EN BANC

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

Promulgated:
July 1, 2014

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SEPARATE OPINION

CARPIO, *J.*:

These consolidated special civil actions for *certiorari* and prohibition[1] filed by petitioners as taxpayers and Filipino citizens challenge the constitutionality of the Disbursement Acceleration Program (DAP) implemented by the President, through the Department of Budget and Management (DBM), which issued National Budget Circular No. 541 (NBC 541) dated 18 July 2012.

Petitioners assail the constitutionality of the DAP, as well as NBC 541, mainly on the following grounds: (1) there is no law passed for the creation of the DAP, contrary to Section 29, Article VI of the Constitution;

[1] G.R. No. 209135 is a petition for prohibition, mandamus, and certiorari under Rule 65 with a petition for declaratory relief under Rule 63, while the rest are petitions for certiorari and/or prohibition.

and (2) the realignment of funds which are not savings, the augmentation of non-existing items in the General Appropriations Act (GAA), and the transfer of appropriations from the Executive branch to the Legislative branch and constitutional bodies all violate Section 25(5), Article VI of the Constitution.

On the other hand, respondents, represented by the Office of the Solicitor General (OSG), argue that no law is required for the creation of the DAP, which is a fund management system, and the DAP is a constitutional exercise of the President's power to augment or realign.

Petitioners have standing to sue. The well-settled rule is that taxpayers, like petitioners here, have the standing to assail the illegal or unconstitutional disbursement of public funds.[2] Citizens, like petitioners here, also have standing to sue on matters of transcendental importance to the public which must be decided early,[3] like the transfer of appropriations from one branch of government to another or to the constitutional bodies, since such transfer may impair the finely crafted system of checks-and-balances enshrined in the Constitution.

The DBM admits that under the DAP the total actual disbursements are as follows:

Table 3. (Figures in Thousand Pesos)[4]

DAP DISBURSEMENTS	AMOUNT
10-Oct-11	67,722,280
21-Dec-11	11,004,157
27-Jun-12	21,564,587
05-Sep-12	2,731,080
21-Dec-12	33,082,603
17-Jun-13	4,658,215
26-Sep-13	8,489,600
TOTAL	149,252,523

Under NBC 541, the sources of DAP funds are as follows:

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

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[2] *Pascual v. Secretary of Public Works*, 110 Phil. 331 (1960)*; Information Technology Foundation of the Phils. v. COMELEC*, 464 Phil. 173 (2004). See also *Kilosbayan, Inc. v. Morato*, 320 Phil. 171 (1995), J. Vicente V. Mendoza, *ponente*.

[3] *Chavez v. PCGG*, 360 Phil. 133 (1998); *Chavez v. Public Estates Authority*, 433 Phil. 506 (2002); *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, 589 Phil. 387 (2008).

[4] *Rollo* (G.R. No. 209135), p. 175. Consolidated Comment, p. 20.

> 10147) and FY 2012 Current Appropriation (R.A. No. 10155), pertaining to:
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> 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. (Boldfacing supplied)

In its Consolidated Comment,[5] the OSG declared that another source of DAP funds is the Unprogrammed Fund in the GAAs, which the DBM claimed can be tapped when government has windfall revenue collections, e.g., dividends from government-owned and controlled corporations and proceeds from the sale of government assets.[6]

I.
Presidential power to augment or realign

The OSG justifies the disbursements under DAP as an exercise of the President's power to augment or realign under the Constitution. The OSG has represented that the President approved the DAP disbursements and NBC 541.[7] Section 25(5), Article VI of the Constitution provides:

> No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, 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**

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5 Id. at 163. Consolidated Comment, p. 8.

6 *Rollo* (G.R. No. 209260), p. 29 (Annex "B" of the Petition in G.R. No. 209260), citing the DBM website which contained the Constitutional and Legal Bases of the DAP (http://www.dbm.gov.ph/?page_id=7364).

7 Memorandum for the Respondents, p. 25; TSN, 28 January 2014, p. 17. Solicitor General Jardeleza stated during the Oral Arguments:

> **SOLICITOR GENERAL JARDELEZA:**
>
> x x x x
>
> Presidential approval, again, did the President authorize the disbursements under the DAP? Yes, Your Honors, kindly look at the 1st Evidence Packet. It contains all the seven (7) memoranda corresponding to the various disbursements under the DAP. The memoranda list in detail all 116 and I repeat 1-1-6 identified and approved DAP projects. They show that every augmentation exercise was approved and duly signed by the President himself. **This should lay to rest any suggestion that DAP was carried out without Presidential approval**. (Boldfacing supplied)

appropriations. (Boldfacing supplied)

Section 25(5) prohibits the transfer of funds appropriated in the general appropriations law for one branch of government to another branch, or for one branch to other constitutional bodies, and *vice versa*. However, "**savings**" from appropriations for a branch or constitutional body may be transferred to another item of appropriation **within the same** branch or constitutional body, as set forth in the second clause of the same Section 25(5).

In *Nazareth v. Villar*,[8] this Court stated:

> In the funding of current activities, projects, and programs, the general rule should still be that the budgetary amount contained in the appropriations bill is the extent Congress will determine as sufficient for the budgetary allocation for the proponent agency. The only exception is found in Section 25 (5), Article VI of the Constitution, by which the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions are authorized to transfer appropriations to augment any item in the GAA for their respective offices from the savings in other items of their respective appropriations. x x x.

Section 25(5) mandates that no law shall be passed authorizing any transfer of appropriations. However, there can be, when authorized by law, augmentation of existing items in the GAA from savings in other items in the GAA within the same branch or constitutional body. This power to augment or realign is lodged in the President with respect to the Executive branch, the Senate President for the Senate, the Speaker for the House of Representatives, the Chief Justice for the Judiciary, and the Heads of the constitutional bodies for their respective entities. The 2011, 2012 and 2013 GAAs all have provisions authorizing the President, the Senate President, the House Speaker, the Chief Justice and the Heads of the constitutional bodies to realign savings within their respective entities.

Section 25(5) expressly states that what can be realigned are "**savings**" from an item in the GAA. To repeat, only savings can be realigned. Unless there are savings, there can be no realignment.

Savings can augment any ***existing*** item in the GAA, provided such item is in the "respective appropriations" of the same branch or constitutional body. As defined in Section 60, Section 54, and Section 53 of the General Provisions of the 2011, 2012 and 2013 GAAs, respectively, "augmentation implies the **existence x x x of a program, activity, or project with an appropriation**, which upon implementation or subsequent

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[8] G.R. No. 188635, 29 January 2013, 689 SCRA 385, 402-403.

evaluation of needed resources, is determined to be deficient. **In no case shall a non-existent program, activity, or project, be funded by augmentation from savings** x x x."

In *Demetria v. Alba*,[9] this Court construed an identical provision in the 1973 Constitution:[10]

> The prohibition to transfer an appropriation for one item to another was explicit and categorical under the 1973 Constitution. However, to afford the heads of the different branches of the government and those of the constitutional commissions considerable flexibility in the use of public funds and resources, the Constitution allowed the enactment of a law authorizing the transfer of funds for the purpose of augmenting an item from savings in another item in the appropriation of the government branch or constitutional body concerned. The leeway granted was thus limited. **The purpose and conditions for which funds may be transferred were specified, *i.e.* transfer may be allowed for the purpose of augmenting an item and *such transfer may be made only if there are savings from another item in the appropriation of the government branch or constitutional body.*** (Boldfacing and italicization supplied)

In *Sanchez v. Commission on Audit*,[11] this Court stressed the twin requisites for a valid transfer of appropriation, namely, (1) the existence of savings and (2) the existence in the appropriations law of the item, project or activity to be augmented from savings, thus:

> Clearly, there are two essential requisites in order that a transfer of appropriation with the corresponding funds may legally be effected. **First, there must be savings in the programmed appropriation of the transferring agency. Second, there must be an existing item, project or activity with an appropriation in the receiving agency to which the savings will be transferred.**
>
> **Actual savings is a sine qua non to a valid transfer of funds from one government agency to another.** The word "actual" denotes that something is real or substantial, or exists presently in fact as opposed to something which is merely theoretical, possible, potential or hypothetical. (Boldfacing supplied)

In *Nazareth v. Villar*,[12] this Court reiterated the requisites for a valid transfer of appropriation as mandated in Section 25(5), Article VI of the Constitution, thus:

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[9] 232 Phil. 222, 229 (1987).

[10] Article VIII, Sec. 16[5]. No law shall be passed authorizing any transfer of appropriations, however, the President, the Prime Minister, the Speaker, the Chief Justice of the Supreme Court, and the heads of constitutional commissions may by law be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

[11] 575 Phil. 428, 454 (2008).

[12] Supra note 8, at 405.

> Under these provisions, the authority granted to the President was subject to **two essential requisites** in order that a transfer of appropriation from the agency's savings would be validly effected. **The first required that there must be savings from the authorized appropriation of the agency. The second demanded that there must be an existing item, project, activity, purpose or object of expenditure with an appropriation to which the savings would be transferred for augmentation purposes only.** (Boldfacing supplied)

Section 25(5), Article VI of the Constitution likewise mandates that savings from one branch, like the Executive, cannot be transferred to another branch, like the Legislature or Judiciary, or to a constitutional body, and *vice versa*. In fact, funds appropriated for the Executive branch, whether savings or not, cannot be transferred to the Legislature or Judiciary, or to the constitutional bodies, and *vice versa*. Hence, funds from the Executive branch, **whether savings or not**, cannot be transferred to the Commission on Elections, the House of Representatives, or the Commission on Audit.

In *Pichay v. Office of the Deputy Executive Secretary*,[13] this Court declared that the President is constitutionally authorized to augment any item in the GAA appropriated for the Executive branch using savings from other items of appropriations for the Executive branch, thus:

> x x x [To] x x x enable the President to run the affairs of the executive department, he is likewise given constitutional authority to augment any item in the General Appropriations Law **using the savings** in other items of the appropriation for his office. In fact, he is explicitly allowed by law to transfer any fund appropriated for the different departments, bureaus, offices and agencies of the Executive Department which is included in the General Appropriations Act, to any program, project or activity of any department, bureau or office included in the General Appropriations Act or approved after its enactment. (Boldfacing supplied)

In *PHILCONSA v. Enriquez*,[14] this Court emphasized that only the President is authorized to use savings to augment items for the Executive branch, thus:

> Under Section 25(5) no law shall be passed authorizing any transfer of appropriations, and under Section 29(1), no money shall be paid out of the Treasury except in pursuance of an appropriation made by law. **While Section 25(5) allows as an exception the realignment of savings to augment items in the general appropriations law for the executive branch, such right must and can be exercised only by the President pursuant to a specific law.** (Boldfacing supplied)

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[13] G.R. No. 196425, 24 July 2012, 677 SCRA 408, 424.
[14] G.R. Nos. 113105, et al., 19 August 1994, 235 SCRA 506, 544.

II.
Definition and Sources of Savings

One of the requisites for a valid transfer of appropriations under Section 25(5), Article VI of the Constitution is that there must be **savings** from the appropriations of the same branch or constitutional body. For the President to exercise his realignment power, there must first be savings from other items in the GAA appropriated to the departments, bureaus and offices of the Executive branch, and such savings can be realigned only to existing items of appropriations within the Executive branch.

When do funds for an item in the GAA become "savings"? Section 60, Section 54, and Section 53 of the 2011, 2012, and 2013 GAAs,[15] respectively, **uniformly** define the term "savings" as follows:

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

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[15] The 2011 and 2012 GAAs contain similar provisions:

> 2011 GAA
> Sec. 60. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.
>
> x x x x
>
> 2012 GAA
> Sec. 54. Meaning of Savings and Augmentation. Savings refer to portions or balances of any programmed appropriation in this Act free from any obligation or encumbrance which are: (i) still available after the completion or final discontinuance or abandonment of the work, activity or purpose for which the appropriation is authorized; (ii) from appropriations balances arising from unpaid compensation and related costs pertaining to vacant positions and leaves of absence without pay; and (iii) from appropriations balances realized from the implementation of measures resulting in improved systems and efficiencies and thus enabled agencies to meet and deliver the required or planned targets, programs and services approved in this Act at a lesser cost.
>
> x x x x

The same definition of "savings" is also found in the GAAs from 2003 to 2010. Prior to 2010, the definition of savings in the GAAs did not contain item (iii) above.

As clearly defined in the 2011, 2012 and 2013 GAAs, savings must be portions or balances from any programmed appropriation "**free from any obligation or encumbrance"**, which means there is no contract obligating payment out of such portions or balances of the appropriation. Otherwise, if there is already a contract obligating payment out of such portions or balances, the funds are not free from any obligation, and thus can not constitute savings.

Section 60, Section 54, and Section 53 of the General Provisions of the 2011, 2012 and 2013 GAAs, respectively, contemplate three sources of savings. *First*, there can be savings when there are funds still available after completion of the work, activity or project, which means there are **excess funds remaining after the work, activity or project is completed**. There can also be savings when there is *final* discontinuance of the work, activity or project, which means there are **funds remaining after the work, activity, or project was started but finally discontinued before completion**. To illustrate, a bridge, half-way completed, is destroyed by floods or earthquake, and thus finally discontinued because the remaining funds are not sufficient to rebuild and complete the bridge. Here, the funds are obligated but the remaining funds are de-obligated upon **final** discontinuance of the project. On the other hand, abandonment means the work, activity or project can no longer be started because of lack of time to obligate the funds, resulting in the physical impossibility to obligate the funds. This happens when a month or two before the end of the fiscal year, there is no more time to conduct a public bidding to obligate the funds. Here, the **funds are not, and can no longer be, obligated and thus will constitute savings**. Final discontinuance or abandonment excludes suspension or temporary stoppage of the work, activity, or project.

Second, there can be savings when there is unpaid compensation and related costs pertaining to vacant positions. *Third*, there can be savings from cost-cutting measures adopted by government agencies.

Section 38, Chapter 5, Book VI of the Administrative Code of 1987[16] authorizes the President, whenever in his judgment public interest requires, "to suspend or otherwise stop further expenditure of funds allotted for any agency, or any other expenditure authorized in the GAA." For example, if

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

there are reported anomalies in the construction of a bridge, the President can order the suspension of expenditures of funds until an investigation is completed. This is only a **temporary, and not a final**, discontinuance of the work and thus **the funds remain obligated**. Section 38 does not speak of savings or realignment. Section 38 does not refer to work, activity, or project that is finally discontinued, which is required for the existence of savings. Section 38 refers only to **suspension** of expenditure of funds, not final discontinuance of work, activity or project. Under Section 38, the funds remain obligated and thus cannot constitute savings.

Funds which are temporarily not spent under Section 38 are not savings that can be realigned by the President. Only funds that qualify as savings under Section 60, Section 54, and Section 53 of the 2011, 2012 and 2013 GAAs, respectively, can be realigned. If the work, activity or program is merely suspended, there are no savings because there is no final discontinuance of the work, activity or project. If the work, activity or project is only suspended, the funds remain obligated. If the President "stops further expenditure of funds," it means that the work, activity or project has already started and the funds have already been obligated. Any discontinuance must be final before the unused funds are de-obligated to constitute savings that can be realigned.

To repeat, funds pertaining to work, activity or project merely suspended or temporarily discontinued by the President are not savings. Only funds remaining after the work, activity or project has been **finally** discontinued or abandoned will constitute savings that can be realigned by the President to augment existing items in the appropriations for the Executive branch.

III.
The DAP, NBC 541 and Other Executive Issuances Related to DAP

A. Unobligated Allotments are not Savings.

In the present cases, the DAP and NBC 541 directed the **"withdrawal of unobligated allotments of agencies with low level of obligations as of June 30, 2012."** The funds withdrawn are then used to augment or fund "priority and/or fast moving programs/projects of the national government." NBC 541 states:

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

x x x x

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

Except for MOOE for previous months, unobligated allotments of agencies with low levels of obligations are not savings that can be realigned by the President to fund priority projects of the government. In the **middle** of the fiscal year, unobligated appropriations, other than MOOE for previous months, do not automatically become savings for the reason alone that the agency has a low level of obligations. As of 30 June of a fiscal year, there are still six months left to obligate the funds. Six months are more than enough time to conduct public bidding to obligate the funds. As of 30 June 2012, there could have been no final abandonment of any work, activity or project because there was still ample time to obligate the funds.

However, if the funds are not yet obligated by the end of November, and the item involves a construction project, then it may be physically impossible to obligate the funds because a public bidding will take at least a month. In such a case, there can be a final abandonment of the work, activity or project.

In the case of appropriations for MOOE, the same are deemed divided into twelve monthly allocations. Excess or unused MOOE appropriations for the month, other than Mandatory Expenditures and Expenditures for Business-type Activities, are deemed savings **after the end of the month because there is a physical impossibility to obligate and spend such funds as MOOE for a period that has already lapsed.** Such excess or unused MOOE can be realigned by the President to augment any existing item of appropriation for the Executive branch. MOOE for future months are not savings and cannot be realigned.

The OSG claims that the DAP, which is used "to fund priority and/or fast moving programs/projects of the national government," is an exercise of the President's power to realign savings. However, except for MOOE for previous months, the DAP funds used for realignment under NBC 541 do not qualify as savings under Section 60, Section 54 and Section 53 of the General Provisions of the 2011, 2012, and 2013 GAAs, respectively. Unobligated allotments for Capital Outlay, as well as MOOE for July to December 2012, of agencies with low level of obligations as of 30 June 2012 are definitely not savings. The low level of obligations by agencies as of 30 June 2012 is not one of the conditions for the existence of savings

under the General Provisions of the 2011, 2012, and 2013 GAAs. To repeat, unobligated allotments withdrawn under NBC 541, except for excess or unused MOOE from January to June 2012, do not constitute savings and cannot be realigned by the President. The withdrawal of such unobligated allotments of agencies with low level of obligations as of 30 June 2012 for purposes of realignment violates Section 25(5), Article VI of the Constitution. Thus, such withdrawal and realignment of funds under NBC 541 are unconstitutional.

The OSG's contention that the President may discontinue or abandon a project as early as the third month of the fiscal year under Section 38, Chapter 5, Book VI of the Administrative Code is clearly misplaced. Section 38 refers only to suspension or stoppage of expenditure of obligated funds, and not to final discontinuance or abandonment of work, activity or project.

Under NBC 541, appropriations for Capital Outlays are sources of DAP funds. However, the withdrawal of unobligated allotments for Capital Outlays as of 30 June 2012 violates the General Provisions of the 2011 and 2012 GAAs.

Section 65 of the General Provisions of the 2011 GAA provides:

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

The same provision was substantially reproduced in the 2012 GAA, as follows:

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

The life span of Capital Outlays under the 2011 and 2012 GAAs is **two** years. This two-year life span is prescribed by law and cannot be shortened by the President, unless the appropriations qualify as "savings" under the GAA. Capital Outlay can be obligated anytime during the two-year period, provided there is sufficient time to conduct a public bidding. Capital Outlay cannot be declared as savings unless there is no more time for such public bidding to obligate the allotment. MOOE, however, can qualify as savings once the appropriations for the month are deemed abandoned by the lapse of the month without the appropriations being fully spent. The only exceptions are (1) Mandatory Expenditures which under the GAA can be declared as savings only in the last quarter of the fiscal year; and (2) Expenditures for Business-type Activities, which under the GAA cannot be realigned.[17] The MOOE is deemed divided into twelve monthly allocations. The lapse of the month without the allocation for that month being fully spent is an abandonment of the allocation, qualifying the unspent allocations as savings.

Appropriations for **future** MOOE cannot be declared as savings. However, NBC 541 allows the withdrawal and realignment of unobligated allotments for MOOE and Capital Outlays as of 30 June 2012. NBC 541 cannot validly declare Capital Outlays as savings in the middle of the fiscal year, long before the end of the two-year period when such funds can still be obligated. This two-year period applies to unused or excess MOOE of previous months in that such unused or excess MOOE can be realigned within the two-year period. However, the declaration of savings and realignment of MOOE for July to December 2012 is contrary to the GAA and the Constitution since MOOE appropriations for a future period are not savings. Thus, the realignment under the DAP of unobligated Capital Outlays as of 30 June 2012, as well as the realignment of MOOE allocated

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[17] Section 57 of the 2013 GAA provides:

> Sec. 57. Mandatory Expenditures. The amounts programmed for petroleum, oil and lubricants as well as for water, illumination and power services, telephone and other communication services, and rent requirements shall be disbursed solely for such items of expenditures: PROVIDED, That any savings generated from these items after taking into consideration the agency's full year requirements may be realigned only in the last quarter and subject to the rules on the realignment of savings provided in Section 54 hereof.
>
> Use of funds in violation of this section shall be void, and shall subject the erring officials and employees to disciplinary actions in accordance with Section 43, Chapter 5 and Section 80, Chapter 7, Book VI of E.O. No. 292, and to appropriate criminal action under existing penal laws.

Section 58 of the 2013 GAA provides:

> Sec. 58. Expenditures for Business-Type Activities. Appropriations for the procurement of supplies and materials intended to be utilized in the conduct of business-type activities shall be disbursed solely for such business-type activity and shall not be realigned to any other expenditure item.
>
> Use of funds in violation of this section shall be void, and shall subject the erring officials and employees to disciplinary actions in accordance with Section 43, Chapter 5 and Section 80, Chapter 7, Book VI of E.O. No. 292, and to appropriate criminal action under existing penal laws.

for the second semester of the fiscal year, violates Section 25(5), Article VI of the Constitution, and is thus unconstitutional.

B. Unlawful release of the Unprogrammed Fund

One of the sources of the DAP is the Unprogrammed Fund under the GAA. The provisions on the Unprogrammed Fund under the 2011, 2012 and 2013 GAAs state:

> **2011 GAA (Article XLV):**
>
> Special Provision(s)
>
> 1. Release of Fund. The amounts authorized herein shall be released **only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress** pursuant to Section 22, Article VII of the Constitution, including savings generated from programmed appropriations for the year x x x. (Boldfacing supplied)
>
> **2012 GAA (Article XLVI)**
>
> 1. Release of Fund. The amounts authorized herein shall be released **only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress** pursuant to Section 22, Article VII of the Constitution x x x. (Boldfacing supplied)
>
> **2013 GAA (Article XLV)**
>
> 1. Release of Fund. The amounts authorized herein shall be released **only when the revenue collections exceed the original revenue targets submitted by the President of the Philippines to Congress** pursuant to Section 22, Article VII of the Constitution, including collections arising from sources not considered in the aforesaid original revenue targets, **as certified by the Btr**. x x x. (Boldfacing supplied)

It is clear from these provisions that as a condition for the release of the Unprogrammed Fund, **the revenue collections, as certified by the National Treasurer, must exceed the original revenue targets submitted by the President to Congress**. During the Oral Arguments on 28 January 2014, the OSG assured the Court that the revenue collections exceeded the original revenue targets for fiscal years 2011, 2012 and 2013. I required the Solicitor General to submit to the Court a certified true copy of the certifications by the Bureau of Treasury that the revenue collections exceeded the original revenue targets for 2011, 2012 and 2013. The transcript of the Oral Arguments showed the following exchange:

JUSTICE CARPIO:
Counsel, you stated in your comment that one of the sources of DAP is the Unprogrammed Fund, is that correct?

SOLGEN JARDELEZA:
Yes, Your Honor.

JUSTICE CARPIO:
Now x x x the Unprogrammed Fund can be used only if the revenue collections exceed the original revenue targets as certified by the Bureau of Treasury, correct?

SOLGEN JARDELEZA:
Yes, Your Honor.

JUSTICE CARPIO:
In other words, the Bureau of Treasury certified to DBM that the revenue collections exceeded the original revenue target, correct?

SOLGEN JARDELEZA:
Yes, Your Honor.

JUSTICE CARPIO:
Can you please submit to the Court a certified true copy of the Certification by the Bureau of Treasury for 2011, 2012 and 2013?

SOLGEN JARDELEZA:
We will, Your Honor.

JUSTICE CARPIO:
Because as far as I know, I may be wrong, we have never collected more than the revenue target. Our collections have always fallen short of the original revenue target. The GAA says "original" because they were trying to move this target by reducing it. x x x I do not know of an instance where our government collected more than the original revenue target. But anyway, please submit that certificate.

SOLGEN JARDELEZA:
We will, Your Honor.[18] (Boldfacing supplied)

In a Resolution dated 28 January 2014, the Court directed the OSG to submit the certifications by the Bureau of Treasury in accordance with the undertaking of the Solicitor General during the Oral Arguments.

On 14 February 2014, the OSG submitted its Compliance attaching the following certifications:

1. Certification dated 11 February 2014 signed by Rosalia V. De Leon, Treasurer of the Philippines. It states:

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[18] TSN, 28 January 2014, p. 106.

> This is to certify that based on the records of the Bureau of Treasury, the amounts indicated in the attached Certification of the Department of Finance dated 04 March 2011 pertaining to the programmed dividend income from shares of stocks in government-owned or controlled corporations for 2011 and to the recorded dividend income as of 31 January 2011 are accurate.
>
> This Certification is issued this 11th day of February 2014.

2. Certification dated 4 March 2011 signed by Gil S. Beltran, Undersecretary of the Department of Finance which states:

> This is to certify that under the Budget for Expenditures and Sources of Financing for 2011, the programmed income from dividends from shares of stock in government-owned and controlled corporations is ₱5.5 billion.
>
> This is to certify further that based on the records of the Bureau of Treasury, the National Government has recorded dividend income amounting of ₱23.8 billion as of 31 January 2011.

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

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

4. Certification dated 3 July 2013 signed by Rosalia V. De Leon, Treasurer of the Philippines which states:

> This is to certify that the actual dividend collections remitted to the National Government for the period January to May 2013 amounted to ₱12.438 billion compared to the full year program of ₱10.0 billion for 2013.
>
> Moreover, the National Government accounted for the sale of right to build and operate the NAIA expressway amounting to ₱11.0 billion in June 2013.

The certifications submitted by the OSG are not compliant with the Court's directive. **The certifications do not state that the revenue collections exceeded the original revenue targets as submitted by the President to Congress**. Except for the ₱11 billion NAIA expressway revenue, the certifications refer solely to dividend collections, and programmed (target) dividends, and not to excess revenue collections as against revenue targets. Programmed dividends from government-owned or controlled corporations constitute **only a portion** of the original revenue targets, and dividend collections from government-owned or controlled

corporations constitute **only a portion** of the total revenue collections. The Revenue Program by source of the government is divided into "**Tax Revenues**" and "**Non-Tax Revenues.**" Dividends from government-owned and controlled corporations constitute *only one of the items* in "Non-Tax Revenues."[19] Non-Tax Revenues consist of all income collected by the Bureau of Treasury, privatization proceeds and foreign grants. The bulk of these revenues comes from the BTr's income, which consists among others of dividends on stocks and the interest on the national government's deposits. Non-Tax Revenues include all windfall income. Any income not falling under Tax Revenues necessarily falls under Non-Tax Revenues. **For 2011, the total programmed (target) Tax and Non-Tax Revenues of the government was ₱1.359 trillion, for 2012 ₱1.560 trillion, and for 2013 ₱1.780 trillion.**[20]

Clearly, the DBM has failed to show that the express condition in the 2011, 2012 and 2013 GAAs for the use of the Unprogrammed Fund has been met. Thus, disbursements from the Unprogrammed Fund in 2011, 2012, and 2013 under the DAP and NBC 541 were in violation of the law.

At any rate, dividends from government-owned or controlled corporations are not savings but revenues, like tax collections, that go directly to the National Treasury in accordance with Section 44, Chapter 5, Book VI of the Administrative Code of 1987, which states:

> SEC. 44. *Accrual of Income to Unappropriated Surplus of the General Fund.* - Unless otherwise specifically provided by law, all income accruing to the departments, offices and agencies by virtue of the provisions of existing laws, orders and regulations shall be deposited in the National Treasury or in the duly authorized depository of the Government and shall accrue to the unappropriated surplus of the General Fund of the Government: Provided, That amounts received in trust and from business-type activities of government may be separately recorded and disbursed in accordance with such rules and regulations as may be determined by the Permanent Committee created under this Act.

Dividends form part of the unappropriated surplus of the General Fund of the Government and they cannot be spent unless there is an appropriations law. The same rule applies to windfall revenue collections which also form part of the unappropriated General Fund. Proceeds from sales of government assets are not savings but revenues that also go directly to the National Treasury. Savings can only come from the three sources expressly specified in Section 60, Section 54 and Section 53 of the General Provisions of the 2011, 2012, and 2013 GAAs, respectively.

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[19] *See* Table C.1 (Revenue Program, By Source, 2011-2013) of 2013 Budget of Expenditures and Sources of Financing (http://www.dbm.gov.ph/wp-content/uploads/BESF/BESF2013/C1.pdf)

[20] Id.

Besides, by definition savings can never come from the Unprogrammed Fund since the term "savings" is defined under the GAAs as "portions or balances of any **programmed** appropriation." The Unprogrammed Fund can only be used for the specific purpose prescribed in the GAAs, and only if the revenue collections exceed the original revenue targets for the fiscal year.

Section 3 of the General Provisions of the 2011, 2012 and 2013 GAAs uniformly provide that all fees, charges, assessments, and other receipts or revenues collected by departments, bureaus, offices or agencies in the exercise of their functions shall be deposited with the National Treasury as **income of the General Fund** in accordance with the provisions of the Administrative Code and Section 65 of Presidential Decree No. 1445.[21] Such income are not savings as understood and defined in the GAAs.

To repeat, dividend collections of government-owned and controlled corporations do not qualify as savings as defined in Section 60, Section 54, and Section 53 of the General Provisions of the 2011, 2012, and 2013 GAAs, respectively. Dividend collections are revenues that go directly to the National Treasury. The Unprogrammed Fund under the 2011, 2012, and 2013 GAAs can only be released when revenue collections exceed the original revenue targets. The DBM miserably failed to show any excess revenue collections during the period the DAP was implemented. Therefore, in violation of the GAAs, the Executive used the Unprogrammed Fund without complying with the express condition for its use – that revenue collections of the government exceed the original revenue target, as certified by the Bureau of Treasury. In other words, the use of the Unprogrammed Fund under the DAP is unlawful, and hence, void.[22]

C. DAP violates the constitutional prohibition on "cross-border" transfers.

Section 25(5), Article VI of the Constitution mandates that savings from one government branch cannot be transferred to another branch, and *vice versa*. This constitutional prohibition on cross-border transfers is clear: the President, the Senate President, the Speaker of the House of Representatives, the Chief Justice, and the Heads of constitutional bodies are

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[21] Section 65, PD No. 1445 states:

SECTION 65. Accrual of Income to Unappropriated Surplus of the General Fund. – (1) Unless otherwise specifically provided by law, all income accruing to the agencies by virtue of the provisions of law, orders and regulations shall be deposited in the National Treasury or in any duly authorized government depository, and shall accrue to the unappropriated surplus of the General Fund of the Government.

[22] Article 5 of the Civil Code states:

Acts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity

only authorized to augment any item in the general appropriations law for their **respective offices** from **savings** in other items of their **respective appropriations**.

Contrary to Section 25(5), Article VI of the Constitution, there were instances of cross-border transfers under the DAP. In the interpellation by Justice Bersamin during the Oral Arguments, Budget Secretary Florencio Abad **expressly admitted** the existence of cross-border transfers of funds, thus:

> **JUSTICE BERSAMIN:**
>
> Alright, the whole time that you have been Secretary of Department of Budget and Management, **did the Executive Department ever redirect any part of savings of the National Government under your control cross border to another department?**
>
> **SECRETARY ABAD:**
>
> Well, in the Memos that we submitted to you, such an instance, Your Honor.
>
> **JUSTICE BERSAMIN:**
>
> Can you tell me two instances? I don't recall having read yet your material.
>
> **SECRETARY ABAD:**
>
> Well, **the first instance had to do with a request from the House of Representatives.** They started building their e-library in 2010 and they had a budget for about 207 Million but they lack about 43 Million to complete its 250 Million requirement. Prior to that, the COA, in an audit observation informed the Speaker that they had to continue with that construction otherwise the whole building, as well as the equipments therein may suffer from serious deterioration. And at that time, since the budget of the House of Representatives was not enough to complete 250 Million, they wrote to the President requesting for an augmentation of that particular item, which was granted, Your Honor. **The second instance in the Memos is a request from the Commission on Audit.** At the time they were pushing very strongly the good governance programs of the government and therefore, part of that is a requirement to conduct audits as well as review financial reports of many agencies. And in the performance of that function, the Commission on Audit needed information technology equipment as well as hire consultants and litigators to help them with their audit work and for that they requested funds from the Executive and the President saw that it was important for the Commission to be provided with those IT equipments and litigators and consultants and the request was granted, Your Honor.[23] (Boldfacing supplied)

Attached to DBM Secretary Abad's Memorandum for the President, dated 12 October 2011, is a Project List for FY 2011 DAP. The last item on

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[23] TSN, 28 January 2014, pp. 42-43.

the list, item no. 22, is for **PDAF augmentation in the amount of ~~₱~~6.5 billion**, also listed as various other local projects.[24] The relevant portion of the Project List attached to the Memorandum for the President dated 12 October 2011, **which the President approved on the same date,** reads:

PROJECT LIST: FY 2011 DISBURSEMENT ACCELERATION PLAN

Agency	Amount (in Million Php)	Details
x x x x		
22. **PDAF** (Various other local projects)	**6,500**	**For augmentation**

The Memorandum for the President dated 12 December 2011 also stated that savings that correspond to completed or discontinued projects may be pooled, among others, to augment deficiencies under the Special Purpose Funds, e.g., **PDAF**, Calamity Fund, and Contingent Fund.[25] The same provision to augment deficiencies under the Special Purpose Funds, including **PDAF**, was included in the Memorandum for the President dated 25 June 2012.[26]

The Special Provisions on the PDAF in the 2013 GAA allowed "the *individual* House member and *individual* Senator to identify the project to be funded and implemented, which identification is made after the enactment into law of the GAA."[27] In addition, Special Provision No. 4 allowed the realignment of funds, and not savings, conditioned on the concurrence of the individual legislator to the request for realignment. In the landmark case of *Belgica v. Executive Secretary,*[28] the Court struck down these Special

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[24] *Rollo* (G.R. No. 209287), p. 536.

[25] *Rollo* (G.R. No. 209287), p. 537. The relevant portions of the Memorandum for the President dated 12 December 2011 state:

> x x x x
>
> BACKGROUND
>
> 1.0 The DBM, during the course of performance reviews conducted on the agencies' operations, particularly on the implementation of their projects/activities, including expenses incurred in undertaking the same, have (sic) identified savings out of the 2011 General Appropriations Act. Said savings correspond to completed or discontinued projects under certain departments/agencies which may be pooled, for the following:
>
> x x x x
>
> 1.3 to provide for deficiencies under the Special Purpose Funds, e.g., PDAF, Calamity Fund, Contingent Fund
>
> x x x x

[26] *Rollo* (G.R. No. 209287), p. 550.

[27] Carpio, J., Concurring Opinion, *Belgica v. Executive Secretary,* G.R. Nos. 208566, 208493, and 209251, 19 November 2013.

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

Provisions on the PDAF primarily for violating the principle of separation of powers.

Clearly, the transfer of DAP funds, in the amount of ₱6.5 billion, to augment the unconstitutional PDAF is also unconstitutional because it is an augmentation of an unconstitutional appropriation.

The OSG contends that "[t]he Constitution does not prevent the President from transferring savings of his department to another department upon the latter's request, provided it is the recipient department that uses such funds to augment its own appropriation." **The OSG further submits that "[i]n relation to the DAP, the President made available to the Commission on Audit, House of Representatives, and the Commission on Elections the savings of his department upon their request for funds, but it was those institutions that applied such savings to augment items in their respective appropriations."**[29] Thus, the OSG **expressly admits** that the Executive transferred appropriations for the Executive branch to the COA, the House of Representatives and the COMELEC but justifies such transfers to the recipients' request for funds to augment items in the recipients' respective appropriations.

The OSG's arguments are obviously untenable. Nowhere in the language of the Constitution is such a misplaced interpretation allowed. Section 25(5), Article VI of the Constitution does not distinguish whether the recipient entity requested or did not request additional funds from the Executive branch to augment items in the recipient entity's appropriations. The Constitution clearly prohibits the President from transferring appropriations of the Executive branch to other branches of government or to constitutional bodies *for whatever reason.* **Congress cannot even enact a law allowing such transfers.** "The *fundamental policy of the Constitution* is against transfer of appropriations even by law, since this 'juggling' of funds is often a rich source of unbridled patronage, abuse and interminable corruption."[30] Moreover, the "cross-border" transfer of appropriations to constitutional bodies impairs the independence of the constitutional bodies.

IV.
No Presidential power of impoundment

The GAA is a law and the President is sworn to uphold and faithfully implement the law. If Congress in the GAA directs the expenditure of public funds for a specific purpose, the President has no power to cancel, prevent or permanently stop such expenditure once the GAA becomes a law. **What the President can do is to veto that specific item in the GAA**. But once the

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[29] *Rollo* (G.R. No. 209287), p. 1072. Memorandum for the Respondents, p. 35.

[30] Padilla, J., Dissenting Opinion, *Gonzales v. Macaraig, Jr.*, G.R. No. 87636, 19 November 1990, 191 SCRA 452, 484.

President approves the GAA or allows it to lapse into law, the President can no longer veto or cancel any item in the GAA or impound the disbursement of funds authorized to be spent in the GAA.

Section 38, Chapter V, Book VI of the Administrative Code of 1987 allows the President "**to suspend or otherwise stop further expenditure**" of appropriated funds but this must be for a legitimate purpose, like when there are anomalies in the implementation of a project or in the disbursement of funds. Section 38 cannot be read to authorize the President **to permanently stop** so as to cancel the implementation of a project in the GAA because the President has no power to amend the law, and the GAA is a law. Section 38 cannot also be read to authorize the President to impound the disbursement of funds for projects approved in the GAA because the President has no power to impound funds approved by Congress.

The President can suspend or stop further expenditure of appropriated funds only after the appropriated funds have become **obligated**, that is, a contract has been signed for the implementation of the project. The reason for the suspension or stoppage must be legitimate, as when there are anomalies. The President has the Executive power to see to it that the GAA is faithfully implemented, without anomalies. However, despite the order to suspend or stop further expenditure of funds the appropriated funds remain obligated until the contract is rescinded. As long as the appropriated funds are still obligated, the funds cannot constitute savings because "savings" as defined in the GAA, must come from appropriations that are "**free from any obligation or encumbrance.**"

Section 38 cannot be used by the President **to stop *permanently* the expenditure of *unobligated* appropriated funds** because that would amount to a Presidential power to impound funds appropriated in the GAA. **The President has no power to impound unobligated funds in the GAA** for two reasons: *first*, the GAA once it becomes law cannot be amended by the President and an impoundment of unobligated funds is an amendment of the GAA since it **reverses the will of Congress**; *second*, the Constitution gives the President the power to prevent unsound appropriations by Congress **only through his line item veto power**, which he can exercise only when the GAA is submitted to him by Congress for approval.

Once the President approves the GAA or allows it to lapse into law, he himself is bound by it. **There is no presidential power of impoundment in the Constitution and this Court cannot create one**. Any ordinary legislation giving the President the power to impound unobligated appropriations is unconstitutional. The power to impound unobligated appropriations in the GAA, coupled with the power to realign such funds to any project, whether existing or not in the GAA, is not only a usurpation of the power of the purse of Congress and a violation of the constitutional

separation of powers, but also **a substantial re-writing of the 1987 Constitution**.

Under the present Constitution, if the President vetoes an item of appropriation in the GAA, Congress may override such veto by an extraordinary two-thirds vote of each chamber of Congress. However, if this Court allows the President to impound the funds appropriated by Congress under a law, then the constitutional power of Congress to override the President's veto becomes inutile and meaningless. This is a substantial and drastic revision of the constitutional check-and-balance finely crafted in the Constitution.

Professor Laurence H. Tribe, in his classic textbook *American Constitutional Law*, explains why there is no constitutional power of impoundment by the President under the U.S. Federal Constitution:

> The federal courts have traditionally rejected the argument that the President possesses inherent power to impound funds and thus halt congressionally authorized expenditures. The Supreme Court issued its first major pronouncement on the constitutional basis of executive impoundment in *Kendall v. United States ex rel. Stokes*. There, in order to resolve a contract dispute, Congress ordered the Postmaster General to pay a claimant whatever amount an outside arbitrator should decide was the appropriate settlement. Presented with a decision by the arbitrator in a case arising out of a claim for services rendered to the United States in carrying the mails, President Jackson's Postmaster General ignored the congressional mandate and paid, instead, a smaller amount that he deemed the proper settlement. The Supreme Court held that a writ of mandamus could issue directing the Postmaster General to comply with the congressional directive. **In reaching this conclusion, the Court held that the President, and thus those under his supervision, did not possess inherent authority, whether implied by the Faithful Execution Clause or otherwise, to impound funds that Congress had ordered to be spent: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible**."
>
> Any other conclusion would have been hard to square with the care the Framers took to limit the scope and operation of the veto power, and **quite impossible to reconcile with the fact that the Framers assured Congress the power to override any veto by a two-thirds vote in each House. For presidential impoundments to halt a program would, of course, be tantamount to a veto that no majority in Congress could override**. To quote Chief Justice Rehnquist, speaking in his former capacity as Assistant Attorney General in 1969: "**With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent**. ... It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be agreed that the spending of money is inherently an

> executive function, but the execution of any law is, by definition, an executive function, and **it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them**."[31] (Citations omitted; emphasis supplied)

In the United States, the Federal Constitution allows the U.S. President to only veto an entire appropriations bill but not line item appropriations in the bill. Thus, U.S. Presidents seldom veto an appropriations bill even if the bill contains specific appropriations they deem unsound. To stop the disbursement of appropriated funds they deem unsound, U.S. Presidents have attempted to assert an implied or inherent Presidential power to impound funds appropriated by Congress. The U.S. Supreme Court, starting from the 1838 case of *Kendall v. United States ex rel. Stokes*, has consistently rejected any attempt by U.S. Presidents to assert an implied presidential power to impound appropriated funds. In the 1975 case of *Train v. City of New York*,[32] the U.S. Supreme Court again rejected the notion that the U.S. President has the power to impound funds appropriated by Congress because **such power would frustrate the will of Congress**. This rationale applies with greater force under the Philippine Constitution, which expressly empowers the President to exercise line item veto of congressional appropriations. **Under our Constitutional scheme, the President's line item veto is the checking mechanism to unsound congressional appropriations, not any implied power of impoundment which certainly does not exist in the Constitution**.

In *PHILCONSA v. Enriquez*,[33] decided on **19 August 1994**, the Court explained the alleged opposing views in the United States on the U.S. President's power to impound appropriated funds by citing a ***1973*** Georgetown Law Journal article[34] and a ***1973*** Yale Law Journal article.[35] These law journal articles were obviously already obsolete because on **18 February 1975** the United States Supreme Court issued its decision in *Train v. City of New York*. Worse, *PHILCONSA* failed to mention the 1838 U.S. Supreme Court case of *Kendall v. United States ex rel. Stokes* cited by Prof. Tribe in his textbook. **In U.S. Federal constitutional jurisprudence, it is well-settled that the U.S. President has no implied or inherent power to impound funds appropriated by Congress.** In any event, the issue of impoundment was not decisive in *PHILCONSA* since the Court based its decision on another legal ground.

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[31] American Constitutional Law, 3rd Edition (2000), Volume 1, pp. 732-733; *Kendall v. United States ex Rel. Stokes*, 37 U.S. 524 (1838).

[32] 420 U.S. 35 (1975).

[33] Supra note 14.

[34] Notes: Presidential Impoundment Constitutional Theories and Political Realities, 61 Georgetown Law Journal 1295 (1973).

[35] Notes Protecting Fisc: Executive Impoundment and Congressional Power, 82 Yale Law Journal 1686 (1973).

This Court must be clear and categorical. Under the U.S. Federal Constitution as well as in our Constitutions, whether the 1935, 1973 or the present 1987 Constitution, there is no implied or inherent Presidential power to impound funds appropriated by Congress. Otherwise, our present 1987 Constitution will become a mangled mess.

Section 38 cannot be invoked by the President to create "savings" by ordering the **permanent stoppage** of disbursement of appropriated funds, whether obligated or not. If the appropriated funds are already **obligated**, then the stoppage of disbursements of funds does not create any savings because the funds remain obligated until the contract is rescinded. If the appropriated funds are **unobligated**, such permanent stoppage amounts to an impoundment of appropriated funds which is unconstitutional. **The authority of the President to suspend or stop the disbursement of appropriated funds under Section 38 can refer only to obligated funds; otherwise, Section 38 will be patently unconstitutional because it will constitute a power by the President to impound appropriated funds**.

Moreover, the OSG and the DBM maintain that the President, in implementing the DAP and NBC 541, "never impounded" funds. In fact, the OSG does not claim that the President exercised the power of impoundment precisely because it is contrary to the purpose of NBC 541, which was intended "to accelerate spending" and push economic growth. During the Oral Arguments, Solicitor General Jardeleza stated:

> **SOLGEN JARDELEZA:**
> But the facts, Your Honor, showed the president never impounded, impoundment is inconsistent with the policy of spend it or use it.
>
> **JUSTICE ABAD:**
> Yeah, well anyway...
>
> **SOLGEN JARDELEZA**:
> So, there is no impoundment, Your Honor, in fact, the marching orders is spend, spend, spend. And that was achieved towards the middle of 2012. There was only DAP because there was slippage, 2010, 2011, and that's what were saying the diminishing amount, Your Honor.[36]

Therefore, it is grave error to construe that the DAP is an exercise of the President's power to impound under Section 38, Chapter VI, Book VI of the Administrative Code of 1987. The OSG and DBM do not interpret Section 38 as granting the President the power to impound. The essence of impoundment is not to spend. The essence of DAP is to "spend, spend, spend," in the words of the Solicitor General.

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[36] TSN, 28 January 2014, p. 104.

V.
The applicability of the doctrine of operative fact

An unconstitutional act confers no rights, imposes no duties, and affords no protection.[37] An unconstitutional act is inoperative as if it has not been passed at all.[38] The exception to this rule is the doctrine of operative fact. Under this doctrine, the law or administrative issuance is recognized as unconstitutional but the effects of the unconstitutional law or administrative issuance, prior to its declaration of nullity, may be left undisturbed as a matter of **equity and fair play**.[39]

As a rule of equity, the doctrine of operative fact can be invoked only by those who relied in good faith on the law or the administrative issuance, prior to its declaration of nullity. Those who acted in bad faith or with gross negligence cannot invoke the doctrine. Likewise, those **directly responsible** for an illegal or unconstitutional act cannot invoke the doctrine. He who comes to equity must come with clean hands,[40] and he who seeks equity must do equity.[41] **Only those who merely relied in good faith on the illegal or unconstitutional act, without any direct participation in the commission of the illegal or unconstitutional act, can invoke the doctrine**.

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

VI.
Conclusion

The Disbursement Acceleration Program has a noble end – "to fast-track public spending and push economic growth." The DAP would fund

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[37] *Chavez v. Judicial and Bar Council*, G.R. No. 202242, 16 April 2013, 696 SCRA 496, 516.
[38] Id.
[39] *League of Cities of the Philippines v. Commission on Elections*, G.R. Nos. 176951, et al., 24 August 2010, 628 SCRA 819, 832; *Commissioner of Internal Revenue v. San Roque Power Corporation*, G.R. No. 187485, 8 October 2013.
[40] *Chemplex (Phils.), Inc. v. Pamatian*, 156 Phil. 408 (1974); *Spouses Alvendia v. Intermediate Appellate Court*, 260 Phil. 265 (1990).
[41] *Arcenas v. Cinco*, 165 Phil. 741 (1976).

"high-impact budgetary programs and projects." However, the road to unconstitutionality is often paved with ostensibly good intentions. Under NBC 541, the President pooled funds which do not qualify as savings, and hence, the pooled funds could not validly be realigned. The unobligated allotments of agencies with low-level of obligations as of 30 June 2012 are certainly not savings as defined in the GAAs, with the exception of MOOE from January to June 2012, excluding Mandatory Expenditures and Expenditures for Business-type Activities. The realignment of these funds to augment items in the GAAs patently contravenes Section 25(5), Article VI of the Constitution. Thus, such realignment under the DAP, NBC 541 and other Executive issuances related to DAP is clearly unconstitutional.

The DAP also violates the prohibition on cross-border transfers enshrined in Section 25(5), Article VI of the Constitution. No less than the DBM Secretary has admitted that the Executive transferred funds to the COA and the House of Representatives.[42] The OSG has also expressly admitted in its Memorandum of 10 March 2014 that the Executive transferred appropriations to the COA, the House of Representatives and the COMELEC.[43] The Executive transferred DAP funds to augment the PDAF, or the unconstitutional Congressional Pork Barrel, making the augmentation also unconstitutional.

The Unprogrammed Fund was released despite the clear requirement in the 2011, 2012 and 2013 GAAs that the Unprogrammed Fund can be used only if the revenue collections exceed the original revenue targets as certified by the National Treasurer, a condition that was never met for fiscal years 2011, 2012 and 2013.

The GAA is a law enacted by Congress. The most important legislation that Congress enacts every year is the GAA. Congress exercises the power of the purse when it enacts the GAA. The power of the purse is a constitutional power lodged solely in Congress, and is a vital part of the checks-and-balances enshrined in the Constitution. Under the GAA, Congress appropriates specific amounts for specified purposes, and the President spends such amounts in accordance with the authorization made by Congress in the GAA.

Under the DAP and NBC 541, the President disregards the specific appropriations in the GAA and treats the GAA as the President's self-created all-purpose fund, which the President can spend as he chooses without regard to the specific purposes for which the appropriations are made in the GAA. In the middle of the fiscal year of the GAA, the President under the DAP and NBC 541 can declare all MOOE for future months (except Mandatory Expenditures and Expenditures for Business-type Activities), as

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[42] TSN, 28 January 2014, pp. 42-43.

[43] *Rollo* (G.R. No. 209287), p. 1072. Memorandum for Respondents, p. 35.

well as all unobligated Capital Outlays, as savings and realign such savings to what he deems are priority projects, whether or not such projects have existing appropriations in the GAA. In short, the President under the DAP and NBC 541 usurps the power of the purse of Congress, making Congress inutile and a surplusage. It is surprising that the majority in the Senate and in the House of Representatives support the DAP and NBC 541 when these Executive acts actually castrate the power of the purse of Congress. This Court cannot allow a castration of a vital part of the checks-and-balances enshrined in the Constitution, even if the branch adversely affected suicidally consents to it. The solemn duty of this Court is to uphold the Constitution and to strike down the DAP and NBC 541.

ACCORDINGLY, I vote to declare the following acts and practices under the Disbursement Acceleration Program and the National Budget Circular No. 541 dated 18 July 2012 **UNCONSTITUTIONAL** for violating Section 25(5), Article VI of the Constitution:

1. Transfers of appropriations from the Executive to the Legislature, the Commission on Elections and the Commission on Audit;

2. Disbursements of unobligated allotments for MOOE as savings and their realignment to other items in the GAAs, where the MOOE that are the sources of savings are appropriations for months still to lapse;

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

4. Disbursements of unobligated allotments as savings and their realignment to items or projects not found in the GAA.

In addition, the use of the Unprogrammed Fund without the certification by the National Treasurer that the revenue collections for the fiscal year exceeded the revenue target for that year is declared **VOID** for being contrary to the express condition for the use of the Unprogrammed Fund under the GAAs.

ANTONIO T. CARPIO
Associate Justice