies of spurring economic growth prompted the Executive Department to finally discontinue slow-moving projects. Verily, in all instances that the power to suspend or to permanently stop expenditure under Section 38 is exercised by the President, ***the "public interest" standard must be met and, any challenge thereto, will have to be decided on a case-to-case basis***, as was done here**.** As previously noted, petitioners have failed to prove that the final discontinuance of slow-moving projects and the transfer of savings generated therefrom to high-impact, fast-moving projects in order to spur economic growth did not serve public interest or was done with grave abuse of discretion. On the contrary, it is not disputed that the DAP significantly contributed to economic growth and achieved its purpose during the limited time it was put in place.

Hence, I find that the President validly exercised his power to permanently stop expenditure under Section 38 in relation to NBC 541, absent sufficient proof to the contrary.

The power to permanently stop further expenditure under Section 38 and,

hence, finally discontinue or abandon a work, activity or purpose vis-à-vis the two-year availability for release of appropriations under the GAA.

I do not subscribe to the view that the provisions[24] in the GAAs giving the appropriations on Maintenance and Other Operating Expenses (MOOE) and Capital Outlays (CO) a life-span of two years prohibit the President from withdrawing the unobligated allotments covering such items.

The availability for release of the appropriations for the MOOE and CO for a period of two years simply means that the work or activity *may be pursued* within the aforesaid period. It does not follow that the aforesaid provision prevents the President from finally discontinuing or abandoning such work, activity or purpose, through the exercise of the power to permanently stop further expenditure, if public interest so requires, under the second phrase of Section 38 of the Administrative Code.

It should be emphasized that Section 38 requires that the power of the President to suspend or to permanently stop expenditure must be *expressly* abrogated by a *specific provision* in the GAA in order to prevent the President from stopping a specific expenditure:

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

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[24] Section 65 (General Provisions), 2011 GAA:

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

Section 65 (General Provisions), 2012 GAA:

> Section 65. Availability of Appropriations. Appropriations for MOOE and capital outlays authorized in this Act shall be available for release and obligation for the purpose specified, and under the same special provisions applicable thereto, for a period extending to one fiscal year after the end of the year in which such items were appropriated: PROVIDED, That a report on these releases and obligations shall be submitted to the Senate Committee on Finance and the House Committee on Appropriations, either in printed form or by way of electronic document.

This is the clear import and meaning of the phrase "except as otherwise provided in the General Appropriations Act." Plainly, there is nothing in the afore-quoted GAA provision on the availability for release of the appropriations for the MOOE and CO for a period of two years which expressly provides that the President cannot exercise the power to suspend or to permanently stop expenditure under Section 38 relative to such items.

That the funds should be made available for two years does not mean that the expenditure cannot be permanently stopped prior to the lapse of this period, if public interest so requires. For if this was the intention, the legislature should have so stated in more clear and categorical terms given the *proviso* (*i.e.*, "except as otherwise provided in the General Appropriations Act") in Section 38 which requires that the power to suspend or to permanently stop expenditure must be expressly abrogated by a provision in the GAA. In other words, we *cannot* imply from the wording of the GAA provision, on the availability for release of appropriations for the MOOE and CO for a period of two years, that the power of the President under Section 38 to suspend or to permanently stop expenditure is specifically withheld. A more express and clear provision must so provide. The legislature must be presumed to know the wording of the *proviso* in Section 38 which requires an express abrogation of such power.

It should also be noted that the power to suspend or to permanently stop expenditure under Section 38 is *not* qualified by any timeframe for good reason. Fraud or other exceptional circumstances or exigencies are no respecters of time; they can happen in the early period of the implementation of the GAA which may justify the exercise of the President's power to suspend or to permanently stop expenditure under Section 38. As a result, such power can be exercised *at any time* even a few days, weeks or months from the enactment of the GAA, when public interest so requires. Otherwise, this means that the release of the funds and the implementation of the MOOE and CO must continue until the lapse of the two-year period even if, for example, prior thereto, grave anomalies have already been uncovered relative to the execution of these items or their execution have become impossible.

An illustration may better highlight the point. Suppose Congress appropriates funds to build a bridge between island A and island B in the Philippine archipelago. A few days before the start of the project, when no portion of the allotment has yet to be obligated, the water level rises due to global warming. As a result, islands A and B are completely submerged. If the two-year period is not qualified by Section 38, then the President cannot order the permanent stoppage of the expenditure, through the withdrawal of the unobligated allotment relative to this project, until after the lapse of the two-year period. Rather, the President must continue to make available and authorize the release of

the funds for this project despite the impossibility of its accomplishment. Again, the law could not have intended such an absurdity.

In sum, the GAA provision on the availability for release and obligation of the appropriations relative to the MOOE and CO for a period of two years is not a ground to declare the DAP invalid because the power of the President to permanently stop expenditure under Section 38 is not expressly abrogated by this provision. Hence, the President's order to withdraw the unobligated allotments of slow-moving projects, pursuant to NBC 541 in conjunction with Section 38, did not violate the aforesaid GAA provision considering that, as previously discussed, the power to permanently stop expenditure was validly exercised in furtherance of public interest, absent sufficient proof to the contrary.

The power to permanently stop expenditure under Section 38 and the prohibition on impoundment under Sections 64 and 65 of the GAA

To my mind, the crucial issue in this case is the relationship between the power to permanently stop expenditure under the second phrase of Section 38 of the Administrative Code vis-à-vis the prohibition on impoundment under Sections 64 (hereinafter "Section 64") and 65 of the 2012 GAA.

For convenience, I reproduce Section 38 below:

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

While Sections 64 and 65 of the 2012 GAA provide:

> Section 64. Prohibition Against Impoundment of Appropriations. **No appropriations authorized under this Act shall be impounded through retention or deduction** unless in accordance with the rules and regulations to be issued by the DBM: PROVIDED, That all the funds appropriated for the purposes, programs, projects, and activities authorized under this Act, except those covered under the Unprogrammed Fund, shall be released pursuant to Section 33(3), Chapter 5, Book VI of E.O. No. 292.

> Section 65. Unmanageable National Budget Deficit. Retention or deduction of appropriations authorized in this Act shall be effected only in cases where there is an unmanageable National Government budget deficit. x x x (Emphasis supplied)

In American legal literature, impoundment has been defined "as action, or inaction, by the President or other offices of U.S. Government, that precludes the obligation or expenditure of budget authority by Congress."[25] In *Philippine Constitution Association v. Enriquez*,[26] we had occasion to expound on this subject:

> This is the first case before this Court where the power of the President to impound is put in issue. Impoundment refers to a refusal by the President, for whatever reason, to spend funds made available by Congress. It is the failure to spend or obligate budget authority of any type (Notes: *Impoundment of Funds*, 86 Harvard Law Review 1505 [1973]).
>
> Those who deny to the President the power to impound argue that once Congress has set aside the fund for a specific purpose in an appropriations act, it becomes mandatory on the part of the President to implement the project and to spend the money appropriated therefor. The President has no discretion on the matter, for the Constitution imposes on him the duty to faithfully execute the laws.
>
> In refusing or deferring the implementation of an appropriation item, the President in effect exercises a veto power that is not expressly granted by the Constitution. As a matter of fact, the Constitution does not say anything about impounding. The source of the Executive authority must be found elsewhere.
>
> Proponents of impoundment have invoked at least three principal sources of the authority of the President. Foremost is the authority to impound given to him either expressly or impliedly by Congress. Second is the executive power drawn from the President's role as Commander-in-Chief. Third is the Faithful Execution Clause which ironically is the same [provision] invoked by petitioners herein.
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> The proponents insist that a faithful execution of the laws requires that the President desist from implementing the law if doing so would prejudice public interest. An example given is when through efficient and prudent management of a project, substantial savings are made. In such a case, it is sheer folly to expect the President to spend the entire amount budgeted in the law (Notes: Presidential Impoundment Constitutional Theories and Political Realities, 61 Georgetown Law Journal 1295 [1973]; Notes Protecting the Fisc: Executive Impoundment and Congressional Power, 82 Yale Law Journal 1686 [1973]).

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25 *Black's Law Dictionary*, 6th Edition (1990), p. 756.
26 G.R. No. 113105, August 19, 1994, 235 SCRA 506.

> We do not find anything in the language used in the challenged Special Provision that would imply that Congress intended to deny to the President the right to defer or reduce the spending, much less to deactivate 11,000 CAFGU members all at once in 1994. But even if such is the intention, the appropriation law is not the proper vehicle for such purpose. Such intention must be embodied and manifested in another law considering that it abrades the powers of the Commander-in-Chief and there are existing laws on the creation of the CAFGU's to be amended. Again we state: a provision in an appropriations act cannot be used to repeal or amend other laws, in this case, P.D. No. 1597 and R.A. No. 6758.[27]

The problem may be propounded in this manner.

As earlier noted, under Section 38, the President's power to permanently stop expenditure, if public interest so requires, is qualified by the phrase "[e]xcept as otherwise provided in the General Appropriations Act." Thus, if the GAA expressly provides that the power to permanently stop expenditure under Section 38 is withheld, the President is prohibited from exercising such power. The question then arises as to whether Section 64 falls within the ambit of the phrase "[e]xcept as otherwise provided in the General Appropriations Act."

The question is novel and not an easy one.

Section 64 indirectly defines "impoundment" as retention or deduction of appropriations. "Impoundment" in the GAA may, thus, be defined as the refusal or failure to wholly (*i.e.*, retention of appropriations) or partially (*i.e.*, deduction of appropriations) spend funds appropriated by Congress. But note the all-encompassing tenor of Section 64 referring as it does to the prohibition on impoundment of *all* appropriations under the GAA, specifically, the appropriations to the three great branches of government and the constitutional bodies.

It may be observed that the term "impoundment" is broad enough to include the power of the President to permanently stop expenditure, relative to the appropriations of the Executive Department, if public interest so requires, under Section 38. The reason is that the permanent stoppage of expenditure under Section 38 effectively results in the retention or deduction of appropriations, as the case may be. Thus, a broad construction of the prohibition on impoundment will lead to the conclusion that Section 64 has rendered Section 38 wholly inoperative. If that be the case, there arises the more difficult question of whether the President has an inherent power of impoundment and whether he can be deprived of such

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[27] Id. at 545-546.

power by statutory command. In *Philippine Constitution Association*, as afore-quoted, although the issue of impoundment was not decisive therein, the Court had occasion to outline the opposing views on this subject.

After much reflection, it is my considered view that, for the moment, as our laws are so worded, there is no imperative need to settle the question on whether the President has an inherent power of impoundment and whether he can be deprived of such power by statutory fiat for the following reasons:

First, it is a settled rule of statutory construction that implied repeals are not favored. Note that Section 64, in prohibiting impoundment of appropriations, made reference to Section 33(3) of the Administrative Code in its final sentence. The legislature must be presumed to have been aware of Section 38 in the Administrative Code so much so that if the prohibition on impoundment in Section 64 was intended to render Section 38 wholly inoperative, then the law should have so stated in clearer terms. But it did not.

Second, because implied repeals are not favored, courts shall endeavor to harmonize two apparently conflicting laws, if possible, so as not to render one wholly inoperative.

In the case at bar, Sections 64 and 38 can be harmonized for two reasons.

First, the scope of Section 64 and Section 38 substantially differs. Section 64 covers all appropriations relative to the three great branches of government and the constitutional bodies while Section 38 refers only to the appropriations of the Executive Department. In other words, Section 64 is broader in scope while Section 38 has limited applicability. As a consequence, under Section 64, the President cannot impound the appropriations of the whole government bureaucracy and must authorize the release of all allotments therefor unless there is an unmanageable national government budget deficit as per Section 65. Once all allotments have been released, however, there arises the power of the President under Section 38 to suspend or to permanently stop expenditure, if public interest so requires, relative to the appropriations in the GAA of the Executive Department.

And second, as afore-quoted, "impoundment" is defined in *Philippine Constitution Association* as the "refusal by the President, **for whatever reason**, to spend funds made available by Congress."[28] We must reasonably presume that the

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[28] Emphasis supplied.

legislature was aware of, and intended this meaning when it used such term in Section 64. In contrast, Section 38 provides a clear standard for the exercise of the power of the President to permanently stop expenditure to be valid, that is, when public interest so requires. It, thus, precludes the President from exercising such power arbitrarily, capriciously and whimsically, or with grave abuse of discretion. Hence, Section 38 may be read as an exception to Section 64.

The practical effects or results of the above construction may be re-stated and summarized as follows:

1. The President is prohibited from impounding appropriations, through retention or deduction, pursuant to Section 64 unless there is an unmanageable national government budget deficit as defined in Section 65. Consequently, the President must authorize the release orders of allotments of all appropriations in the GAA relative to the three great branches of government and the constitutional bodies.[29]

2. However, once the allotments have been released, the President possesses the power to suspend or to permanently stop expenditure, relative to the appropriations of the Executive Department, if public interest so requires, pursuant to Section 38 of the Administrative Code.

3. The power to suspend or to permanently stop expenditure, under Section 38, must comply with the public interest standard, that is, there must be a sufficiently compelling public interest that would justify such suspension or permanent stoppage of expenditure.

4. Because the President's determination of the existence of public interest justifying such suspension or permanent stoppage of expenditure enjoys the presumption of constitutionality, the burden of proof is on the challenger to show that the public interest standard has not been met. If brought before the courts, compliance with the public interest standard will, thus, have to be decided on a case-to-case basis.

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[29] This interpretation of Section 64, involving the mandatory release of all allotments relative to the appropriations of the other branches of government and constitutional bodies, is in consonance with the constitutional principles on separation of powers and fiscal autonomy. Interestingly, these principles are expressly recognized in the 2011 GAA but do not appear in the 2012 and 2013 GAAs. Section 69 of the 2011 GAA provides:
Sec. 69. Automatic and Regular Release of Appropriations. Notwithstanding any provision of law to the contrary, the appropriations authorized in this Act for the Congress of the Philippines, the Judiciary, the Civil Service Commission, the Commission on Audit, the Commission on Elections, the Office of the Ombudsman and the Commission on Human Rights shall be automatically and regularly released.

As a necessary consequence of the above, the power to permanently stop expenditure under Section 38 is not rendered inoperative by Section 64. Hence, the actions taken by the President, pursuant to Section 38 in relation to NBC 541, as previously discussed, are valid notwithstanding the prohibition on impoundment under Section 64.

Section 38, insofar as it allows the President to permanently stop expenditures, is a valid legislative grant of the power of impoundment to the President.

As previously noted, Section 38, insofar as it allows the President to permanently stop expenditures, may be treated as an effective grant of the power of impoundment by the legislature because the permanent stoppage of expenditure effectively results in the retention or deduction of appropriations, as the case may be. However, its nature and scope is limited in that: (1) it only covers the appropriations of the Executive Department, and (2) it is circumscribed by the "public interest" standard, thus, precluding an unbridled exercise of such power.

Assuming *arguendo* that the President has no inherent or implied power of impoundment under the Constitution, Section 38 is valid and constitutional because it constitutes an ***express legislative grant*** of the power of impoundment. Indeed, in *Kendall v. United States*,[30] the U.S. Supreme Court categorically ruled that the President cannot countermand the act of Congress directing the payment of claims owed to a private corporation. In so ruling, it found that the President has no inherent or implied power to forbid the execution of laws. However, *Kendall* did ***not*** involve a statutory grant of the power of impoundment. It is important to note that while there is no inherent or implied power of impoundment granted to the President in American constitutional law, *there exist express* ***legislative*** *grants of such power in the aforesaid jurisdiction.*

A helpful overview of the meaning of impoundment and its history in U.S. jurisdiction is quoted below:

> **Impoundment**
>
> *An action taken by the president in which he or she proposes not to spend all or part of a sum of money appropriated by Congress.*

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[30] 37 U.S. 524 (1838).

> The current rules and procedures for impoundment were created by the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C.A. § 601 et seq.), which was passed to reform the congressional budget process and to resolve conflicts between Congress and President RICHARD M. NIXON concerning the power of the Executive Branch to impound funds appropriated by Congress. Past presidents, beginning with Thomas Jefferson, had impounded funds at various times for various reasons, without instigating any significant conflict between the executive and the legislative branches. At times, such as when the original purpose for the money no longer existed or when money could be saved through more efficient operations, Congress simply acquiesced to the president's wishes. At other times, Congress or the designated recipient of the impounded funds challenged the president's action, and the parties negotiated until a political settlement was reached.
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> **Changes During the Nixon Administration**
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> The history of accepting or resolving impoundments broke down during the Nixon administration for several reasons. First, President Nixon impounded much greater sums than had previous presidents, proposing to hold back between 17 and 20 percent of controllable expenditures between 1969 and 1972. Second, Nixon used impoundments to try to fight policy initiatives that he disagreed with, attempting to terminate entire programs by impounding their appropriations. Third, Nixon claimed that as president, he had the constitutional right to impound funds appropriated by Congress, thus threatening Congress's greatest political strength: its power over the purse. Nixon claimed, "The Constitutional right of the President of the United States to impound funds, and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear."
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> In the face of Nixon's claim to impoundment authority and his refusal to release appropriated funds, **Congress in 1974 passed the Congressional Budget and Impoundment Control Act, which reformed the congressional budget process and established rules and procedures for presidential impoundment**. In general, the provisions of the act were designed to curtail the power of the president in the budget process, which had been steadily growing throughout the twentieth century.[31] (Emphasis supplied)

The conditions and procedure through which the President may impound appropriations under the Impoundment Control Act in U.S. jurisdiction are described as follows:

> § 44 Impoundment Control Act
>
> Congress enacted the Congressional Budget and Impoundment

[31] http://legal-dictionary.thefreedictionary.com/impoundment last visited on June 5, 2014.

> Control Act of 1974. Under the Act, whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided, or that such budget authority should be rescinded for fiscal policy or other reasons, or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President is required to send a special message to both houses of Congress, and any amount of budget authority proposed to be rescinded or that is to be reserved will be made available for obligation unless, within 45 days, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved. Funds made available for obligation under such procedure may not be proposed for rescission again. The contents of the special message are set forth in the statute.
>
> The Impoundment Control Act of 1974 further provides that the President, the Director of the Office or Management and Budget, the head of any department or agency of the Government, or any officer or employee of the United States may propose a deferral of any budget authority provided for a specific purpose or project by transmitting a special message to Congress. Deferrals are permissible only to: (1) provide for contingencies; (2) achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law. Moreover, the provisions on deferrals are inapplicable to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message.
>
> If fund budget authority that is required to be made available for obligation is not made available, the Comptroller General is authorized to bring a civil action to require such budget authority to be made available for obligation. However, no such action may be brought until the expiration of 25 days of continuous session of Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the contemplated action has been filed with Congress.[32]

As can be seen, it is well within the powers of Congress to grant to the President the power of impoundment. The reason for this is not difficult to discern. If Congress possesses the power of appropriation, then it can set the conditions under which the President may alter or modify these appropriations subject to guidelines or limitations that Congress itself deems necessary and expedient. Admittedly, the legislative grant of the power of impoundment in U.S. jurisdiction is more sophisticated and contains strict guidelines in order to prevent the President from abusing such power. However, the point remains that Congress ***may*** grant the President the power of impoundment.

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[32] 63C Am Jur 2d Public Funds § 44.

For these reasons, I find that Section 38 ***is*** an express legislative grant of such power. ***And the Court cannot deny the President of that power***. *Whether this legislative grant of the power of impoundment under Section 38 is, however, wise or prudent is an altogether different matter.* The remedy lies with Congress to repeal or amend Section 38 in order to set more stringent safeguards and guidelines. I will return to this important point later.

But, as it now stands, Section 38 is a valid grant of such power because, as already discussed, it complies with the sufficiency of standard test. For we have long ruled that "public interest" is a sufficient standard, when read in relation to the goals on effectivity, efficiency and economy in the execution of the budget under the Administrative Code, thus, precluding a finding of undue delegation of legislative powers.[33] Further, as previously and extensively discussed, Section 38 can be harmonized with Section 64 in that Section 38 is an exception to the general prohibition on the power of the President to impound appropriations under Section 64. Consequently, even if we concede that the President has no inherent or implied power of impoundment under the Constitution, he possesses that power by virtue of Section 38 which is an express legislative grant of the power of impoundment.

The power to finally discontinue or abandon a work, activity or purpose in the GAA vis-à-vis Section 38

At this juncture, I find it necessary to further discuss the power to finally discontinue or abandon a work, activity or purpose in the GAA in relation to Section 38. Recall that the GAA definition of "savings" partly provides—

> [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrances which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; x x x

However, the GAA does not expressly state under what conditions or standards the power to finally discontinue or abandon a work, activity or purpose may be validly exercised. As I previously observed, because of the silence of the GAA on this point, the standards may be found elsewhere such as the Constitution and Administrative Code which expressly set the standards of effectivity, efficiency and economy in the execution of the national budget. Additionally, I agree with Justice Leonen that the "irregular, unnecessary, excessive, extravagant or

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[33] *See People v. Rosenthal*, 68 Phil. 328 (1939).

unconscionable" standards under the Constitution[34] and pertinent laws may be resorted to in delimiting this power to finally discontinue or abandon a work, activity or purpose authorized under the GAA.

It should be noted, however, that the power to finally discontinue or abandon a work, activity or purpose implicitly granted and recognized under the GAA's definition of "savings" is ***independent*** and ***separate*** from the power of the President to permanently stop expenditures under Section 38 of the Administrative Code. As I previously noted, the power to finally discontinue or abandon a work, activity or purpose under the GAA may be exercised by all heads of offices, and not the President alone.

Why is this significant?

Because even if we were to concede that the President could not have validly ordered the permanent stoppage of expenditure on slow-moving projects under Section 38 in relation to NBC 541, he would still possess this power under his power to finally discontinue or abandon a work, activity or purpose under the GAA. The lack of specific standards in the GAA and the resort to the broad standards of "effectivity, efficiency and economy" as well as the "irregular, unnecessary, excessive, extravagant or unconscionable" standards, as aforementioned, in the Constitution and pertinent laws permit this result. In particular, the ineffective and inefficient use of funds on slow-moving projects would easily satisfy the aforementioned standards. From this perspective, the GAA itself has provided for a limited grant of the power of impoundment through the power to finally discontinue or abandon the work, activity or purpose.

The above, again, demonstrates the weaknesses of our current laws in ***lacking*** proper procedures and safeguards in the exercise of the power to finally discontinue or abandon a work, activity or purpose implicitly granted and recognized in the GAA, thus, opening the doors to the abuse and misuse of such power.

The enormous powers of the President to: (a) permanently stop expenditures

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[34] Article IX-D, Section 2(2) of the Constitution provides:

> The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties.

under Section 38 and (b) to finally discontinue or abandon a work, activity or purpose under the GAA definition of "savings."

The ramifications of the positions taken thus far in this case are wide-ranging because they incalculably affect the powers and prerogatives of the presidency. The net effect of the views expressed in this case is to ***effectively deny*** to the President (1) the power to permanently stop expenditure, when public interest so requires, under Section 38, and (2) the power to finally discontinue or abandon a work, activity or purpose implicitly granted and recognized in the GAA. I have taken the contrary position.

With these powers, in the hands of an able and just President, much good can be accomplished. But, in the hands of a weak or corrupt President, much damage can be wrought. Truly, we are adjudicating here, to a large extent, the very capability of the President, as chief implementer of the national budget, to effectively chart our nation's destiny.

The underlying rationale of the view I take in this case is not an original one. I fall back on an age-old axiom of constitutional law: a law cannot be declared invalid nor can a constitutional provision be rendered inoperative because of the possibility or fear of its abuse. We do not possess that power. For us to rule based on the possibility or fear of abuse will result in judicial tyranny because virtually all constitutional and statutory provisions conferring powers upon agents of the State can be abused. In the timeless words of Justice Laurel, "[t]he possibility of abuse is not an argument against the concession of the power as there is no power that is not susceptible of abuse."[35]

The remedy is and has always been constant unwavering vigilance. The remedy is and has always been to prosecute instances when the power has been abused ***with the full force of the law***. The remedy is and has always been ***to put in place sufficient safeguards***, through remedial legislation and the proper exercise of the legislative oversight powers, to prevent the abuse and misuse of these powers while giving the holder of the power sufficient flexibility in pursuing the common good.

The task does not belong to the courts alone. It resides in the criminal justice system. It resides in Congress and the other governmental bodies (like the

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[35] *Angara v. Electoral Commission*, 63 Phil. 139, 177 (1936).

Commission on Audit) under our system of checks and balances. ***And, ultimately, it resides in the moral strength, courage and resolve of our people and nation***. That alone can stop abuse of power. Not deprivation or curtailment of powers, out of fear or passion in these turbulent times in the life of our nation, that the laws specifically grant to the President and which serve a legitimate and vital State interest; powers that are an essential and integral component of the design of our government in order for it to respond to various exigencies in the pursuit of the common good.

It is noteworthy that there have been legislative efforts to redefine "savings" in the GAA. The view has been expressed that the prevailing definition of "savings" in the GAA is highly susceptible to abuse.[36] In this regard, information is the key, information on, among others, how funds are spent, how savings are generated, what projects are suspended or permanently stopped, what projects are benefitted by augmentations, the extent of such augmentations, and, most of all, the valid justifications for such actions on the part of the government. The remedy lies largely with the legislature, through its oversight functions and through remedial legislation, in making the details of, and the justifications for all governmental actions and transactions more transparent and accessible to the people. ***In fine, information is the light that will scatter the darkness where abuse of power interminably lurks and thrives.*** Further, as previously noted, there is an urgent necessity to set the proper procedures and safeguards in the exercise of the power to finally discontinue or abandon a work, activity or purpose implicitly granted and recognized under the GAA's definition of "savings."

Anent Section 38, the model followed in U.S. jurisdiction provides meaningful and useful guidance on how the vast power to impound allotted funds granted to the President under Section 38 can be adequately limited while giving him the flexibility to pursue the common good. We would do well to study and learn from their experience. Indubitably, ***there is an imperative need to provide greater or stricter safeguards and guidelines on how or under what conditions or limitations the vast power granted to the President under Section 38 is to be exercised***. The remedy, again, lies with the legislature in achieving the delicate balance of preventing the abuse and misuse of the power under Section 38 while allowing the President to pursue the common good.

The question of whether the power has been abused is entirely separate and distinct from the question as to whether the power exists. An affirmative answer to

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[36] *See*, for instance, House Bill No. 4992 (AN ACT DEFINING THE TERM "SAVINGS" AS USED IN THE NATIONAL BUDGET AND PROVIDING GUIDELINES FOR ITS USE AND EXPENDITURE, AND FOR OTHER PURPOSES) introduced by Representative Lorenzo R. Tañada III [http://www.erintanada.com/component/content/article/19-budget-reform/240-budget-sacings-act.html last visited May 22, 2014]

the first gives rise to administrative, civil and/or criminal liabilities. To the second, we need only look at our Constitution and laws for the answer. Here, as already stated, the power is clearly and unequivocally conferred on the President who must exercise it, not with an unbridled discretion, but as circumscribed by the standard of public interest.

In the case at bar, it is not disputed that the power was exercised to serve or pursue an important and legitimate State interest *albeit* temporary in nature, *i.e.*, the urgent necessity to spur economic growth for the promotion of the general welfare. That it achieved this purpose is also not in dispute. And while there have been claims that part of the DAP funds were fraudulently misused or abused, such claims, if true, necessitate that the government prosecutes the offenders with the full force of the law. But, certainly, they preclude the Court from depriving the President of the power to permanently stop expenditures, when public interest so requires, until and unless Section 38 is amended or repealed.

Our solemn duty is to defend and uphold the Constitution. We cannot arrogate unto ourselves the power to repeal or amend Section 38 for this properly belongs to the legislature. We must stay the course of constitutional supremacy. That is our sacred trust.

On the use of unreleased appropriations under the DAP

NBC 541, which was the source of savings under the DAP, categorically refers to unobligated *allotments* of programmed appropriations as the sources of the savings generated therefrom:

> 3.0 **Coverage**
>
> 3.1 These guidelines shall cover the withdrawal of <u>unobligated allotments</u> as of June 30, 2012 of all national government agencies (NGAs) charged against FY 2011 Continuing Appropriation (R.A. No. 10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to:
>
> 3.1.1 Capital Outlays (CO);
>
> 3.1.2 Maintenance and Other Operating Expenses (MOOE) related to the implementation of programs and projects, as well as capitalized MOOE; and
>
> 3.1.3 Personal Services corresponding to unutilized pension benefits declared as savings by the agencies concerned based on their updated/validated list of pensioners.

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

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

Further, to reiterate, the withdrawal of unobligated allotments in the present case should not be taken in isolation of the reason for its withdrawal. The withdrawal was brought about by the determination of the President that the continued implementation of slow-moving projects, under NBC 541, is inimical to public interest because it significantly dampened economic growth. It is, therefore, inaccurate to state that the subject unobligated allotments were indiscriminately declared as savings considering that there was a legitimate State interest involved in ordering their withdrawal and the burden of proof was on petitioners to show that such State interest failed to comply with the "public interest" standard in Section 38. Again, petitioners failed to carry this *onus*. With the permanent stoppage of expenditure on these slowing projects and, hence, their final discontinuance or abandonment, savings were generated pursuant to the definition of "savings" in the GAA.

On the augmentation of project, activity or program (PAP) not covered by any appropriations in the pertinent GAAs

Preliminarily, the view has been expressed that the DAP was used to authorize the augmentations of items in the GAA many times over their original appropriations. While the magnitude of these supposed augmentations are, indeed, considerable, it must be recalled that Article VI, Section 25(5) of the Constitution purposely did not set a limit, in terms of percentage, on the power to augment of the heads of offices:

> MR. SARMIENTO. I have one last question. Section 25, paragraph (5) authorizes the Chief Justice of the Supreme Court, the Speaker of the House of

> Representatives, the President, the President of the Senate to augment any item in the General Appropriations Law. Do we have a limit in terms of percentage as to how much they should augment any item in the General Appropriations Law?
>
> MR. AZCUNA. The limit is not in percentage but "from savings." So it is only to the extent of their savings.[37]

Consequently, even if Congress appropriated only one peso for a particular PAP in the appropriations of the Executive Department, and the Executive Department, thereafter, generated savings in the amount of ₱1B, it is, theoretically, possible to augment the aforesaid one peso PAP appropriation with ₱1B. The intent to give considerable leeway to the heads of offices in the exercise of their power to augment allows this result.

Verily, the sheer magnitude of the augmentation, *without more,* is not a ground to declare it unconstitutional. For it is possible that the huge augmentations were legitimately necessitated by the prevailing conditions at the time of the budget execution. On the other hand, it is also possible that the aforesaid augmentations may have breached constitutional limitations. But, in order to establish this, the burden of proof is on the challenger to show that the huge augmentations were done with grave abuse of discretion, such as where it was merely a veiled attempt to defeat the legislative will as expressed in the GAA, or where there was no real or actual deficiency in the original appropriation, or where the augmentation was motivated by malice, ill will or to obtain illicit political concessions. Here, none of the petitioners have proved grave abuse of discretion nor have the beneficiaries of these augmentations been properly impleaded in order for the Court to determine the justifications for these augmentations, and thereafter, rule on the presence or absence of grave abuse of discretion.

The Court cannot speculate or surmise, by the sheer magnitude of the augmentations, that a constitutional breach occurred. Clear and convincing proof must be presented to nullify the challenged executive actions because they are presumptively valid. Concededly, it is difficult to mount such a challenge based on grave abuse of discretion, but it is not impossible. It will depend primarily on the particular circumstances of a case, hence, as previously noted, the necessity of remedial legislation making access to information readily available to the people relative to the justifications on the exercise of the power to augment.

Further, assuming that the power to augment has become prone to abuse, because it is limited only by the extent of actual savings, then the remedy is a constitutional amendment; or remedial legislation subjecting the power to

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[37] II RECORD, CONSTITUTIONAL COMMISSION 111 (July 22, 1986).

augment to strict conditions or guidelines as well as strict real time monitoring. Yet, it cannot be discounted that limiting the power to augment, based on, say, a set percentage, would unduly restrict the effectivity of this fiscal management tool. As can be seen, these issues go into the wisdom of the subject constitutional provision which is not proper for judicial review. As it stands, the substantial augmentations in this case, without more, cannot be declared unconstitutional absent a clear showing of grave abuse of discretion for the necessity of such augmentations are presumed to have been legitimate and *bona fide*.

In the main, with respect to the PAPs which were allegedly not covered by any appropriation under the pertinent GAA, I find that such finding is premature on due process grounds. In particular, it appears that the Solicitor General was not given an opportunity to be heard relative to the alleged lack of appropriation cover of the DOST's DREAM project and the augmentation to the DOST-PCIEETRD because these were culled from the entries in the evidence packets submitted by the Solicitor General to the Court *in the course of the oral arguments of this case*. I find that the proper procedure is to contest the entries in the evidence packets in a proper case filed for that purpose where the government is given an opportunity to be heard.

Also, with respect to the augmentations relative to the DOST-PCIEETRD, aside from prematurity on due process grounds as afore-discussed, I note that the GAA purposely describes items, in certain instances, in general or broad language. Thus, a new activity may be subsumed in an item, like "Research and Management Services," for as long as it is reasonably connected to such item. Again, whether this was the case here is something that should be litigated, if the parties are so minded, in a proper case, in order to give the DOST an opportunity to be heard.

On cross-border transfer of savings

The Solicitor General admits[38] that the President made available to the Commission on Audit (COA), House of Representatives and Commission on Elections (Comelec) a portion of the savings of the Executive Department in order to address certain exigencies, to wit:

1. The COA requested for funds to implement an infrastructure program and to strengthen its regulatory capabilities;

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[38] Memorandum for the Solicitor General, p. 35.

2. The House of Representatives requested for funds to complete the construction of its e-library in order to prevent the deterioration of the work already done on the aforesaid project; and

3. The Comelec requested for funds to augment its budget for the purchase of the Precinct Count Optical Scan (PCOS) machines for the May 2013 elections to avert a return to the manual counting system.

The Solicitor General presents an interesting argument to justify these cross-border transfers. He claims that the power to augment, under Article VI, Section 25(5) of the Constitution, merely prohibits *unilateral* inter-departmental transfer of savings. In the above cases, the other department or constitutional commission requested for the funds, thus, they are not covered by this constitutional prohibition. Moreover, once the funds were given, the President had no say as to how the funds were going to be used.

The theory is novel but untenable.

Article VI, Section 25(5) clearly prohibits cross-border transfer of savings regardless of whether the recipient office requested for the funds. For if we uphold the Solicitor General's theory, nothing will prevent the other heads of offices from subsequently flooding the Executive Department with requests for additional funds. This would spawn the evil that the subject constitutional provision precisely seeks to prevent because it would make the other offices beholden to the Executive Department in view of the funds they received. It would, thus, undermine the principle of separation of powers and the system of checks and balances under our plan of government.

The Solicitor General further argues that the aforesaid transfers were rare and far between, and, more importantly, they were necessitated by exigent circumstances. Thus, it would have been impracticable to wait for Congress to pass a supplemental budget to address the aforesaid exigencies.

I disagree for the following reasons.

First, Article VI, Section 25(5) is clear, categorical and absolute. It admits of no exception. The lack of means and time to pass a supplemental budget is not an exception to the rule prohibiting the cross-border transfer of savings from one branch or constitutional body to another branch or constitutional body. (Parenthetically, it was not even clearly demonstrated that it was impracticable to pass a supplemental budget or that the reasons for not resorting to the passage of a

supplemental budget to address the aforesaid exigencies was not due to the fault or negligence of the concerned government agencies.)

Second, the Court cannot allow a relaxation of the rule in Article VI, Section 25(5) on the pretext of extreme urgency and/or exigency for this would invite intermittent violations of this rule, which is intended to preserve and protect the integrity and independence of the three great branches of government as well as the constitutional bodies. The constitutional value at stake is one of a high order that cannot and should not be perfunctorily disregarded.

Third, the power to make appropriations is constitutionally vested in Congress; the Executive Department cannot usurp or circumvent this power by transferring its savings to another branch or constitutional body. It must follow the procedure laid down in the Constitution for the passage of a supplemental budget if it so desires to aid or help another branch or constitutional body which is in dire need of funds. The assumption is that Congress will see for itself the extreme urgency and necessity of passing such a supplemental budget and there is no reason to assume that Congress will not swiftly and decisively act, if the circumstances warrant.

Fourth, even if we assume that grave consequences would have befallen our people and nation had the aforesaid cross-border transfers of savings not been undertaken because a supplemental budget would not have been timely passed to address such exigencies, still, this would not justify the relaxation of the rule under Article VI, Section 25(5). The possibility of not being able to pass a supplemental budget to timely and adequately address certain exigencies is one of the unavoidable risks or costs of this mechanism adopted under our plan of government. If grave consequences should befall our people and nation as a result thereof, the people themselves must hold our government officials accountable for the failure to timely pass a supplemental budget, if done with malice or negligence, should such be the case. The ballot and/or the filing of administrative, civil or criminal cases are the constitutionally designed remedies in such a case.

In the final analysis, until and unless the absolute prohibition on cross-border transfer of savings in our Constitution is amended, we must follow its letter, and any deviation therefrom must necessarily suffer from the vice of unconstitutionality. For these reasons, I find that the three aforesaid transfers of savings are unconstitutional.

On the Unprogrammed Fund

I do not subscribe to the view that there was an unlawful release of the Unprogrammed Fund through the DAP. The reason given for this view is that the government was not able to show that revenue collections exceeded the original revenue targets submitted by the President to Congress relative to the 2011, 2012 and 2013 GAAs.

I find that the resolution of the issue, as to whether the release of the Unprogrammed Fund under the DAP is unlawful, is premature.

The Unprogrammed Fund provisions under the 2011, 2012 and 2013 GAAs, respectively, state:

2011 GAA (Article XLV):

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

2012 GAA (Article XLVI)

1. Release of Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution: **PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund: PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.**

2013 GAA (Article XLV)

1. Release of Fund. The amounts authorized herein shall be released only when the **revenue collections exceed the original revenue targets** submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, **including collections arising from sources not considered in the original revenue targets**, as certified by the Btr: **PROVIDED, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.** (Emphasis supplied)

As may be gleaned from the afore-quoted provisions, in the 2011 GAA, there are three *provisos*, to wit:

1. PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund,

2. PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds,

3. PROVIDED, FURTHERMORE, That if there are savings generated from the programmed appropriations for the first two quarters of the year, the DBM may, subject to the approval of the President, release the pertinent appropriations under the Unprogrammed Fund corresponding to only fifty percent (50%) of the said savings net of revenue shortfall: PROVIDED, FINALLY, That the release of the balance of the total savings from programmed appropriations for the year shall be subject to fiscal programming and approval of the President.[39]

In the 2012 GAA, there are two *provisos*, to wit:

1. PROVIDED, That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund:

2. PROVIDED, FURTHER, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.

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[39] The last two *provisos* in the 2011 GAA may be lumped together because they are interrelated.

And, in the 2013 GAA, there is one *proviso*, to wit:

> 1. PROVIDED, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds.

These *provisos* should be reasonably construed as exceptions to the general rule that revenue collections should exceed the original revenue targets because of the plain meaning of the word "provided" and the tenor of the wording of these *provisos*. Further, in both the 2011 and 2012 GAA provisions, the phrase "may be used to cover releases from appropriations in this Fund" in the first *proviso* is essentially of the same meaning as the phrase "shall be sufficient basis for the issuance of a SARO covering the loan proceeds" in the second *proviso* because, precisely, the SARO is the authority to incur obligations. In other words, both phrases pertain to the authorization to release funds under the Unprogrammed Fund when the conditions therein are met even if revenue collections do not exceed the original revenue targets.

I now discuss the above *provisos* in greater detail.

The first *proviso*, found in both the 2011 and 2012 GAAs, states that "collections arising from sources not considered in the aforesaid original revenue targets **may be used to cover releases from appropriations in this Fund.**"[40] As previously discussed, a reasonable interpretation of this *proviso* signifies that, *even if the revenue collections do not exceed the original revenue targets*, funds from the Unprogrammed Fund ***can still be released*** to the extent of the collections from sources not considered in the original revenue targets. Why does the law permit this exception?

The national budget follows a matching process: revenue targets are matched with the proposed expenditure level. Revenue targets are the expected level of revenue collections for a given year. These targets are made based on previously identified and expected sources of revenues like taxes, fees or charges to be collected by the government. By providing for this *proviso*, the law recognizes that revenues may be generated from sources not considered in the original budget preparation and planning. These revenues from *unexpected* sources then become the funding for the items under the Unprogrammed Fund.

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[40] Emphasis supplied.

But why does the law not require that these revenues from *unexpected* sources be first used for the programmed appropriations if the circumstances warrant (such as when there is a budget deficit)?

The rationale seems to be that Congress expects the Executive Department to meet the needed revenue, based on the identified sources of the original revenue targets, in order to fund its programmed appropriations for the given year so much so that revenues from *unexpected* sources are not to be used for programmed appropriations and are, instead, reserved for items under the Unprogrammed Fund. If the Executive Department fails to achieve the original revenue targets for that year from expected sources, then it suffers the consequences by having inadequate funds to fully implement the programmed appropriations. In other words, the *proviso* is a disincentive to the Executive Department to rely on revenues from *unexpected* sources to fund its programmed appropriations. Verily, the Court cannot look into the wisdom of this system; it can only interpret and apply what it clearly provides. It may be noted though that in the 2013 GAA, the subject *proviso* has been omitted altogether, perhaps, in recognition of the possible ill effects of this *proviso* because it effectively allows the release of the Unprogrammed Fund even if there is a budget deficit (*i.e.*, when revenue collections do not exceed the original revenue targets).

I now turn to the next *proviso*, found in the 2011, 2012 and 2013 GAAs, which states that "in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds." This *proviso*, again, permits the release of funds from the Unprogrammed Fund, to the extent of the loan proceeds, *even if the revenue collections do not exceed the original revenue targets*. Why does the law allow this exception?

One conceivable basis is that the loans may specifically provide, as a condition thereto, that the proceeds thereof will be used to fund items under the Unprogrammed Fund categorized as foreign-assisted projects. Again, the wisdom of this *proviso* is beyond judicial review.

The last *proviso*, found only in the 2011 GAA, states that "if there are savings generated from the programmed appropriations for the first two quarters of the year, the DBM may, subject to the approval of the President release the pertinent appropriations under the Unprogrammed Fund corresponding to only fifty percent (50%) of the said savings net of revenue shortfall." Here, again, is another exception to the general rule that funds from the Unprogrammed Fund can only be released if revenue collections exceed the original revenue targets. Whether these conditions were met and whether funds from the Unprogrammed

Fund were released pursuant thereto are matters that were not squarely and specifically litigated in this case.

Based on the foregoing, it is erroneous and premature to rule that the Executive Department made unlawful releases from the Unprogrammed Fund of the 2011, 2012 and 2013 GAAs merely because the DBM was unable to submit a certification that the revenue collections exceeded the original revenue targets for these years considering that the funds so released may have been authorized under the afore-discussed *provisos* or exception clauses of the respective GAAs.

It may also be noted that the 2013 GAA states—

> **2013 (Article XLV)**
>
> 1. Release of Fund. The amounts authorized herein shall be released only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress pursuant to Section 22, Article VII of the Constitution, **including collections arising from sources not considered in the original revenue targets**, as certified by the Btr: PROVIDED, That in case of newly approved loans for foreign-assisted projects, the existence of a perfected loan agreement for the purpose shall be sufficient basis for the issuance of a SARO covering the loan proceeds. (Emphasis supplied)

Under the 2013 GAA, the condition, therefore, which will trigger the release of the funds from the Unprogrammed Fund, as a general rule, is that the revenue collections, *including collections arising from sources not considered in the original revenue targets*, exceed the original revenue targets, and *not* revenue collections exceed the original revenue targets.

In view of the foregoing, a becoming respect to a co-equal branch of government should prompt us to defer judgment on this issue for at least three reasons:

First, as afore-discussed, funds from the Unprogrammed Fund can be lawfully released even if revenue collections do not exceed the original revenue targets provided they fall within the applicable *provisos* or exception clauses in the relevant GAAs. Hence, the failure of the DBM to submit certifications, as directed by the Court, showing that revenue collections exceed the original revenue targets relative to the 2011, 2012 and 2013 GAAs *does not conclusively demonstrate* that there were unlawful releases from the Unprogrammed Fund.

Second, while the Solicitor General did not submit the certifications showing that revenue collections exceed the original revenue targets relative to the 2011, 2012 and 2013 GAAs, he did submit certifications showing that, for various periods in 2011 to 2013, the actual dividend income received by the National Government exceeded the programmed dividend income as well as income from the sale of the right to build and operate the NAIA expressway.[41] However, the Solicitor General did not explain why these certifications justify the release of funds under the Unprogrammed Fund.

Be that as it may, the certifications imply or seem to suggest that the Executive Department is invoking the *proviso* "That collections arising from sources not considered in the aforesaid original revenue targets may be used to cover releases from appropriations in this Fund" to justify the release of funds under the Unprogrammed Fund considering that these dividend incomes and income from the aforesaid sale of the right to build and operate are in excess or outside the scope of the programmed dividends or revenues. However, I find it premature to make a ruling to uphold this proposition.

It is not sufficient to establish that these revenues are in excess or outside the scope of the programmed dividends or revenues but rather, it must be shown that these collections arose from sources not considered in the original revenue targets. It must first be established what sources were considered in the original revenue targets and what sources were not before we can determine whether these collections fall within the subject *proviso*. These pre-conditions have not been duly established in a proper case where factual litigation is permitted.

Thus, while I find that the failure of the DBM to submit the aforesaid certifications, showing that revenue collections exceed the original revenue targets relative to the 2011, 2012 and 2013 GAAs, does not conclusively demonstrate that there were unlawful releases from the Unprogrammed Fund, I equally find that the

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[41] A. March 4, 2011 Certification signed by Gil S. Beltran, Undersecretary of the Department of Finance:

This is to certify that under the Budget for Expenditures and Sources of Financing for 2011, the programmed income from dividends from shares of stock in government-owned and controlled corporations is ₱5.5 billion.

This is to certify further that based on the records of the Bureau of Treasury, the National Government has recorded dividend income amount of ₱23.8 billion as of 31 January 2011.

B. April 26, 2012 Certification signed by Roberto B. Tan, Treasurer of the Philippines:

This is to certify that the actual dividend collections remitted to the National Government for the period January to March 2012 amount to ₱19.419 billion compared to the full year program of ₱5.5 billion for 2012.

C. July 3, 2013 Certification signed by Rosalia V. De Leon, Treasurer of the Philippines:

This is to certify that the actual dividend collections remitted to the National Government for the period January to May 2013 amounted to ₱12.438 billion compared to the full year program of ₱10.0 billion for 2013.

Moreover, the National Government accounted for the sale of right to build and operate the NAIAA expressway amounting to ₱11.0 billion in June 2013.

certifications submitted by the Solicitor General to be inadequate to rule that the releases from the Unprogrammed Fund were lawful.

Third, and more important and decisive, much of the difficulty in resolving this issue, as already apparent from the previous points, arose from the unusual way this issue was litigated before us. Whether the Executive Department can validly invoke the general rule or exceptions to the release of funds under the Unprogrammed Fund necessarily involves factual matters that were attempted to be litigated before this Court *in the course of the oral arguments of this case*. This is improper not only because this Court is not a trier of facts but also because petitioners were effectively prevented from controverting the authenticity and veracity of the documentary evidence submitted by the Solicitor General. It would not have mattered if the facts in dispute were admitted, like the afore-discussed cross-border transfers of savings, but on this particular issue on the Unprogrammed Fund, the facts remain in dispute and inadequate to establish that the general rule and exceptions were not complied with. Consequently, it is improper for us to resolve this issue, in this manner, considering that: (1) the issue is highly factual which should first be brought before the proper court or tribunal, (2) the factual matters have not been adequately established by both parties in order for the Court to properly rule thereon, and (3) the indispensable parties, such as the Bureau of Treasury and other government bodies or agencies, which are the custodians and generators of the requisite information, were not impleaded hereto, hence, the authenticity and veracity of the factual data needed to resolve this issue were not properly established. Due process requirements should not be lightly brushed aside for they are essential to a fair and just resolution of this issue. We cannot run roughshod over fundamental rights.

Thus, I find that the subject issue, as to whether the releases of funds from the Unprogrammed Fund relative to the relevant GAAs were unlawful, is not yet ripe for adjudication. The proper recourse, if the circumstances so warrant, is to establish that the afore-discussed general rule ***and*** exceptions were not met insofar as the releases from the Unprogrammed Fund in the 2011, 2012 and 2013 GAAs, respectively, are concerned. This should be done in a proper case where all indispensable parties are properly impleaded. There should be no obstacle to the acquisition of the requisite information upon the filing of the proper case pursuant to the constitutional right to information.

In another vein, I do not subscribe to the view that the DAP utilized the Unprogrammed Fund as a source of "savings."

First, the Executive Department did not claim that the funds released from the Unprogrammed Fund are "savings." What it stated is that the funds released

from the Unprogrammed Fund were *one of the sources of funds* under the DAP. In this regard, the DBM website states—

> **C. Sourcing of Funds for DAP**
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> 1. How were funds sourced?
>
> Funds used for programs and projects identified through DAP were sourced from savings generated by the government, the reallocation of which is subject to the approval of the President; **as well as the Unprogrammed Fund** that can be tapped when government has windfall revenue collections, e.g., unexpected remittance of dividends from the GOCCs and Government Financial Institutions (GFIs), sale of government assets.[42] (Emphasis supplied)

As can be seen, the Unprogrammed Fund was treated as a separate and distinct source of funds from "savings." Thus, the Executive Department can make use of such funds as part of the DAP for as long as their release complied with the afore-discussed general rule or exceptions and, as previously discussed, it has not been conclusively shown that the afore-discussed requisites were not complied with.

Second, the Solicitor General maintains that all funds released under the DAP have a corresponding appropriation cover. In other words, they were released pursuant to a legitimate work, activity or purpose for which they were authorized. For their part, petitioners failed to prove that funds from the Unprogrammed Fund were released to finance projects that did not fall under the specific items on the GAA provision on the Unprogrammed Fund. Absent proof to the contrary, the presumption that the funds from the Unprogrammed Fund were released by virtue of a specific item therein must, in the meantime, prevail in consonance with the presumptive validity of executive actions.

For these reasons, I find that there is no basis, as of yet, to rule that the Unprogrammed Fund was unlawfully released.

On Section 5.7.3 of NBC 541

Section 5.7.3 of NBC 541 provides:

> 5.7 The withdrawn allotments may be:

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[42] http://www.dbm.gov.ph/?page_id=7362 last visited May 16, 2014.

x x x x

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

Petitioners argue that the phrase "not considered" allows the Executive Department to transfer the withdrawn allotments to non-existent programs and projects in the 2012 GAA.

The Solicitor General counters that the subject phrase has technical underpinnings familiar to the intended audience (*i.e.*, budget bureaucrats) of the subject Circular and assures this Court that the phrase is not intended to refer to non-existent programs and projects in the 2012 GAA. He further argues that the phrase "to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year" means "to fund priority programs and projects not considered ***priority*** in the 2012 budget but expected to be started or implemented during the current year." Hence, the subject phrase suffers from no constitutional infirmity.

I disagree with the Solicitor General.

Evidently, the Court cannot accept such an argument. If the meaning of a phrase would be made to depend on the meaning in the minds of the intended audience of a challenged issuance, then virtually no issuance can be declared unconstitutional since every party will argue that, in their minds, the language of the challenged issuance conforms to the Constitution. Naturally, the Court can only look into the plain meaning of the word/s of a challenged issuance. If the words in the subject phrase truly partake of a technical meaning that obviates constitutional infirmity, then respondents should have pointed the Court to such relevant custom, practice or usage with which the subject phrase should be understood rather than arguing based on a generalized claim that in the minds of the intended audience of the subject Circular, the subject phrase pertains to items existing in the relevant GAA.

The argument that the phrase "to fund priority programs and projects not considered in the 2012 budget" should be understood as "to fund priority programs and projects not considered ***priority*** in the 2012 budget" is, likewise, untenable. Because if this was the intended meaning, then the subject Circular should have simply so stated. But, as it stands, the meaning of "not considered" is equivalent to "not included" and is, therefore, void because it allows the augmentation, through savings, of programs and projects not found in the relevant

GAA. This clearly contravenes Article VI, Section 29(1) of the Constitution and Section 54 of the 2012 GAA, to wit:

> Section 29. (1) No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.
>
> Section 54. x x x
>
> Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. **In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized by this Act.** (Emphasis supplied)

Of course, the Solicitor General impliedly argues that, despite the defective wording of Section 5.7.3 of NBC 541, no non-existent program or project was ever funded through the DAP. Whether that claim is true necessarily involves factual matters that are not proper for adjudication before this Court. In any event, petitioners may bring suit at the proper time and place should they establish that non-existent programs or projects were funded through the DAP by virtue of Section 5.7.3 of NBC 541.

On the applicability of the operative fact doctrine

I find that the operative fact doctrine is applicable to this case for the following reasons:

First, it must be recalled that, based on the preceding disquisitions, I do not find the DAP to be wholly unconstitutional, and limit my finding of unconstitutionality to (1) Sections 5.4, 5.5 and 5.7 of NBC 541, insofar as it authorized the withdrawal of unobligated allotments from slow-moving projects that were not finally discontinued or abandoned, (2) Section 5.7.3 of NBC 541, insofar as it authorized the augmentation of appropriations not found in the 2012 GAA, and (3) the three afore-discussed cross-border transfers of savings. Hence, my discussion on the applicability of operative fact doctrine is limited to the effects of the declaration of unconstitutionality relative to the above enumerated.

Second, indeed, the general rule is that an unconstitutional executive or legislative act is void and inoperative; conferring no rights, imposing no duties, and affording no protection. As an exception to this rule, the doctrine of operative fact recognizes that the existence of an executive or legislative act, prior to a

determination of its unconstitutionality, is an operative fact and may have consequences that cannot always be ignored.[43] In other words, under this doctrine, the challenged executive or legislative act remains unconstitutional, but its effects may be left undisturbed as a matter of equity and fair play. It is applicable when a declaration of unconstitutionality will impose an undue burden on those who have relied in good faith on the invalid executive or legislative act.[44]

As a rule of equity, good faith and bad faith are of necessity relevant in determining the applicability of this doctrine. Thus, in one case, the Court did not apply the doctrine relative to a party who benefitted from the unconstitutional executive act because the party acted in bad faith.[45] The good faith or bad faith of the beneficiary of the unconstitutional executive act was the one held to be decisive.[46] The reason, of course, is that, as previously stated, the doctrine seeks to protect the interests of those who relied in good faith on the invalid executive or legislative act. Consequently, the point of inquiry should be the good faith or bad faith of those who benefitted from the afore-discussed unconstitutional acts.

Third, as earlier discussed, the declaration of unconstitutionality relative to Sections 5.4, 5.5, and 5.7 as well as Section 5.7.3 of NBC 541 was premised on their defective wording. Hence, absent proof of a slow-moving project that was not finally discontinued or abandoned but whose unobligated allotments were partially withdrawn, or a program or project augmented through savings which did not exist in the relevant GAA, the discussion on the applicability of the operative fact doctrine relative thereto is premature.

Fourth, this leaves us with the question as to the applicability of the doctrine relative to the aforesaid cross-border transfers of savings. Here, the point of inquiry, as earlier noted, must be the good faith or bad faith of the beneficiaries of the unconstitutional executive act, specifically, the House of Representatives, COA and Comelec. In the case at bar, there is no evidence clearly showing that these entities acted in bad faith in requesting funds from the Executive Department which were part of the latter's savings or that they received the aforesaid funds knowing that these funds came from an unconstitutional or illegal source. The lack of proof of bad faith is understandable because this issue was never squarely raised and litigated in this case as it developed only during the oral arguments of this case. Thus, as to these entities, the presumption of good faith and regularity in the performance of official duties must, in the meantime, prevail. Further, it cannot be doubted that an undue burden will be imposed on these entities which have relied

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43 *Planters Products, Inc. v. Fertiphil Corporation*, 572 Phil. 270, 301-302 (2008).
44 Id. at 302.
45 *Chavez v. National Housing Authority*, 557 Phil. 29, 117 (2007) *citing Chavez v. PEA*, 451 Phil. 1 (2003).
46 Id.

in good faith on the aforesaid invalid transfers of savings, if the operative fact doctrine is not made to apply thereto.

Given these considerations, I find that the operative fact doctrine applies to the aforesaid cross-border transfers of savings. Hence, the effects of the unconstitutional cross-border transfers of savings can no longer be undone. *It is hoped, however, that no constitutional breach of this tenor will occur in the future given the clear and categorical ruling of the Court on the unconstitutionality of cross-border transfer of savings.*

Because of the various views expressed relative to the impact of the operative fact doctrine on the potential administrative, civil and/or criminal liability of those involved in the implementation of the DAP, I additionally state that any discussion or ruling on the aforesaid liability of the persons who authorized and the persons who received the funds from the aforementioned unconstitutional cross-border transfers of savings, is premature. The doctrine of operative fact is limited to the effects of the declaration of unconstitutionality on the executive or legislative act that is declared unconstitutional. Thus, it is improper for this Court to discuss or rule on matters not squarely at issue or decisive in this case which affect or may affect their alleged liabilities without giving them an opportunity to be heard and to raise such defenses that the law allows them in a proper case where their liabilities are properly at issue. Due process is the bedrock principle of our democracy. Again, we cannot run roughshod over fundamental rights.

Conclusion

I now summarize my findings by discussing the constitutional and statutory requisites for "savings" and "augmentation" as applied to the DAP.

As stated earlier, for "savings" to arise, the following requisites must concur:

1. The appropriation must be a programmed appropriation in the GAA;

2. The appropriation must be free from any obligation or encumbrances;

3. The appropriation must still be available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized.

Relative to the DAP, these requisites were *generally* met because:

1. The DAP, as partially implemented by NBC 541, covers only programmed appropriations;

2. The covered appropriations refer specifically to unobligated allotments;

3. The President made a categorical determination to permanently stop the expenditure on slow-moving projects through the withdrawal of their unobligated allotments which resulted in the final discontinuance or abandonment thereof. The slow manner of spending on such projects was found to be inimical to public interest in view of the vital need at the time to spur economic growth through faster government spending. Thus, the power was validly exercised pursuant to Section 38 absent clear and convincing proof to the contrary. With the final discontinuance or abandonment of such projects, there remained a balance of the appropriation equivalent to the amount of the unobligated allotments which may be validly considered as savings.

As an *exception* to the above, I find that, because of the broad language of NBC 541, Section 5.4, 5.5 and 5.7 thereof are void insofar as they (1) allowed the withdrawal of unobligated allotments from slow-moving projects which were not finally discontinued or abandoned, and (2) authorized the use of such withdrawn unobligated allotments as "savings."

On the other hand, for "augmentation" to be valid, the following requisites must be satisfied:

1. The program, activity, or project to be augmented by savings must be a program, activity, or project in the GAA;

2. The program, activity, or project to be augmented by savings must refer to a program, activity, or project within or under the same office from which the savings were generated;

3. Upon implementation or subsequent evaluation of needed resources, the appropriation of the program, activity, or project to be augmented by savings must be shown to be deficient.

As applied to the DAP, these requisites were, again, *generally* met:

1. The DAP, as partially implemented by NBC 541, augmented projects within the GAA;

2. It augmented projects within the appropriations of the Executive Department;

3. The acts of the Executive Department enjoy presumptive constitutionality. Section 5.5 of NBC 541 mandates the evaluation of reports of, and consultations with the concerned departments/agencies by the DBM to determine which projects are slow-moving and fast-moving. The DBM enjoys the presumption of regularity in the performance of its official duties. Thus, it may be reasonably presumed that, in the process, the determination of which fast-moving projects required augmentation was also made. Petitioners did not prove otherwise.

As *exceptions* to the above, I find that: (1) the admitted cross-border transfers of savings from the Executive Department, on the one hand, to the Commission on Audit, House of Representatives and Commission on Elections, respectively, on the other, are void for violating the second requisite, and (2) the phrase "to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year" in Section 5.7.3 of NBC 541 is void for violating the first requisite.

In sum, I vote to limit the declaration of unconstitutionality to the afore-discussed for the following reasons:

First, I am of the view that the Court should not make a broad and sweeping declaration of unconstitutionality relative to acts or practices that were not actually proven in this case. Hence, I limit the declaration of unconstitutionality to the three admitted cross-border transfers of savings. To rule otherwise would transgress the actual case and controversy requirement necessary to validly exercise the power of judicial review.

Second, I find it improper to declare the DAP unconstitutional without specifying the provisions of the implementing issuances which transgressed the Constitution. The acts or practices declared unconstitutional by the majority relative to the DAP are a restatement of existing constitutional and statutory provisions on the power to augment and the definition of savings. These do not identify the provisions in the implementing issuances of the DAP which allegedly violated the Constitution and pertinent laws. Again, it transgresses the actual case and controversy requirement.

Third, I do not subscribe to the view of the majority relative to the interpretation and application of Section 38 of the Administrative Code, and the GAA provisions on savings, impoundment, the two-year availability for release of appropriations and the unprogrammed fund, for reasons already extensively discussed. While I find the wording of these laws to be highly susceptible to abuse and even unwise and imprudent, the Court has no recourse but to interpret and apply them based on their plain meaning, and not to accord them an interpretation that lead to absurd results or render them inoperative.

Last, I find that the remedy in this case is not solely judicial but largely legislative in that imperative reforms are needed in, among others, the limits of Section 38, the definition of "savings," the transparency of the exercise of the power to augment, the safeguards and limitations on this power, and so on. How this is to be done belongs to Congress which must balance the State interests in curbing abuse vis-à-vis flexibility in fiscal management.

Ultimately, however, the remedy resides in the people: to press for needed reforms in the laws that currently govern the enactment and execution of the national budget and to be vigilant in the prosecution of those who may have fraudulently abused or misused public funds. In fine, I am of the considered view that the abuse or misuse of the power to augment will persist if the needed reforms in the subject laws are not promptly instituted. Hence, the necessity of calling upon the moral strength, courage and resolve of our people and nation to address these weaknesses in our laws which have, to a large extent, precipitated the present controversy.

ACCORDINGLY, I vote to **PARTIALLY GRANT** the petitions:

The Disbursement Acceleration Program is **PARTIALLY UNCONSTITUTIONAL:**

1. Sections 5.4, 5.5 and 5.7 of National Budget Circular No. 541 are **VOID** insofar as they (1) allowed the withdrawal of unobligated allotments from slow-moving projects which were not finally discontinued or abandoned, and (2) authorized the use of such withdrawn unobligated allotments as "savings" for violating the definition of "savings" under the 2011, 2012 and 2013 general appropriations acts.

2. The admitted cross-border transfers of savings from the Executive Department, on the one hand, to the Commission on Audit, House of

Representatives and Commission on Elections, respectively, on the other, are **VOID** for violating Article VI, Section 25(5) of the Constitution.

3. The phrase "to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year" in Section 5.7.3 of National Budget Circular No. 541 is **VOID** for contravening Article VI, Section 29(1) of the Constitution and Section 54 of the 2012 General Appropriations Act.

MARIANO C. DEL CASTILLO
Associate Justice