Republic of the Philippines
Supreme Court
Manila

EN BANC

DENNIS A.B. FUNA,
Petitioner,

-versus-

ACTING SECRETARY OF JUSTICE ALBERTO C. AGRA, IN HIS OFFICIAL CONCURRENT CAPACITIES AS ACTING SECRETARY OF THE DEPARTMENT OF JUSTICE AND AS ACTING SOLICITOR GENERAL, EXECUTIVE SECRETARY LEANDRO R. MENDOZA, OFFICE OF THE PRESIDENT,
Respondents.

G.R. No. 191644

Present:

SERENO, *C.J.*,
CARPIO,
VELASCO, JR.,
LEONARDO-DE CASTRO,
BRION,
PERALTA,
BERSAMIN,
DEL CASTILLO,
ABAD,
VILLARAMA, JR.,
PEREZ,
MENDOZA,
REYES,
PERLAS-BERNABE, and
LEONEN, *JJ.*:

Promulgated:
FEBRUARY 19, 2013

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DECISION

BERSAMIN, *J.*:

Section 13, Article VII of the 1987 Constitution expressly prohibits the President, Vice-President, the Members of the Cabinet, and their deputies or assistants from holding any other office or employment during their tenure unless otherwise provided in the Constitution. Complementing the prohibition is Section 7, paragraph (2), Article IX-B of the 1987 Constitution, which bans any appointive official from holding any other office or employment in the Government or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries, unless otherwise allowed by law or the primary functions of his position.

These prohibitions under the Constitution are at the core of this special civil action for *certiorari* and prohibition commenced on April 7, 2010 to assail the designation of respondent Hon. Alberto C. Agra, then the Acting Secretary of Justice, as concurrently the Acting Solicitor General.

Antecedents

The petitioner alleges that on March 1, 2010, President Gloria M. Macapagal-Arroyo appointed Agra as the Acting Secretary of Justice following the resignation of Secretary Agnes VST Devanadera in order to vie for a congressional seat in Quezon Province; that on March 5, 2010, President Arroyo designated Agra as the Acting Solicitor General in a concurrent capacity;[1] that on April 7, 2010, the petitioner, in his capacity as a taxpayer, a concerned citizen and a lawyer, commenced this suit to challenge the constitutionality of Agra's concurrent appointments or designations, claiming it to be prohibited under Section 13, Article VII of the 1987 Constitution; that during the pendency of the suit, President Benigno S. Aquino III appointed Atty. Jose Anselmo I. Cadiz as the Solicitor General; and that Cadiz assumed as the Solicitor General and commenced his duties as such on August 5, 2010.[2]

Agra renders a different version of the antecedents. He represents that on January 12, 2010, he was then the Government Corporate Counsel when President Arroyo designated him as the Acting Solicitor General in place of Solicitor General Devanadera who had been appointed as the Secretary of Justice;[3] that on March 5, 2010, President Arroyo designated him also as the Acting Secretary of Justice vice Secretary Devanadera who had meanwhile tendered her resignation in order to run for Congress representing a district in Quezon Province in the May 2010 elections; that he then relinquished his position as the Government Corporate Counsel; and that pending the appointment of his successor, Agra continued to perform his duties as the Acting Solicitor General.[4]

Notwithstanding the conflict in the versions of the parties, the fact that Agra has admitted to holding the two offices concurrently in acting capacities is settled, which is sufficient for purposes of resolving the constitutional question that petitioner raises herein.

The Case

In *Funa v. Ermita*,[5] the Court resolved a petition for *certiorari*, prohibition and *mandamus* brought by herein petitioner assailing the

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1 *Rollo*, p. 13.
2 Id. at 172.
3 Id. at 76.
4 Id. at 77.
5 G.R. No. 184740, February 11, 2010, 612 SCRA 308.

constitutionality of the designation of then Undersecretary of the Department of Transportation and Communications (DOTC) Maria Elena H. Bautista as concurrently the Officer-in-Charge of the Maritime Industry Authority. The petitioner has adopted here the arguments he advanced in *Funa v. Ermita*, and he has rested his grounds of challenge mainly on the pronouncements in *Civil Liberties Union v. Executive Secretary*[6] and *Public Interest Center, Inc. v. Elma.*[7]

What may differentiate this challenge from those in the others is that the appointments being hereby challenged were in acting or temporary capacities. Still, the petitioner submits that the prohibition under Section 13, Article VII of the 1987 Constitution does not distinguish between an appointment or designation of a Member of the Cabinet in an acting or temporary capacity, on the one hand, and one in a permanent capacity, on the other hand; and that Acting Secretaries, being nonetheless Members of the Cabinet, are not exempt from the constitutional ban. He emphasizes that the position of the Solicitor General is not an *ex officio* position in relation to the position of the Secretary of Justice, considering that the Office of the Solicitor General (OSG) is an independent and autonomous office attached to the Department of Justice (DOJ).[8] He insists that the fact that Agra was extended an appointment as the Acting Solicitor General shows that he did not occupy that office in an *ex officio* capacity because an *ex officio* position does not require any further warrant or appointment.

Respondents contend, in contrast, that Agra's concurrent designations as the Acting Secretary of Justice and Acting Solicitor General were only in a temporary capacity, the only effect of which was to confer additional duties to him. Thus, as the Acting Solicitor General and Acting Secretary of Justice, Agra was not "holding" both offices in the strict constitutional sense.[9] They argue that an appointment, to be covered by the constitutional prohibition, must be regular and permanent, instead of a mere designation.

Respondents further contend that, even on the assumption that Agra's concurrent designation constituted "holding of multiple offices," his continued service as the Acting Solicitor General was akin to a hold-over; that upon Agra's designation as the Acting Secretary of Justice, his term as the Acting Solicitor General expired in view of the constitutional prohibition against holding of multiple offices by the Members of the Cabinet; that under the principle of hold-over, Agra continued his service as the Acting Solicitor General "until his successor is elected and qualified"[10] to "prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office;"[11] and that during his continued service as the

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6 G.R. Nos. 83896 and 83815, February 22, 1991, 194 SCRA 317.
7 G.R. No. 138965, June 30, 2006, 494 SCRA 53.
8 Section 34, Chapter 12, Title III, Book 4 of the Administrative Code of 1987.
9 *Rollo*, p. 83.
10 Id. at 86.
11 Id. at 87.

Acting Solicitor General, he did not receive any salaries and emoluments from the OSG after becoming the Acting Secretary of Justice on March 5, 2010.[12]

Respondents point out that the OSG's independence and autonomy are defined by the powers and functions conferred to that office by law, not by the person appointed to head such office;[13] and that although the OSG is attached to the DOJ, the DOJ's authority, control and supervision over the OSG are limited only to budgetary purposes.[14]

In his reply, petitioner counters that there was no "prevailing special circumstance" that justified the non-application to Agra of Section 13, Article VII of the 1987 Constitution;[15] that the temporariness of the appointment or designation is not an excuse to disregard the constitutional ban against holding of multiple offices by the Members of the Cabinet;[16] that Agra's invocation of the principle of hold-over is misplaced for being predicated upon an erroneous presentation of a material fact as to the time of his designation as the Acting Solicitor General and Acting Secretary of Justice; that Agra's concurrent designations further violated the *Administrative Code of 1987* which mandates that the OSG shall be autonomous and independent.[17]

Issue

Did the designation of Agra as the Acting Secretary of Justice, concurrently with his position of Acting Solicitor General, violate the constitutional prohibition against dual or multiple offices for the Members of the Cabinet and their deputies and assistants?

Ruling

The petition is meritorious.

The designation of Agra as Acting Secretary of Justice concurrently with his position of Acting Solicitor General was unconstitutional and void for being in violation of the constitutional prohibition under Section 13, Article VII of the 1987 Constitution.

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12 Id. at 91, 100.
13 Id. at 94.
14 Id.
15 Id. at 126.
16 Id. at 128-129.
17 Id. at 137.

1.
Requisites of judicial review not in issue

The power of judicial review is subject to limitations, to wit: (1) there must be an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have the standing to assail the validity of the subject act or issuance, that is, he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.[18]

Here, the OSG does not dispute the justiciability and ripeness for consideration and resolution by the Court of the matter raised by the petitioner. Also, the *locus standi* of the petitioner as a taxpayer, a concerned citizen and a lawyer to bring a suit of this nature has already been settled in his favor in rulings by the Court on several other public law litigations he brought. In *Funa v. Villar*,[19] for one, the Court has held:

> To have legal standing, therefore, a suitor must show that he has sustained or will sustain a "direct injury" as a result of a government action, or have a "material interest" in the issue affected by the challenged official act. However, **the Court has time and again acted liberally on the *locus standi* requirements and has accorded certain individuals, not otherwise directly injured, or with material interest affected, by a Government act, standing to sue provided a constitutional issue of critical significance is at stake. The rule on *locus standi* is after all a mere procedural technicality in relation to which the Court, in a *catena* of cases involving a subject of transcendental import, has waived, or relaxed, thus allowing non-traditional plaintiffs, such as concerned citizens, taxpayers, voters or legislators, to sue in the public interest, albeit they may not have been personally injured by the operation of a law or any other government act. In *David*, the Court laid out the bare minimum norm before the so-called "non-traditional suitors" may be extended standing to sue**, thusly:
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> > 1.) For *taxpayers*, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
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> > 2.) For *voters*, there must be a showing of obvious interest in the validity of the election law in question;
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> > 3.) For *concerned citizens*, there must be a showing that the issues raised are of transcendental importance which must be settled early; and

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[18] *Lawyers Against Monopoly and Poverty (LAMP) v. The Secretary of Budget and Management*, G.R. No. 164987, April 24, 2012, 670 SCRA 373, 382.

[19] G.R. No. 192791, April 24, 2012, 670 SCRA 579.

> 4.) For *legislators,* there must be a claim that the official action complained of infringes their prerogatives as legislators.
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> **This case before Us is of transcendental importance, since it obviously has "far-reaching implications," and there is a need to promulgate rules that will guide the bench, bar, and the public in future analogous cases. We, thus, assume a liberal stance and allow petitioner to institute the instant petition.[20] (Bold emphasis supplied)**

In *Funa v. Ermita*,[21] the Court recognized the *locus standi* of the petitioner as a taxpayer, a concerned citizen and a lawyer because the issue raised therein involved a subject of transcendental importance whose resolution was necessary to promulgate rules to guide the Bench, Bar, and the public in similar cases.

But, it is next posed, did not the intervening appointment of and assumption by Cadiz as the Solicitor General during the pendency of this suit render this suit and the issue tendered herein moot and academic?

A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value.[22] Although the controversy could have ceased due to the intervening appointment of and assumption by Cadiz as the Solicitor General during the pendency of this suit, and such cessation of the controversy seemingly rendered moot and academic the resolution of the issue of the constitutionality of the concurrent holding of the two positions by Agra, the Court should still go forward and resolve the issue and not abstain from exercising its power of judicial review because this case comes under several of the well-recognized exceptions established in jurisprudence. Verily, the Court did not desist from resolving an issue that a supervening event meanwhile rendered moot and academic if any of the following recognized exceptions obtained, namely: (1) there was a grave violation of the Constitution; (2) the case involved a situation of exceptional character and was of paramount public interest; (3) the constitutional issue raised required the formulation of controlling principles to guide the Bench, the Bar and the public; and (4) the case was capable of repetition, yet evading review.[23]

It is the same here. The constitutionality of the concurrent holding by Agra of the two positions in the Cabinet, albeit in acting capacities, was an issue that comes under all the recognized exceptions. The issue involves a probable violation of the Constitution, and relates to a situation of exceptional character and of paramount public interest by reason of its

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20 Id. at 594-595.
21 *Supra* note 4.
22 Id. at 319.
23 See *Funa v. Villar, supra* note 18, at 592-593; *David v. Macapagal-Arroyo*, G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 & 171424, May 3, 2006, 489 SCRA 160, 214-215.

transcendental importance to the people. The resolution of the issue will also be of the greatest value to the Bench and the Bar in view of the broad powers wielded through said positions. The situation further calls for the review because the situation is capable of repetition, yet evading review.[24] In other words, many important and practical benefits are still to be gained were the Court to proceed to the ultimate resolution of the constitutional issue posed.

2.
Unconstitutionality of Agra's concurrent designation as Acting Secretary of Justice and Acting Solicitor General

At the center of the controversy is the correct application of Section 13, Article VII of the 1987 Constitution, *viz*:

> Section 13. The President, Vice-President, the Members of the Cabinet, and their deputies or assistants shall not, unless otherwise provided in this Constitution, hold any other office or employment during their tenure. They shall not, during said tenure, directly or indirectly practice any other profession, participate in any business, or be financially interested in any contract with, or in any franchise, or special privilege granted by the Government or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries. They shall strictly avoid conflict of interest in the conduct of their office.

A relevant and complementing provision is Section 7, paragraph (2), Article IX-B of the 1987 Constitution, to wit:

> Section 7. x x x
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> Unless otherwise allowed by law or the primary functions of his position, no appointive official shall hold any other office or employment in the Government or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries.

The differentiation of the two constitutional provisions was well stated in *Funa v. Ermita*,[25] a case in which the petitioner herein also assailed the designation of DOTC Undersecretary as concurrent Officer-in-Charge of the Maritime Industry Authority, with the Court reiterating its pronouncement in *Civil Liberties Union v. The Executive Secretary*[26] on the intent of the Framers behind these provisions of the Constitution, *viz*:

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24 *Javier v. Commission on Elections*, Nos. L-68379-81, September 22, 1986, 144 SCRA 194, 198.
25 *Supra* note 4.
26 *Supra* note 5, at 329-331.

> Thus, while all other appointive officials in the civil service are allowed to hold other office or employment in the government during their tenure when such is allowed by law or by the primary functions of their positions, members of the Cabinet, their deputies and assistants may do so only when expressly authorized by the Constitution itself. **In other words, Section 7, Article IX-B is meant to lay down the general rule applicable to all elective and appointive public officials and employees, while Section 13, Article VII is meant to be the exception applicable only to the President, the Vice-President, Members of the Cabinet, their deputies and assistants.**
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> x x x x
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> Since the evident purpose of the framers of the 1987 Constitution is to impose a stricter prohibition on the President, Vice-President, members of the Cabinet, their deputies and assistants with respect to holding multiple offices or employment in the government during their tenure, the exception to this prohibition must be read with equal severity. On its face, the language of Section 13, Article VII is prohibitory so that it must be understood as intended to be a positive and unequivocal negation of the privilege of holding multiple government offices or employment. Verily, wherever the language used in the constitution is prohibitory, it is to be understood as intended to be a positive and unequivocal negation. **The phrase "unless otherwise provided in this Constitution" must be given a literal interpretation to refer only to those particular instances cited in the Constitution itself, to wit**: the Vice-President being appointed as a member of the Cabinet under Section 3, par. (2), Article VII; or acting as President in those instances provided under Section 7, pars. (2) and (3), Article VII; and, **the Secretary of Justice being *ex-officio* member of the Judicial and Bar Council by virtue of Section 8 (1), Article VIII.** (Bold emphasis supplied.)

Being designated as the Acting Secretary of Justice concurrently with his position of Acting Solicitor General, therefore, Agra was undoubtedly covered by Section 13, Article VII, *supra*, whose text and spirit were too clear to be differently read. Hence, Agra could not validly hold any other office or employment during his tenure as the Acting Solicitor General, because the Constitution has not otherwise so provided.[27]

It was of no moment that Agra's designation was in an acting or temporary capacity. The text of Section 13, *supra*, plainly indicates that the intent of the Framers of the Constitution was to impose a stricter prohibition on the President and the Members of his Cabinet in so far as holding other offices or employments in the Government or in government-owned or government controlled-corporations was concerned.[28] In this regard, *to hold an office* means to possess or to occupy the office, or to be in possession and administration of the office, which implies nothing less than the actual

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[27] *E.g.*, the Constitution, under its Section (1), Article VIII, provides that the Secretary of Justice sits as an *ex officio* member of the Judicial and Bar Council.

[28] *Civil Liberties Union v. The Executive Secretary*, *supra* note 5, at 326-327.

discharge of the functions and duties of the office.[29] Indeed, in the language of Section 13 itself, *supra*, the Constitution makes no reference to the nature of the appointment or designation. The prohibition against dual or multiple offices being held by one official must be construed as to apply to all appointments or designations, whether permanent or temporary, for it is without question that the avowed objective of Section 13, *supra*, is to prevent the concentration of powers in the Executive Department officials, specifically the President, the Vice-President, the Members of the Cabinet and their deputies and assistants.[30] To construe differently is to "open the veritable floodgates of circumvention of an important constitutional disqualification of officials in the Executive Department and of limitations on the President's power of appointment in the guise of temporary designations of Cabinet Members, undersecretaries and assistant secretaries as officers-in-charge of government agencies, instrumentalities, or government-owned or controlled corporations."[31]

According to *Public Interest Center, Inc. v. Elma*,[32] the only two exceptions against the holding of multiple offices are: (1) those provided for under the Constitution, such as Section 3, Article VII, authorizing the Vice President to become a member of the Cabinet; and (2) posts occupied by Executive officials specified in Section 13, Article VII without additional compensation in *ex officio* capacities as provided by law and as required by the primary functions of the officials' offices. In this regard, the decision in *Public Interest Center, Inc. v. Elma* adverted to the resolution issued on August 1, 1991 in *Civil Liberties Union v. The Executive Secretary*, whereby the Court held that the phrase "the Members of the Cabinet, and their deputies or assistants" found in Section 13, *supra*, referred only to the heads of the various executive departments, their undersecretaries and assistant secretaries, and did not extend to other public officials given the rank of Secretary, Undersecretary or Assistant Secretary.[33] Hence, in *Public Interest Center, Inc. v. Elma*, the Court opined that the prohibition under Section 13

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29 *Funa v. Ermita*, *supra* note 4, at 329.

30 Id. at 330.

31 Id. at 331.

32 *Supra* note 6.

33 The clarification was the Court's action on the motion for clarification filed in *Civil Liberties Union v. The Executive Secretary*, and revises the main opinion promulgated on February 22, 1991 (194 SCRA 317) *totally invalidating* Executive Order No. 284 dated July 25, 1987 (whose questioned Section 1 states: "Even if allowed by law or by the ordinary functions of his position, a member of the Cabinet, undersecretary or assistant secretary or other appointive officials of the Executive Department may, in addition to his primary position, hold not more than two positions in the government and government corporations and receive the corresponding compensation therefor; Provided, that this limitation shall not apply to ad hoc bodies or committees, or to boards, councils or bodies of which the President is the Chairman."). The clarifying dictum now considered Executive Order No. 284 *partly valid* to the extent that it included in its coverage "other appointive officials" aside from the members of the Cabinet, their undersecretaries and assistant secretaries, with the dispositive part of the clarificatory resolution of August 1, 1991 stating: "WHEREFORE, subject to the qualification above-stated, the petitions are GRANTED. Executive Order No. 284 is hereby declared null and void insofar as it allows a member of the Cabinet, undersecretary or assistant secretary to hold other positions in the government and government-owned and controlled corporations."

did not cover Elma, a Presidential Assistant with the rank of Undersecretary.[34]

It is equally remarkable, therefore, that Agra's designation as the Acting Secretary of Justice was not in an *ex officio* capacity, by which he would have been validly authorized to concurrently hold the two positions due to the holding of one office being the consequence of holding the other. Being included in the stricter prohibition embodied in Section 13, *supra*, Agra cannot liberally apply in his favor the broad exceptions provided in Section 7, paragraph 2, Article IX-B of the Constitution ("Unless otherwise allowed by law or the primary functions of his position") to justify his designation as Acting Secretary of Justice concurrently with his designation as Acting Solicitor General, or vice versa. Thus, the Court has said –

> [T]he qualifying phrase "unless otherwise provided in this Constitution" in Section 13, Article VII cannot possibly refer to the broad exceptions provided under Section 7, Article IX-B of the 1987 Constitution. To construe said qualifying phrase as respondents would have us do, would render nugatory and meaningless the manifest intent and purpose of the framers of the Constitution to impose a stricter prohibition on the President, Vice-President, Members of the Cabinet, their deputies and assistants with respect to holding other offices or employment in the government during their tenure. Respondents' interpretation that Section 13 of Article VII admits of the exceptions found in Section 7, par. (2) of Article IX-B would obliterate the distinction so carefully set by the framers of the Constitution as to when the high-ranking officials of the Executive Branch from the President to Assistant Secretary, on the one hand, and the generality of civil servants from the rank immediately below Assistant Secretary downwards, on the other, may hold any other office or position in the government during their tenure**.**[35]

To underscore the obvious, it is not sufficient for Agra to show that his holding of the other office was "allowed by law or the primary functions of his position." To claim the exemption of his concurrent designations from the coverage of the stricter prohibition under Section 13, *supra*, he needed to establish herein that his concurrent designation was expressly allowed by the Constitution. But, alas, he did not do so.

To be sure, Agra's concurrent designations as Acting Secretary of Justice and Acting Solicitor General did not come within the definition of an *ex officio* capacity. Had either of his concurrent designations been in an *ex officio* capacity in relation to the other, the Court might now be ruling in his favor.

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[34] *Public Interest Center, Inc. v. Elma, supra* note 6 at 64, with the Court summing up at the end with the statement: "In sum, the prohibition in Section 13, Article VII of the 1987 Constitution does not apply to respondent Elma since neither the PCGG Chairman nor the (Chief Presidential Legal Counsel) is a Cabinet secretary, undersecretary, or assistant secretary. x x x."

[35] *Civil Liberties Union v. The Executive Secretary, supra* note 5, at 329-330.

The import of an *ex officio* capacity has been fittingly explained in *Civil Liberties Union v. Executive Secretary*,[36] as follows:

> x x x. The term *ex officio* means "from office; by virtue of office." It refers to an "authority derived from official character merely, not expressly conferred upon the individual character, but rather annexed to the official position." *Ex officio* likewise denotes an "act done in an official character, or as a consequence of office, and without any other appointment or authority other than that conferred by the office." An *ex officio* member of a board is one who is a member by virtue of his title to a certain office, and without further warrant or appointment. x x x.
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> x x x x
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> The *ex officio* position being actually and in legal contemplation part of the principal office, it follows that the official concerned has no right to receive additional compensation for his services in the said position. The reason is that these services are already paid for and covered by the compensation attached to his principal office. x x x.

Under the *Administrative Code of 1987*, the DOJ is mandated to "provide the government with a principal law agency which shall be both its legal counsel and prosecution arm; administer the criminal justice system in accordance with the accepted processes thereof consisting in the investigation of the crimes, prosecution of offenders and administration of the correctional system; implement the laws on the admission and stay of aliens, citizenship, land titling system, and settlement of land problems involving small landowners and members of indigenous cultural minorities; and provide free legal services to indigent members of the society."[37] The DOJ's specific powers and functions are as follows:

> (1) Act as principal law agency of the government and as legal counsel and representative thereof, whenever so required;
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> (2) Investigate the commission of crimes, prosecute offenders and administer the probation and correction system;
>
> (3) Extend free legal assistance/representation to indigents and poor litigants in criminal cases and non-commercial civil disputes;
>
> (4) Preserve the integrity of land titles through proper registration;
>
> (5) Investigate and arbitrate untitled land disputes involving small landowners and members of indigenous cultural communities;
>
> (6) Provide immigration and naturalization regulatory services and implement the laws governing citizenship and the admission and stay of aliens;

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[36] Id. at 333-335.

[37] Sections 1 and 2, Chapter 1, Title III, Book IV of the Administrative Code of 1987.

(7) Provide legal services to the national government and its functionaries, including government-owned or controlled corporations and their subsidiaries; and

(8) Perform such other functions as may be provided by law.[38]

On the other hand, the *Administrative Code of 1987* confers upon the Office of the Solicitor General the following powers and functions, to wit:

> The Office of the Solicitor General shall represent the Government of the Philippines, its agencies and instrumentalities and its officials and agents in any litigation, proceeding, investigation or matter requiring the services of lawyers. When authorized by the President or head of the office concerned, it shall also represent government owned or controlled corporations. The Office of the Solicitor General shall discharge duties requiring the services of lawyers. It shall have the following specific powers and functions:
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> 1. Represent the Government in the Supreme Court and the Court of Appeals in all criminal proceedings; represent the Government and its officers in the Supreme Court, the Court of Appeals, and all other courts or tribunals in all civil actions and special proceedings in which the Government or any officer thereof in his official capacity is a party.
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> 2. Investigate, initiate court action, or in any manner proceed against any person, corporation or firm for the enforcement of any contract, bond, guarantee, mortgage, pledge or other collateral executed in favor of the Government. Where proceedings are to be conducted outside of the Philippines the Solicitor General may employ counsel to assist in the discharge of the aforementioned responsibilities.
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> 3. Appear in any court in any action involving the validity of any treaty, law, executive order or proclamation, rule or regulation when in his judgment his intervention is necessary or when requested by the Court.
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> 4. Appear in all proceedings involving the acquisition or loss of Philippine citizenship.
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> 5. Represent the Government in all land registration and related proceedings. Institute actions for the reversion to the Government of lands of the public domain and improvements thereon as well as lands held in violation of the Constitution.
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> 6. Prepare, upon request of the President or other proper officer of the National Government, rules and guidelines for government entities governing the preparation of contracts, making investments, undertaking of transactions, and drafting of forms or other writings needed for official use, with the end in view of facilitating their enforcement and insuring that they are entered into or prepared conformably with law and for the best interests of the public.
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> 7. Deputize, whenever in the opinion of the Solicitor General the public interest requires, any provincial or city fiscal to assist him in the

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[38] Section 3, Chapter 1, Title III, Book IV of the Administrative Code of 1987.

> performance of any function or discharge of any duty incumbent upon him, within the jurisdiction of the aforesaid provincial or city fiscal. When so deputized, the fiscal shall be under the control and supervision of the Solicitor General with regard to the conduct of the proceedings assigned to the fiscal, and he may be required to render reports or furnish information regarding the assignment.
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> 8. Deputize legal officers of government departments, bureaus, agencies and offices to assist the Solicitor General and appear or represent the Government in cased involving their respective offices, brought before the courts and exercise supervision and control over such legal Officers with respect to such cases.
>
> 9. Call on any department, bureau, office, agency or instrumentality of the Government for such service, assistance and cooperation as may be necessary in fulfilling its functions and responsibilities and for this purpose enlist the services of any government official or employee in the pursuit of his tasks.
>
> 10. Departments, bureaus, agencies, offices, instrumentalities and corporations to whom the Office of the Solicitor General renders legal services are authorized to disburse funds from their sundry operating and other funds for the latter Office. For this purpose, the Solicitor General and his staff are specifically authorized to receive allowances as may be provided by the Government offices, instrumentalities and corporations concerned, in addition to their regular compensation.
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> 11. Represent, upon the instructions of the President, the Republic of the Philippines in international litigations, negotiations or conferences where the legal position of the Republic must be defended or presented.
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> 12. Act and represent the Republic and/or the people before any court, tribunal, body or commission in any matter, action or proceedings which, in his opinion affects the welfare of the people as the ends of justice may require; and
>
> 13. Perform such other functions as may be provided by law.[39]

The foregoing provisions of the applicable laws show that one position was not derived from the other. Indeed, the powers and functions of the OSG are neither required by the primary functions nor included by the powers of the DOJ, and vice versa. The OSG, while attached to the DOJ,[40] is not a constituent unit of the latter,[41] as, in fact, the *Administrative Code of 1987* decrees that the OSG is independent and autonomous.[42] With the enactment of Republic Act No. 9417,[43] the Solicitor General is now vested with a cabinet rank, and has the same qualifications for appointment, rank,

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39 Section 35, Chapter 12, Title III, Book IV of the Administrative Code of 1987.
40 Section 34, Chapter 12, Title III, Book IV of the Administrative Code of 1987.
41 Section 4, Chapter 1, Title III, Book IV of the Administrative Code of 1987.
42 Section 34, Chapter 12, Title III, Book IV of the Administrative Code of 1987.
43 *An Act to Strengthen the Office of the Solicitor General, by Expanding and Streamlining its Bureaucracy, Upgrading Employee Skills, and Augmenting Benefits, and Appropriating funds therefor and for Other Purposes*.

prerogatives, salaries, allowances, benefits and privileges as those of the Presiding Justice of the Court of Appeals.[44]

Moreover, the magnitude of the scope of work of the Solicitor General, if added to the equally demanding tasks of the Secretary of Justice, is obviously too much for any one official to bear. Apart from the sure peril of political pressure, the concurrent holding of the two positions, even if they are not entirely incompatible, may affect sound government operations and the proper performance of duties. Heed should be paid to what the Court has pointedly observed in *Civil Liberties Union v. Executive Secretary*:[45]

> Being head of an executive department is no mean job. It is more than a full-time job, requiring full attention, specialized knowledge, skills and expertise. If maximum benefits are to be derived from a department head's ability and expertise, he should be allowed to attend to his duties and responsibilities without the distraction of other governmental offices or employment. He should be precluded from dissipating his efforts, attention and energy among too many positions of responsibility, which may result in haphazardness and inefficiency. Surely the advantages to be derived from this concentration of attention, knowledge and expertise, particularly at this stage of our national and economic development, far outweigh the benefits, if any, that may be gained from a department head spreading himself too thin and taking in more than what he can handle.

It is not amiss to observe, lastly, that assuming that Agra, as the Acting Solicitor General, was not covered by the stricter prohibition under Section 13, *supra*, due to such position being merely vested with a cabinet rank under Section 3, Republic Act No. 9417, he nonetheless remained covered by the general prohibition under Section 7, *supra*. Hence, his concurrent designations were still subject to the conditions under the latter constitutional provision. In this regard, the Court aptly pointed out in *Public Interest Center, Inc. v. Elma*:[46]

> The general rule contained in Article IX-B of the 1987 Constitution permits an appointive official to hold more than one office only if "allowed by law or by the primary functions of his position." In the case of *Quimson v. Ozaeta*, this Court ruled that, "[t]here is no legal objection to a government official occupying two government offices and performing the functions of both *as long as there is no incompatibility*." The crucial test in determining whether incompatibility exists between two offices was laid out in *People v. Green* - whether one office is subordinate to the other, in the sense that one office has the right to interfere with the other.
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> > [I]ncompatibility between two offices, is an inconsistency in the functions of the two; x x x Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that

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44 Section 3, Republic Act No. 9417.
45 *Supra* note 5, at 339.
46 *Supra* note 6.

> incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. x x x The offices must subordinate, one [over] the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law. x x x.
>
> x x x x

While Section 7, Article IX-B of the 1987 Constitution applies in general to all elective and appointive officials, Section 13, Article VII, thereof applies in particular to Cabinet secretaries, undersecretaries and assistant secretaries. In the Resolution in *Civil Liberties Union v. Executive Secretary*, this Court already clarified the scope of the prohibition provided in Section 13, Article VII of the 1987 Constitution. Citing the case of *US v. Mouat*, it specifically identified the persons who are affected by this prohibition as secretaries, undersecretaries and assistant secretaries; and categorically excluded public officers who merely have the rank of secretary, undersecretary or assistant secretary.

> Another point of clarification raised by the Solicitor General refers to the persons affected by the constitutional prohibition. The persons cited in the constitutional provision are the "Members of the Cabinet, their deputies and assistants." These terms must be given their common and general acceptation as referring to the heads of the executive departments, their undersecretaries and assistant secretaries. *Public officials given the rank equivalent to a Secretary, Undersecretary, or Assistant Secretary are not covered by the prohibition, nor is the Solicitor General affected thereby*. (Italics supplied).

It is clear from the foregoing that the strict prohibition under Section 13, Article VII of the 1987 Constitution is not applicable to the PCGG Chairman nor to the CPLC, as neither of them is a secretary, undersecretary, nor an assistant secretary, even if the former may have the same rank as the latter positions.

It must be emphasized, however, that despite the non-applicability of Section 13, Article VII of the 1987 Constitution to respondent Elma, he remains covered by the general prohibition under Section 7, Article IX-B and his appointments must still comply with the standard of compatibility of officers laid down therein; failing which, his appointments are hereby pronounced in violation of the Constitution.[47]

Clearly, the primary functions of the Office of the Solicitor General are not related or necessary to the primary functions of the Department of Justice. Considering that the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to

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[47] Id. at 59-63.

retain both,[48] an incompatibility between the offices exists, further warranting the declaration of Agra's designation as the Acting Secretary of Justice, concurrently with his designation as the Acting Solicitor General, to be void for being in violation of the express provisions of the Constitution.

3.
Effect of declaration of unconstitutionality of Agra's concurrent appointment; the *de facto* officer doctrine

In view of the application of the stricter prohibition under Section 13, *supra,* Agra did not validly hold the position of Acting Secretary of Justice concurrently with his holding of the position of Acting Solicitor General. Accordingly, he was not to be considered as a *de jure* officer for the entire period of his tenure as the Acting Secretary of Justice. A *de jure* officer is one who is deemed, in all respects, legally appointed and qualified and whose term of office has not expired.[49]

That notwithstanding, Agra was a *de facto* officer during his tenure as Acting Secretary of Justice. In *Civil Liberties Union v. Executive Secretary*,[50] the Court said:

> During their tenure in the questioned positions, respondents may be considered *de facto* officers and as such entitled to emoluments for actual services rendered. It has been held that "in cases where there is no *de jure*, officer, a *de facto* officer, who, in good faith has had possession of the office and has discharged the duties pertaining thereto, is legally entitled to the emoluments of the office, and may in an appropriate action recover the salary, fees and other compensations attached to the office. This doctrine is, undoubtedly, supported on equitable grounds since it seems unjust that the public should benefit by the services of an officer *de facto* and then be freed from all liability to pay any one for such services. Any per diem, allowances or other emoluments received by the respondents by virtue of actual services rendered in the questioned positions may therefore be retained by them.

A *de facto* officer is one who derives his appointment from one having colorable authority to appoint, if the office is an appointive office, and whose appointment is valid on its face.[51] He may also be one who is in possession of an office, and is discharging its duties under color of authority, by which is meant authority derived from an appointment, however irregular or informal, so that the incumbent is not a mere volunteer.[52] Consequently, the acts of the *de facto* officer are just as valid for all purposes as those of a

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48 *Summers v. Ozaeta*, 81 Phil. 754, 764 (1948); see Mechem, *A Treatise on the Law of Public Offices and Officers*, pp. 268-269 (1890).

49 *Topacio v. Ong*, G.R. No. 179895, December 18, 2008, 574 SCRA 817, 830.

50 *Supra* note 5, at 339-340.

51 *Dimaandal v. Commission on Audit*, G.R. No. 122197, June 26, 1998, 291 SCRA 322, 330.

52 Id; see also *The Civil Service Commission v. Joson, Jr.*, G.R. No. 154674, May 27, 2004, 429 SCRA 773, 786-787.

de jure officer, in so far as the public or third persons who are interested therein are concerned.[53]

In order to be clear, therefore, the Court holds that all official actions of Agra as a *de facto* Acting Secretary of Justice, assuming that was his later designation, were presumed valid, binding and effective as if he was the officer legally appointed and qualified for the office.[54] This clarification is necessary in order to protect the sanctity of the dealings by the public with persons whose ostensible authority emanates from the State.[55] Agra's official actions covered by this clarification extend to but are not limited to the promulgation of resolutions on petitions for review filed in the Department of Justice, and the issuance of department orders, memoranda and circulars relative to the prosecution of criminal cases.

WHEREFORE, the Court **GRANTS** the petition for *certiorari* and prohibition; **ANNULS AND VOIDS** the designation of Hon. Alberto C. Agra as the Acting Secretary of Justice in a concurrent capacity with his position as the Acting Solicitor General for being unconstitutional and violative of Section 13, Article VII of the 1987 Constitution; and **DECLARES** that Hon. Alberto C. Agra was a *de facto* officer during his tenure as Acting Secretary of Justice.

No pronouncement on costs of suit.

SO ORDERED.

LUCAS P. BERSAMIN
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice

ANTONIO T. CARPIO
Associate Justice

PRESBITERO J. VELASCO, JR.
Associate Justice

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53 See Mechem, *supra* note 47, at 10 and 218; *Topacio v. Ong, supra* note 48, at 829-830.
54 Id.; *Señeres v. Commission on Elections*, G.R. No. 178678, April 16, 2009, 585 SCRA 557, 575.
55 *Topacio v. Ong, supra* note 48 at 830.

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

ROBERTO A. ABAD
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

JOSE CATRAL MENDOZA
Associate Justice

BIENVENIDO L. REYES
Associate Justice

ESTELA M. PERLAS-BERNABE
Associate Justice

MARVIC M. V. F. LEONEN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the court.

MARIA LOURDES P. A. SERENO
Chief Justice