G.R. No. 209287 - MARIA CAROLINA P. ARAULLO, Chairperson Bagong Alyansang Makabayan; JUDY M. TAGUIWALO, Professor, University of the Philippines Diliman, Co-Chairperson, Pagbabago; HENRI KAHN, Concerned Citizens Movement; REP. LUZ ILAGAN, Gabriela Women's Party Representative; REP. CARLOS ISAGANI ZARATE, Bayan Muna Partylist Representative; RENATO M. REYES, JR., Secretary General of BAYAN; MANUEL K. DAYRIT, Chairman, and Kapatiran Party; VENCER MARI E. CRISOSTOMO, Chairperson, Anakbayan; and VICTOR VILLANUEVA, Convenor Youth Act Now v. BENIGNO SIMEON C. AQUINO III, President of the Republic of the Philippines; PAQUITO N. OCHOA, JR., Executive Secretary; and FLORENCIO B. ABAD, Secretary of the Department of Budget and Management.

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

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

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

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

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

G.R. No. 209442 – GRECO ANTONIOUS BEDA B. BELGICA, BISHOP REUBEN M. ABANTE and REV. JOSE L. GONZALEZ v. PRESIDENT BENIGNO SIMEON C. AQUINO III, THE SENATE OF THE PHILIPPINES, represented by SENATE PRESIDENT FRANKLIN M. DRILON; THE HOUSE OF REPRESENTATIVES, represented by SPEAKER FELICIANO BELMONTE, JR.; THE EXECUTIVE OFFICE, represented by EXECUTIVE SECRETARY PAQUITO N. OCHOA, JR.; THE DEPARTMENT OF BUDGET AND

MANAGEMENT, represented by SECRETARY FLORENCIO ABAD; THE DEPARTMENT OF FINANCE, represented by SECRETARY CESAR V. PURISIMA; and THE BUREAU OF TREASURY, represented by ROSALIA V. DE LEON.

G.R. No. 209517 – CONFEDERATION FOR UNITY, RECOGNITION AND ADVANCEMENT OF GOVERNMENT EMPLOYEES (COURAGE), represented by its 1st Vice President, SANTIAGO DASMARINAS, JR.; ROSALINDA NARTATES, for herself and as National President of the Consolidated Union of Employees National Housing Authority (CUE-NHA); MANUEL BACLAGON, for himself and as President of the Social Welfare Employees Association of the Philippines, Department of Social Welfare and Development Central Office (SWEAP-DSWD CO); ANTONIA PASCUAL, for herself and as National President of the Department of Agrarian Reform Employees Association (DAREA); ALBERT MAGALANG, for himself and as President of the Environment and Management Bureau Employees Union (EMBEU); and MARCIAL ARABA, for himself and as President of the Kapisanan Para Sa Kagalingan ng mga Kawani ng MMDA (KKK-MMDA) v. BENIGNO SIMEON C. AQUINO III, President of the Republic of the Philippines, PAQUITO OCHOA, JR., Executive Secretary; and HON. FLORENCIO B. ABAD, Secretary of the Department of Budget and Management.

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

Promulgated:

February 3, 2015

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SEPARATE OPINION
(Qualified Concurrence)

BRION, *J.*:

I write this SEPARATE OPINION (Qualified Concurrence) to express my qualified agreement with the *ponencia*'s DENIAL WITH FINALITY of the parties' respective motions for reconsideration of the Court's Decision in these consolidated cases, promulgated on July 1, 2014.

I qualify my concurrence as I do not completely agree with the *ponencia's* views on AUGMENTATION; our commonly held views on this topic should take effect in the present case and in all similar future cases.

While I share the *ponencia's* views on the OPERATIVE FACT DOCTRINE, I believe that our ruling is direct, in point and is necessary to the full resolution of the present case. It is not at all an *obiter dictum*.

Last but not the least, I also offer my thoughts on the Court's exercise of judicial review in these cases, and its impact on the public funds and the participants involved.

The Decision under Consideration.

We declared in our Decision that the Executive's Disbursement Acceleration Program (*DAP*) is ***unconstitutional*** for violating the principle of ***separation of powers***, as well as the prohibition against the ***transfers and augmentation of funds*** under Article VI, Section 25, paragraph 5[1] of the 1987 Constitution.

This cited constitutional provision states that no transfer of appropriations from one item to another may be made except within very narrow exceptions. The DAP, described by its proponents as a "mechanism to support high-impact and priority programs and projects using savings and unprogrammed funds,"[2] facilitated the transfer of appropriations without complying with the requirements to allow the exceptional transfer of appropriation that the Constitution imposes:

(1) The General Appropriation Acts (*GAAs*) of 2011 and 2012 lacked the appropriate provisions authorizing the transfer of funds. Contrary to the constitutional provision limiting the transfer of savings within a single branch of government, the GAAs ***authorized the "cross-border" transfer of savings from appropriations in one branch of government to other branches***;

(2) Some of the funds used to finance DAP projects ***were not sourced from savings***. Savings could be generated only when the purpose of the appropriation has been fulfilled, or when the need for the appropriation no longer exists. Under these standards, the unobligated allotments and unreleased appropriations, which the Executive used to fund the DAP, were not savings.

(3) Some of the ***projects funded through the DAP do not have items in the GAA***; hence, the Executive – in violation of the Constitution – usurped the Legislative's power of the purse by effectively allocating and spending funds on its own authority.

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[1] No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.

[2] Department of Budget and Management, The Disbursement Acceleration Program: What You Need to Know About DAP, http://www.gov.ph/featured/dap/.

(4) ***Funds*** that the DAP ***sourced from the Executive had been used to augment items in other branches of the government***, thus violating the rule against the transfer of funds from one branch of government to another.

(5) The DAP ***unlawfully released and allowed the use of unprogrammed funds***,[3] without complying with the prior requisite that the original revenue targets must have first been exceeded.

The Court's ruling also explained and clarified the application of the ***Doctrine of Operative Fact*** to the case. We pointed out the ***general rule*** (**the *void ab initio doctrine***) that "an unconstitutional act is not a law and in legal contemplation, as inoperative as though it had never been passed."[4]

Without changing this rule of invalidity (*i.e.*, without rendering the unconstitutional act valid), the ***effects of actions*** made pursuant to the unconstitutional act or statute ***prior to the declaration of its unconstitutionality***, may be recognized if the strict application of the general rule would result in ***inequity and injustice***, ***and*** if the ***prior reliance*** on the unconstitutional statute had been made ***in good faith***.[5]

In the context of the case before us and as explained in my Separate Opinion supporting J. Lucas Bersamin's *ponencia*, the Doctrine of Operative Fact is a ***rule established in favor of those who relied in good faith on an unconstitutional law prior to the declaration of its invalidity***. It is not a doctrine for those who did not rely on the law because they were the authors, proponents and implementers of the unconstitutional act.

I. My Concurrence

I agree with the majority that the points raised in the parties' motions for reconsideration no longer need to be further discussed as they had been raised and passed upon in the Court's original ruling. If I add my concurrence at all, the addition is only to clarify and explain my vote in my own terms, hoping thereby to explain as well the full import of the majority's ruling.

First, the Court did not "unnecessarily constitutionalize" the issues before it. As the majority concluded, the final determination of whether the

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[3] Unprogrammed Funds are standby appropriations authorized by Congress in the annual general appropriations act. Department of Budget and Management, A Brief on the Special Purpose Funds in the National Budget (Oct. 5, 2013), *available at* http://www.dbm.gov.ph/wp-content/uploads/DAP/Note%20on%20the%20Special%20Purpose%20Funds%20_Released%20-%20Oct%202013_.pdf. Note, however, that this definition had been abbreviated to accommodate special provisions that may be required by Congress prior to the release of unprogrammed funds.

[4] The term *ab initio* doctrine was first used in the case *Norton v. Shelby Conty*, 118 US 425, 6 S. Ct. 1121, 30 L. Ed. 178 (1886).

[5] See the *ponencia* in the main decision in *Araullo v. Aquino*, G.R. No. 209287, July 1, 2014, pp. 85 – 90, Brion, J.'s *Separate Concurring* Opinon, pp. 52 – 62.

provisions of the GAA (including its definition of "savings") adhere to the terms of the Constitution, is first and foremost a judicial function.

The issues raised and resolved, at their core, involve the question of whether the government gravely abused its discretion in its expenditure of funds. To answer this question through the exercise of the Court's power of judicial review, the Court had to look at both the relevant laws and the constitutional provisions governing the budget expenditure process, and to use them as standards in considering the acts alleged to have been committed with grave abuse of discretion.

The use of the Constitution in fact is rendered necessary by its provisions detailing how the national funds are to be safeguarded in the course of their allocation and expenditure.[6] These details are there for one primary and overriding purpose – to safeguard the funds and their integrity.[7]

Thus, we could not have fully fulfilled our judicial review task had we limited ourselves solely to the statutory interpretation of the Administrative Code of 1987. Incidentally, the petitioners themselves cited the same constitutional rules we cited and/or passed upon, to support and defend their positions; the parties fully argued the merits and demerits of their respective causes based on these cited constitutional rules. *Thus, it appears too late in the day to argue that only the Administrative Code of 1987 should have been used as standard of review*.

Second, The legislatively defined term "savings", although arrived at through the exercise of the congressional power of the purse, cannot and should not be understood as an overriding, exclusive and conclusive standard in determining the propriety of the use of public funds; the congressional definition cannot go against or undermine the standards set by the Constitution on the use of public funds. In other words, in defining "savings", the Legislature cannot defy nor subvert the terms laid down by the Constitution.

Third, past executive practice does not *and cannot* legalize an otherwise unconstitutional act. While executive interpretation in the course of applying the law may have persuasive effect in considering the constitutionality of the law the Executive implements, executive interpretation is not the applicable nor the conclusive legal yardstick to test the law's validity.[8] The assailed law, first and foremost, should be consistent

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[6] *See*, for instance, Sections 24, 25, 27 (2), 29, Article VI of the 1987 Constitution.

[7] The Constitution, in specifying the process for and providing checks and balances in the formulation, enactment, implementation and audit of the national budget seeks to ensure that public funds shall be spent only for a public purpose, determined by Congress through a law.

[8] ***The interpretation of an administrative government agency xxx which is tasked to implement a statute, is accorded great respect and ordinarily controls the construction of the courts***. A long line of cases establish the basic rule that the courts will not interfere in matters which are addressed to the sound discretion of government agencies entrusted with the regulation of activities coming under the special technical knowledge and training of such agencies. xxx

with the terms of the Constitution, as explained and interpreted by the Judiciary through its rulings.[9]

Precisely, a third branch of government – the Judiciary – has been made a co-equal component in the governmental structure, to pass upon the constitutionality and legality of the acts of the Executive and the Legislative branches when these acts are questioned.[10] In exercising this function, the Judiciary is always guided by the rule that the Constitution is the supreme law and all acts of government, including those of the Court, are subject to its terms.[11] The Executive, to be sure, has no basis to claim exception to this

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"The rationale for this rule relates not only to the emergence of the multifarious needs of a modern or modernizing society and the establishment of diverse administrative agencies for addressing and satisfying those needs; it also relates to the accumulation of experience and growth of specialized capabilities by the administrative agency charged with implementing a particular statute. In *Asturias Sugar Central, Inc. v. Commissioner of Customs*, the Court stressed that executive officials are presumed to have familiarized themselves with all the considerations pertinent to the meaning and purpose of the law, and to have formed an independent, conscientious and competent expert opinion thereon. The courts give much weight to the government agency or officials charged with the implementation of the law, their competence, expertness, experience and informed judgment, and the fact that they frequently are drafters of the law they interpret."

As a general rule, contemporaneous construction is resorted to for certainty and predictability in the laws, especially those involving specific terms having technical meanings.

However, ***courts will not hesitate to set aside such executive interpretation when it is clearly erroneous, or when there is no ambiguity in the rule, or when the language or words used are clear and plain or readily understandable to any ordinary reader***.

Stated differently, when an administrative agency renders an opinion or issues a statement of policy, it merely interprets a pre-existing law and the administrative interpretation is at best advisory for it is the courts that finally determine what the law means. Thus, ***an action by an administrative agency may be set aside by the judicial department if there is an error of law, abuse of power, lack of jurisdiction or grave abuse of discretion clearly conflicting with the letter and spirit of the law***. *Energy Regulation Board v. Court of Appeals*, 409 Phil. 36, 47 – 48 (2001). citation omitted

[9] Administrative or executive acts, orders and regulations shall be valid only when they are not contrary to the laws of the Constitution. *De Agbayani v. Philippine National Bank*, 148 Phil. 443, 447 (1971).

x x x administrative interpretation of the law is at best merely advisory, for it is the courts that finally determine what the law means.' It cannot be otherwise as the Constitution limits the authority of the President, in whom all executive power resides, to take care that the laws be faithfully executed. ***No lesser administrative executive office or agency then can, contrary to the express language of the Constitution, assert for itself a more extensive prerogative***. *Bautista v. Juinio*, 212 Phil. 307, 321 (1984), citing *Teoxon v. Member of the Board of Administrators*, L-25619, June 30, 1970, 30 SCRA 585, *United States v. Barrias*, 11 Phil. 327 (1908); *United States v. Tupasi Molina*, 29 Phil. 119 (1914); *People v. Santos*, 63 Phil. 300 (1936); *Chinese Flour Importers Association v. Price Stabilization Board*, 89 Phil. 439, *Victorias Milling Co. v. Social Security Commission*, 114 Phil. 555 (1962). Cf. *People v. Maceren*, L-32166, October 18, 1977, 79 SCRA 450 (per Aquino, J.).

[10] The judiciary is the final arbiter on the question of whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature. *Tañada v. Angara*, 338 Phil. 546, 574 – 575 (1997) former Chief Justice Roberto Concepcion's discussion during the Constitutional Commission's deliberations on judicial power.

[11] The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. *Angara v. Electoral Commission*, 63 Phil. 139, 158 (1936).

norm, based solely on the practice that it and the Legislative Branch of government have established in the past.

Fourth, Section 39,[12] Chapter 5, Book VI of the Administrative Code, in allowing the President to transfer funds from and to any regular appropriation – regardless of the branch of government to which the fund is allotted – violates Article VI, Section 25, paragraph 5, of the 1987 Constitution.

Fifth, The Court discussed the Operative Fact Doctrine in its ruling to clarify the ***effects of the declaration of the unconstitutionality of the DAP,*** given the rule that an unconstitutional act or statute is void from the beginning.

The Court's discussion clarifies the ***effects*** on the public funds already disbursed and spent, on the projects that can no longer be undone, and on the officials who disbursed and spent the unconstitutional DAP funds before the declaration of the DAP's unconstitutionality. ***This ruling is not an obiter dictum as it directly bears on the constitutional issues raised***.

I shall discuss the Operative Fact Doctrine in greater detail, in relation with the points raised in the parties' motions, to remove all doubts and misgivings about this Doctrine and its application to the present case.

II. <u>The Court's Exercise of Judicial Review over the DAP</u>

The respondents question the Court's exercise of judicial review on the DAP based on two grounds:

First, the Court cannot exercise its power of judicial review without an actual case or controversy. The second paragraph in Section 1, Article VIII of the 1987 Constitution did not expand the Court's jurisdiction, but instead added to its judicial power the authority to determine whether grave abuse of discretion had intervened in the course of governmental action.[13]

The respondents further posit that before this Court may exercise this additional aspect of judicial power, the petitioners must first comply with the requisites of an actual case or controversy; the petitioners failed to comply with this requirement and to show as well their standing to file their petitions

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[12] Section 39. Authority to Use Savings in Appropriations to Cover Deficits. - Except as otherwise provided in the General Appropriations Act, any savings in the regular appropriations authorized in the General Appropriations Act for programs and projects of any department, office or agency, may, with the approval of the President, be used to cover a deficit in any other item of the regular appropriations: provided, that the creation of new positions or increase of salaries shall not be allowed to be funded from budgetary savings except when specifically authorized by law: provided, further, that whenever authorized positions are transferred from one program or project to another within the same department, office or agency, the corresponding amounts appropriated for personal services are also deemed transferred, without, however increasing the total outlay for personal services of the department, office or agency concerned.

[13] Respondents' Motion for Reconsideration, pp. 38 – 48.

in view of the absence of any injury or threatened injury resulting from the enforcement of the DAP.

Second, the issues resolving the DAP's legality had been unnecessarily constitutionalized. These questions should have been examined only against the statutes involving the national budget. Had this been done, the DBM's interpretation of these statutes is entitled to a heavy presumption of validity. The respondents consequently insist that the Court's interpretation of "savings" and the requisites for the release of "unprogrammed funds" is contrary to the established practices of past administrations, Congress, and even those of the Supreme Court.

The respondents assert that their cited past practices should be given weight in interpreting the relevant provisions of the laws governing the national budget. The respondents cite, by way of example, the definition of savings. The Court's interpretation of savings, according to the respondents, can be overturned by subsequent legislation redefining "savings, thus proving that the issue involves statutory, and not constitutional interpretation." [14] The respondents similarly argue with respect to the President's release of the unprogrammed funds that the presidential action only involves the interpretation of relevant GAA provisions.[15]

I shall address these issues in the same order they are posed above.

A. The petitioners successfully established a prima facie case of grave abuse of discretion sufficient to trigger the Court's expanded jurisdiction.

The concept of judicial power under the 1987 Constitution recognizes the Court's *(1)* ***traditional jurisdiction*** to settle actual cases or controversies; and *(2)* its ***expanded jurisdiction*** to determine whether a government agency or instrumentality committed grave abuse of discretion in the course of its actions.

The exercise of ***either power*** involves the exercise of the Court's power of judicial review, *i.e.*, the Court's authority to strike down acts – of the Legislative, the Executive, the constitutional bodies, and the administrative agencies – that are contrary to the Constitution.[16]

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[14] Respondents' Motion for Reconsideration, pp. 5 – 8.

[15] Respondents' Motion for Reconsideration, pp. 29 – 35.

[16] See the discussion of judicial supremacy in *Angara v. Electoral Commission*, *supra*, as juxtaposed with the discussion of the Court's expanded *certiorari* jurisdiction in *Francisco, Jr. v. The House of Representatives,* 460 Phil. 830, 882 – 883, 891 (2003):

> The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government. x x x And the judiciary in turn, with the Supreme Court as the final arbiter, effectively checks the other departments in the exercise of its power to determine the law, and hence to declare executive and legislative acts void if violative of the Constitution.

Judicial review under the Court's **traditional jurisdiction** requires the following justiciability requirements: (1) the existence of an ***actual case or controversy*** calling for the exercise of judicial power; (2) the person challenging the act must have the ***standing*** to question the validity of the subject act or issuance; otherwise stated, 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.[17]

In comparison, the exercise of the Court's **expanded jurisdiction** to determine whether grave abuse of discretion amounting to lack of or excess of jurisdiction has been committed by the government, is triggered by a *prima facie* showing of grave abuse of discretion in the course of governmental action.[18]

A reading of Section 1, Article VIII of the 1987 Constitution, quoted below, shows that ***textually***, the commission of grave abuse of discretion by the government is the cause that triggers the Court's expanded judicial power and that gives rise to the actual case or controversy that the complaining petitioners (who had been at the receiving end of the governmental grave abuse) can invoke in filing their petitions. In other words, the commission of grave abuse takes the place of the actual case or controversy requirement under the Court's traditional judicial power.

> Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of the courts of justice ***to settle actual controversies*** involving rights which are legally demandable and enforceable, ***and to determine whether or not there has been a grave abuse of discretion*** amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

In the scholarly estimation of former Supreme Court Justice Florentino Feliciano, "x x x judicial review is essential for the maintenance and enforcement of the separation of powers and the balancing of powers among the three great departments of government through the definition and maintenance of the boundaries of authority and control between them." To him, "[j]udicial review is the chief, indeed the only, medium of participation – or instrument of intervention – of the judiciary in that balancing operation."

To ensure the potency of the power of judicial review to curb grave abuse of discretion by "any branch or instrumentalities of government," the afore-quoted Section 1, Article VIII of the Constitution engraves, for the first time into its history, into block letter law the so-called "expanded certiorari jurisdiction" of this Court x x x.

x x x x

There is indeed a plethora of cases in which this Court exercised the power of judicial review over congressional action. Thus, in *Santiago v. Guingona, Jr*., this Court ruled that it is well within the power and jurisdiction of the Court to inquire whether the Senate or its officials committed a violation of the Constitution or grave abuse of discretion in the exercise of their functions and prerogatives. x x x

[17] *Senate of the Philippines v. Ermita*, G.R. No. 169777, April 20, 2006, 488 SCRA 1, 35; and *Francisco v. House of Representatives*, 460 Phil. 830, 842 (2003).

[18] See Justice Arturo D. Brion's discussion on the requisites to trigger the Court's expanded jurisdiction in his Separate Concurring Opinion on *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014.

A textual examination of the definition of judicial power shows that two distinct and separate powers are involved over distinct and separate matters.

Under the Court's **traditional jurisdiction**, what are involved are controversies brought about by rights, whether public or private, which are demandable and enforceable against another. Thus, the "standing" that must be shown is based on the possession of rights that are demandable and enforceable or which have been violated, giving rise to damage or injury and to actual disputes or controversies between or among the contending parties.

In comparison, the **expanded jurisdiction** – while running along the same lines – involves a dispute of a totally different nature. It does not address the rights that a private party may demand of another party, whether public or private. It solely addresses the relationships of parties to any branch or instrumentality of the government, and allows direct but limited redress against the government; the redress is not for all causes and on all occasions, but only when a grave abuse of discretion on the part of government is alleged[19] to have been committed, to the petitioning party's prejudice. Thus, the scope of this judicial power is very narrow, but its focus also gives it strength as it is a unique remedy specifically fashioned to actualize an active means of redress against an all-powerful government.

These distinctions alone already indicate that the two branches of judicial power that the Constitution expressly defines should be distinguished from, and should not be confused with, one another.

The case or controversy falling under the Court's jurisdiction, whether traditional or expanded, relates to disputes under the terms the Constitution expressly requires. But because of their distinctions, the context of the required "case or controversy" under the Court's twin powers differs from one another. By the Constitution's own definition, the controversy under the Court's expanded jurisdiction must relate to the rights that a party may have against the government in the latter's exercise of discretion affecting the complaining party.

The immediate questions, under this view, are two-fold.

First, does the complaining party have a right to demand or claim action or inaction from a branch or agency of government? ***Second***, is there grave abuse of discretion in the government's exercise of its powers, affecting the complaining party?

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[19] By virtue of the Court's expanded certiorari jurisdiction, judicial power had been "extended over the very powers exercised by other branches or instrumentalities of government when grave abuse of discretion is present. In other words, the expansion empowers the judiciary, as a matter of duty, to inquire into acts of lawmaking by the legislature and into law implementation by the executive when these other branches act with grave abuse of discretion." *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014 (Brion, J. *separate concurring*).

In the present consolidated cases, the petitions indisputably relate to the budget process that has been alleged (and proven under our assailed Decision) to be contrary to the Constitution; they likewise necessarily relate to the legality and constitutionality of the expenditure of public funds that government raised through taxation, *i.e.*, from forced exactions from people subject to the government's taxing jurisdiction.

As I have separately discussed in my Separate Opinion to our Decision, ***the public funds involved are massive*** and, unfortunately, ***have not been fully accounted for***, ***even with respect only to the portion that the present administration has administered since it was sworn to office on June 30, 2010***.[20] This situation potentially carries with it grave and serious criminal, civil and administrative liabilities.

The petitions also alleged violations of constitutional principles that are critical to the continued viability of the country as a *constitutional democracy*, among them, the *rule of law*, the *system of checks and balances*, and *the separation of powers*.

That the complaining petitioners have a right to question the budget and expenditure processes and their implementation cannot be doubted as they are Filipino citizens and organizations of Filipinos who pay their taxes; who expect that public funds shall be spent pursuant to guidelines laid down by the Constitution and the laws; and who likewise expect that the country will be run as a constitutional democracy by upright leaders and responsible institutions, not by shattered institutions headed by misguided leaders and manned by subservient followers.[21]

To be sure, the unimpeded access that the DAP and the illegally diverted funds it made available to the country's political leaders, results not only in the opportunity for the misuse of public funds. Such misuse and the availability of funds in the wrong hands can destroy institutions – even this Court - against whom these funds may be or has been used; rig even the elections and destroy the integrity of the ballot that the nation badly needs for its continued stability; and ultimately convert the country – under the

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[20] *Araullo v. Aquino*, G.R. No. 209287, July 1, 2014 (Brion J. *separate concurring*) pp. 2 – 4.

[21] Compare with requisites for standing as a citizen and as a taxpayer:

> The question in standing is whether a party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Kilosbayan, Incorporated v. Morato*, 316 Phil. 652, 696 (1995), citing *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 633 (1962).
>
> Standing as taxpayer requires that public funds are disbursed by a political subdivision or instrumentality and in doing so, a law is violated or some irregularity is committed, and that the petitioner is directly affected by the alleged *ultra vires* act. *Bugnay Construction & Development Corp. v. Laron*, 257 Phil. 245, 256 – 257 (1989).
>
> A citizen acquires standing only if he can establish that he has suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government; the injury is fairly traceable to the challenged action; and the injury is likely to be redressed by a favorable action. *Telecommunications and Broadcast Attorneys of the Philippines, Inc. v. Commission on Elections*, 352 Phil. 153, 168 (1998).

false façade of reform – into the caricature of a republic. These are the injuries that the petitioners wish to avert.

From these perspectives, I really cannot see how the respondents can claim with a straight face that there is no actual case or controversy and that the petitioners have no standing to bring their petitions before this Court.

Stated bluntly, the grounds for the petitions are the acts of grave abuse of discretion alleged to have been committed by the country's executive and legislative leaders in handling the national budget. This is the justiciable controversy that is before us, properly filed under the terms of the Constitution. As I already observed in my previous Separate Opinion in this case:

> I note that aside from newspaper clippings showing the antecedents surrounding the DAP, the petitions are filled with quotations from the respondents themselves, either through press releases to the general public or as published in government websites. In fact, the petitions – quoting the press release published in the respondents' website – enumerated disbursements released through the DAP; it also included admissions from no less than Secretary Abad regarding the use of funds from the DAP to fund projects identified by legislators on top of their regular PDAF allocations.
>
> Additionally, the respondents, in the course of the oral arguments, submitted details of the programs funded by the DAP, and admitted in Court that the funding of Congress' e-library and certain projects in the COA came from the DAP. They likewise stated in their submitted memorandum that the President "made available" to the Commission on Elections (COMELEC) the "savings" of his department upon request for fund.
>
> All of these cumulatively and sufficiently lead to a *prima facie case* of grave abuse of discretion by the Executive in the handling of public funds. In other words, these admitted pieces of evidence, taken together, support the petitioners' allegations and establish sufficient basic premises for the Court's action on the merits. While the Court, unlike the trial courts, does not conduct proceedings to receive evidence, it must recognize as established the facts admitted or undisputedly represented by the parties themselves.
>
> First, the existence of the DAP itself, the justification for its creation, the respondent's legal characterization of the source of DAP funds (i.e., unobligated allotments and unreleased appropriations for slow moving projects) and the various purposes for which the DAP funds would be used (i.e., for PDAF augmentation and for "aiding" other branches of government and other constitutional bodies) are clearly and indisputably shown.
>
> Second, the respondents' undisputed realignment of funds from one point to another inevitably raised questions that, as discussed above, are ripe for constitutional scrutiny. (Citations omitted)[22]

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[22] *Araullo v. Aquino*, G.R. No. 209287, July 1, 2014, (J. Brion, *separate concurring*) pp. 21 – 22.

I see no reason to change these views and observations.

B. The framework in reviewing acts alleged to constitute grave abuse of discretion under the Court's expanded jurisdiction.

I next address the respondents' arguments regarding the impropriety of the Court's exercise of judicial review because the issues presented before the Court could be better resolved through statutory interpretation, a process where the Executive's interpretation of the statute should be given great weight.

The present case involves the Court's expanded jurisdiction, involving the determination of whether grave abuse of discretion was committed by the government, specifically, by the Executive. Based on jurisprudence, such grave abuse must amount to lack or excess of jurisdiction by the Executive: otherwise stated, ***the assailed act must have been outside the powers granted to the Executive by law or by the Constitution, or must have been exercised in such a manner that he exceeded the power granted to him.***[23]

In examining these cases, the Court necessarily has to look at the laws granting power to the government official or agency involved, to determine whether they acted outside of their lawfully-given powers.

And to determine whether the Executive gravely abused its discretion in creating and implementing the DAP, the Court must necessarily also look at both the laws governing the budget expenditure process and the relevant constitutional provisions involving the national budget. In the course of reviewing these laws, the Court would have to compare these provisions, and in case of discrepancy between the statutory grant of authority and the constitutional standards governing them, rule that the latter must prevail.

The Constitution itself directly provides guidelines and standards that must be observed in creating, implementing, and even auditing the national budget.[24] It outlines what the government can and cannot do. Necessarily, the laws involving the national budget would have to comply with these standards, and any act or law that contravenes them is unconstitutional.

a. ***The definition of savings***

The definition of savings is an aspect of the ***power of the purse*** that constitutionally belongs to Congress, *i.e.*, the power to determine the ***what***,

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[23] *See*, for instance, *Biraogo v. The Philippine Truth Commission of 2010*, G.R. No. 192935, December 7, 2010, 637 SCRA 78; *David v. Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, and *Kilosbayan v. Guingona*, G.R. No. 113375, May 5, 1994, 232 SCRA 110.

[24] See Article VI, Sections 24, 25, 27 par. 2, 29, and Article IX-D, Sections 1 – 4, 1987 Constitution.

how, how much and ***why*** of public spending,[25] and includes the determination of when spending may be stopped, as well as where these savings may be transferred. This explains why we looked at the definition of savings in the past GAAs in determining whether the DAP violated the general prohibition against transfers and augmentation in Section 25 (5), Article VI, of the 1987 Constitution.

While the power to define "savings" rightfully belongs to Congress as an aspect of its power of the purse, it is not an unlimited power; it is subject to the limitation that the national budget or the GAA is a law that must necessarily comply with the constitutional provisions governing the national budget, as well as with the jurisprudential interpretation of these constitutional provisions.

We declared, for instance, in *Sanchez v. Commission on Audit*[26] that before a transfer of savings under the narrow exception provided under Section 25 (5) may take place, there must be ***actual savings***, *viz*:

> 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.[27]

This jurisprudential interpretation of "actual savings" may not be violated by Congress in defining what constitutes "savings" in its yearly GAA; neither may Congress, in defining "savings", contravene the text and purpose of Section 25 (5), Article VI.

Congress, for instance, is constitutionally prohibited from creating a definition of savings that makes it possible for hypothetical, or potential sources of savings to readily be considered as savings.

That there must be "actual" savings connotes tangibility or the character of being substantially real; savings must have first been realized before it may be used to augment other items of appropriation. In this sense, actual savings carry the commonsensical notion that there must first have been an amount left over from what was intended to be spent in compliance with an item in the GAA before funds may be considered as savings. Thus, Congress can provide for the means of determining how savings are generated, but this cannot be made in such a way that would

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[25] Under the Constitution, the spending power called by James Madison as "the power of the purse," belongs to Congress, subject only to the veto power of the President. The President may propose the budget, but still the final say on the matter of appropriations is lodged in the Congress.

The power of appropriation carries with it the power to specify the project or activity to be funded under the appropriation law. It can be as detailed and as broad as Congress wants it to be. *Philippine Constitutional Association v. Enriquez*, G.R. No. 113105, August 19, 1994, 235 SCRA 506, 522.

[26] 575 Phil. 428 (2008).

[27] Id. at 454.

allow the transfer of appropriations from one item to another before savings have actually been realized.

Congress, in defining savings, would have to abide by Article VI, Section 25 (5), among other constitutional provisions involving the national budget, as well as the jurisprudential interpretations of the Court involving these provisions.

Additionally, note that the ***general appropriations act*** is an ***annual exercise*** by the Congress of its power to appropriate or to determine how public funds should be spent. It involves a ***yearly act*** through which Congress determines how the income for a particular year may be spent.

Necessarily, the provisions regarding the release of funds, the definition of savings, or the authority to augment contained in a GAA affect only the income and items for that year. These provisions cannot be made to extend beyond the appropriations made in that particular GAA; otherwise, they would be extraneous to that particular GAA and partake of the nature of a prohibited "rider"[28] that violates the "one subject-one title" rule under Section 26 (1), Article VI[29] of the Constitution.[30]

Once the provisions on release becomes effective with respect to appropriations other than those found in the GAA in which they have been written, ***they no longer pertain to the appropriations for that year***, but to the process, rights and duties in general of public officers in the handling of funds. They would then already involve a separate and distinct subject matter from the current GAA and should thus be contained in a separate bill.[31] This is another constitutional standard that cannot be disregarded in passing a law like the GAA.[32] For the same reasons, the definition of savings cannot be made to retroact to past appropriations.

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[28] Where the subject of a bill is limited to a particular matter, the members of the legislature as well as the people should be informed of the subject of proposed legislative measures. This constitutional provision thus precludes the insertion of riders in legislation, a rider being a provision not germane to the subject matter of the bill. *Lidasan v. Comelec*, G.R. No. L-28089, October 25, 1967, 21 SCRA 479, 510 (Fernando, J. *dissenting*).

[29] Section 26, Article VI of the 1987 Constitution provides:

Section 26. (1) Every bill passed by the Congress shall embrace only one subject which shall be expressed in the title thereof.

[30] Note, too, that Congress cannot include in a general appropriations bill matters that should be more properly enacted in separate legislation, and if it does that, the inappropriate provisions inserted by it must be treated as "item", which can be vetoed by the President in the exercise of his item-veto power. *Philippine Constitutional Association v. Enriquez*, G.R. No. 113105, August 19, 1994, 235 SCRA 506, 532.

[31] As the Constitution is explicit that the provision which Congress can include in an appropriations bill must "relate specifically to some particular appropriation therein" and "be limited in its operation to the appropriation to which it relates," it follows that any provision which does not relate to any particular item, or which extends in its operation beyond an item of appropriation, is considered "an inappropriate provision" which can be vetoed separately from an item. Also to be included in the category of "inappropriate provisions" are unconstitutional provisions and provisions which are intended to amend other laws, because clearly these kind of laws have no place in an appropriations bill. These are matters of general legislation more appropriately dealt with in separate enactments. *Philippine Constitutional Association v. Enriquez*, G.R. No. 113105, August 19, 1994, 235 SCRA 506, 534.

[32] Article VI, Section 25, paragraph 2 of the 1987 Constitution requires that "No provision or enactment shall be embraced in the general appropriations bill unless it relates specifically to some

On the other hand, the Court's statutory interpretation of "unprogrammed funds," and its review of the Special Provisions for its release in the 2011 and 2012 GAAs, is in line with the constitutional command that money shall be paid out of the Treasury only in pursuance of an appropriation made by law.[33]

Likewise, while the Executive's interpretation of the provisions governing unprogrammed funds is entitled to great weight, such interpretation cannot and should not be applied when it contravenes both the text and purpose of the provision.[34]

b. *Unprogrammed Fund*

In this light, I reiterate my support for the *ponencia's* and Justice Antonio Carpio's conclusion that the use of the Unprogrammed Fund under the DAP violated the special conditions for its release.

In our main Decision, we found that the *proviso* allowing the use of sources not considered in the original revenue targets to cover releases from the Unprogrammed Fund was not intended to prevail over the general provision requiring that revenue collections first exceed the original revenue targets.[35]

We there declared that releases from the Unprogrammed Fund through the DAP is void because they were made prematurely, *i.e.* before the original revenue targets had been reached and exceeded. We reached this conclusion because of the Republic's failure to submit any document certifying that revenue collections had exceeded original targets for the Fiscal Years 2011, 2012, and 2013. We waited for this submission even beyond the last oral arguments for the case (held in January 2014) and despite the sufficient time given for the parties to file their respective memoranda.

Instead, the respondents submitted certifications of windfall income, and argued that the proviso on releases under the Unprogrammed Fund allows the Executive to use this windfall income to fund items in the Unprogrammed Fund.

The respondent's Motion for Reconsideration argues that this kind of interpretation is absurd and renders nil the proviso allowing the use of income not otherwise considered in the original revenue targets, since actual revenue collections may be determined only by the next fiscal year.[36]

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particular appropriation therein. Any such provision or enactment shall be limited in its operation to the appropriation to which it relates."

[33] Article VI, Section 29, paragraph 1 of the 1987 Constitution provides that:

29. (1) No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.

[34] *Bautista v. Juinio*, G.R. No. L-50908, January 31, 1984, 127 SCRA 329, 343.

[35] *Araullo v. Aquino*, G.R. No. 209287, July 1, 2014, pp. 77 – 83.

[36] Respondents' Motion for Reconsideration, pp. 29 – 35.

If the respondents' argument (that the Court's interpretation is absurd and cannot be implemented) were to be followed, the actual result would in fact be to render the entire provision on releases under the Unprogrammed Fund unimplementable.

It must be remembered that the general provision for releases for items under the Unprogrammed Fund requires that revenue collections must first exceed the original targets before these collections may be released. Assuming *in arguendo* that the Executive can determine this only by March 31 of the next fiscal year, then no Unprogrammed Fund could be released at all because the requirement in the general provision cannot be timely complied with. In other words, the respondent's argument regarding the impracticality of the proviso directly impacts on, and negates, the general provision that the proviso qualifies.

To illustrate, assuming that the original revenue targets had been exceeded (without need for unexpected income), releases for items under the Unprogrammed Fund would still not be made based on the respondents' assertion that revenue collections can only be determined by the first quarter of the next fiscal year.

From the point of view of history, I do not think that this general provision on releases for items under the Unprogrammed Fund would have been in place as early as FY 2000 if it could not actually be implemented.[37] This improbability, as well as the consistent requirement that original revenue targets first be exceeded before funds may be released for items under the Unprogrammed Fund, clearly supports the Court's interpretation on the special conditions for releases under the Unprogrammed Fund. Additionally, as both the *ponencia*[38] and Justice Carpio[39] point out, total revenue targets may be determined on a quarterly basis. Thus, requiring that total revenue targets be first met before releases may be made under the Unprogrammed Funds is not as impracticable and absurd as the respondents picture them to be.

c. Qualification to the ponencia's prospective application of the Court's statutory interpretation on the release of the Unprogrammed Fund

I qualify, my concurrence, however, with respect to the *ponencia*'s conclusion that the Court's statutory interpretation of the Unprogrammed

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[37] In as early as the 2000, the General Appropriations Act require, as a condition for the release of unprogrammed funds, that revenue collections first exceed the original revenue targets, in a similar language as the provisions in the 2011 and 2012 GAA, viz:

> 1. Release of Fund. The amounts herein appropriated 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 or when the corresponding funding or receipts for the purpose have been realized in the special cases covered by specific procedures in Special Provision Nos. 2, 3, 4, 5, 7, 8, 9, 13 and 14 herein: x x x

[38] *See* the *ponencia*'s discussion on pp. 18 – 21.

[39] *See* Justice Carpio's discussion on the release of the Unprogrammed Fund in pp. 10 – 11 of his Separate Opinion.

Fund provision should be applied prospectively. Prospective application, to me, is ***application in the present*** and in all future similar cases.

The Court's statutory interpretation of a law applies prospectively if it ***does not apply to actions prior*** to the Court's decision. We have used this kind of application in several cases when we opted not to apply new doctrines to acts that transpired prior to the pronouncement of these new doctrines.

In *People v. Jabinal*,[40] for instance, we acquitted a secret agent found to be in possession of an unlicensed firearm prior to the Court's pronouncement in *People v. Mapa*[41] overturning several cases that declared secret agents to be exempt from the illegal possession of firearms provisions. Jabinal committed the crime of illegal possession of firearms at a time when the prevailing doctrine exempted secret agents, but the trial court found him guilty of illegal possession of firearms after the Court's ruling in *People v. Mapa*. The Court reversed Jabinal's conviction, ruling that the *People v. Mapa* ruling cannot have retroactive application.

The Court explained the reason for the prospective application of its decisions interpreting a statute, under the following terms:

> Decisions of this Court, although in themselves not laws, are nevertheless evidence of what the laws mean, and this is the reason why under Article 8 of the New Civil Code, "Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system . . ." ***The interpretation upon a law by this Court constitutes, in a way, a part of the law as of the date that law was originally passed, since this Court's construction merely establishes the contemporaneous legislative intent that the law thus construed intends to effectuate***. The settled rule supported by numerous authorities is a restatement of the legal maxim "legis interpretation legis vim obtinet" — the interpretation placed upon the written law by a competent court has the force of law. The doctrine laid down in Lucero and Macarandang was part of the jurisprudence, hence, of the law, of the land, at the time appellant was found in possession of the firearm in question and where he was arraigned by the trial court. It is true that the doctrine was overruled in the Mapa case in 1967, ***but when a doctrine of this Court is overruled and a different view is adopted, the new doctrine should be applied prospectively, and should not apply to parties who had relied on, the old doctrine and acted on the faith thereof.*** This is especially true in the construction and application of criminal laws, where it is necessary that the punishment of an act be reasonably foreseen for the guidance of society.[42]

The ***prospective application of a statutory interpretation, however, does not extend to its application to the case in which the pronouncement***

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40 154 Phil. 565 (1974).
41 127 Phil. 624 (1967).
42 154 Phil. 565, 571 (1974).

or new interpretation was made. For this reason, we affirmed Mapa's conviction for illegal possession of firearms.[43]

In other words, the prospective application of a statutory interpretation of a law applies to the facts of ***the case in which the interpretation was made*** and to acts subsequent to this pronouncement. The prospective effect of a statutory interpretation cannot be made to apply only to acts after the Court's new interpretation; the interpretation applies also to the case in which the interpretation was laid down. Statutory interpretation, after all, is used to reach a decision on the immediate case under consideration.

For instance, in several cases[44] where we declared an administrative rule or regulation to be void for being contrary to the law it seeks to implement, ***we applied our interpretation to resolve the issue in the cases before us***. We did not say that the application of our interpretation applies only to all cases after the pronouncement of illegality.

The present case poses to us the issue of whether the DAP made releases under the Unprogrammed Fund in violation of the special conditions for its release. In resolving this issue, we clarified the meaning of one of these conditions, and found that it had been violated. Thus, the Court's statutory interpretation of the release of unprogrammed funds applies to the present case, and to cases with similar facts thereafter. The release of unprogrammed funds under the DAP is void and illegal, for having violated the special conditions requisite to their release.

At this point, the funds have presumably been spent,[45] and are now being subjected to audit. Thus, it is up to the Commission on Audit[46] to issue

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[43] 127 Phil. 624 (1967).

[44] *See* for instance, the following cases: (1) *People v. Maceren*, No. L-32166, October 18, 1977, 79 SCRA 450 where the Court acquitted Maceren, who was then charged with the violation of the Fisheries Administrative Order No. 84 for engaging in electro fishing. The AO No. 84 sought to implement the Fisheries Law, which prohibited "the use of any obnoxious or poisonous substance" in fishing. In acquitting Maceren, the Court held that AO no. 84 exceeded the prohibited acts in the Fisheries Law, and hence should not penalize electro-fishing. (2) *Conte v. Commission on Audit*, G.R. No. 116422, November 4, 1996, 264 SCRA 19 where the Court, in interpreting that SSS Resolution No. 56 is illegal for contravening Republic Act No. 660, and thus refused to reverse the Commission on Audit's disallowance of the petitioners' benefits under SSS Resolution No. 56. (3) *Insular Bank of Asia and Americas Employees Union v. Inciong*, 217 Phil 629 (1984), where the Court nullified Section 2, Rule IV, Book III of the Rules to implement the Labor Code and Policy instruction No. 9 for unduly enlarging the exclusions for holiday pay in the Labor Code, and thus ordered its payment to the petitioner; and (4) *Philippine Apparel Workers Union vs. National Labor Relations Commission*, G.R. No. L-50320, July 31, 1981, 106 SCRA 444 where the Court held that the implementing rules issued by the Secretary of Labor exceeded the authority it was granted under Presidential Decree No. 1123, and thus ordered the respondent employer company to pay its union the emergency cost of living allowance that PD No. 1123 requires.

[45] Ninety-six percent or P69.3 billion of the P72.11 billion Disbursement Acceleration Plan (DAP) has successfully been released to agencies and government-owned or -controlled corporations (GOCCs) as of end-December 2011. Department of Budget and Management, 96% of P72.11-B disbursement acceleration already released, 77.5% disbursed (Jan. 9, 2012), available at http://www.gov.ph/2012/01/09/96-of-p72-11-b-disbursement-acceleration-already-released-77-5 disbursed/.

[46] Article IX-D, Section 2, paragraph 1 provides:

(1) The Commission on Audit shall have the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or

the appropriate notice of disallowance for the illegal release of these funds, and to decide whether the officials behind its release should be liable for their return.[47] It is in these proceedings that the question of whether the officials acted in good faith or in bad faith would be relevant, as only officials who acted in bad faith in causing the unlawful release of public funds may be held liable for the return of funds illegally spent.[48]

III. Reconsideration of what constitutes an item for augmentation purposes

Upon a close re-examination of the issue, I concur with the *ponencia*'s decision to reverse its earlier conclusion that several PAPs funded by the DAP had no items, in violation of the constitutional requirement that savings may be transferred only to existing items in the GAA.

My concurrence, however, is subject to the qualifications I have made in the succeeding discussion on the need for a deficiency before an item may be augmented.

This change of position, too, does not, in any way, affect the unconstitutionality of the methods by which the DAP funds were sourced to augment these PAPs. The acts of using funds that were not yet savings to augment other items in the GAA remain contrary to the Constitution.

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instrumentalities, including government-owned or controlled corporations with original charters, and on a post- audit basis:

(a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under this Constitution;
(b) autonomous state colleges and universities;
(c) other government-owned or controlled corporations and their subsidiaries; and
(d) such non-governmental entities receiving subsidy or equity, directly or indirectly, from or through the Government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. However, where the internal control system of the audited agencies is inadequate, the Commission may adopt such measures, including temporary or special pre-audit, as are necessary and appropriate to correct the deficiencies. It shall keep the general accounts of the Government and, for such period as may be provided by law, preserve the vouchers and other supporting papers pertaining thereto.

[47] Pursuant to its mandate as the guardian of public funds, the COA is vested with broad powers over all accounts pertaining to government revenue and expenditures and the uses of public funds and property. This includes the exclusive authority to define the scope of its audit and examination, establish the techniques and methods for such review, and promulgate accounting and auditing rules and regulations. ***The COA is endowed with enough latitude to determine, prevent and disallow irregular, unnecessary, excessive, extravagant or unconscionable expenditures of government funds.*** It is tasked to be vigilant and conscientious in safeguarding the proper use of the government's, and ultimately the people's, property. The exercise of its general audit power is among the constitutional mechanisms that gives life to the check and balance system inherent in our form of government. *Veloso v. Commission on Audit*, G.R. No. 193677, September 6, 2011, 656 SCRA 767, 776.

[48] *See Blaquera v. Alcala*, 356 Phil. 678 (1998); *Casal v. Commission on Audit*, 538 Phil. 634 (2006).

A. Jurisprudential standards for determining an item

For an augmentation to be valid, the savings should have been transferred to an item in the general appropriations act. This requirement reflects and is related to two other constitutional provisions regarding the use of public funds, ***first***, that no money from the public coffers may be spent except through an appropriation provided by law;[49] and ***second***, that the President may veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto shall not affect the items to which he does not object.[50]

In my view, ***the power of augmentation cannot be exercised to circumvent or dilute these principles, such that an interpretation of what constitutes as an item for purposes of augmentation cannot be at odds with the exercise of the President's power to veto items in the GAA or Congress's exclusive, plenary power of the purse***.

As early as 1936, the Court has defined an item, *in the context of the President's veto power*, as "the particulars, the details, the distinct severable parts of the appropriation bill."[51] An appropriation, on the other hand, is the setting apart by law of a certain sum from the public revenue for a specified purpose.[52] Thus, for purposes of an item veto, an item consists of a severable part of a sum of public money set aside for a particular purpose.

This definition, however, begs the question of how to determine when a part of the appropriation law is its distinct and severable part. Subsequent cases, still pertaining to the President's veto powers, gave us the opportunity to gradually expound and develop the applicable standard. In *Bengzon v. Drilon*,[53] in particular, we described an item as an "indivisible sum of money dedicated to a stated purpose," and as "specific appropriation of money, not some general provision of law, which happens to be put into an appropriation bill."[54]

We further refined this characterization in the recent case of *Belgica v. Executive Secretary*,[55] where we pointed out that "an item of appropriation must be an item characterized by singular correspondence – meaning an allocation of a specified singular amount for a specified singular purpose, otherwise known as a "line-item."[56]

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49 Article VI, Section 29, paragraph 1, 1987 Constitution.
50 Article VI, Section 27, paragraph 2, 1987 Constitution.
51 *Bengzon v. Secretary of Justice*, 62 Phil. 912, 916 (1936).
52 Id.
53 *Bengzon v. Drilon*, G.R. No. 103524, April 15, 1992, 208 SCRA 133.
54 Id. at 144.
55 G.R. No. 208566, November 19, 2013.
56 Id.

In the course of these succeeding cases, we have narrowed our description of the term "item" in an appropriation bill so that *(1)* it now must be indivisible; *(2)* that this indivisible amount be for a specific purpose; and *(3)* that there must exist a singular correspondence between the indivisible amount and the specified, singular purpose.

In *Nazareth v. Villar*,[57] a case we cited in *Belgica*, we even required, for augmentation purposes, that there must be an existing item, project, activity, purpose ***or*** object of expenditure with an appropriation to which the savings would be transferred.[58]

B. Our original main Decision: an expenditure category that had no appropriation cannot be augmented

Our main Decision, considering these jurisprudential standards, found that the ***allotment class*** (***i.e., the expense category of an item of appropriation, classifying it either as a Capital Outlay (CO), Maintenance and Other Operating Expense (MOOE), or Personal Services (PS)***) of several PAPs funded through the DAP had no appropriation.

Thus, it was then observed that the DAP funded the following expenditure items that had no appropriation cover, to wit: (i) personnel services and capital outlay under the DOST's Disaster Risk, Exposure, Assessment and Mitigation (DREAM) project; (ii) capital outlay for the COA's "IT Infrastructure Program and hiring of additional litigation experts"; (iii) capital outlay for the Philippine Air Force's "On-Base Housing Facilities and Communications Equipment";and (iv) capital outlay for the Department of Finance's "IT Infrastructure Maintenance Project."

It must be emphasized, at this point, that these PAPs had been funded through items found in the GAA; ***the ponencia concluded that they had no appropriation cover because these items had no allocations for the expenditure categories that the DAP funded.***

To illustrate, Department of Finance's IT Infrastructure Maintenance Project had been funded by increasing the appropriation for the "Electronic data management processing," an item which under the GAA only had funding for PS and MOOE. ***The DAP, in funding the IT Infrastructure Maintenance Project, increased appropriation for this item by adding funds for its CO, when it initially had zero funding for them. It was concluded that the DAP's act of financing the CO of an item which had no funding for CO violated the requirement that only items found in the GAA may be augmented***.

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57 G.R. No. 188635, January 29, 2013 689 SCRA 385.

58 Id. at 405.

I supported this argument in the main decision because the jurisprudential standards to determine an item fit the expenditure category of a PAP. It is an indivisible sum of money, and it had been set aside for a specific, singular purpose of funding an aspect of a PAP. As I pointed out in my Separate Opinion:

> Since Congress did not provide anything for personnel services and capital outlays under the appropriation "Generation of new knowledge and technologies and research capability building in priority areas identified as strategic to National Development," then these cannot be funded in the guise of a valid transfer of savings and augmentation of appropriations.[59]

I made this conclusion bearing in mind that the jurisprudential standards apply to an allotment class, and with due consideration as well of the complexity and dynamism of the budgetary process.

The budgetary process is a complex undertaking in which the Executive and Congress are given their constitutionally-assigned tasks, neither of whom can perform the function of the other. The budget proposal comes from the Executive, which initially makes the determination of the PAPs to be funded, and by how much each allotment class (*i.e.*, the expense category of an item of appropriation, classifying it either as a Capital Outlay (CO), Maintenance and Other Operating Expense (MOOE), or Personal Services (PS)) will be funded. The proposal would then be given to the Congress for scrutiny and enactment into law during its legislative phase. At this point, Congress can amend the items in the budget proposal but cannot increase its total amount. These amendments may include increasing or decreasing the expense categories found in the proposal; it may, in its scrutiny of the budget, determine that certain PAPs need capital outlay or additional funds for personnel services, or even eliminate allotments for capital outlay for certain PAPs.[60]

In this light, I concluded then that when the Executive opts to augment an expenditure item that Congress had no intention of funding, then it usurped Congress's power to appropriate.

C. The motion for reconsideration: items, not their allotment classes, may be augmented

The respondents in their Motion for Reconsideration argue that the PAPs funded by the DAP had items in the GAA, and that the breakdown of its expenditure categories may be augmented even if the GAA did not fund them, so long as the PAPs themselves have items. ***The point of inquiry should be whether the PAP had an item, and not whether the expenditure***

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[59] *Araullo v. Aquino*, G.R. No. 209287, July 1, 2014 (Brion, J., *separate*) p. 49.

[60] Article VI, Section 25, paragraph 1 of the 1987 Constitution, JOAQUIN G. BERNAS, S.J. THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY, 779 (2009).

category of a PAP was funded. In asserting this argument, the respondents pointed out that ***the Constitution requires the augmentation to an item, and not an allotment class.***

The majority supports this argument, citing the need to give the Executive sufficient flexibility in the implementation of the budget, and noting that ***equating an item to an expense category or allotment class would mean that the President can veto an expense category without vetoing the PAP.*** It could lead to situation where a PAP would continue to exist, despite having no appropriation for PS or MOOE, because the President has vetoed these expense categories.

To be sure, the provisions in the Constitution do not exist in isolation from each other; they must be construed and interpreted in relation with other provisions and with other grants and limitations of power found in the Constitution. The Constitution, after all, provides the basic blueprint of how our government should be run, and in so doing, reflects the careful compromises and check-and-balancing mechanisms that we, as a nation, have agreed to.

As I have earlier pointed out, the power of augmentation, as an exception to the general rule against transfer of appropriations, must be construed in relation to both the President's item veto power and Congress's exclusive power to appropriate.

Considering that our interpretation of the meaning of what constitutes an item in the present case would necessarily affect what the President may veto in an appropriation law, I agree with the decision to clarify that ***the jurisprudential tests for determining an item pertains to a PAP, and not its expense categories.***

Given, too, the interrelated nature of the President's veto power and his power to augment an item in the GAA, I agree that what may be vetoed (and consequently, what may be augmented) is the total appropriation for a PAP, and not each of its allotment class. Notably, past presidential vetoes show direct vetoes of items and special provisions, not of a specific allotment class of a PAP.

Thus, ***an appropriation for a PAP is the indivisible, specified purpose for which a public fund has been set aside for.*** The President, therefore, may validly augment the PAP representing an item in an appropriation law, including its expenditure categories that initially had no funding.

To illustrate, the CO of the item "Electronic data management processing" may be augmented, even if the GAA did not allocate funds for its CO.

D. Qualification: Augmentation requires that an item must have been deficient

But while I agree with the *ponencia*'s decision to elevate the definition of an item to a particular PAP and not limit it to an expense category, I would like to point out that we are dealing with an augmentation, and not a veto – hence, ***aside from the consideration of the existence of an item, it must also be determined whether this augmented item had a deficiency***.

The very nature of an augmentation points to the existence of a deficiency. An item must have been in existence, and must demonstrably need supplementation, before it may be validly augmented. ***Without a deficiency, an item cannot be augmented, otherwise, it would violate the constitutional prohibition against money being spent without an appropriation made by law.*** An item that has no deficiency does not need additional funding; thus, the funding of an item with no deficiency could only mean that an additional PAP, not otherwise considered in the GAA nor included in the item sought to be augmented, would be funded by public funds.

This interpretation finds support and statutory authority in the definition of augmentation in the GAA of 2011 and 2012, viz:

> Augmentation implies the existence in this Act of a program, activity, or project with an appropriation, ***which upon implementation or subsequent evaluation of needed resources, is determined to be deficient.*** In no case shall a non-existent program, activity, or project, be funded by augmentation from savings or by the use of appropriations otherwise authorized in this Act.[61]

Thus, a PAP that has no deficiency could not be augmented. Augmenting an otherwise sufficiently-funded PAP violates the constitutional command that public money should be spent only through an appropriation made by law; too, if committed during the implementation of the 2011 and 2012 GAA, it also contravenes the definition of augmentation found therein.

At this point, it is worth noting that the items that the main decision earlier found to be objectionable for having no appropriations have two common features: ***first***, ***the augmentations massively increased their funding, and second, the massive increase went to expense categories that initially had no funding.***

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[61] Section 60 of the General Provisions of Rep. Act No. 10147 (General Appropriations Act of 2011) and Section 54 of the General Provisions of Rep. Act No. 10155 (General Appropriations Act of 2012).

Although I have earlier pointed out that these expense categories may be augmented provided that the PAP itself encounters a deficiency, ***the two commonalities in the abovementioned projects render their augmentations highly suspect. These commonalities do not indicate a deficiency, but rather, that PAPs not otherwise considered under their GAAs had been funded by the augmentations.***

Allow me to illustrate my point in more concrete queries: If the Department of Finance's Electronic data management processing is indeed an existing, deficient item under the GAA, why would its appropriation need an additional augmentation of Php 192.64 million in CO, when its original appropriation had none at all?[62]

The Court, however, is not a trier of facts, and we cannot make a determination of whether there had been a deficiency in the present case. ***In the interest of ensuring that the law and the Constitution have been followed, however, I urge my colleagues in the Court to refer the records of the case to the Commission on Audit for the determination of whether the items augmented by the DAP, particularly the items previously declared unconstitutional, had been deficient prior to their augmentation***.

IV. The impact of the Court's exercise of judicial review on existing laws involving the budgetary process

The majority, in denying the respondents' motion for reconsideration, points out that Section 39, Chapter 5, Book VI of the Administrative Code cannot be used to justify the transfer of funds through the DAP, because it contradicted the clear command of Section 25 (5), Article VI of the 1987 Constitution. Section 39 authorizes the President to augment any regular appropriation, *regardless of the branch of government it is appropriated to*, in clear contravention of the limitation in Section 25 (5) that transfers may be allowed only within the branch of government to which the appropriation has been made.

The practical effect of this ruling would be the need for a provision in the succeeding GAAs authorizing augmentation, if Congress would be so

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[62] The same query applies to the DAP's augmentation of the Commission on Audit's appropriation for "A1.a1. General Administration and Support", and the Philippine Airforce's appropriations for "A.II.a.2 Service Support Activities, A.III.a.1 Air and Ground Combat Services, A.III.a.3 Combat Support Services and A.III.b.1 Territorial Defense Activities"

The DAP, in order to finance the "IT Infrastructure Program and hiring of additional expenses" of the Commission on Audit in 2011 increased the latter's appropriation for General Administration and Support. DAP increased the appropriation by **adding P5.8 million for MOOE and P137.9 million for CO.** The COA's appropriation for General Administration and Support, during the GAA of 2011, however, **does not contain any item for CO.**

In order to finance the Philippine Airforce's "On-Base Housing Facilities and Communication Equipment," the DAP augmented several appropriations of the Philippine Airforce **with capital outlay totaling to Php29.8 million**. **None of these appropriations had an item for CO.** (Respondents' Seventh Evidence Packet)

minded to authorize it, in accordance with the clear mandate of Section 25 (5) of the Constitution. To recall, Section 25 (5) of the Constitution requires that a law must first be in place before augmentation may be performed.

Arguably, the wordings of the Administrative Code and the GAAs of 2011 and 2012 (which, like the Administrative Code, allow the President to augment *any* appropriation) on the authority to augment funds, give credence to the respondents' contention that the President may, upon request, transfer the Executive's savings to items allotted to other branches of government.

In my view, they most certainly do not. No law may contravene the clear text and terms of the Constitution, and Section 25 (5), Article VI cannot be clearer in limiting the transfer of savings within the branch of government in which it had been generated. In other words, no cross-border transfer of funds may be allowed.

To begin with, what need is there for a law allowing for augmentation, if it may be done through more informal channels of requests? Further, a regime that allows transfers based solely on requests is inconsistent with the limited and exceptional nature of the power of augmentation. Note that the language of Article VI, Section 25 (5) begins with a general prohibition against the passage of law allowing for transfer of funds, and that the power to augment had been provided by way of exception, and with several qualifications.

Lastly, I cannot agree that past practice holds any persuasive value in legalizing the cross-border transfer of funds. Past practice, while expressive of the interpretation of the officers who implement a law, cannot prevail over the clear text and terms of the Constitution.[63]

Notably, the language of the past GAAs also show varying interpretation of Section 25 (5), Article VI of the 1987 Constitution. For instance, while the Administrative Code of 1987 contained faulty language in giving the President the authority to augment, such language was soon addressed by Congress, when as early as the 1990 GAA,[64] it granted the authority to use savings to the officials enumerated in Section 25 (5), Article

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63 *Supra* note 9.

64 Section 16 of the General Provisions of Rep. Act No. 6831 (the General Appropriations Act of 1990) provides:

> Section 16. Use of Savings. - The President of the Philippines, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Heads of Constitutional Commissions under Article IX of the Constitution, and the Ombudsman are hereby ***authorized to augment any item in this Act for their respective offices from savings in other items of their respective appropriation***s: provided, that no item of appropriation recommended by the President in the budget submitted to Congress pursuant to Article VII, Section 22 of the Constitution which has been disapproved or reduced by Congress shall be restored or increased by the use of appropriations authorized for other purposes in this Act by augmentation. Any item of appropriation for any purpose recommended by the President in the budget shall be deemed to have been disapproved by Congress if no corresponding appropriation for the specific purpose is provided in this Act.

VI of the 1987 Constitution, as expressed in this provision. The broader authority allowing them to augment any item in the appropriations act started only in the 2005 GAA, an unconstitutional practice in the annual GAA that should now be clipped.

V. Operative Fact Doctrine

With the DAP's unconstitutionality, the next point of inquiry logically must be on this ruling's impact on the projects and programs funded under the DAP. This is only logical as our ruling necessarily must carry practical effects on the many sectors that the DAP has touched.

A. The application of the doctrine of operative fact to the DAP

As I earlier pointed out, a declaration of unconstitutionality of a law renders it void: the unconstitutional law is not deemed to have ever been enacted, and no rights, obligations or any effect can spring from it.

The doctrine of operative fact mitigates the harshness of the declared total nullity and recognizes that the unconstitutional law, prior to the declaration of its nullity, was an operative fact that the citizenry followed or acted upon. This doctrine, *while maintaining the invalidity of the nullified law*, provides for an exceptional situation that recognizes that ***acts done in good faith and in reliance of the law prior to its invalidity***, are effective and can no longer be undone.[65]

A lot of the misunderstanding exists in this case in considering the doctrine, apparently because of the term "good faith" and the confusion between the present case and future cases seeking to establish the criminal, civil or administrative liability of those who participated in the DAP affair.

The respondents, particularly, demonstrate their less than full understanding of the operative fact doctrine, as shown by their claim that it has nothing to do with persons who acted pursuant to the DAP prior to its declaration of invalidity and that "the court cannot load the dice, so to speak, by disabling possible defenses in potential suits against the so-called 'authors, proponents and implementors.'"[66]

The respondents likewise decry the use of the terms "good faith" and "bad faith" which may be exploited for political ends, and that any negation of good faith violates the constitutional presumption of innocence. Lastly, the nullification of certain acts under the DAP does not operate to impute bad faith on the DAP's authors, proponents and implementors.

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[65] *See Municipality of Malabang, Lanao del Sur v. Benito*, 137 Phil. 360 (1969), *Serrano de Agbayani v. Philippine National Bank*, 148 Phil. 443, 447 - 448 (1971)., *Planters Products, Inc. v. Fertiphil Corporation*, G.R. No. 166006, March 14, 2008, 548 SCRA 485.

[66] Respondents' Motion for Reconsideration, p. 36.

A first point I wish to stress is that the doctrine is about the ***effects*** of the declaration of the unconstitutionality of an act, law or measure. It is not about the unconstitutionality itself or its underlying reasons. The doctrine in fact was formulated ***to address the situation of those who acted under an invalidated law prior to the declaration of invalidity***.

Thus, while as a general rule, an unconstitutional law or act is a nullity and carries no effect at all, the operative fact doctrine holds that its ***effects*** may still be recognized (although the law or act remains invalid) with respect to those who had acted and relied in good faith on the unconstitutional act or law prior to the declaration of its invalidity; to reiterate what I have stated before, the invalidated law or act was then an operative fact and those who relied on it in good faith should not be prejudiced as a matter of equity and justice.[67] The key essential word under the doctrine is the ***fact of "reliance"***; "good faith" only characterizes the reliance made.

It was in this manner and under this usage that "good faith" came into play in the present case. The clear reference point of the term was to the "reliance" by those who had acted under the unconstitutional act or law prior to the declaration of its invalidity. To again hark back to what has been mentioned above, all these refer to the "effects" of an invalidated act or law. No reference at all is made of the term "good faith" (as used in the operative fact doctrine sense) to whatever criminal, civil or administrative liability a participant in the DAP may have incurred for his or her participation.[68]

Two reasons explain why the term "good faith" could not have referred to any potential criminal, civil or administrative liability of a DAP participant.

The ***first reason*** is that the determination of criminal, civil or administrative liability is not within the jurisdiction of this Court to pass upon *at this point*. The Court therefore has no business speaking of good faith in the context of any criminal, civil or administrative liability that might have been incurred; in fact, the Court never did. If it did at all, it was to explain that good faith in that context is out of place in the present proceedings because the issue of criminal, civil or administrative liability belongs to other tribunals in other proceedings. If the respondents still fail to comprehend this, I can only say – *there can be none so blind as those who refuse to see.*

The ***second reason***, related to the first, is that cases touching on the criminal, civil or administrative liabilities incurred for participation in the DAP affair are cases that have to wait for another day at a forum other than this Court. These future cases may only be affected by our present ruling in

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[67] *See* Kristin Grenfell, California Coastal Commission: Retroactivity of a Judicial Ruling of Unconstitutionality, 14 Duke Envtl. L & Policy F. 245 (Fall 2003).

[68] *See Araullo v. Aquino*, G.R. No. 209287, July 1, 2014 (Brion, J., *separate*) pp. 55 – 58.

so far as we clarified *(1)* the effects of an unconstitutional statute on those who ***relied in good faith,*** under the operative fact doctrine, on the unconstitutional act prior to the declaration of its unconstitutionality; and *(2)* that the authors, proponents and implementors of the unconstitutional DAP are not among those who can seek cover behind the operative fact doctrine as they ***did not rely on the unconstitutional act*** prior to the declaration of its nullity. They were in fact the parties responsible for establishing and implementing the DAP's unconstitutional terms and in these capacities, cannot rely on the unconstitutionality or invalidity of the DAP as reason to escape potential liability for any unconstitutional act they might have committed.

For greater certainty and in keeping with the *strict meaning of the operative fact doctrine*, the authors, proponents and implementors of the DAP are those who ***formulated, made or approved*** the DAP as a budgetary policy instrument, including in these ranks the sub-cabinet senior officials who effectively recommended its formulation, promulgation or approval and who actively participated or collaborated in its implementation. They cannot rely on the terms of the DAP as in fact they were its originators and initiators.

In making this statement, the Court is not "loading the dice," to use the respondents' phraseology, against the authors, proponents and implementors of the DAP. We are only clarifying the scope of application of the operative fact doctrine by initially defining where and how it applies, and to whom, among those related to the DAP, the doctrine would and would not apply. By so acting, the Court is not cutting off possible lines of defenses that the authors, proponents and implementors of the unconstitutional DAP may have; it is merely stating a legal consequence of the constitutional invalidity that we have declared.

Apparently, the good and bad faith that the respondents mention and have in mind relate to the potential criminal, civil, and administrative cases that may be filed against the authors, proponents and implementors of the unconstitutional DAP. Since these are not issues in the petitions before us but are cases yet to come, we cannot and should not be heard about the presence of good faith or bad faith in these future cases. If I mentioned at all specific actions indicating bad faith, it was only to balance my statement that the Court should not be identified with a ruling that seemingly clears the respondents from liabilities for the constitutional transgression we found.[69]

I reiterate the above points by quoting the pertinent portion of my Separate Opinion:

> Given the jurisprudential meaning of the operative fact doctrine, a first consideration to be made under the circumstances of this case is the application of the doctrine: **(1)** to the programs, works and projects the

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[69] *Araullo v. Aquino*, G.R. No. 209287, July 1, 2014 (Brion, J., *separate*) p. 58.

DAP funded in relying on its validity; **(2)** to the officials who undertook the programs, works and projects; and **(3)** to the public officials responsible for the establishment and implementation of the DAP.

With respect to the programs, works and projects, **I fully agree with J. Bersamin** that the ***DAP-funded programs, works and projects*** can no longer be undone; practicality and equity demand that they be left alone as they were undertaken relying on the validity of the DAP funds at the time these programs, works and projects were undertaken.

The ***persons and officials***, on the other hand, ***who merely received or utilized the budgetary funds in the regular course*** and without knowledge of the DAP's invalidity, would suffer prejudice if the invalidity of the DAP would affect them. Thus, they should not incur any liability for utilizing DAP funds, unless they committed criminal acts in the course of their actions other than the use of the funds in good faith.

The doctrine, on the other hand, cannot simply and generally be extended to the ***officials who never relied on the DAP's validity and who are merely linked to the DAP because they were its authors and implementors***. A case in point is the case of the DBM Secretary who formulated and sought the approval of NBC No. 541 and who, as author, cannot be said to have relied on it in the course of its operation. Since he did not rely on the DAP, ***no occasion exists to apply the operative fact doctrine to him and there is no reason to consider his "good or bad faith" under this doctrine.***

This conclusion should apply to all others whose only link to the DAP is as its authors, implementors or proponents. If these parties, for their own reasons, would claim the benefit of the doctrine, then the burden is on them to prove that they fall under the coverage of the doctrine. As claimants seeking protection, they must actively show their good faith reliance; good faith cannot rise on its own and self-levitate from a law or measure that has fallen due to its unconstitutionality. Upon failure to discharge the burden, then the general rule should apply – the DAP is a void measure which is deemed never to have existed at all.

The good faith under this doctrine should be ***distinguished from the good faith considered from the perspective of liability***. It will be recalled from our above finding that the respondents, through grave abuse of discretion, committed a constitutional violation by withdrawing funds that are not considered savings, pooling them together, and using them to finance projects outside of the Executive branch and to support even the PDAF allocations of legislators.

When transgressions such as these occur, the ***possibility for liability for the transgressions committed*** inevitably arises. It is a basic rule under the law on public officers that public accountability potentially imposes ***a three-fold liability – criminal, civil and administrative against a public officer***. A ruling of this kind can only come from a tribunal with direct or original jurisdiction over the issue of liability and where the good or bad faith in the performance of duty is a material issue. This Court is not that kind of tribunal in these proceedings as we merely decide the question of the DAP's constitutionality. If we rule beyond pure constitutionality at all, it is only to expound on the question of the consequences of our declaration of unconstitutionality, in the manner that

> we do when we define the application of the operative fact doctrine. Hence, any ruling we make implying the existence of the presumption of good faith or negating it, is only for the purpose of the question before us – the constitutionality of the DAP and other related issuances.
>
> To go back to the case of Secretary Abad ***as an example***, we cannot make any finding on good faith or bad faith ***from the perspective of the operative fact doctrine*** since, as author and implementor, he did not rely in good faith on the DAP.
>
> Neither can we make any pronouncement on his criminal, civil or administrative liability, *i.e., based on his performance of duty,* since we do not have the jurisdiction to make this kind of ruling and we cannot do so without violating his due process rights. In the same manner, given our findings in this case, we should not identify this Court with a ruling that seemingly clears the respondents from liabilities for the transgressions we found in the DBM Secretary's performance of duties when the evidence before us, at the very least, shows that his actions negate the presumption of good faith that he would otherwise enjoy in an assessment of his performance of duty.
>
> To be specific about this disclaimer, aside from the many admissions outlined elsewhere in the Opinion, there are indicators showing that the DBM Secretary might have established the DAP knowingly aware that it is tainted with unconstitutionality.[70]

B. The application of the operative fact doctrine to the PAPs that relied on the DAP and to the DAP's authors, proponents and implementors, is not obiter dictum

While I agree with the *ponencia*'s discussion of the application of the operative fact doctrine to the case, I cannot agree with its characterization of our ruling as an *obiter dictum*.

An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.[71]

In this light, the Court's declaration of the unconstitutionality of several aspects of the DAP necessarily produces two main effects: (1) it voids the acts committed through the DAP that are unconstitutional; and (2) the PAPs that have been funded or benefitted from these void acts are likewise void.

By way of exception, the operative fact doctrine recognizes that the DAP's operation had consequences, which would be iniquitous to undo despite the Court's declaration of the DAP's unconstitutionality.

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[70] *Araullo v. Aquino*, G.R. No. 209287, July 1, 2014 (Brion, J., *separate*) pp. 56 – 58.

[71] This is otherwise known as the void *ab initio* doctrine, first used in the case of *Norton v. Shelby County*, 118 US 425, 6 S. Ct. 1121, 30 L. Ed. 178 (1886).

Necessarily, the Court would have to specify the application of the operative fact doctrine, and in so doing, distinguish between the two main effects. In other words, given the unconstitutionality's two effects, the Court, logically, would have to distinguish which of these effects remains recognized by the operative fact doctrine.

This is the reason for the discussion distinguishing between the applicability of the operative fact doctrine to PAPs that relied in good faith to the DAP's existence, and its non-application to the DAP's authors, proponents and implementors. The operative fact doctrine, given its nature and definition, only applies to the PAPs, but cannot apply to the unconstitutional act itself. As the doctrine cannot apply to the act, with more strong reason can it not apply to the acts of its authors, proponents and implementors of the unconstitutional act.

It is in this sense and for these reasons that the Court distinguished between the PAPs that benefitted from the DAP, and the DAP's authors, proponents and implementors.

It is also in this sense that the Court pointed out that the DAP's authors, proponents and implementors cannot claim any reliance in good faith; the operative fact doctrine does not apply to them, as the nature of their participation in the DAP's conception is antithetical to any good faith reliance on its constitutionality.

Without the Court's discussion on the operative fact doctrine and its application to the case, the *void ab initio* doctrine applies to nullify both the acts and the PAPs that relied on these acts. Hence, the Court's discussion on the operative fact doctrine is integral to the Court's decision – it provides how the effect of the Court's declaration of unconstitutionality would be implemented. The discussion is not, as the *ponente* vaguely described it, an "*obiter* pronouncement."

In sum, I concur with the *ponencia*'s legal conclusions denying the following issues raised by the motions for reconsideration:

(1) That the following acts and practices under the Disbursement Acceleration Program, National Budget Circular No. 541 and related executive issuances are UNCONSTITUTIONAL for violating Section 25(5), Article VI, of the 1987 Constitution and the doctrine of separation of powers, namely:

   (a) The withdrawal of unobligated allotments from the implementing agencies, and the declaration of withdrawn unobligated allotments and unreleased appropriations as savings prior to the end of the fiscal year and without complying with the statutory definition of savings contained in the General Appropriations Acts; and

(b) The cross-border transfers of the savings of the Executive to augment the appropriations of other offices outside the Executive.

(2) That the use of unprogrammed funds despite the absence of a certification by the National Treasurer that the revenue collections exceeded the revenue targets is VOID and ILLEGAL for non-compliance with the conditions provided in the relevant General Appropriations Acts.

Too, I join the *ponencia* in reversing its former conclusion that several projects, activities and programs funded by the DAP had not been covered by an item in the GAAs, but subject to the qualification that these items should be audited by the Commission on Audit to determine whether there had been a deficiency prior to the augmentation of said items. This is in line with my discussion that an item needs to be deficient before it may be augmented.

My concurrence in the *ponencia* is further qualified by my discussions on: *(1)* the prospective application of our statutory interpretation on the release of unprogrammed funds; and *(2)* the application of the operative fact doctrine as an integral aspect in reaching the Court's decision.

For all these reasons, I join the majority's conclusion, but subject to my opposition against the conclusion that the Court's discussion on the operative fact doctrine is *obiter dictum*, as well as to the qualification that an item must first be found to be deficient before it may be augmented.

Further, in light of my recommendations as regards the implementation of the Court's ruling on the release of unprogrammed funds and augmentation, ***I recommend that we provide the Commission on Audit with a copy of the Court's decision and the records of the case, and to direct it to immediately conduct the necessary audit of the projects funded by the DAP.***

ARTURO D. BRION
Associate Justice