

EN BANC

[G.R. No. 191644, February 19, 2013]

DENNIS A.B. FUNA, PETITIONER, VS. ACTING SECRETARY OF JUSTICE ALBERTO C. AGRA, IN HIS OFFICIAL CONCURRENT CAPACITIES AS ACTING SECRETARY OF THE DEPARTMENT OF JUSTICE AND AS ACTING SOLICITOR GENERAL, EXECUTIVE SECRETARY LEANDRO R. MENDOZA, OFFICE OF THE PRESIDENT, RESPONDENTS.

DECISION

BERSAMIN, J.:

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

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

Antecedents

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

Agra renders a different version of the antecedents. He represents that on January 12, 2010, he was then the Government Corporate Counsel when President Arroyo designated him as the Acting Solicitor General in place of Solicitor General Devanadera who had been appointed as the Secretary of Justice;^[3] that on March

5, 2010, President Arroyo designated him also as the Acting Secretary of Justice vice Secretary Devanadera who had meanwhile tendered her resignation in order to run for Congress representing a district in Quezon Province in the May 2010 elections; that he then relinquished his position as the Government Corporate Counsel; and that pending the appointment of his successor, Agra continued to perform his duties as the Acting Solicitor General.^[4]

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

The Case

In *Funa v. Ermita*,^[5] the Court resolved a petition for *certiorari*, prohibition and *mandamus* brought by herein petitioner assailing the constitutionality of the designation of then Undersecretary of the Department of Transportation and Communications (DOTC) Maria Elena H. Bautista as concurrently the Officer-in-Charge of the Maritime Industry Authority. The petitioner has adopted here the arguments he advanced in *Funa v. Ermita*, and he has rested his grounds of challenge mainly on the pronouncements in *Civil Liberties Union v. Executive Secretary*^[6] and *Public Interest Center, Inc. v. Elma*.^[7]

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

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

Respondents further contend that, even on the assumption that Agra's concurrent designation constituted "holding of multiple offices," his continued service as the Acting Solicitor General was akin to a hold-over; that upon Agra's designation as the Acting Secretary of Justice, his term as the Acting Solicitor General expired in view of the constitutional prohibition against holding of multiple offices by the Members of

the Cabinet; that under the principle of hold-over, Agra continued his service as the Acting Solicitor General “until his successor is elected and qualified”^[10] to “prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office;”^[11] and that during his continued service as the Acting Solicitor General, he did not receive any salaries and emoluments from the OSG after becoming the Acting Secretary of Justice on March 5, 2010.^[12]

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

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

Issue

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

Ruling

The petition is meritorious.

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

1.

Requisites of judicial review not in issue

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

Here, the OSG does not dispute the justiciability and ripeness for consideration and resolution by the Court of the matter raised by the petitioner. Also, the *locus standi*

of the petitioner as a taxpayer, a concerned citizen and a lawyer to bring a suit of this nature has already been settled in his favor in rulings by the Court on several other public law litigations he brought. In *Funa v. Villar*,^[19] for one, the Court has held:

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

- 1.) For *taxpayers*, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
- 2.) For *voters*, there must be a showing of obvious interest in the validity of the election law in question;
- 3.) For *concerned citizens*, there must be a showing that the issues raised are of transcendental importance which must be settled early; and
- 4.) For *legislators*, there must be a claim that the official action complained of infringes their prerogatives as legislators.

This case before Us is of transcendental importance, since it obviously has "far-reaching implications," and there is a need to promulgate rules that will guide the bench, bar, and the public in future analogous cases. We, thus, assume a liberal stance and allow petitioner to institute the instant petition.^[20] (Bold emphasis supplied)

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

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

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

It is the same here. The constitutionality of the concurrent holding by Agra of the two positions in the Cabinet, albeit in acting capacities, was an issue that comes under all the recognized exceptions. The issue involves a probable violation of the Constitution, and relates to a situation of exceptional character and of paramount public interest by reason of its transcendental importance to the people. The resolution of the issue will also be of the greatest value to the Bench and the Bar in view of the broad powers wielded through said positions. The situation further calls for the review because the situation is capable of repetition, yet evading review.^[24] In other words, many important and practical benefits are still to be gained were the Court to proceed to the ultimate resolution of the constitutional issue posed.

2.

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

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

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