

# Balanced Ledgers and Watertight Compartments: An Analysis of Separation of Powers Challenges in Relation to the Budgetary Process

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## I. INTRODUCTION

The past year has seen a renewed attention to separation of power issues with respect to the interplay between the Legislature and the Executive in the realm of the national budgetary process. Several petitions were filed in the Supreme Court challenging the perceived imbalance of powers between the two departments in the context of the budget process particularly in budget legislation and execution. In turn, the Court responded with vigor in determining whether or not the acts of the Executive and the Legislative departments so challenged were violative of the principle of separation of powers. This Article attempts to study the trend in separation of powers challenges, with a focus on those lodged against Executive and Legislative action in relation to the budgetary process. It also proposes an alternative paradigm for the examination of separation of power issues with respect to the powers and prerogatives of the President in the area of budget execution and in the performance of his constitutional duties and prerogatives.

While no discussion will be made regarding the merits of the budget cases — *Belgica v. Ochoa, Jr.*<sup>1</sup> (which ruled on the challenges against the Priority Development Assistance Fund (PDAF), the Malampaya Fund and the Presidential Social Fund (PSF) and *Araullo v. Aquino*<sup>2</sup> (which ruled on the constitutionality of the Disbursement Acceleration Program (DAP), National Budget Circular (NBC) No. 541 and other related Executive issuances) — these cases will be briefly discussed to serve as a factual backdrop and to contextualize the thesis of this Article.

*A. Priority Development Assistance Fund Scam as Trigger*

The PDAF scam served as a trigger to the filing of new cases dealing with the national budget. When the Court promulgated its decision in *Belgica* on 19 November 2013, the past year stood witness to the dramatic culmination of the legal battle on the constitutionality of the PDAF (colloquially referred to as the “pork barrel”). In the past, the PDAF had been challenged in the judicial forum beginning with the case of *Philippine Constitution Association v. Enriquez*<sup>3</sup> in 1994, and subsequently with the case of *Lawyers Against Monopoly and Poverty (LAMP) v. Department of Budget and Management*<sup>4</sup> in 2012. In both cases, the Court upheld the constitutionality of the PDAF. Yet, despite these holdings, the issue remained unsettled — foreseeably so, since the provisions of law authorizing the PDAF may change with the

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1. *Belgica v. Ochoa, Jr.*, 710 SCRA 1 (2013).

2. *Araullo v. Aquino III*, G.R. Nos. 209287, 209135, 209136, 209155, 209164, 209260, 209442, 209517, & 209569, July 1, 2014.

3. *Philippine Constitution Association v. Enriquez*, 235 SCRA 506 (1994).

4. *Lawyers Against Monopoly and Poverty (LAMP) v. Department of Budget and Management*, 670 SCRA 373 (2012).

passage of each General Appropriations Act (GAA) for a particular fiscal year.<sup>5</sup> Its constitutionality was again put into question when the PDAF scam unravelled in 2013.<sup>6</sup>

It all began with a six-part newspaper expose<sup>7</sup> detailing the activities perpetrated by Janet Lim-Napoles in creating ghost non-government organizations (NGOs) in order to amass public funds.<sup>8</sup> These NGOs were used as conduits to siphon PDAF, Malampaya, and Fertilizer Funds to Napoles' and lawmakers' pockets — into Napoles' by pocketing the savings of non- or under-implementation of projects; and into the legislator's pockets as kickbacks/commissions. Napoles' trusted-employee-turned-whistleblower, Benhur Luy, revealed that Napoles allegedly defrauded the government worth ₱10 billion from 2002 to 2012.<sup>9</sup> Outraged by these events, civil society groups and concerned citizens took to the streets in what was famously dubbed as the "Million People March" on 26 August 2013 to lobby for the abolition of the pork barrel.<sup>10</sup> On 23 August 2013, three days prior to the "Million People March," the President publicly announced the abolition of the pork barrel to allay the fears and suspicions of the public.<sup>11</sup> The announcement was made before various petitions were filed by different groups praying for the Court to declare the pork barrel unconstitutional.<sup>12</sup> The President's abolition partook the nature of a political course of action

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5. *See Belgica*, 710 SCRA at 52-75.

6. Tetch Torres-Tupas, *SC declared PDAF unconstitutional*, PHIL. DAILY INQ., Nov. 19, 2013, available at <http://newsinfo.inquirer.net/530223/sc-declares-pdaf-unconstitutional> (last accessed Sep. 30, 2014).

7. Yasmin D. Arquiza, Janet Napoles and the unravelling of the pork barrel scandal, available at <http://www.gmanetwork.com/news/story/341906/news/specialreports/janet-napoles-and-the-unraveling-of-the-pork-barrel-scandal> (last accessed Sep. 30, 2014).

8. *Id.*

9. Nancy C. Carvajal, *25 Senators on Luy List*, PHIL. DAILY INQ., May 14, 2014, available at <http://newsinfo.inquirer.net/602031/25-senators-on-luy-list> (last accessed Sep. 30, 2014).

10. Carmela G. Lapeña, *From Facebook to Luneta: Anti-pork protests spills into streets August 26*, available at <http://www.gmanetwork.com/news/story/322566/news/nation/from-facebook-to-luneta-anti-pork-protest-spills-into-streets-august-26> (last accessed Sep. 30, 2014).

11. Kimberly Jane Tan, *President Aquino: Time to abolish PDAF*, available at <http://www.gmanetwork.com/news/story/323265/news/nation/president-aquino-time-to-abolish-pdaf> (last accessed Sep. 30, 2014).

12. G.R. No. 208493 or the Alcantara Petition was filed on 28 August 2013; G.R. No. 208566 or the Belgica Petition was filed on 3 September 2013; & UDK-14951 or the Nepomuceno Petition was filed on 5 September 2013. *Belgica*, 701 SCRA at 83-87.

rather than a legal one<sup>13</sup> — the President being without power to repeal a law like the GAA. Yet this move was necessary to reflect the President's unflinching commitment towards corruption-free governance.

On 19 November 2013, the Court en banc struck down the pork barrel as unconstitutional.<sup>14</sup> Yet the battle continued because the PDAF scam uncovered more allegedly suspect practices regarding the budgetary process, similarly vulnerable to corruption like PDAF. Among them are: (a) the PSF, also referred to as the "Presidential Pork;" (b) the DAP; and (c) other Lump Sum Discretionary Funds (LSDFs) under the GAAs. These were separately challenged by almost the same group that challenged the PDAF. The PSF has been challenged in *Belgica*,<sup>15</sup> the DAP in *Araullo*,<sup>16</sup> and the LSDFs in general terms, without being raised as an issue in the latter case. Suffering the same fate, the Court declared certain aspects of the DAP unconstitutional for being violative of Section 25 (5)<sup>17</sup> of Article VI of the Constitution and the doctrine of separation of powers.<sup>18</sup>

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13. An argument has been advanced that this is a form of Executive Impoundment or the President's prerogative not to expend appropriated funds. The Supreme Court has yet no definitive pronouncement on the constitutionality of Executive Impoundment.

14. *Belgica*, 710 SCRA at 88-89.

15. *Id.*

16. *Araullo*, G.R. No. 209287.

17. This Section provides that

[n]o 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.

PHIL. CONST. art. VI, § 25, ¶ 5.

18. See *Araullo*, G.R. No. 209287. The Court, in its decision in *Araullo*, enumerated the following acts and practices under the DAP, National Budget Circular No. 541, and other related executive issuances, thus: (a) the withdrawal of unobligated allotments from the implementing agencies, and the declaration of the 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; (b) the cross-border transfers of the savings of the Executive to augment the appropriations of other offices outside the Executive; and (c) the funding of projects, activities, and programs that were not covered by any appropriation in the General Appropriations Act. *Araullo*, G.R. No. 209287.

*B. Presidential Social Fund, Disbursement Acceleration Program, and Constitutional Challenges*

The primary constitutional challenge against the PSF is that it constitutes undue delegation of legislative power.<sup>19</sup> Petitioners in *Belgica* claimed that Section 12<sup>20</sup> of Presidential Decree (P.D.) 1869, as amended by P.D. 1993, lacks sufficient standards that will limit or guide the President in the determination of what “priority infrastructure development projects” are to be financed by the PSF.<sup>21</sup> The Court held that Section 12 of P.D. 1869 did not provide adequate guidelines or limitations in the law to map out the boundaries of the delegate’s authority and prevent the delegation from running riot, indeed lacking sufficient standards to guide the Executive in discharging the power so delegated.<sup>22</sup> Consequently, the use of the PSF for “priority infrastructure development projects” was declared unconstitutional while its other uses were upheld.<sup>23</sup>

As for the DAP, petitioners in *Araullo* claimed that the Executive arrogated upon itself the power to legislate, in particular, the power to appropriate.<sup>24</sup> They asserted that the “DAP was intended for new projects outside the GAA and to augment lump sum items in the Special Purpose Funds as PDAF;”<sup>25</sup> that “tantamount to appropriating public funds, the [NBC No.] 541 authorizes the funding [of] priority programs and projects

19. *Id.*

20. Amending Section Twelve of Presidential Decree No. 1869 Consolidating and Amending Presidential Decrees No. 1067-A, 1067-B, 1067-C, 1399 and 1632, Relative to the Franchise and Powers of the Philippine Amusement and Gaming Corporation (PAGCOR), Presidential Decree No. 1993, § 1 (1985). This Section provides —

SECTION 1. Section 12 of Presidential Decree No. 1869 is hereby amended to read as follows:

Sec. 12. Special Condition of Franchise. — After deducting five percent as Franchise Tax, the [50%] percent share of the government in the aggregate gross earnings of the Corporation from this Franchise, or 60% if the aggregate gross earnings be less than ₱150,000,000.00, shall immediately be set aside and shall accrue to the General Fund to finance the priority infrastructure development projects and to finance the restoration of damaged or destroyed facilities due to calamities, as may be directed and authorized by the Office of the President of the Philippines.

*Id.* (emphasis supplied).

21. *Araullo*, G.R. No. 209287.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

not considered in the 2012 budget but expected to be started or implemented during the fiscal year.”<sup>26</sup>

Given this factual context, this Article will examine the application of separation of powers in cases involving the national budget. A survey of relevant decisions of the Court dealing with the principle of separation of powers and the system of checks and balances will be reviewed to trace the framework within which the Court’s examination of separation of powers challenges is made. It will examine the model of separation of powers as applied in the Philippines and how it facilitates the achievement of State policies. The need for independence among and interdependence between the coordinate branches of government will be explored in light of these recent legal controversies. It will propose an alternative paradigm for the examination of separation of power issues with respect to the powers and prerogatives of the Executive in the area of budget execution and in the performance of his constitutional duties and prerogatives.

This Article is organized as follows — Part II discusses the principle of separation of powers in general and examines the Philippine model based on the examination within which separation of power challenges is made as culled from case law. Part III focuses on the separation of powers in the area of budgetary process and reviews extant judicial interpretation on the division of labor between the Executive and the Legislative in terms of the budget with emphasis on the Appropriations Clause. Part IV proposes an alternative paradigm for the examination of separation of power issues with respect to the powers and prerogatives of the President in the area of budget execution and in the performance of his constitutional duties and prerogatives.

## II. SEPARATION OF POWERS

### A. *History and Nature*

In his publication *The Spirit of the Laws*, Baron de Montesquieu first coined the term “separation of powers” as reflective of the ideal relationship between the three branches of government namely — the Judiciary, the Legislature, and the Executive.<sup>27</sup> For Montesquieu, the Judicial branch is responsible for interpreting the Constitution and laws, and applying their interpretations to controversies brought before it;<sup>28</sup> the Legislative branch, for enacting the laws of the state and appropriating the money necessary to

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26. *Id.*

27. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* li (Franz Neumann trans., 1949).

28. *Id.* at 174-79.

operate the government;<sup>29</sup> and the Executive branch, for implementing and administering the public policy enacted and funded by the Legislative branch.<sup>30</sup> According to classical political theory, the purpose of separation of powers is “to moderate, diffuse[,] and diminish government power.”<sup>31</sup> This operates under the assumption that tyranny results from concentration of power.<sup>32</sup> The second, more modern and pragmatic justification for separation of powers is that it partakes of a division of labor that ensures efficiency in government<sup>33</sup> — that the separation of powers assigns each branch specific powers and functions so that they can operate within their respective spheres of experience, information, and expertise.

Decisions of the United States (U.S.) Supreme Court provides for two ways on how the principle of separation of powers may be violated: first, “one branch may *interfere impermissibly* with the other’s performance of its constitutionally assigned function;”<sup>34</sup> and second, “the doctrine may be violated when one branch *assumes a function* that more properly is entrusted to another.”<sup>35</sup> These two ways are apparently different, but are in essence substantially identical, as both deal with interference and arrogation of power.

*Undue Delegation of Legislative Power* and *Constitutional Adjudication* are the most common forms of interference with legislative power. Both concepts prescind from the general rule that legislative power is vested with the Congress<sup>36</sup> — and can only be exercised by another co-equal branch when delegated subject to well-defined conditions. The difference between undue delegation of legislative power and constitutional adjudication lies in the branch to which the interference is attributed.

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29. *Id.* at 171-72.

30. *Id.* at 172-74.

31. Christoph Möllers, *Steps to a Tripartite Theory of Multi-level Government*, (An Unpublished Working Paper under the Jean Monnet Program, New York University School of Law) available at <http://www.jeanmonnetprogram.org/archive/papers/03/030501.pdf> (last accessed Sep. 30, 2014).

32. *Id.*

33. *Id.*

34. *Belgica*, 710 SCRA at 108 (citing *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-46, & 451-52 (1977) & *United States v. Nixon*, 418 U.S. 683 (1974)).

35. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) & *Springer v. Government of Philippine Islands*, 277 U.S. 189, 203 (1928)).

36. PHIL. CONST. art. VI, § 1. This Section provides that “[t]he legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.” PHIL. CONST. art. VI, § 1.

*Delegation of Legislative Power* is not per se unconstitutional. A law may delegate legislative power under strict jurisprudential guidelines and parameters.<sup>37</sup> This type of interference is primarily committed by the Legislature when the law passed by it is declared by the Court to be incomplete and lacking in standards.<sup>38</sup> However, there are two things that must be noted. First, a law is presumed constitutional unless declared otherwise. Second, the constitutionality of a law only becomes ripe for judicial inquiry when there is an actual controversy (i.e. the entity granted some measure of legislative power through delegation has acted beyond what the law delegates). Hence, until there is a *prima facie* showing that the delegate acts in a manner contrary to or in excess of the confines of the delegating law, the law is presumed to be constitutional.

On the other hand, *Constitutional Adjudication* occurs when courts decide general and highly politicized questions with pervasive impact not only for the parties involved but also for the whole political process.<sup>39</sup> This is primarily committed by the Judiciary. In so doing, the courts, under the guise of its power to check on abuse of discretion, tread the domain of law-making by adjudicating questions which are properly resolved on a political level.<sup>40</sup>

There are other forms of interference, which presently have not been assigned legal nomenclature, as when: (a) the Executive engages in law-making; (b) when the Legislature engages in execution of the law; or (c) when the Judiciary performs executive functions. The first two are claimed to have been committed in the various budget-related practices that have been challenged before the Court since the discovery of the PDAF scam.

### B. *The Philippine Model*

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37. See *Pelaez v. Auditor General*, 15 SCRA 569, 576-77 (1965). The Court said, [a]lthough Congress may delegate to another branch of the Government the power to fill in the details in the execution, enforcement or administration of a law, it is essential, to forestall a violation of the principle of separation of powers, that said law: (a) be complete in itself — it must set forth therein the policy to be executed, carried out or implemented by the delegate — and (b) fix a standard — the limits of which are sufficiently determinate or determinable — to which the delegate must conform in the performance of his functions.

*Id.*

38. *Id.*

39. Möllers, *supra* note 31.

40. See *Arroyo v. De Venecia*, 277 SCRA 268 (1997) & *Santiago v. Guingona, Jr.*, 298 SCRA 756 (1998).



In Philippine jurisprudence, the separation of powers is considered a fundamental principle in our system of government.<sup>41</sup> The principle of separation of powers is obtained not through express provision but by actual division — “the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the [E]xecutive, the [L]egislative[,] and the [J]udicial departments of the government.”<sup>42</sup> The Court has also held that “[e]ach department of the government has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere.”<sup>43</sup> However, this has never been taken to mean that the three departments are to be kept completely separate and distinct, or that the Constitution intended them to be absolutely unrestrained and independent of each other. 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. U.S. jurisprudence to this effect has been adopted in this country from the period predating the 1935 Constitution and consistently until the present.<sup>44</sup>

Moreover, there are two primary models of separation of powers in the federal conceptualization of the principle — the formalist view and the functionalist view.<sup>45</sup> The formalist model of separation of powers espouses virtually no interaction between the three separate branches.<sup>46</sup> This model is based on a reliance on an overarching principle of separation of powers underlying the fundamental law or under-reading the Vested Clauses and had favored the recognition of powers as provided in the U.S. constitution.<sup>47</sup>

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41. *Francisco, Jr. v. Nagmamalaskit na mga Manananggol ng mga Manggagawang Pilipino, Inc.*, 415 SCRA 44 (2003).

42. *Angara v. Electoral Commission*, 63 Phil. 139, 157 (1936).

43. *Id.* at 156.

44. *See Alejandrino v. Quezon*, 46 Phil. 83, 91 (1924) (citing *Sutherland v. Governor*, 29 Mich. 320 (1874)). “It is true that neither of the departments can operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest.” *Id.* *See also Alejandrino*, 46 Phil. at 113 (J. Johnson, dissenting opinion). “If the doctrine that the different departments — [E]xecutive, [L]egislative[,] and [J]udicial — are absolutely independent and one can never interfere to control or restrain, modify or annul, the action of the other, then the very purpose of the organization of the three departments for ‘checks and balances’ would be defeated.” *Id.*

45. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011). *See also* David A. Carillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F.L. Rev. 655 (2011) & Jonathan Zasloff, *Taking Politics Seriously: A Theory of California’s Separation of Powers*, 51 UCLA L. Rev. 1079 (2003).

46. *See* Manning, *supra* note 45, at 1943-44.

47. *See* Carillo & Chou, *supra* note 45, at 657.

On the other hand, the functionalist model allows more interdependence and coordination between the departments, permits checks and balances, and directs the examination to whether or not the exercised power by one department is inherently lodged in another.<sup>48</sup> Under this flexible model, more latitude for action on general circumstances is allowed, based on a wider scope of the Vesting Clauses.<sup>49</sup> Functionalists consider as a clear violation of separation of powers when (1) a department exercises powers clearly vested upon another; or (2) when a department unduly impedes or prevents another from performing what is clearly the latter's exclusive or constitutionally-granted power.<sup>50</sup>

Surveying the more recent cases involving the principle of separation of powers, the Court has had diverse factual patterns of governmental action within which to interpret the principle. It includes the President's invocation of Executive privilege,<sup>51</sup> legislators' participation in budget execution,<sup>52</sup> undue delegation of legislative powers in favor of the President,<sup>53</sup> congressional oversight,<sup>54</sup> and augmentation exercises.<sup>55</sup> In most of these cases, the Authors find that the examination appears to fall within two categories — first, when the challenge pertains to acts falling within those context-specific provisions of the Constitution which explicitly grant or limit a power of a certain department; and, second, when the challenge pertains to exercise of a power not so specifically granted or limited. This framework of examination is a hybrid between the two primary models of separation of powers — the formalist view and the functionalist view. It can be found that the Court has historically adhered to a strict but reasonable interpretation for context-specific provisions in the Constitution, which are considered to be limitations on specific powers, while allowing a level of interdependence in the form of checks and balances that provides conflict or friction that prevents the abuse of power by a single department.

This hybrid model that has developed in this jurisdiction is best expressed in the case of *Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc.*,<sup>56</sup> wherein the Court ruled upon the constitutionality of the second impeachment complaint against Former Chief

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48. See Manning, *supra* note 45, at 1950-52.

49. *Id.* at 1953-55.

50. See Carillo & Chou, *supra* note 45, at 664-65.

51. See Senate of the Philippines v. Ermita, 488 SCRA 1 (2006).

52. See Guingona, Jr. v. Carague, 196 SCRA 221 (1991) & Abakada Guro Party v. Purisima 562 SCRA 251 (2008).

53. See *Belgica*, 701 SCRA at 144-50.

54. See *Abakada Guro Party*, 562 SCRA at 286.

55. See *Araullo*, G.R. No. 209287.

56. *Francisco, Jr.*, 415 SCRA.

Justice Hilario Davide. Before delving into the controversy, the Court stated that it takes heed of what it called the “essential truth” that

the inviolate doctrine of separation of powers among the [L]egislative, [E]xecutive[,] or [J]udicial branches of government by no means prescribes for absolute autonomy in the discharge by each of that part of the governmental power assigned to it by the sovereign people.

At the same time, the corollary doctrine of checks and balances which has been carefully calibrated by the Constitution to temper the official acts of each of these three branches must be given effect without destroying their indispensable co-equality.

Taken together, these *two fundamental doctrines of republican government*, intended as they are to insure that governmental power is wielded only for the good of the people, *mandate a relationship of interdependence and coordination among these branches where the delicate functions of enacting, interpreting[,] and enforcing laws are harmonized* to achieve a unity of governance, guided only by what is in the greater interest and well-being of the people. *Verily, salus populi est suprema lex.*<sup>57</sup>

### C. Checks and Balances

Encroachment per se is not forbidden by the functionalist model of separation of powers.<sup>58</sup> The modern interpretation of this principle is that it allows a degree of blending of powers between these three branches of government. This modern view is a product of the shift of perspective from the normative view<sup>59</sup> that the purpose of separation of powers is only to avoid concentration of power to the more modern, pragmatic view that it is also intended to ensure efficiency of the entire government machinery. Impermissible encroachment happens only when one branch traverses the *exclusive* jurisdiction of the other branches.

The case of *Macalintal v. Commission on Elections*<sup>60</sup> reflects this modern interpretation of separation of powers. It held that

[i]t is now beyond debate that the principle of separation of powers (1) allows the ‘blending’ of some of the Executive, [L]egislative, or [J]udicial powers in one body; (2) does not prevent one branch of government from inquiring into the affairs of the other branches to maintain the balance of power; (3) but ensures that there is no encroachment on matters within the exclusive jurisdiction of the other branches.<sup>61</sup>

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57. *Id.* at 105 (emphasis supplied).

58. See Manning, *supra* note 45, at 1950–58.

59. See *Myers v. United States*, 272 U.S. 52 (1926).

60. *Macalintal v. Commission on Elections*, 405 SCRA 614 (2003).

61. *Id.* at 701–02.

An inquiry by one branch into the affairs of the other for the purpose of maintaining the balance of power is, therefore, one of permissible encroachment. The Legislature's inquiry on the activities of the Executive pursuant to its oversight function,<sup>62</sup> or in aid of future legislation,<sup>63</sup> is permissible encroachment; so too when the Judiciary exercises its power of expanded judicial review over acts of the Executive to determine whether or not grave abuse of discretion was committed.<sup>64</sup> Encroachments are derogations of the principle of separation of powers. As such, the power to encroach must not be presumed. To be permissible, the same should be expressly stated in the Constitution. Thus, the Legislature's oversight function and the Judiciary's expanded power of judicial review are both textually committed to these branches.

The effect of permissible encroachments is constructive. The Legislature's oversight and the Judiciary's judicial review enhance checks and balances. It therefore prevents concentration of power in one branch. On the other hand, the President's veto power<sup>65</sup> serves the modern and more

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62. PHIL. CONST. art. VI, § 22. This Section provides —

The heads of departments may upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appeal before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the State or the public interest so requires and the President so states in writing, the appearance shall be conducted in Executive session.

PHIL. CONST. art. VI, § 22.

63. PHIL. CONST. art. VI, § 21.

64. PHIL. CONST. art. VIII, § 1. This Section provides —

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.

PHIL. CONST. art. VIII, § 1.

65. PHIL. CONST. art. VI, § 27. This Section provides —

(1) Every bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same, he shall sign it; otherwise, he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such

pragmatic purpose of efficient and optimum government functioning. The Executive's veto is not a check on Legislature's law-making prerogatives but is essentially a complement or "follow through" so to speak, of the latter. In fact, in *Bengzon v. Secretary of Justice and Insular Auditor*,<sup>66</sup> the Court characterized the President's veto power as negative legislation, to wit —

His disapproval of a bill, commonly known as a veto, is essentially a legislative act. The questions presented to the mind of the Chief Executive are precisely the same as those the legislature must determine in passing a bill, except that his will be a broader point of view.

The Constitution is a limitation upon the power of the [L]egislative department of the government, but in this respect it is a grant of power to the Executive department. The Legislature has the affirmative power to enact laws; the Chief Executive has the negative power by the constitutional exercise of which he may defeat the will of the Legislature.<sup>67</sup>

In vetoing a line-item in accordance with Section 27 (2), Article VI of the Constitution, or in permanently stopping further expenditure of funds in accordance with Section 38, Chapter 5, Book VI of the 1987 Administrative Code,<sup>68</sup> the President is essentially "amending" or "repealing" an act of

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reconsideration, two-thirds of all the Members of such House shall agree to pass the bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law. In all such cases, the votes of each House shall be determined by yeas or nays, and the names of the Members voting for or against shall be entered in its Journal. The President shall communicate his veto of any bill to the House where it originated within thirty days after the date of receipt thereof; otherwise, it shall become a law as if he had signed it.

(2) The President shall have the power to veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto shall not affect the item or items to which he does not object.

PHIL. CONST. art. VI, § 27.

66. *Bengzon v. Secretary of Justice and Insular Auditor*, 62 Phil. 912 (1936).

67. *Id.* at 916.

68. Instituting the Administrative Code of 1987 [ADMINISTRATIVE CODE OF 1987], Executive Order No. 292, Bk. VI, Ch. 5, § 38 (1987). This Section provides —

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

Congress to address exigencies which were not obtaining when the GAA was being crafted by the Legislature and which may have only manifested in the post-budget legislation stage.

On the other hand, impermissible encroachment is one which lacks any constitutional basis. An example of this impermissible encroachment is when Congress performs Executive functions; the Judiciary performs Executive functions; and the Executive performs functions pertaining to the Judiciary.

In *Abakada Guro Party List Group v. Purisima*,<sup>69</sup> the Court held that any legislative intervention in the execution of the laws by means other than a statute is an encroachment on the domain of the Executive branch and violates the separation of powers.<sup>70</sup> In *Guingona, Jr. v. Court of Appeals*,<sup>71</sup> the Court declined to render an advisory opinion on what the government prosecutors should do — when, how, and whom to grant or deny admission to the Witness Protection Program — as this is tantamount to the incursion into Executive prerogatives.<sup>72</sup> In *Maceda v. Vasquez*,<sup>73</sup> the Court held that the Ombudsman encroached into the Court's power of administrative supervision over all courts and its personnel when the former investigated a criminal complaint against a judge for the falsification of a judge's certification submitted to the Court.<sup>74</sup>

#### *D. Effect of Acts Deemed Violative of Separation of Powers*

There are two views as to the effects of acts assailed as and subsequently declared unconstitutional. The orthodox view is best explained by the Court in *De Agbayani v. Philippine National Bank*.<sup>75</sup> The Court said that

[t]he orthodox view is that an unconstitutional act, for that matter, an executive order or a municipal ordinance likewise suffering from that infirmity, cannot be the source of any legal rights or duties. Nor can it justify any official act taken under it. Its repugnancy to the fundamental law once judicially declared results in its being to all intents and purposes a mere scrap of paper.<sup>76</sup>

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*Id.*

69. *Abakada Guro Party*, 562 SCRA.

70. *Id.* (citing L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 85-87 (1982)).

71. *Guingona, Jr. v. Court of Appeals*, 292 SCRA 402 (1998).

72. *Id.*

73. *Maceda v. Vasquez*, 221 SCRA 464 (1993).

74. *Id.*

75. *De Agbayani v. Philippine National Bank*, 38 SCRA 429 (1971).

76. *Id.* at 434.

The second view involves the principle of prospectivity of the declaration of unconstitutionality of a law, and of the effectivity of judicial declarations. The Court, in *Araullo*, calls this the “operative fact doctrine,”<sup>77</sup> which reckons with the existence of the act prior to the declaration of its nullity. The effects of the implementation of these unconstitutional laws are made to remain undisturbed as a matter of equity and fair play to innocent people who may have relied on the presumed validity of the law prior to the declaration.<sup>78</sup>

### III. SEPARATION OF POWERS AND THE NATIONAL BUDGET

#### A. Budget Preparation and Legislation

To contextualize the discussion of separation of powers in relation to the budgetary process, we will take a look at the budget process by its phases, in terms of what each phase entails and who is responsible for each. The budget cycle may be conveniently divided into four stages namely: (a) budget preparation; (b) budget legislation; (c) budget execution; and (d) budget accountability.<sup>79</sup> In each stage, there are different stakeholders participating and lobbying for their respective interests.

*Budget preparation* is the first stage of the budgetary process. It is primarily the Executive who is responsible in this stage to estimate budgetary requirements and set budgetary priorities and policies, subject to estimated revenues and borrowing limits. This budgeting phase begins with a Budget Call.<sup>80</sup> It is when the parameters, budget priorities, and procedures that guide the agencies in preparing their respective proposed budgets are set.<sup>81</sup> Lead agencies meet and synergize their proposed agency budgets in order to

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77. See *Tañada v. Tuvera*, 136 SCRA 27, 41 (1985) (citing *Chicot County Drainage District v. Baxter Bank*, 308 U.S. 371, 374 (1940)). The Court quoted the U.S. Supreme Court, to wit —

The actual existence of a statute, prior to such a determination, is an *operative fact* and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects — with respect to particular conduct, private and official.

*Id.* (emphasis supplied).

78. *League of Cities of the Philippines (LCP) v. Commission on Elections*, 628 SCRA 819, 832-34 (2010).

79. *Araullo*, G.R. No. 209287.

80. Budget ng Bayan, Budget Preparation, available at <http://budgetngbayan.com/budget-101/budget-preparation/> (last accessed Sep. 30, 2014) [hereinafter Budget ng Bayan, Preparation].

81. *Id.*

meet targeted outcomes.<sup>82</sup> Thereafter, the agencies will submit their proposed budget to the DBM which in turn conducts technical hearings where the agencies will defend their proposed budgets.<sup>83</sup> The Legislature is not entirely foreclosed from participating at this stage of the budget process. Under Section 13 of P.D. No. 1177,<sup>84</sup> the Legislature also submits its proposed expenditure levels and undergoes the same process of defending it before the DBM during its technical hearings.

Furthermore, the DBM Technical Bureaus present their recommendations before the Executive Review Board, composed of the DBM Secretary and other senior officials.<sup>85</sup> The proposed national budget shall be submitted to the President for his approval.<sup>86</sup> In the event of approval, the same becomes the National Expenditure Program (NEP) which in turn is submitted for the Legislature's consideration.<sup>87</sup>

*Budget Legislation* is the second stage of the process. This commences upon the Executive's submission of the NEP — when Congress acts upon the budget recommended by the President and prepares a General Appropriations Bill (GAB) which, after its passage as law, is required by the Constitution for disbursement of public funds. The Constitution provides that all revenue bills must originate from the House of Representatives.<sup>88</sup> The GAB is filed with the House Committee on Appropriations where public hearings thereon are conducted before it is passed on for plenary hearings.<sup>89</sup> Once passed by the House, it will be transmitted to the Senate where it will undergo the same process. As a matter of practice, the Senate Committee on Finance commences its deliberation long before the House version is transmitted to the Senate. After the Senate plenary vote, a Bicameral Conference Committee is constituted to reconcile provisions in

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82. *Id.*

83. *Id.*

84. Revising the Budget Process in Order to Institutionalize the Budgetary Innovations of the New Society [Budget Reform Decree of 1977], Presidential Decree No. 1177, § 13 (1977). See *Carague*, 196 SCRA at 238. In this case, the Court ruled that P.D. No. 1177 remains to be a valid law. *Id.*

85. Budget ng Bayan, Preparation, *supra* note 80.

86. *Id.*

87. *Id.*

88. PHIL. CONST. art. VI, § 24. This Section provides that “[a]ll appropriation, revenue[,], or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments.” PHIL. CONST. art. VI, § 24.

89. Budget ng Bayan, Budget Legislation, available at <http://budgetngbayan.com/budget-101/budget-legislation/> (last accessed Sep. 30, 2014).



the House and Senate GAB versions.<sup>90</sup> The Bicameral version will be returned to both Houses for ratification and enrollment.<sup>91</sup> The enrolled bill will be transmitted to the President for his signature and veto, if applicable.<sup>92</sup> The Executive is, likewise, not a mere spectator at this stage of the budget process. The enactment of the national budget differs from ordinary legislation in that: (a) it is initiated through a proposal from the President instead of any member of Congress; (b) it is only for one year; and (c) it is subject to the President's line-item veto.<sup>93</sup> Once signed, the GAB becomes the GAA.

Generally, the GAA also serves as the allotment release for all the budget items except those contained in the negative list which require Special Allotment Release Orders (SARO).<sup>94</sup> Lump-sum funds such as the PDAF require SAROs because the projects funded by them do not have appropriation covers, but are selected by the legislator from DBM's project menu.<sup>95</sup> For projects with appropriation which are covered by the respective Agency Budget Matrices, the bidding therefor usually begins in the fourth quarter of the immediately preceding fiscal year to ensure that the award is made by the first quarter of the fiscal year.<sup>96</sup> For projects needing SAROs, bidding begins only when the SARO has been issued.<sup>97</sup> When the bidding is completed, the Notice of Cash Allocation (NCA) is issued.<sup>98</sup> The NCA is a disbursement authority issued by the DBM to the agency authorizing the latter to pay its obligations.<sup>99</sup> The allotted funds are usually disbursed in tranches. A portion of it is disbursed to private contractors as mobilization fund. But subsequent disbursements are made only upon prior liquidation and proof of implementation.

### *B. Budget Execution*

The enforcement of the national budget, as primarily contained in the GAA, is indisputably a function both constitutionally assigned and properly

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90. *Id.*

91. *Id.*

92. *Id.*

93. Motion for Reconsideration of Respondents, Araullo, et al. v. Aquino, et al., G.R. No. 209287, July 1, 2014, p14.

94. Budget ng Bayan, Budget Execution, *available at* <http://budgetngbayan.com/budget-101/budget-execution/> (last accessed Sep. 30, 2014).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

entrusted to the Executive branch. In *Guingona, Jr. v. Carague*,<sup>100</sup> the Court explained that the phase of budget execution “covers the various operational aspects of budgeting[,]”<sup>101</sup> and accordingly includes “the evaluation of work and financial plans for individual activities,”<sup>102</sup> the “regulation of fund releases[,]”<sup>103</sup> as well as all “other related activities”<sup>104</sup> that comprise the budget execution cycle. This is rooted in the principle that the allocation of power in the three principal branches of government is a grant of all powers inherent in them. Thus, unless the Constitution provides otherwise, the Executive department should exclusively exercise all roles and prerogatives which go into the implementation of the national budget as provided under the GAA as well as any other appropriation law.<sup>105</sup>

It is this stage of the budgetary process that is historically delegated to the President as chief administrator of the government — the GAA being one of the laws that he must faithfully execute under the “take care” clause.<sup>106</sup> In this stage, the President is mandated to spend public funds in accordance with the appropriation made by Congress. In *Araullo*, executive actions pertaining to this stage of the budget process were claimed to be violative of the doctrine of separation of powers — since this is when the budget consisting of predetermined allocation of funds is operationalized to provide for predetermined programs, activities, and projects, and to respond to contingencies which were not foreseen at the time of the passage of the GAA.

*Budget Accountability* is the final stage of the budgetary process wherein the expenditures and the projects for which they were made are evaluated.<sup>107</sup> This is the post-budget execution audit that is performed by the Commission on Audit (COA), the Constitutional Commission authorized to examine, audit, and settle all accounts pertaining to revenue, receipts and

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100. *Carague*, 196 SCRA.

101. *Id.* at 236.

102. *Id.*

103. *Id.*

104. *Id.*

105. The same holding was made in *Belgica*, where the Supreme Court found that practices constituting post-enactment participation by the members of the Legislature and provisions that countenance the same are unconstitutional. *Belgica*, 710 SCRA at 122-23.

106. PHIL. CONST. art. VII, § 17. This Section provides that “[t]he President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.” PHIL. CONST. art. VII, § 17.

107. See Budget ng Bayan, Budget Accountability, available at <http://budgetngbayan.com/budget-101/budget-accountability> (last accessed Sep. 30, 2014).

expenditures, and uses of public funds.<sup>108</sup> The results of the audit guide both the Executive and the Legislature for the next budget cycle.

The following provisions, programs, and issuances regarding budget legislation and budget execution are described in terms of their nature, legal basis, and what aspects of the same were challenged as violative of separation of powers.

### *C. Priority Development Assistance Fund*

The term PDAF first appeared in the 2000 GAA, but its mechanism had been institutionalized since the Marcos era, when it was known as the “Support for Local Development Projects,” then through the Cory Aquino administration, when it became known as the “Countrywide Development Fund,” and finally, through the Estrada administration until its abolition, it was called PDAF.<sup>109</sup> In substance, the PDAF is a system of lump-sum budgeting where appropriation is made for localized projects identified by the legislator representing the district where the projects are to be implemented.<sup>110</sup>

### *D. Disbursement Acceleration Program*

The DBM defines the DAP as a “stimulus package under the Aquino administration designed to fast-track public spending and push economic growth. This covers high-impact budgetary programs and projects which will be augmented out of the savings generated during the year and additional revenue sources.”<sup>111</sup>

The DAP was a spending policy put in place to fast-track public spending. It used Unprogrammed Funds and savings to fund fast-moving or priority projects.<sup>112</sup> To achieve its purpose of fast-tracking public spending, savings generated by the various departments of the Executive were withdrawn, and Unprogrammed Funds, comprised of excess remittances of

108. PHIL. CONST. art. IX-D, § 2, ¶ 1.

109. *Belgica*, 710 SCRA at 52-64.

110. *Id.* at 105. In this case, the Court defined the pork barrel System as “the collective body of rules and practices that govern the manner by which lump-sum, discretionary funds, primarily intended for local projects, are utilized through the respective participation of the Legislative and Executive branches of government, including its members.” *Id.*

111. Department of Budget and Management, Frequently Asked Questions about the Disbursement Acceleration Program (DAP), available at <http://www.dbm.gov.ph/wp-content/uploads/DAP/DAP%20FAQs%20-%20OCT%205%202013.pdf> (last accessed Sep. 30, 2014) [hereinafter DBM, FAQs about DAP].

112. *Id.*

dividends from GOCCs, were collected.<sup>113</sup> These collections were in turn pooled and re-aligned to augment existing programs, activities, and projects which have been identified as fast-moving and quick-disbursing.<sup>114</sup>

The DAP drew basis from various statutes like the Administrative Code<sup>115</sup> and scattered provisions of the Constitution.<sup>116</sup> The DAP was implemented by NBC No. 541.<sup>117</sup> According to NBC No. 541, all released allotments in fiscal year 2011 charged against Republic Act (R.A.) No. 10147<sup>118</sup> which remain unobligated as of 30 June 2012 shall be immediately considered for withdrawal.<sup>119</sup> Thereafter, consistent with the President's directive, the DBM shall, based on the results of its consultations with the departments and agencies, and reports of the latter's computed unobligated allotments, withdraw the unobligated allotments as of 30 June 2012 through the issuance of a negative SARO.<sup>120</sup> The collected allotments shall, in turn, become eligible for either of the following purposes,<sup>121</sup> namely:

- (a) Reissuance for the original programs or projects of the agencies/[operating units (OUs)] concerned, from which the allotments were withdrawn;
- (b) Realignment for additional funding for other existing programs and projects of the agency/OU; or
- (c) Used to augment existing programs and projects of any agency and to fund priority programs and projects not considered in the 2012 budget but expected to be started or implemented during the current year.<sup>122</sup>

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113. *Id.*

114. *Id.*

115. ADMINISTRATIVE CODE, Bk. VI, Ch. 5, § 39.

116. *See* DBM, FAQs about DAP, *supra* note 111. The DBM cited Section 25 (5), Article VI of the Constitution as a legal basis to augment funds authorized in the GAA through the use of savings from other budget items. *Id.*

117. Department of Budget and Management, National Budget Circular No. 541 "Adoption of Operational Efficiency Measure — Withdrawal of Agencies' Unobligated Allotments as of June 30, 2012" [NBC No. 541] (July 18, 2012). *See Araullo*, G.R. No. 209287.

118. An Act Appropriating Funds for the Operation of the Government of the Republic of the Philippines from January One to December Thirty-One, Two Thousand and Eleven, and for Other Purposes [General Appropriations Act of 2011], Republic Act No. 10147 (2010).

119. NBC No. 541, § 5.4.

120. *Id.* § 5.5.

121. *Id.* § 5.7.

122. *Id.*

Utilization of the consolidated withdrawn allotments for other priority programs and projects shall be subject to approval of the President.<sup>123</sup> Further, all releases made out of the withdrawn allotments shall be within the approved Expenditure Program level of the national government for the current year.<sup>124</sup>

*E. Lump Sum Discretionary Funds and Special Purpose Funds*

The Constitution prescribes that “no provision or enactment shall be embraced in the [GAB] unless it relates specifically to some particular appropriation therein.”<sup>125</sup> This is called “line-item budgeting” where Congress assigns a specific appropriation for each item in the GAA.<sup>126</sup> The Constitution, however, has not entirely forbidden the use of the LSDFs,<sup>127</sup> but the disbursement thereof is subject to strict legal parameters.<sup>128</sup> Examples of LSDFs are: (a) the Malampaya Funds and the PSF; (b) the PDAF; (c) the Special Purpose Funds (SPFs); and (d) the Unprogrammed Fund.

On one hand, the Malampaya Fund, created pursuant to Section 8 of P.D. No. 910<sup>129</sup> on 22 March 1976, was established to intensify, strengthen, and consolidate government efforts relating to the exploration, exploitation, and development of indigenous energy resource.<sup>130</sup> On the other hand, the PSF is commonly understood to refer to Section 12, Title IV of P.D. No. 1869<sup>131</sup> or the Philippine Amusement and Gaming Corporation (PAGCOR) Charter.

The DBM defines SPFs in the following manner —

[SPFs] are budgetary allocations in the [GAA] allocated for specific purposes. These are usually lump sum in nature, as the recipient departments or agencies and/or the specific programs and projects have not yet been identified during the budget preparation and legislation. These are

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123. *Id.* § 5.10.

124. *Id.* § 5.11.

125. PHIL. CONST. art. VI, § 25, ¶ 2.

126. *Id.*

127. *See* PHIL. CONST. art. VI, § 25, ¶ 6. This Section provides that “[d]iscretionary funds appropriated for particular officials shall be disbursed only for public purposes to be supported by appropriate vouchers and subject to such guidelines as may be prescribed by law.” PHIL. CONST. art. VI, § 25, ¶ 6.

128. *See* ADMINISTRATIVE CODE, Bk. VI, Ch. 5, § 35.

129. Creating an Energy Development Board, Defining its Powers and Functions, Providing Funds Therefor, and for Other Purposes, Presidential Decree No. 910, § 8 (1976).

130. *See* P. D. No. 910, *whereas* cl.

131. *See* P.D. No. 1993, § 1 amending P.D. No. 1869, § 12.

then made available for allocation to agencies in addition to their built-in appropriations during budget execution, pursuant to special provisions and conditions pertaining to the SPF.<sup>132</sup>

Although the specific projects and programs have not yet been identified, the nature and character of the projects to be funded by the SPF is defined in the GAA. For example, under the 2014 GAA, these funds should be applied to socio-economic projects.<sup>133</sup>

#### *F. Unprogrammed Funds*

Finally, Unprogrammed Funds are standby appropriations which may be tapped only when any of the following events happen:

- (a) Revenue collections exceed the original revenue targets in the Budget of Expenditures and Sources Financing (BESF)<sup>134</sup> submitted by the President to Congress;
- (b) New revenues are collected [or] realized from sources not originally considered in the BESF submitted by the President to Congress; or

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132. Department of Budget and Management, A Brief on the Special Purpose Funds in the National Budget, *available at* [http://www.dbm.gov.ph/wp-content/uploads/DAP/Note%20on%20the%20Special%20Purpose%20Funds%20o\\_Released%20-%20Oct%202013\\_.pdf](http://www.dbm.gov.ph/wp-content/uploads/DAP/Note%20on%20the%20Special%20Purpose%20Funds%20o_Released%20-%20Oct%202013_.pdf) (last accessed Sep. 30, 2014) [hereinafter DBM, Special Purpose Funds].

133. *Id.* According to the DBM, the Special Purpose Funds in the 2014 Budget would be utilized for the following:

- (a) Budgetary support to Government Corporations ;
- (b) Allocation to Local Government Units;
- (c) Tax Expenditures Fund;
- (d) Debt Service Fund — Interest Payments;
- (e) Miscellaneous Personnel Benefits Fund;
- (f) Pension Gratuity Fund;
- (g) Calamity Fund;
- (h) Contingent Fund;
- (i) Dep-Ed School Building Program/Educational Facilities;
- (j) Priority Development Assistance Fund;
- (k) E-Government Fund;
- (l) International Commitments Fund; and
- (m) Feasibility Studies Fund

*Id.*

134. According to the DBM, the BESF “contains the macro economic assumptions, public sector context (including overviews of LGU and GOCC financial positions), breakdown of expenditures and funding sources for the fiscal year and two previous years.” *Id.*

- (c) Newly approved loans for foreign assisted projects are secured or when conditions are triggered for other sources of funds such as perfected loan agreements for foreign assisted projects.<sup>135</sup>

Similar to SPFs, the specific projects and programs to be financed by the Unprogrammed Funds had not been identified during the budget preparation and legislation stage. However, the general purposes of this fund have been identified.<sup>136</sup> The only difference between SPFs and Unprogrammed Funds is that the amount of the former is part of the national budget while the latter is not. For fiscal year 2014, for example, as the funding sources for the ₱139.9 billion Unprogrammed Fund are not included in the BESF submitted by the President to Congress, it is not part of the ₱2.268 trillion proposed 2014 National Budget, which is the sum of the new programmed appropriations for departments and SPFs and automatic appropriations.

### *G. Separation of Powers and the Budget Process*

The basic premise of the budget process is the Appropriation Clause, which reads, “[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law.”<sup>137</sup> Disbursements of public funds require legislative authorization as to the purpose intended and the amount to be spent. This has been interpreted to mean that the Legislature’s power of the purse removes from the Executive any discretion to fund an activity not authorized by Congress using public or private funds.<sup>138</sup> Cast in the imperative, neither the Judiciary nor the Executive can spend public funds without the indispensable requirement, subject only to the power to augment allowed to be exercised by the following — 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

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<sup>135</sup>. *Id.*

<sup>136</sup>. *Id.* The Unprogrammed Fund in the 2014 Budget comprises of:

- (a) Budgetary Support to GOCCs
- (b) Support to Foreign-assisted projects
- (c) General Fund Adjustment
- (d) Support for Infrastructure Projects and Social Programs
- (e) AFP Modernization Program
- (f) Debt Management Program
- (g) Risk Management Program
- (h) People’s Survival Fund.

DBM, Special Purpose Funds, *supra* note 132.

<sup>137</sup>. PHIL. CONST. art. VI, § 29.

<sup>138</sup>. See Kate Stith, *Legislature’s Power of the Purse*, 97 YALE L.J. 595 (1988).

Commissions.<sup>139</sup> At this level of analysis, the Court's judgments are clear that the only exception to the general rule embodied in the Appropriation Clause is the limited power to augment.

This limited authorization to treat appropriations different from that mandated by Congress is discussed in detail in *Demetria v. Alba*,<sup>140</sup> thus —

The prohibition to transfer an appropriation for one item to another was explicit and categorical under the 1973 Constitution. However, to afford the heads of the different branches of the government and those of the constitutional commissions considerable flexibility in the use of public funds and resources, the [1973] [C]onstitution allowed the enactment of a law authorizing the transfer of funds for the purpose of augmenting an item from savings in another item in the appropriation concerned. *The leeway granted was thus limited. The purpose and conditions for which funds may be transferred were specified, i.e.,] transfer may be allowed for the purpose of augmenting an item and such transfer may be made only if there are savings from another item in the appropriation of the government branch or constitutional body.*<sup>141</sup>

Given this division of budgeting powers, the Legislature is said to be a very “powerful agenda-setter and decision-maker” in presidential systems.<sup>142</sup> The Constitution strengthens the role of the Legislature by granting it the conventional bases by which to assert its influence over the budget — the Appropriation Clause grants it the power to bind the Executive to predefined priorities, to amend the budget proposed by the Executive, and to exercise legislative oversight, among others. It has been interpreted to have the “exclusive” power of the purse. However, the framers of the Constitution did not seem to intend this contemporaneous interpretation to mean that the Executive is merely to sit by the sidelines. Instead, it provides for a participative budgetary process, granting the Executive the power to submit a budget or to veto a line of appropriation. During deliberations, the procedure for budget legislation also affords the Executive an opportunity for pro-active participation by inviting department representatives to two levels of hearing namely: (a) on the Committee level where budget hearings are conducted on a department-level basis; and (b) on the Sub-Committee level where the budget hearing is on an agency-to-agency level.<sup>143</sup> With the

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139. PHIL. CONST. art. VI, § 25, ¶ 5.

140. *Demetria v. Alba*, 148 SCRA 208 (1987).

141. *Id.* at 214. (emphasis supplied).

142. Ian Lienert, *Who Controls the Budget: The Legislature or the Executive?* (An Unpublished Paper Submitted to the International Monetary Fund) 3, available at <http://www.sals.gov.za/icseminar/2013/executive.pdf> (last accessed Sep. 30, 2014).

143. Edcel C. Lagman, Former Representative, 1st District of Albay, House of Representatives, Remarks at an event of UP Economics Towards Consciousness (Feb. 21, 2008) (transcript available at



Faithful Execution Clause, the Executive is tasked to make sure that laws are faithfully executed, including the GAA.

#### IV. PROPOSITION

##### *A. Unique Position of the President vis-à-vis Other Heads Under Section 25 (5); President's Implicit Power of the Purse*

The President's bounden duty is encapsulated in his oath under the Constitution, to "faithfully and conscientiously fulfill [his or her] duties as [the] President of the Philippines, preserve and defend its Constitution, [and] execute its laws."<sup>144</sup> Notwithstanding the use of a more restrictive interpretation of the extent of executive power, it becomes apparent that the President occupies the unique position not shared by any other department or official in the government — to defend the Constitution and to execute laws.

The President, in whom the Constitution vests executive power, assumes an abundance of authority that enables him to play a central role in the administration of government. The plenitude of powers given to the President has been historically considered to encompass those provided in Article VII (e.g. appointment,<sup>145</sup> removal,<sup>146</sup> control,<sup>147</sup> military powers,<sup>148</sup> pardoning,<sup>149</sup> borrowing,<sup>150</sup> diplomatic,<sup>151</sup> and faithful execution<sup>152</sup>). Among the powers include the Faithful Execution Clause or the Take-care Clause in Section 17 which states that he "shall ensure that the laws be faithfully executed."<sup>153</sup> This duty requires the President to ensure that laws, including the Constitution, are faithfully executed by or in favor of the government, or any of its branches, without qualification, apart from limitations imposed by the Constitution.

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<http://www.edcellagman.com.ph/speeches/national/49-up-economics-towards-consciousness-up-etc.html> (last accessed Sep. 30, 2014)).

144. PHIL. CONST. art. VII, § 5.

145. PHIL. CONST. art. VII, § 16.

146. PHIL. CONST. art. VII, § 16.

147. PHIL. CONST. art. VII, § 17.

148. PHIL. CONST. art. VII, § 18.

149. PHIL. CONST. art. VII, § 19.

150. PHIL. CONST. art. VII, § 20.

151. PHIL. CONST. art. VII, § 21.

152. PHIL. CONST. art. VII, § 17.

153. PHIL. CONST. art. VII, § 17.

In *Biraogo v. Philippine Truth Commission*,<sup>154</sup> the Court, in upholding the President's power to create an ad hoc commission and to allocate funding for the same even though there is no explicit constitutional grant of such power, recognized that the powers of the President are not comprised merely of those that were explicitly provided in the Constitution. This is consistent with the holding in *Marcos v. Manglapus*,<sup>155</sup> where the Court described the more expansive scope of executive power while recognizing separation of powers, thus —

The 1987 Constitution, however, brought back the presidential system of government and restored the separation of legislative, executive[,] and judicial powers by their actual distribution among three distinct branches of government with provision for checks and balances.

It would not be accurate, however, to state that 'executive power' is the power to enforce the laws, for the President is head of state as well as head of government and whatever powers in here in such positions pertain to the office unless the Constitution itself withholds it. Furthermore, the Constitution itself provides that the execution of the laws is only one of the powers of the President. It also grants the President other powers that do not involve the execution of any provision of law, e.g., his power over the country's foreign relations.

On these premises, we hold the view that *although the 1987 Constitution imposes limitations on the exercise of specific powers of the President, it maintains intact what is traditionally considered as within the scope of 'executive power.'* Corollarily, *the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. In other words, Executive power is more than the sum of specific powers so enumerated.*

It has been advanced that whatever power inherent in the government that is neither legislative nor judicial has to be executive.<sup>156</sup>

Moreover, as Chief Executive, the President is responsible for ensuring the success of the entire government as an enterprise. For this reason, he has "residual powers" which are founded upon his duty as steward for the people.<sup>157</sup> As head of the government, the President has such powers and prerogatives that are inherent in his office unless the Constitution itself withholds it. He should, therefore, be allowed to take measures that benefit, directly or indirectly, any and all branches of government, as long as he does not run afoul with the context-specific limitations or prohibitions contained in the Constitution and other laws. The justification for a different treatment with respect to the Executive's exercise of prerogatives in the budgetary process, specifically, budget execution was best expressed by Retired Justice

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154. *Biraogo v. Philippine Truth Commission*, 637 SCRA 78 (2010).

155. *Marcos v. Manglapus*, 177 SCRA 668 (1989).

156. *Id.* at 691-92 (emphasis supplied).

157. *Id.* at 694.

Vicente V. Mendoza during the oral arguments in *Araullo* where disbursements under the DAP were challenged for being violative of the principle of separation of powers —

JUSTICE MENDOZA: The cross-border transfer, if Your Honors please, is not an application of the DAP. What were these cross-border transfers? They are transfers of savings as defined in the various [GAAs] so it makes them similar to the DAP, the use of savings. There was a cross-border which appears to violate Section 25, paragraph 5 of Article VI in the sense that the border was crossed. But never has it been claimed that the purpose was to augment a deficient item in another department of the government or agency of the government. The cross-border transfers, if Your Honors please, were in the nature of [aid] rather than augmentations. *Here is a government entity, separate and independent from the Executive Department, solely in need of public funds. The President is there 24 hours a day, [seven] days a week. [He is] in charge of the whole operation although six or seven heads of offices given the power to augment. Only the President is in effect in-charge, and has the responsibility for the failure of any part of the government.* You have election, for one reason or another, the money is not enough to hold election. There will be chaos if no money is given as an aid, not to augment, but as an aid to a department like COA. *The President is responsible in a way that the other heads, given the power to augment are not. So he cannot very well allow this, if Your Honor please.*<sup>158</sup>

This political accountability on the part of the President for the well-being of the entire government had been recognized in extant literature.<sup>159</sup> Justice Scalia spoke of the same accountability of the President — him being the one to blame in *Morrison v. Olson*.<sup>160</sup> As to the current budget controversies, a contemporary legal mind said that, “[u]ltimately, President Aquino alone, more than the Supreme Court or the Legislature, will be accountable for the fortunes or misfortunes of the Filipino people during this period. The burden is heavy.”<sup>161</sup> This lends support to the argument that the nation requires a less strict application of separation of powers by showing that the entire governmental machinery cannot be run by hermetically sealed departments. The opposite leaves a vacuum, for to require the coordinate branches to merely operate within the textually-committed powers in the Constitution is to leave a plenitude of powers not clearly legislative or

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158. See *Araullo*, G.R. No. 209287 (emphasis supplied).

159. J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1205-06 (1989) (citing ALEXANDER HAMILTON, THE FEDERALIST NO. 70 427-28 (C. Rossiter ed., 1961)).

160. *Morrison v. Olson*, 487 U.S. 654, 728-29 (1988) (J. Scalia, dissenting opinion).

161. Melencio S. Sta. Maria, Understanding The President's Response to the SC's DAP Ruling, available at <http://www.interaksyon.com/article/91293/mel--sta--maria--understanding-the-presidents-response-to-the-scs-dap-ruling> (last accessed Sep. 30, 2014).

judicial that a President cannot exercise, but remains responsible for — thus resulting in responsibility without corresponding power.

*B. Budget Execution v. Exercise of Constitutionally-Vested Executive Powers and Prerogatives*

While it is readily conceded that the power to augment is specific in application and limited in the grant of its authority, it cannot be allowed to literally foreclose any other exercise by the President of his constitutional powers that may incidentally require the disbursement of public funds. A more restrictive interpretation that would consider any and all acts of the President that may incidentally require the disbursements of fund as an application of Section 25 (5) of Article VI instead of an exercise of textually-committed power to the Executive and powers incidental thereto clearly emasculates the Executive. There must be some “room for play in the joints”<sup>162</sup> on the part of the President to allow him to oversee and empower the entire government, including those independent and separate departments, in order to exercise the powers vested in them by the Filipino people in the Constitution and other laws. The classic examples of this are allowing the Executive to provide assistance to, and as requested by, other departments to allow them to perform their constitutional mandates: (a) funding assistance to the Commission on Elections for the conduct of elections; and (b) funding assistance to the COA for the engagement of additional litigators to prosecute improper use of public funds.<sup>163</sup> In both cases, the President is responsible for making sure that the said departments are able to function given the conditions on the ground. He cannot sit idly while other departments are unable to function. In the face of an overarching interpretation of strict separation of powers, this situation presents a difficult choice for the Executive — aid an arm of the government, or stand aside lest he violate the Constitution.

A proposition to relax the interpretation is not novel. Several jurisdictions have emphasized blending over separation, and have shown that it has worked within its own context. Relaxation of separation of powers, or more specifically, a shift in the balance in terms of the spending powers, may in fact bring desirable results.<sup>164</sup> In fact, in terms of the practical effects of the interplay of budgeting powers of the Executive and the Legislature, some latitude for marginal discretion for the Executive may be more consistent

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162. See *Locke v. Davey*, 540 U.S. 712, 719 (2004).

163. See *Araullo*, G.R. No. 209287.

164. See Bob Allen & Sarah Miller, *The Constitutionality of Executive Spending Powers* (An Unpublished Briefing Paper Submitted to the Harvard Law School Federal Budget Policy Seminar) 14, available at [http://www.law.harvard.edu/faculty/hjackson/ConstitutionalityOfExecutive\\_38.pdf](http://www.law.harvard.edu/faculty/hjackson/ConstitutionalityOfExecutive_38.pdf) (last accessed Sep. 30, 2014).

with public interest in terms of fiscal discipline and effective administration, than a Legislature that insists on legislating strictly behind a veil of ignorance. While the latter may seem to strengthen the Legislature, it renders the government unable to respond to uncertainties — which, to a predetermined budget, are certain to arise. This is the state of nature.

Moreover, a more expansive theory of the President having implied “power of the purse” has been explored. As early as 1989, Gregory Sidak discussed a more expansive version of the same, without claiming authorship — stating that this has been advanced by U.S. Presidents as far back as George Washington.<sup>165</sup> Moreover, allowing the Executive “room for play in the joints” in the exercise of budget execution — insofar as responding to these and similar urgent contingencies is concerned — does not result in the evil sought to be prevented by the principle. When there is a legitimate and urgent need for public funds on the part of an independent department, there can be no abuse of power on the part of the Executive if it comes to the former’s aid, in the interest of a working government. In fact, it facilitates what the principle of separation of powers seeks to accomplish — an effective and efficient “working” government.

Although the Legislature is thought to play a less significant role in developing countries, as shown by a study examining the Macapagal-Arroyo regime,<sup>166</sup> it is arguable whether it is a reason to strictly guard against any perceived encroachment by the Executive of the prerogatives of the Legislature by reason of the latter’s delegation or silence. The Authors posit that this is a signal of a democracy that is learning to mature. The Legislature is deciding for itself, as an incident to its exercise of the power of the purse, the optimum level of delegation appropriate for the budget. It is useful to remember that even at the stage of budget preparation, the Legislature is already consulted or, at the very least, its previous will is taken into account. The Legislature is given ample time to deliberate and come up with the national budget containing the lump-sum funds, the definition of savings and the authority to augment. It is the Legislature’s exercise of the power of the purse that allows the Executive some room for “play in the joints” required to cover unexpected situations. This is a model that considers the budget an incomplete political contract. It is a recognition by the Legislature that it cannot foresee and provide for all contingencies that will require disbursement of public funds during the effectivity of the annual budget.

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165. Sidak, *supra* note 159, at 1163.

166. See Susan Rose-Ackerman, et al., *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines*, 29 BERKELEY J. INT’L L. 246 (2011). In this article, the authors warned against a President determined to test the constitutional limits to increase her power. *Id.*

The Executive's role in the formulation and execution of the budget, if strong, does not necessarily constitute encroachment when there is due exercise of discretion. The same does not amount to encroachment when it arose from delegation and constituted as a necessity to respond to conditions requiring the Executive's institutional competency and technical expertise. The growth in size and complexity of the government, along with its budget, inevitably leads to greater executive participation in the budgetary process. This is the political branches striking a balance to deliver their respective outcomes for their constituencies. That being said, the institutional features provided by the Constitution and the factual circumstances relating to the Executive's participation in the budget process (e.g. a presidential system where the Executive is elected in a national campaign with a fixed term and no re-election, multi-party system, bi-cameral legislature, and timely submission of the NEP<sup>167</sup>) show that there is no "hyperpresidentialism" in this case, only an Executive that is attempting to operationalize a budget in the face of an economic slump, uncertainties in international territorial disputes, and unprecedented damage caused by calamities.

### C. *Balancing*

In examining the separation of powers doctrine, one must necessarily hearken back to its roots. Its conceptualization was developed first, to avoid abuse of power on the part of a department, and second, to ensure the efficient and effective operation of government. In fact, it allows blending of powers on the part of the coordinate branches in order to check each other. The Court, in *Angara v. Electoral Commission*,<sup>168</sup> stated that separation of powers is obtained by actual division in the Constitution. It was conceded that

[a]s any human production, our Constitution is of course lacking perfection and perfectibility, but as much as it was within the power of our people, acting through their delegates to so provide, that instrument which is the expression of their sovereignty however limited, has established a *republican government intended to operate and function as a harmonious whole, under a system*

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167. Empirical studies on budgets and budget cycles have shown that these variables are positively related to a balance of power tilted in favor of the Legislature and against the Executive in terms of policy-setting and control. As to the timely submission of the budget, the Aquino administration has consistently submitted the NEP on time, giving the Legislature four or five months to deliberate on the budget, longer than the three-month world median. See Paul Posner and Chung-Keun Park, *Role of the Legislature in the Budget Process: Recent Trends and Innovations*, available at <http://www.oecd.org/gov/budgeting/43411793.pdf> (last accessed Sep. 30, 2014).

168. *Angara*, 63 Phil.

*of checks and balances, and subject to specific limitations and restrictions provided in the said instrument.*<sup>169</sup>

At the core of the principle's application in the Philippine context, the Court has consistently measured an act as violating or conforming to the principle of separation of powers with the constitutional grant of powers to each department as a baseline, subject to allowable blending in the form of checks and balances. Therefore, this has been a delicate balancing act on the part of the Judiciary. For context-specific cases explicitly provided for by the Constitution, a strict but reasonable interpretation, subject to the seeming shift from considerable flexibility in *Demetria* and in *Nazareth v. Villar*<sup>170</sup> as to the grant of the power to augment to Constitutional managers under Section 25 (5) of Article VI, to even less the marginal flexibility on the part of the President sought to be preserved by the Office of the Solicitor General in *Araullo*. While the Court, in *Araullo*, may have seemingly retained the considerable flexibility under Section 25 (5), the strict interpretation of what savings are as defined in the GAA and its characterization as a constitutional question make a shift that seems to almost foreclose even the marginal flexibility in *Araullo*. And though this may be considered to have secured for Congress the "exclusivity" of the power of the purse, its effect remains to be seen on how the national budget is operationalized, and how the current and future administrations can quickly react to uncertainties not provided for in the budget.

The delicate balance required for the blending of powers for an effective government is not achieved by strictly reading the separation of powers in the budgetary process. Specifically, it does not serve the best interest of governance since the Executive's power to disburse funds incident to the performance of his constitutional duties and prerogatives should be considered, by statutory construction, strictly as action pertaining to budget execution limited by the GAA. Strictly reading the separation of powers forms a vacuum and does not consider the realities on the ground. This does not require a radical change in the framework of examination, given that the Court already developed a hybrid model that can accommodate a more responsibility-power equitable examination of the exercise of the President's constitutional powers and duties.

#### V. DISCLAIMER

This Article in no sense endorses a *carte blanche* authority or preclusive power on the part of any branch to unilaterally exercise prerogatives that would constitute abuse of power. This merely provides that marginal flexibility should be afforded each branch of the government, with special

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169. *Id.* at 157 (emphasis supplied).

170. *Nazareth v. Villar*, 689 SCRA 385 (2013).

consideration for the Executive as the government's chief executive officer, so that a blending of powers is achieved to enable the Executive to discharge his constitutional powers and prerogatives in an environment that creates a balance that accomplishes the ultimate end — to deliver to the Filipino people a more responsive and pro-active government capable of responding quickly and efficiently to the conditions on the ground.

The dissent of Justice Holmes in *Springer v. Government*<sup>171</sup> resounds through the decades for its truth, and applies in this instance —

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution require.<sup>172</sup>

for “[t]he great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other.”<sup>173</sup> For in actuality, and as required to deliver public output that a government is expected to and must do, it is interdependence more than dependence that drives the interplay of powers between coordinate branches.<sup>174</sup>

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171. *Springer*, 277 U.S. 189.

172. *Id.* at 211. (J. Holmes, dissenting opinion).

173. *Id.* at 209.

174. *Planas v. Gil*, 67 Phil. 62, 74 (1939).