EN BANC

G.R. No. 209287: Maria Carolina P. Araullo, et al., *petitioners* vs. Benigno Simeon C. Aquino III, et al., *respondents*; **G.R. No. 209135:** Augusto L. Syjuco, Jr., *petitioner* vs. Florencio B. Abad, et al., *respondents*; **G.R. No. 209136:** Manuelito R. Luna, *petitioner* vs. Secretary Florencio Abad, et al., *respondents*; **G.R. No. 209155:** Atty. Jose Malvar, Villegas, Jr., *petitioner* vs. The Honorable Executive Secretary Paquito N. Ochoa, Jr., at al., *respondents*; **G.R. No. 209164:** Philippine Constitution Association (PHILCONSA), at al., *petitioners* vs. The Department of Budget and Management and/or Hon. Florencio B. Abad, *respondents*; **G.R. No. 209260:** Integrated Bar of the Philippines, *petitioner* vs. Secretary Florencio Abad of the Department of Budget and Management, *respondent*; **G.R. No. 209442:** Greco Antonious Beda B. Belgica, et al., *petitioners* vs. President Benigno Simeon C. Aquino III, at al., *respondents*; **G.R. No. 209517:** Confederation for Unity, Recognition and Advancement of Government Employees (COURAGE), et al., *petitioners* vs. Benigno Simeon C. Aquino, III, et al., *respondents*; **G.R. No. 209569:** Volunteers Against Crime and Corruption (VACC), *petitioner* vs. Paquito N. Ochoa, Jr., et al., *respondents.*

Promulgated:
July 1, 2014

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CONCURRING OPINION

LEONEN, *J.*:

I concur in the result.

I agree that some acts and practices covered by the Disbursement Acceleration Program as articulated in National Budget Circular No. 541 and in related executive issuances and memoranda are unconstitutional. We declare these principles for guidance of bench and bar considering that the petitions were mooted. The application of these principles to the 116 expenditures contained in the "evidence packet" submitted by the Solicitor General as well as the application of the doctrine of operative fact should await proper appraisal in the proper forum.

I

Isolated from their political color and taking the required sterile juridical view, the petitions consolidated in this case ask us to define the limits of the constitutional discretion of the President to spend in relation to his duty to execute laws passed by Congress. Specifically, we are asked to

decide whether there has been grave abuse of discretion in the promulgation and implementation of the Disbursement Acceleration Program (DAP).

The DAP was promulgated and implemented in response to the slowdown in economic growth in 2011.[1] Economic growth in 2011 was within the forecasts of the National Economic Development Authority but below the growth target of 7% expected by other agencies and organizations.[2] The Senate Economic Planning Office Report of March 2012 cited government's underspending, specially in infrastructure, as one of the factors that contributed to the weakened economy.[3] This was a criticism borne during the early part of this present administration.[4]

On July 18, 2012, National Budget Circular No. 541 was issued. This circular recognized that the spending targets were not met for the first five months of the year.[5] The reasons can be deduced from a speech delivered by the President on October 23, 2013, wherein he said:

> I remember that in 2011, I addressed you for the first time as President of the Republic. Back then, we had to face a delicate balancing act. As we took a long hard look at the contracts and systems we inherited, and set about to purge them of opportunities for graft, the necessary pause led to a growing demand to pump prime the economy.[6]

During the oral arguments of this case, Secretary Florencio Abad of the Department of Budget and Management (DBM) confirmed that they discovered leakages that resulted in the weakened capacity of agencies in implementing projects when President Aquino assumed office.[7] Spending was hampered. Economic growth slowed down.

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1 The economy slowed from 7.6 percent growth in 2010 to 3.7 percent in 2011. *Senate Economic Planning Office Economic Report*, March 2012, ER-12-01, p. 1 < http://www.senate.gov.ph/publications/ER%202012-01%20-%20March%202012.pdf> (visited May 23, 2014).

2 *Senate Economic Planning Office Economic Report*, March 2012, ER-12-01, p. 1 < http://www.senate.gov.ph/publications/ER%202012-01%20-%20March%202012.pdf> (visited May 23, 2014). These agencies include the Development Budget Coordination Committee as well as the Asian Development Bank and the World Bank.

3 *Senate Economic Planning Office Economic Report*, March 2012, ER-12-01, p. 2 < http://www.senate.gov.ph/publications/ER%202012-01%20-%20March%202012.pdf> (visited May 23, 2014).

4 *See* K. J. Tan, *Senators question [government] underspending in 2011*, August 9, 2011 <http://www.gmanetwork.com/news/story/228895/economy/senators-question-govt-underspending-in-2011> (visited May 23, 2014).

5 DBM NBC No. 541 (2012), 1.0.

6 President Benigno S. Aquino III's Speech at the Annual Presidential Forum of the Foreign Correspondents Association of the Philippines (FOCAP), October 23, 2013 <http://www.pcoo.gov.ph/speeches2013/speech2013_oct23.htm> (visited May 23, 2014).

7 TSN, January 28, 2014, p. 10

To address the underspending resulting from that "pause," "measures ha[d] to be implemented to optimize the utilization of available resources"[8] and "to accelerate spending and sustain the fiscal targets during the year."[9] The President authorized withdrawals from the agencies' unobligated allotments.[10] National Budget Circular (NBC) No. 541, thus, stated its purposes as:

> a. To provide the conditions and parameters on the withdrawal of unobligated allotments of agencies as of June 30, 2012 to fund priority and/or fast-moving programs/projects of the national government;
>
> b. To prescribe the reports and documents to be used as bases on the withdrawal of said unobligated allotments; and
>
> c. To provide guidelines in the utilization or reallocation of the withdrawn allotments.[11]

The Department of Budget and Management describes the Disbursement Acceleration Program, which petitioners associate with NBC No. 541, as "a **stimulus package** under the Aquino administration **designed to fast-track public spending and push economic growth**. This covers high-impact budgetary programs and projects which will be augmented out of the savings generated during the year and additional revenue sources."[12]

According to Secretary Abad, the Disbursement Acceleration Program "is not just about the use of savings and unprogrammed funds, it is a package of reformed interventions to de-clog processes, improve the absorptive capacities of agencies and mobilize funds for priority social and economic services."[13]

The President explained in the cited 2013 speech that the "stimulus package" was successful in ensuring that programs delivered the greatest impact in the most efficient manner.[14] According to the President, the stimulus package's contribution of 1.3% percentage points to gross domestic

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8 DBM NBC No. 541 (2012), 1.0.
9 DBM NBC No. 541 (2012), 1.0.
10 DBM NBC No. 541 (2012), 1.0.
11 DBM NBC No. 541 (2012), 2.1–2.3.
12 Frequently Asked Questions about the Disbursement Acceleration Program (DAP) <http://www.dbm.gov.ph/?page_id=7362> (visited May 23, 2014).
13 TSN, January 28, 2014, p. 11.
14 President Benigno S. Aquino III's Speech at the Annual Presidential Forum of the Foreign Correspondents Association of the Philippines (FOCAP), October 23, 2013 <http://www.pcoo.gov.ph/speeches2013/speech2013_oct23.htm> (visited May 23, 2014).

product (GDP) growth in the last quarter of 2011 was recognized by the World Bank in one of its quarterly reports.[15]

The subject matter of this constitutional challenge is unique. As ably clarified in the ponencia, the DAP is not covered by National Budget Circular No. 541 alone or by a single legal issuance.[16] Furthermore, respondents manifested that it has already served its purpose and is no longer being implemented.[17]

II

The Disbursement Acceleration Program (DAP) is indeed a label for a fiscal management policy.[18]

Several activities and programs are included within this policy. To implement this policy, several internal memoranda requesting for the declaration of savings and specific expenditures[19] as well as the DBM's National Budget Circular No. 541 were issued. DAP — as a label — served to distinguish the activities of a current administration from other past fiscal management policies.[20]

It is for this reason that we cannot make a declaration of constitutionality or unconstitutionality of the DAP. Petitions filed with this court should be more specific in the acts of respondents — other than the promulgation of policy and rules — alleged to have violated the Constitution.[21] Judicial review should not be wielded pursuant to political

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15 President Benigno S. Aquino III's Speech at the Annual Presidential Forum of the Foreign Correspondents Association of the Philippines (FOCAP), October 23, 2013 <http://www.pcoo.gov.ph/speeches2013/speech2013_oct23.htm> (visited DATE HERE); *See also Philippines Quarterly Update: From Stability to Prosperity for All*, March 2012 <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/06/12/000333037_20120612011744/Rendered/PDF/698330WP0P12740ch020120FINAL0051012.pdf> (visited May 23, 2014).

16 Ponencia, pp. 35–47.

17 Respondents' memorandum, pp. 30–33.

18 *See* ponencia, pp. 35–36.

19 Memoranda for the President dated October 12, 2011; December 12, 2011; June 25, 2012; September 4, 2012; December 19, 2012; May 20, 2013 and September 25, 2013. *See* ponencia, pp. 37–42.

20 See TSN, November 19, 2013, pp. 147–148.

21 As I have previously stated:

> Generally, we are limited to an examination of the legal consequences of law as applied. This presupposes that there is a specific act which violates a demonstrable duty on the part of the respondents. This demonstrable duty can only be discerned when its textual anchor in the law is clear. In cases of constitutional challenges, we should be able to compare the statutory provisions or the text of any executive issuance providing the putative basis of the questioned act vis-a-vis a clear constitutional provision. Petitioners carry the burden of filtering events and identifying the textual basis of the acts they wish to question before the court. This enables the respondents to tender a proper traverse on the alleged factual background and the legal issues that should be resolved.
>
> Petitions filed with this Court are not political manifestos. They are pleadings that raise important legal and constitutional issues.
>
> Anything short of this empowers this Court beyond the limitations defined in the Constitution. It invites us to use our judgment to choose which law or legal provision to tackle. We become one of the

motives; rather, it is a discretion that should be wielded with deliberation, care, and caution. Our pronouncements should be narrowly tailored to the facts of the case to ensure that we do not unduly transgress into the province of the other departments.[22] *Ex facto jus oritur.* Law arises only from facts.

III

We also run into several technical problems that can cause inadvisable precedents should we proceed to make declarations on DBM NBC No. 541 alone.

First, this circular is addressed to agencies and meant to define the procedures for adopting and achieving operational efficiency in government.[23] Hence, it is a set of rules internal to the executive. Our jurisdiction begins only when these rules are the basis for actual expenditure of funds. Even so, the petitions that were filed with us should specify which expenditures should be appraised in relation to existing law and the Constitution.[24]

Second, there are laudable provisions in this circular that are not subject to controversy. These include the exhortation that government agencies should effectively and efficiently use their funds within the soonest possible time so that they become relevant to the purposes for which they had been allotted.[25] To declare the whole of the circular unconstitutional confuses and detracts from the constitutional commitment that we should use our power of judicial review cautiously and effectively. We have to wield our powers deliberately but with precision. Narrowly tailored constitutional doctrines are better guides to future behavior. These doctrines will not stifle innovative and creative approaches to good governance.

Third, on its face, the circular covers only appropriations in fiscal years 2011 and 2012.[26] However, from the "evidence packets" which were submitted by the Solicitor General, there were expenditures pertaining to the DAP even after the expiration of the circular. Any blanket declaration of constitutionality of this circular, therefore, will be misdirected.

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party's advisers defeating the necessary character of neutrality and objectivity that are some of the many characteristics of this Court's legitimacy. – J. Leonen's concurring opinion in *Belgica v. Hon. Secretary Paquito N. Ochoa*, G.R. No. 208566, November 19, 2013, pp. 4-5 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2013/november2013/208566.pdf> [Per J. Perlas-Bernabe, En Banc].

22 Dissenting opinion of J. Leonen in *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014, pp. 2 and 7 [Per J. Mendoza, En Banc].

23 DBM NBC No. 541 (2012), 3.0–3.2, 5.0–5.2.

24 Dissenting opinion of J. Leonen in *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014, pp. 6-7 [Per J. Mendoza, En Banc].

25 DBM NBC No. 541 (2012), 1.0, 2.0, 5.2–5.8.

26 DBM NBC No. 541 (2012), 3.1.

IV

In the spirit of deliberate precision, I agree with the ponencia's efforts to clearly demarcate the discretion granted by the Constitution to the legislature and the executive. I add some qualifications.

The budget process in the ponencia is descriptive,[27] not normative. That is, it reflects what is happening. It should not be taken as our agreement that the present process is fully compliant with the Constitution.

For instance, I am of the firm view that the treatment of departments and offices granted fiscal autonomy should be different.[28] Levels of fiscal autonomy among various constitutional organs can be different.[29]

For example, the constitutional protection granted to the judiciary is such that its budget cannot be diminished below the amount appropriated during the previous year.[30] Yet, we submit our items for expenditure to the executive through the DBM year in and year out. This should be only for advice and accountability; not for approval.

In the proper case, we should declare that this constitutional provision on fiscal autonomy means that the budget for the judiciary should be a lump sum corresponding to the amount appropriated during the previous year.[31] This may mean that as a proportion of the national budget and in its absolute amount, the judiciary's budget cannot be reduced. Any additional appropriation for the judiciary should cover only new items for amounts greater than what have already been constitutionally appropriated. Public accountability on our expenditures will be achieved through a resolution of the Supreme Court En Banc detailing the items for expenditure corresponding to that amount.

The ponencia may inadvertently marginalize this possible view of how the Constitution requires the judiciary's budget to be prepared. It will also make it difficult for us to further define fiscal autonomy as constitutionally or legally mandated for the other constitutional offices.

With respect to the discretions in relation to budget execution: ***The legislature has the power to authorize a maximum amount to spend per item,***[32] ***and the executive has the power to spend for the item up to the***

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27 Ponencia, pp. 27–34.
28 *See for example,* CONST., art. VIII, sec. 3, art. IX-A, sec. 5, art. XI, sec. 14, and art. XIII, sec. 17 (4).
29 Id.
30 CONST., art. VIII, sec. 3.
31 CONST., art. VIII, sec. 3.
32 CONST., art. VI, sec. 24, 25 (5), and 29.

amount limited in the appropriations act.[33] The metaphor that Congress has "the power of the purse" does not fully capture this distinction. It only captures part of the dynamic between the executive and the legislature.

Any expenditure beyond the maximum amount provided for the item in the appropriations act is an augmentation of that item.[34] It amounts to a transfer of appropriation. This is generally prohibited except for instances when "upon implementation or subsequent evaluation of needed resources, [the appropriation for a program, activity or project existing in the General Appropriations Act] is determined to be deficient."[35] In which case, all the conditions provided in Article VI, Section 25 (5) of the Constitution must first be met.

The limits defined in this case only pertain to the power of the President — and by implication, other constitutional offices — to augment items of appropriation. There is also the power of the President to realign allocations of funds to another item — ***without augmenting that item*** — whenever revenues are insufficient in order to meet the priorities of government.

V

The President's power or discretion to spend up to the limits provided by law is inherent in executive power. It is essential to his exercise of his constitutional duty to "ensure that the laws be faithfully executed"[36] and his constitutional prerogative to "have control of all the executive departments."[37]

The legislative authority to spend up to a certain amount for a specific item does not mean that the President must spend that full amount. The

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33 Const., art. VII, sec. 1.

34 CONST., art. VI, sec. 25 (5).

35 General Appropriations Act (2012), sec. 54
Sec. 54. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.

Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. In no case shall a non-existent program, activity or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.
See also General Appropriations Act (2013), sec. 53, and General Appropriations Act (2011), sec. 60.

36 CONST., art. VII, sec. 17.

37 CONST., art. VII, sec. 17.

President can spend less due to efficiency.[38] He may also recall any allocation of unobligated funds to control an executive agency.[39] The expenditure may turn out to be irregular, extravagant, unnecessary, or illegal.[40] It is always possible that there are contemporary circumstances that would lead to these irregularities that could not have been seen by Congress.

Congress authorizes a budget predicting the needs for an entire fiscal year.[41] But the President must execute that budget based on the realities that he encounters.

Parenthetically, because of the constitutional principle of independence, the power to spend is also granted to the judiciary.[42] The President does not have the discretion to withhold any amount pertaining to the judiciary. The Constitution requires that all appropriations for it shall be "automatically and regularly released."[43] The President's power to implement the laws[44] and the existence of provisions on automatic and regular release of appropriations[45] of independent constitutional branches and bodies support the concept that the President's discretion to spend up to the amount allowed in the appropriations act inherent in executive power is exclusively for offices within his department.

VI

Congress appropriates based on projected revenues for the fiscal year.[46] Not all revenues are available at the beginning of the year. The budget is planned, and the General Appropriations Act (GAA) is enacted, before the actual generation and collection of government funds. Revenue collection happens all throughout the year. Taxes and fees, for instance, still need to be generated.

The appropriations act is promulgated, therefore, on the basis of hypothetical revenues of government in the coming fiscal year. While hypothetical, it is the best educated, economic, and political collective guess of the President and Congress.

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38 *See* Exec. Order No. 292, book VI, chap. 2, sec. 3.
39 Exec. Order No. 292, book VI, chap. 5, sec. 38; CONST., art. VII, sec. 17.
40 *See* Pres. Decree No. 1445 (1978), sec. 33; Government Accounting and Auditing Manual, vol. 1, book III, title 3, art. 2, sec. 162.
41 Exec. Order No. 292, book VI, chap. 2, sec. 4.
42 CONST., art. VIII, sec. 3.
43 CONST., art. VIII, sec. 3.
44 CONST., art. VII, sec. 1.
45 *See for example,* CONST., art. VIII, sec. 3, art. IX-A, sec. 5, art. XI, sec. 14, and art. XIII, sec. 17 (4).
46 *See* Exec. Order No. 292, book VI, chap. 2, sec. 11.

Projected expenditures may not be equal to what will actually be collected. Hence, there is no prohibition from enacting budgets that may result in a deficit spending. There is no requirement in the Constitution that Congress pass only balanced budgets.[47]

Ever since John Maynard Keynes introduced his theories of macroeconomic accounts, governments have accepted that a certain degree of deficit spending (more expenditures than income) is acceptable to achieve economic growth that will also meet the needs of an increasing population.[48] The dominant economic paradigm is that developmental goals cannot be achieved without economic growth,[49] i.e., that the amount of products and services available are greater than that measured in the prior years.

Economic growth is dependent on many things.[50] It is also the result of government expenditures.[51] The more that the government spends, the more that businesses and individuals are able to raise revenues from their transactions related to these expenditures.[52] The monies paid to contractors in public infrastructure projects will also be used to allow these contractors to purchase materials and equipment as well as to pay their workers.[53] These workers will use their income to purchase services and products and so on.[54] The possibility that value will be used to create more value is what makes the economy grow.

Theoretically, the more the economy grows, the more that government is able to collect in the form of taxes and fees.

It is necessary for the government to be able to identify the different factors limiting the impact of expenditures on economic growth.[55] It is also necessary that it makes the necessary adjustments consistent with the country's short-term and long-term goals.[56] The government must be capable of making its own priorities so that resources could be shifted in accordance with the country's actual needs.

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47 Total projected revenues equals expenditures, thus, the concept of "unprogrammed funds".

48 *See* John Maynard Keynes, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1935). For a comparison on the Keynesian model with alternate models, s*ee also* B. Douglas Bernheim, A NEOCLASSICAL PERSPECTIVE ON BUDGET DEFICITS, 3 Journal of Economic Perspectives 55 (1989).

49 *See also* D. Perkins, et al., ECONOMICS OF DEVELOPMENT, 6th Ed., 60 (2006). There are, however, opinions that it is possible to develop with zero growth. *See also* Herman E. Daly, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT (1997), but this is not the economic theory adopted by our budget calls.

50 The macroeconomic formula is Y = C + I + G + (X-M). Y is income. C is personal consumption. I is Investment. G is government expenditures. X is exports. M is imports.

51 Id.

52 *See* John Maynard Keynes, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1935), Chapter 10: The Marginal Propensity to Consume and the Multiplier.

53 *See* John Maynard Keynes, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1935), Chapter 10: The Marginal Propensity to Consume and the Multiplier.

54 *See* John Maynard Keynes, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1935), Chapter 10: The Marginal Propensity to Consume and the Multiplier.

55 *See* Exec. Order No. 292, book VI, chap. 3, sec. 12 (1).

56 *See* Exec. Order No. 292, book VI, chap. 2, sec. 3–4.

Thus, it makes sense for economic managers to recommend that government expenditures be used efficiently: *Scarce resources must be used for the project that will have the most impact at the soonest time*. While Congress contributes by putting the frame through the Appropriations Act, actual economic impact will be decided by the executive who attends to present needs.

The executive may aim for better distribution of income among the population or, simply, more efficient ways to build physical and social infrastructure so that prosperity thrives. Certainly, good economic management on the part of our government officials means being concerned about projects or activities that do not progress in accordance with measured expectations. At the beginning of the year or at some regular intervals, the executive should decide on resource allocations reviewing prior ones so as to achieve the degree of economic efficiency required by good governance.[57] These allocations are authorities to start the process of obligation. To obligate means the process of entering into contract for the expenditure of public money.[58]

However, disbursement of funds is not automatic upon allocation or allotment. There are procurement laws to contend with.[59] Funds are disbursed only after the government enters into a contract, and a notice of cash allocation is issued.[60]

At any time before disbursement of funds, the President may again deal with contingencies. Inherent in executive power is also the necessary power for the President to decide on priorities without violating the law. How and when the President reviews these priorities are within his discretion. The Constitution should not be viewed with such awkward academic restrictions that will constrain, in practice, the ability of the President to respond. Constitutional interpretation may be complex, but it is not unreasonable. It should always be relevant.

Congress has the constitutional authority to determine the maximum levels of expenditures per item in the budget.[61] It is not Congress, however, that decides when and how, in fact, the resources are to be actually spent. Congress cannot do so because it is a collective deliberative body designed to create policy through laws.[62] It cannot and does not implement the law.[63]

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57 *See* Exec. Order No. 292, book VI, chap. 6, sec. 51.

58 *See Budget Advocacy Project, Philippine Governance Forum, Department of Budget and Management, Frequently Asked Questions: National Government Budget* 13 (2002); *Budget Execution* <http://budgetngbayan.com/budget-101/budget-execution/> (visited May 9, 2014).

59 *See for example* Rep. Act No. 9184, Government Procurement Reform Act (2002).

60 *Budget Execution* <http://budgetngbayan.com/budget-101/budget-execution/> (visited May 9, 2014).

61 CONST., art. VI, sec. 24–25, 29.

62 CONST., art. VI, sec. 1.

Parenthetically, this was one of the principal reasons why we declared the Priority Development Assistance Fund (PDAF) as unconstitutional.[64]

Since the President attends to realities and decides according to priorities, our constitutional design is to grant him the flexibility to make these decisions subject to clear legal limitations.

Hence, changes in the allotment of funds are not prohibited transfers of appropriations if these changes are still consistent with the maximum allowances under the GAA. They are merely manifestations of changing priorities in the use of funds. They are still in line with the President's duty to implement the General Appropriations Act.

Thus, if revenues have not been fully collected at a certain time but there is a need to fully spend for an item authorized in the appropriations act, the President should be able to move the funds from an agency, which is not effectively and efficiently using its allocation, to another agency. *This is the concept of realignment of funds as differentiated from augmentation of an item.*

VII

Realignment of the allocation of funds is different from the concept of augmentation contained in Article VI, Section 25 (5) of the Constitution.

In realignment of allocation of funds, the President, upon recommendation of his subalterns like the Department of Budget and Management, finds that there is an item in the appropriations act that needs to be funded. However, it may be that the allocated funds for that targeted item are not sufficient. He, therefore, moves allocations from another budget item to that item ***but only to fund the deficiency: that is, the amount needed to fill in so that the maximum amount authorized to be spent for that item in the appropriations act is actually spent.***

The appropriated amount is not increased. It is only filled in order that the item's purpose can be fully achieved with the amount provided in the appropriations law. There is no augmentation that happens.

In such cases, there is no need to identify savings. The concept of savings is only constitutionally relevant as a requirement for augmentation

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63 CONST., art. VII, sec. 1.

64 *Belgica v. Hon. Secretary Paquito N. Ochoa*, G.R. No. 208566, November 19, 2013 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2013/november2013/208566.pdf> [Per J. Perlas-Bernabe, En Banc].

of items. It is the executive who needs to fully and faithfully implement sundry policies contained in many statutes and needs to decide on priorities, given actual revenues.

The flexibility of realignment is required to allow the President to fully exercise his basic constitutional duty to faithfully execute the law and to serve the public "with utmost responsibility . . . and efficiency."[65]

Unlike in augmentation, which deals with increases in appropriations, realignment involves determining priorities and deals with allotments without increases in the legislated appropriation. In realignment, therefore, there is no express or implied amendment of any of the provisions of the Appropriations Act. The actual expenditure is only up to the amount contained in the law.

For purposes of adapting to the country's changing needs, the President's power to realign expenditures necessarily includes the power to withdraw allocations that were previously made for projects that are not effectively and efficiently moving or that, in his discretion, are not needed at the present.[66]

These concepts are implicit in law. Thus, Book VI, Chapter 5, Section 3 of the Administrative Code provides:

> Section 3. Declaration of Policy. — It is hereby declared the policy of the State to formulate and implement a National Budget that is an instrument of national development, reflective of national objectives, strategies and plans. *The budget shall be supportive of and consistent with the socio-economic development plan and shall be oriented towards the achievement of explicit objectives and expected results, to ensure that funds are utilized and operations are conducted effectively, economically, and efficiently.* (Emphasis supplied)

To set priorities is to favor one project over the other given limited resources available. Thus, there is a possibility when resources are wanting, that some projects or activities authorized in the General Appropriations Act may be suspended.

Justice Carpio's interpretation of Section 38, Chapter 5, Book VI of the Administrative Code is that the power to suspend can only be exercised by the President for appropriated funds that were obligated.[67] If the funds were appropriated but not obligated, the power to suspend under Section 38

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65 CONST., art. VII, sec. 5 and art. XI, sec. 1.

66 *See* Exec. Order No. 292, book VI, chap. 2, sec. 3; Exec. Order No. 292, book VI, chap. 5, sec. 38.

67 J. Carpio, separate concurring opinion, p. 21.

is not available.[68] Justice Carpio reasons that to allow the President to suspend or stop the expenditure of unobligated funds is equivalent to giving the President the power of impoundment.[69] If, in the opinion of the President, there are unsound appropriations in the proposed General Appropriations Act, he is allowed to exercise his line item veto power.[70] Once the GAA is enacted into law, the President is bound to faithfully execute its provisions.[71]

I disagree.

When there are reasons apparent to the President at the time when the General Appropriations Act is submitted for approval, then he can use his line item veto. However, at a time when he executes his priorities, suspension of projects is a valid legal remedy.

Suspension is not impoundment. Besides, the prohibition against impoundment is not yet constitutional doctrine.

It is true that the General Appropriations Act provides for impoundment.[72] *Philconsa v. Enriquez*[73] declined to rule on its constitutional validity.[74] Until a ripe and actual case, its constitutional contours have yet to be determined. Certainly, there has been no specific expenditure under the umbrella of the Disbursement Allocation Program alleged in the petition and properly traversed by respondents that would allow us the proper factual framework to delve into this issue. Any definitive pronouncement on impoundment as constitutional doctrine will be

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68 Id.
69 Id.
70 Id.
71 Id.
72 *See e.g.* General Appropriations Act (2011), sec. 66.
Section 66. Prohibition Against Impoundment of Appropriations. No appropriations authorized under this Act shall be impounded through retention or deduction, unless in accordance with the rules and regulations to be issued by the DBM: PROVIDED, That all the funds appropriated for the purposes, programs, projects and activities authorized under this Act, except those covered under the Unprogrammed Fund, shall be released pursuant to Section 33(3), Chapter 5, Book VI of E.O. No. 292.
Section 33(3), Chapter 5, Book VI of E.O. No. 292 provides:
CHAPTER 5
Budget Execution

SECTION 33. Allotment of Appropriations.—Authorized appropriations shall be allotted in accordance with the procedure outlined hereunder:
. . .
(3) Request for allotment shall be approved by the Secretary who shall ensure that expenditures are covered by appropriations both as to amount and purpose and who shall consider the probable needs of the department or agency for the remainder of the fiscal year or period for which the appropriation was made.
73 G.R. No. 113105, August 19, 1994, 235 SCRA 506 [Per J. Quiason, En Banc].
74 Id. at 545–546.

premature, advisory, and, therefore, beyond the province of review in these cases.[75]

Impoundment is not mentioned in the Constitution. At best, it can be derived either from the requirement for the President to faithfully execute the laws with reference to the General Appropriations Act.[76] Alternatively, it can be implied as a limitation imposed by the legislature in relation to the preparation of a budget. The constitutional authority that will serve as the standpoint to carve out doctrine, thus, is not yet clear.

To be constitutionally sound doctrine, impoundment should refer to a willful and malicious withholding of funds for a legally mandated and funded project or activity. The difficulty in making broad academic pronouncements is that there may be instances where it is necessary that some items in the appropriations act be unfunded.

The President, not Congress, decides priorities when actual revenue collections during a fiscal year are not sufficient to fund all authorized expenditures. In doing so, the President may have to leave some items with partial or no funding. Making priorities for spending is inherently a discretion within the province of the executive. Without priorities, no legal mandate may be fulfilled. It may be that refusing to fund a project in deficit situations is what is needed to faithfully execute the other mandates provided in law. In such cases, attempting to partially fund all projects may result in none being implemented.

Of course, even if there is a deficit, impoundment may exist if there is evidence of willful and malicious conduct on the part of the executive to withdraw funding from a specific item other than to make priorities. Whether that situation is present in the cases at bar is not clear. It has neither been pleaded nor proven. The contrary has not been asserted by petitioners. They have filed broad petitions unarmed with the specifics of each of the expenditures. They have also failed to traverse the "evidence packets" presented by respondents.

Impoundment, as a constitutional doctrine, therefore, becomes clear and salient under conditions of surpluses; that is, that the revenue actually

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[75] *See Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, G.R. No. 183591, October 14, 2008, 568 SCRA 402, 450 [Per J. Carpio-Morales, En Banc], *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, October 5, 2010, 632 SCRA 146, 176-179 [Per J. Carpio-Morales, En Banc], and J. Leonen's concurring opinion in *Belgica v. Hon. Secretary Paquito N. Ochoa*, G.R. No. 208566, November 19, 2013, pp. 6–7 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2013/november2013/208566.pdf> [Per J. Perlas-Bernabe, En Banc].

[76] CONST., art. VII, sec. 5.

collected and available exceeds the expenditures that have been authorized. Again, this situation has neither been pleaded nor proven.

Justice Carpio highlights Prof. Laurence Tribe's position on impoundment.[77] While I have the highest admiration for Laurence Tribe as constitutional law professor, I understand that his dissertation is on American Constitutional Law. I maintain the view that the decisions of the United States Supreme Court and the analysis of their observers are not part of our legal order. They may enlighten us or challenge our heuristic frames in our reading of our own Constitution. But, in no case should we capitulate to them by implying that they are binding precedent. To do so would be to undermine our own sovereignty.

Thus, with due respect to Justice Carpio's views, the discussions in *Philconsa v. Enriquez*[78] could not have been rendered outdated by US Supreme Court decisions. They can only be outdated by the discussions and pronouncements of this court.

VIII

Of course, there are instances when the President must mandatorily withhold allocations and even suspend expenditure in an obligated item. This is in accordance with the concept of "fiscal responsibility": a duty imposed on heads of agencies and other government officials with authority over the finances of their respective agencies.

Section 25 (1) of Presidential Decree No. 1445,[79] which defines the powers of the Commission on Audit, states:

> Section 25. Statement of Objectives. –
>
> . . . .
>
> (1) To determine whether or not the fiscal responsibility that rests directly with the head of the government agency has been properly and effectively discharged;
>
> . . . .

This was reiterated in Volume I, Book 1, Chapter 2, Section 13 of the Government Accounting and Auditing Manual,[80] which states:

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77 J. Carpio, separate concurring opinion, pp. 22–24.

78 G.R. No. 113105, August 19, 1994, 235 SCRA 506, 545–546 [Per J. Quiason, En Banc].

79 Pres. Decree No. 1445 (1978), otherwise known as the Government Auditing Code of the Philippines. *See also* CONST., art. IX-D, sec. 2; Exec. Order No. 292 s. (1987), book V, title I, subtitle B, chap. 4.

80 The Government Accounting and Auditing Manual (GAAM) was issued pursuant to Commission on Audit Circular No. 91-368 dated December 19, 1991. The GAAM is composed of three volumes:

> **Section 13. The Commission and the fiscal responsibility of agency heads. –** One primary objective of the Commission is to determine whether or not the fiscal responsibility that rests directly with the head of the government agency has been properly and effectively discharged.
>
> The head of an agency and all those who exercise authority over the financial affairs, transaction, and operations of the agency, shall take care of the management and utilization of government resources in accordance with law and regulations, and safeguarded against loss or wastage to ensure efficient, economical, and effect operations of the government.

Included in fiscal responsibility is the duty to prevent irregular, unnecessary, excessive, or extravagant expenses. Thus:

> Section 33. Prevention of irregular, unnecessary, excessive, or extravagant expenditures of funds or uses of property; power to disallow such expenditures. The Commission shall promulgate such auditing and accounting rules and regulations as shall prevent irregular, unnecessary, excessive, or extravagant expenditures or uses of government funds or property.

The provision authorizes the Commission on Audit to promulgate rules and regulations. But, this provision also guides all other government agencies *not to make any expenditure that is "irregular, unnecessary, excessive, or extravagant."* [81] The President should be able to prevent unconstitutional or illegal expenditure based on any allocation or obligation of government funds.

Volume I, Book III, Title 3, Article 2 of the Government Accounting and Auditing Manual defines irregular, unnecessary, excessive, extravagant, and unconscionable expenditures as:

> **Section 162. Irregular expenditures.** – The term "irregular expenditure" signifies an expenditure incurred without adhering to established rules, regulations, procedural guidelines, policies, principles or practices that have gained recognition in law. Irregular expenditures are incurred without conforming with prescribed usages and rules of discipline. There is no observance of an established pattern, course, mode of action, behavior, or conduct in the incurrence of an irregular expenditure. A transaction conducted in a manner that deviates or departs from, or which does not comply with standards set, is deemed irregular. An anomalous

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Volume I – Government Auditing Rules and Regulations; Volume II – Government Accounting; and Volume III – Government Auditing Standards and Principles and Internal Control System. In 2002, Volume II of the GAAM was replaced by the New Government Accounting System as per Commission on Audit Circular No. 2002-002 dated June 18, 2002.

[81] Pres. Decree No. 1445, sec. 33.

> transaction which fails to follow or violate appropriate rules of procedure is likewise irregular. Irregular expenditures are different from illegal expenditures since the latter would pertain to expenses incurred in violation of the law whereas the former in violation of applicable rules and regulations other than the law.
>
> **Section 163. Unnecessary expenditures.** – The term "unnecessary expenditures" pertains to expenditures which could not pass the test of prudence or the obligations of a good father of a family, thereby non-responsiveness to the exigencies of the service. Unnecessary expenditures are those not supportive of the implementation of the objectives and mission of the agency relative to the nature of its operation. This could also include incurrence of expenditure not dictated by the demands of good government, and those the utility of which cannot be ascertained at a specific time. An expenditure that is not essential or that which can be dispensed with without loss or damage to property is considered unnecessary. The mission and thrusts of the agency incurring the expenditure must be considered in determining whether or not the expenditure is necessary.
>
> **Section 164. Excessive expenditures.** – The term "excessive expenditures" signifies unreasonable expense or expenses incurred at an immoderate quantity or exorbitant price. It also includes expenses which exceed what is usual or proper as well as expenses which are unreasonably high, and beyond just measure or amount. They also include expenses in excess of reasonable limits.
>
> **Section 165. Extravagant expenditures.** – The term "extravagant expenditures" signifies those incurred without restraint, judiciousness and economy. Extravagant expenditures exceed the bounds of propriety. These expenditures are immoderate, prodigal, lavish, luxurious, wasteful, grossly excessive, and injudicious.
>
> **Section 166. Unconscionable expenditures.** – The term "unconscionable expenditures" signifies expenses without a knowledge or sense of what is right, reasonable and just and not guided or restrained by conscience. These are unreasonable and immoderate expenses incurred in violation of ethics and morality by one who does not have any feeling of guilt for the violation.

These are sufficient guidelines for government officials and heads of agencies to determine whether a particular program, activity, project, or any other act that involves the expenditure of government funds should be approved or not.

The constitutional framework outlined and the cited statutory provisions should be the context for interpreting Section 38, Chapter 5, Book VI of the Administrative Code:

> Section 38. Suspension of Expenditure of Appropriations. — Except as otherwise provided in the General Appropriations Act and

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

The General Appropriations Act for Fiscal Years 2011, 2012, and 2013 also uniformly provide:

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

The President can withhold allocations from items that he deems will be "irregular, unnecessary, excessive or extravagant."[82] ***Viewed in another way, should the President be confronted with an expenditure that is clearly "irregular, unnecessary, excessive or extravagant,"***[83] ***it may be an abuse of discretion for him not to withdraw the allotment or withhold or suspend the expenditure***

For purposes of augmenting items — as opposed to realigning funds — the President should be able to treat such amounts resulting from otherwise "irregular, unnecessary, excessive or extravagant" expenditures as savings.

IX

The Constitution mentions "savings" in Article VI, Section 25 (5) in relation to the power of the heads of government branches and constitutional commissions to augment items in their appropriations. Thus:

> Sec. 25.
>
> . . . .
>
> 5. No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate,

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82 Pres. Decree No. 1445, sec. 33.

83 Pres. Decree No. 1445, sec. 33.

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

The existence of savings in one item is a fundamental constitutional requirement for augmentation of another item.[84] Augmentation modifies the maximum amount provided in the General Appropriations Act appropriated for an item by way of increasing such amount.[85] The power to augment items allows heads of government branches and constitutional commissions to exceed the limitations imposed on their appropriations, through their savings, to meet the difference between the actual and authorized allotments.[86]

The law provides for the definition of savings. The law mentioned in Article VI, Section 25 (5) refers not only to the General Appropriations Act's general provisions but also to other statutes such as the Administrative Code and the Auditing Code contained in Presidential Decree No. 1445.

The clause in the General Appropriations Act for Fiscal Years 2011, 2012, and 2013, subject to our interpretation for purposes of determination of savings, is as follows:

> [S]avings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrances which are (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized. . . .[87]

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84 CONST., art. VI, sec. 25 (5).

85 Id. There is no legal provision that prohibits spending less than the amount provided.

86 Id.

87 The entire provision reads: General Appropriations Act (2012), sec. 54

> Sec. 54. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.
>
> Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, which upon implementation or subsequent evaluation of needed resources, is determined to be deficient. In no case shall a non-existent program, activity or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.
>
> *See also* General Appropriations Act (2013), sec. 53 and General Appropriations Act (2011), sec. 60, containing the same provision. These conditions are not, however, relevant to this case.

The ponencia,[88] Justice Antonio Carpio,[89] Justice Arturo Brion,[90] and Justice Estela Perlas-Bernabe[91] drew attention to this GAA provision that qualified "savings" as "free from any obligation or encumbrances." The phrase, "free from any obligation or encumbrances," however, provides for three situations namely: (1) completion; (2) final discontinuance; or (3) abandonment. The existence of any of these three situations should constitute an appropriation as free from obligation.

These words are separated by "or" as a conjunctive. Thus, "final discontinuance" should be given a meaning that is different from "abandonment."

The only logical reading in relation to the other provisions of law is that "abandonment" may be discontinuance in progress. This means that a project is temporarily stopped because to continue would mean to spend in a manner that is "irregular, unnecessary, excessive or extravagant." When the project is remedied to prevent the irregularity in these expenditures, then the project can further be funded. When the project is not remedied, then the executive declares a "final discontinuance" of the project.

In these cases, it makes sense for the President to withdraw or withhold allocation or further obligation of the funds. It is in this light that the Administrative Code provides that the President may suspend work or the entire program when, based on his judgment, public interest requires it.[92]

To further comply with the duty to use funds "effectively, economically and efficiently,"[93] the President should be able to realign or reallocate these funds. The allocations withdrawn for any of these purposes should be available either for realignment or as savings to augment certain appropriation items.

National Budget Circular No. 541 was issued because of the executive's concern about the number of "slow-moving projects."[94] The slow pace of implementation may have been due to irregularities or illegalities. It could be that it was due to inefficiencies, or it could be that there were simply projects which the executive refused to implement.

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88 Ponencia, p. 59.
89 J. Carpio, separate concurring opinion, p. 8.
90 J. Brion, separate opinion, p. 38.
91 J. Perlas-Bernabe, separate concurring opinion, p. 3.
92 Exec. Order No. 292, book VI, chap. 5, sec. 38.
93 *See* Exec. Order No. 292, book VI, chap. II, sec. 3.
94 DBM NBC No. 541 (2012), 1.0–2.0.

X

There are other species of legitimate savings for purposes of augmentation of appropriation items that justify withdrawal of allocations.

"Final discontinuance" or "abandonment" can occur when, even with the exercise of good faith by officials of the executive departments, there are unforeseen events that make it improbable to complete the procurement and obligation of an item within the time period allowed in the relevant General Appropriations Act.

DBM NBC No. 541 provides an implicit deadline of June 30, 2012 for unobligated but allocated items.[95] There is a mechanism of consultation with the agencies concerned.[96] For instance, the 5th Evidence Packet submitted by the Office of the Solicitor General shows a copy of Department of Transportation and Communication Secretary Joseph Abaya's letter to the Department of Budget and Management, recommending withdrawal of funds from certain projects,[97] which they were having difficulties in implementing.[98]

In Section 5.4 of Circular No. 541, the bases for the deadline are:

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

These assumptions as well as the determination of a deadline are consistent with the President's power to control "all the executive departments, bureaus and offices."[99] It is also within the scope of his power to fully and faithfully execute laws. Judicial review of the deadline as well as its policy basis will only be possible if there is a clear and convincing showing by a petitioner that grave abuse of discretion is present. Generally, the nature of the expenditure, the time left to procure, and the efforts both of the agency concerned and the Department of Budget and Management to meet the obstacles to meet the procurement plans would be relevant. But in most instances, this is really a matter left to the judgment of the President.

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95 DBM NBC No. 541 (2012), sec. 2.1, 3.1, and 5.4.
96 DBM NBC No. 541 (2012), sec. 5.4 and 5.5.
97 5th Evidence Packet, p. 1
98 TSN, January 28, 2014, p. 23
99 CONST., art. VII, sec. 17.

To this extent, I disagree with the proposal of Justice Carpio on our declaration of the timelines for purposes of determining when there can be savings. Justice Carpio is of the view that there is a need to declare as unconstitutional:

> Disbursements of unobligated allotments for Capital Outlay as savings and their realignment to other items in the GAA, prior to the last two months of the fiscal year if the period to obligate is one year, or prior to the last two months of the second year if the period to obligate is two years.[100]

It is not within the scope of our powers to insist on a specific time period for all expenditures given the nuances of executing a budget. To so hold would be to impinge on the ability of the President to execute laws and exercise his control over all executive departments.

XI

Article VI, Section 25 (5) requires that for any augmentation to be valid, it must be for an existing item. Furthermore, with respect to the President, the augmentation may only be for items within the executive department.[101]

The power to augment under this provision is qualified by the words, "respective offices." This means that the President and the other officials enumerated can only augment items within their departments. In other words, augmentation of items is allowed provided that the source department and the recipient department are the same.

Transfer of funds from one department to other departments had already been declared as unconstitutional in *Demetria v. Alba.*[102] Moreover, a corollary to our pronouncement in *Gonzales v. Macaraig, Jr.*[103] that "[t]he doctrine of separation of powers is in no way endangered because the transfer is made within a department (or branch of government) and not from one department (branch) to another" [104] is that transfers across departments are unconstitutional for being violative of the doctrine of separation of powers.

There are admissions in the entries contained in the evidence packets that presumptively show that there have been at least two (2) instances of

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100 J. Carpio, separate concurring opinion, p. 33.
101 CONST., art. VI, sec. 25 (5).
102 232 Phil. 222, 229–230 (1987) [Per J. Fernan, En Banc].
103 G.R. No. 87636, November 19, 1990, 191 SCRA 452 [Per J. Melencio-Herrera, En Banc].
104 Id. at 472.

augmentation by the executive of items outside its department.[105] If these are indeed validated upon the proper audit to have been actually expended, then such acts are unconstitutional.

The Solicitor General suggests that we stay our hand to declare these transfers as unconstitutional since the Congress has acquiesced to these transfers of funds and have not prohibited them in the next budget period.[106] Alternatively, respondents also suggest that the transfers were necessary because of contingencies or for interdepartmental cooperation.[107]

Acquiescence of an unconstitutional act by one department of government can never be a justification for this court not to do its constitutional duty.[108] The Constitution will fail to provide for the neutrality and predictability inherent in a society thriving within the auspices of the rule of law if this court fails to act in the face of an actual violation. The interpretation of the other departments of government of their powers under the Constitution may be persuasive on us,[109] but it is our collective reading which is final. The constitutional order cannot exist with acquiescence as suggested by respondents.

Furthermore, the residual powers of the President exist only when there are plainly ambiguous statements in the Constitution. If there are instances that require more funds for a specific item outside the executive agencies, a request for supplemental appropriation may be made with Congress. Interdependence is not proscribed but must happen in the context of the rule of law. No exigent circumstances were presented that could lead to a clear and convincing explanation why this constitutional fiat should not be followed.

XII

Definitely, Section 5.7.3 of DBM NBC No. 541 is not an ideal example of good rule writing. By this provision, withdrawn allotments may be:

> 5.7.3 Used to augment existing programs and projects of any agency and to fund priority programs and projects not considered

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105 In the 1st Evidence Packet, p. 4 shows that the Commission on Audit received DAP funds for its IT Infrastructure Program and for the hiring of additional IT experts. On p. 38, the House of Representatives received DAP funding for the "Construction of the Legislative Library and Archive/Building/Congressional E-Library."

106 TSN, January 28, 2014, p. 16.

107 Office of the Solicitor General's memorandum, p. 35.

108 CONST., art. VIII, sec. 1.

109 *See* J. Leonen, dissenting opinion, p. 8, in *Umali v. COMELEC*, April 22, 2014 < http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/203974.pdf>.

> in the 2012 budget but expected to be started or implemented during the current year.

This provision is too broad. It appears to sanction the unconstitutional act of augmenting a non-existing item in the general appropriations acts (GAAs) or any supplemental appropriations law.

The Solicitor General suggests that this provision should be read broadly so as to skirt any constitutional infirmity, thus:

> 76. Paragraph 5.7.3 of NBC No. 541 makes no mention of items or appropriations. Instead, it refers to '. . .existing programs and projects of any agency and . . . priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year.' On questioning from the Chief Justice, respondents submitted that 'programs and projects' do not refer to items of appropriation (as they appear in the GAA) but to specific activities, the specific details and particular justifications for which may not have been considered by Congress, but are necessarily included in the broad terms used in the GAA. Activities need not be enumerated for consideration of Congress, as they are already encapsulated in the broader terms 'programs' or 'projects'. This finds statutory support in the Revised Administrative Code which defines 'programs' as 'functions and activities for the performance of a major purpose for which a government agency is established' and 'project' as a 'component of a program covering a homogenous group of activities that results in the accomplishment of an identifiable output.'[110]

Every presumption in interpreting a provision of law should indeed be granted so as to allow constitutionality in any provision in law or regulation.[111] This presumption applies to facial reviews of provisions. However, it is unavailing in the face of actual facts that clearly and convincingly show a breach of the constitutional provision. Such facts must be established through the rules of evidence.

The Solicitor General himself submitted "evidence packets" which admit projects benefiting from the DAP.[112] Based on respondent's allegations, the projects have "appropriations cover."[113] Petitioners were unable to refute these allegations. Perhaps, it was because it was the first time that they encountered this full accounting of the DAP.

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110 Memorandum of Solicitor General, pp. 27–28.
111 *People v. Vera*, 65 Phil. 56, 95 (1937) [Per J. Laurel, En Banc].
112 The Solicitor General submitted seven (7) evidence packets detailing the DAP-funded projects.
113 Memorandum of Solicitor General, pp. 25–26.

In my view, it is not in this petition for certiorari and prohibition that the proper traverse of factual allegations can be done. We cannot go beyond guidance that any allocation — or augmentation — for an activity not covered by any item in any appropriation act is both unconstitutional and illegal.

XIII

I agree with the assessment on the constitutionality of using unprogrammed funds as appropriations cover.[114] An increase in the dividends coming from government financial institutions and government-owned and -controlled corporations is not the condition precedent for using revenues for items allowed to be funded from unplanned revenues. The provisions of the General Appropriations Act clearly provide that the actual revenues exceed the projected revenues presented and used in the approval of the current law.[115]

I agree with Justice Bernabe's views relating to the pooling of funds.[116] There are many laudable intentions in the Disbursement Acceleration Program (DAP). But its major problem lies in the concept of pooled funds. That is, that there is a lump sum from various sources used both to realign allocation and to augment appropriations items. It is unclear whether augmentation of one item is done with funds that are legitimately savings from another. It is difficult to assess each and every source as well as whether each and every expenditure has appropriations cover.

It would have been better if the executive just augmented an item and was clear about its source for savings. What happened was that there was an intermediary mechanism of commingling and pooling funds. Thus, there was the confusion as to whether DAP was the source or ultimately only the mechanism to create savings. Besides, access to information, clarity, and simplicity of governmental acts can ensure public accountability. When the information cannot be accessed freely or when access is too sophisticated, public doubt will not be far behind.

In view of this, I, therefore, agree to lay down the basic principles in the fallo of our decision so that the expenditures can be properly audited.

XIV

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114 Ponencia, pp. 77–82.

115 *See* General Appropriations Act (2011), XLV, A (1); General Appropriations Act (2012), XLVI, A (1).

116 J. Perlas-Bernabe, separate concurring opinion, pp. 6–7.

Thus, there are factual issues that need to be determined before some or all of the 116 projects[117] contained in the evidence packets admitted by respondents to have benefitted from the DAP can be nullified:

First, whether the transfers of funds were in the nature of realignment of allocations or augmentation of items;

Second, whether the withdrawal of allocations, under the circumstances and considering the nature of the work, activity, or project, was consistent with the definition of savings in the General Appropriations Act, the Administrative Code, and the Auditing Code;

Third, whether the transfer of allotments and the corresponding expenditures were proper augmentations of existing items;

Fourth, whether there were actual expenditures from savings that amounted to augmentation of items outside the executive;

Fifth, whether there were actual expenditures justified with unprogrammed funds as the appropriations cover.

The accounts submitted by the Solicitor General should be assessed and audited in a proper proceeding that will allow those involved to traverse the factual issues, thereby ensuring all parties a full opportunity to be heard. The 116 projects claimed as part of the Disbursement Allocation Program (DAP) were not alleged by petitioners but were raised as part of the oral arguments of respondents. The details of each project need to be further examined. Each of the expenditure involved in every project may, therefore, be the subject of more appropriate procedure such as a special audit by the Commission on Audit or the proper case filed by any interested party to nullify any specific transfer based on evidence that they can present.

XV

The general rule is that a declaration of unconstitutionality of any act means that such act has no legal existence: It is *null and void ab initio*.[118]

The existing exception is the doctrine of operative facts. The application of this doctrine should, however, be limited to situations where (a) there is a showing of good faith in the acts involved or (b) where in

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[117] TSN, January 28, 2014, p. 17.

[118] *See also Yap v. Thenamaris Ship's Management*, G.R. No. 179532, May 30, 2011, 649 SCRA 369, 380 [Per J. Nachura, Second Division].

equity we find that the difficulties that will be borne by the public far outweigh rigid application to the effect of legal nullity of an act.

The doctrine saves only the effects of the unconstitutional act. It does not hint or even determine whether there can be any liability arising from such acts. Whether the constitutional violation is in good faith or in bad faith, or whether any administrative or criminal liability is forthcoming, is the subject of other proceedings in other forums.

Likewise, to rule that a declaration of unconstitutionality per se is the basis for determining liability is a dangerous proposition. It is not proper that there are suggestions of administrative or criminal liability even before the proper charges are raised, investigated, and filed.

Any discussion on good faith or bad faith is, thus, premature. But, in our jurisdiction, the presumption of good faith is a universal one. It assures the fundamental requisites of due process and fairness. It frames a judicial attitude that requires us to be impartial.

Certiorari and prohibition as remedies are, thus, unavailing for these questions where the factual conditions per expense item cannot be convincingly established and where the regulations have become moot and academic. This is definitely not the proper case to assess the effects of each of the 116 projects under the DAP.

Our decision today should not be misinterpreted as authority to undo infrastructure built or expenditures made under the DAP. Nor should it be immediately used as basis for saying that any or all officials or beneficiaries are either liable or not liable. Each expenditure must be audited in accordance with our ruling.

FINAL NOTE

Cases invested with popular and contemporary political interest are difficult. Sustained public focus is assured because of the effect of this decision on the current balance of political power. It makes for good stories both in traditional and social media. The public's interest can be captivated because the protagonists live in the here and now.

In the efforts to win over an audience, there are a few misguided elements who offer unverified and illicit peeks into our deliberations. Since they do not sit in our chamber, they provide snapshots culled from disjointed clues and conversations. Some simply move to speculation on the basis of their simplified and false view of what motivates our judgments. We are not

beholden to the powers that appoint us. There are no factions in this court. Unjustified rumors are fanned by minds that lack the ability to appreciate the complexity of our realities. This minority assumes that their stories or opinions will be well-received by the public as they imagine it to be. Those who peddle stereotypes and prejudice fail to see the Filipino as they are. They should follow the example of many serious media practitioners and opinion leaders who help our people as they engage in serious and deep analytical discussion of public issues in all forms of public media.

The justices of this court are duty-bound to deliberate. This means that we are all open to listening to the views of others. It is possible that we take tentative positions to be refined in the crucible of collegial discussion and candid debate. We benefit from the views of others: each one shining their bright lights on our own views as we search for disposition of cases that will be most relevant to our people.

We decide based on the actual facts in the cases before us as well as our understanding of the law and our role in the constitutional order. We are aware of the heavy responsibilities that we bear. Our decisions will guide and affect the future of our people, not simply those of our public officials.

DAP is a management program that appears to have had been impelled with good motives. It generally sought to bring government to the people in the most efficient and effective manner. I entertain no doubt that not a few communities have been inspired or benefited from the implementation of many of these projects.

A government of the people needs to be efficient and effective. Government has to find ways to cause change in the lives of people who have lived in our society's margins: whether this be through well thought out infrastructure or a more egalitarian business environment or addressing social services or ensuring that just peace exists. The amount and timing of funding these activities, projects, or programs are critical.

But, the frailty of the human being is that our passion for results might blind us from the abuses that can occur. In the desire to meet social goals urgently, processes that similarly congeal our fundamental values may have been overlooked. After all, "daang matuwid" is not simply a goal but more importantly, the auspicious way to get to that destination.

The Constitution and our laws are not obstacles to be hurdled. They assure that the best for our people can be done in the right way. In my view, the Constitution is a necessary document containing our fundamental norms and values that assure our people that this government will be theirs and will

always be accountable to them. It is to that faith that we have taken our oaths. It is in keeping with that faith that we discharge our duties.

We can do no less.

ACCORDINGLY, for guidance of the bench and bar, I vote to declare the following acts and practices under the Disbursement Acceleration Program (DAP); National Budget Circular No. 541 dated July 18, 2012; and related executive issuances as unconstitutional:

(a) any implementation of Section 5.7.3 insofar as it relates to activities not related to any existing appropriation item even if in anticipation of future projects;

(b) any augmentation by the President of items appropriated for offices outside the executive branch;

(c) any augmentation of any item, even within the executive department, which is sourced from funds withdrawn from activities which have not yet been (1) completed, (2) finally discontinued, or (3) abandoned; and

(d) any use of unprogrammed funds without all the conditions in the General Appropriations Act being present.

Let a copy of this decision be served on all the other officers covered in Article VI, Section 25 (5) of the 1987 Constitution for their guidance.

The evidence packets submitted by respondents should also be transmitted to the Commission on Audit for their appropriate action.

MARVIC MARIO VICTOR F. LEONEN
Associate Justice