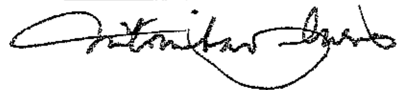
EN BANC

G.R. No. 230818 – (EFRAIM C. GENUINO, Petitioner **v. COMMISSION ON AUDIT (COA), COA OFFICE OF THE DIRECTOR, CORPORATE GOVERNMENT SECTOR, CLUSTER 6,** represented by **DIRECTOR JOSEPH B. ANACAY, and the OFFICE OF THE COA SUPERVISING AUDITOR – PHILIPPINE AMUSEMENT AND GAMING CORPORATION (PAGCOR),** represented by **AUDITOR BELEN B. LADINES,** Respondents**).**

G.R. No. 244540 – (RENE C. FIGUEROA, Petitioner v. **COMMISSION ON AUDIT,** Respondent**).**

Promulgated:

February 14, 2023



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CONCURRENCE & DISSENT

LAZARO-JAVIER, *J.*:

I.

The case is closely related to *Genuino v. Commission on Audit*, G.R. No. 230818, in that they both involve Notice of Disallowance No. 2013-002 (10) dated February 20, 2013 disallowing the amount of PHP 2,000,000.00 granted by Philippine Amusement and Gaming Corporation (PAGCOR) as financial assistance to the Pleasant Village Subdivision *and* a common question of law of transcendental importance – the **continuing immunity** of PAGCOR funds from Commission on Audit's (COA) audit jurisdiction pursuant to Section 15 of Presidential Decree No. 1869 (PD 1869).[1]

[1] SECTION 15. Auditor – The Commission on Audit or any government agency that the Office of the President may designate shall appoint a representative who shall be the Auditor of the Corporation and such personnel as may be necessary to assist said representative in the performance of his duties. The salaries of the Auditor or representative and his staff shall be fixed by the Chairman of the Commission on Audit or designated government agency, with the advice of the Board, and said salaries and other expenses shall be paid by the Corporation. The funds of the Corporation to be covered by the audit shall be limited to the 5% franchise tax and the 50% of the gross earnings pertaining to the Government as its share.

I agree with the *ponencia* that we ought to revisit our ruling in *Genuino*, considering that PD 1869 predates the 1987 Constitution. As such, the former may no longer be operative *because all funds received by the PAGCOR, though not to be turned over to government, becomes public funds subject to audit by virtue of these constitutional provisions.*

I agree with the *ponencia*, not just because the ***Constitution*** was ratified more recently than PD 1869, but also because ***any law inconsistent with it shall be deemed repealed or void altogether.***

Indeed, there should be **no distinction as to the type of funds** subject to the COA's audit jurisdiction over PAGCOR, a government owned and controlled corporation (GOCC).

According to the questioned provision:

> **SECTION 15. Auditor** – The Commission on Audit or any government agency that the Office of the President may designate shall appoint a representative who shall be the Auditor of the Corporation and such personnel as may be necessary to assist said representative in the performance of his duties. The salaries of the Auditor or representative and his staff shall be fixed by the Chairman of the Commission on Audit or designated government agency, with the advice of the Board, and said salaries and other expenses shall be paid by the Corporation. The funds of the Corporation to be covered by the audit shall be limited to the 5% franchise tax and the 50% of the gross earnings pertaining to the Government as its share.

As then Associate Justice (now Senior Associate Justice) Marvic Mario Victor F. Leonen so wisely pointed out during the deliberations, Section 15 of PD 1869 remained good law only until the ratification of the 1987 Constitution. Section 2, Article IX-D now mandates the COA to audit **all** government agencies, including GOCCs with original charters, *viz.*:[2]

> **SECTION 2.** (1) The Commission on Audit shall have the **power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations with original charters,** and on a post-audit basis: (a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under this Constitution; (b) autonomous state colleges and universities; (c) other government-owned or controlled corporations and their subsidiaries; and (d) such non-governmental entities receiving subsidy or equity, directly or indirectly,

[2] See *Feliciano v. Commission on Audit,* 464 Phil. 439, 452–453 [Per J. Carpio, *En Banc*].

from or through the Government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. However, where the internal control system of the audited agencies is inadequate, the Commission may adopt such measures, including temporary or special pre-audit, as are necessary and appropriate to correct the deficiencies. It shall keep the general accounts of the Government and, for such period as may be provided by law, preserve the vouchers and other supporting papers pertaining thereto.

(2) The Commission shall have exclusive authority, subject to the limitations in this Article, to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties.[3] (Emphases and underlining supplied)

More, Sections 3 and 4, Article IX-D **did away with the immunity** of any instrumentality of the government from the COA's audit jurisdiction, thus:

SECTION 3. No law shall be passed exempting any entity of the Government or its subsidiary in any guise whatever, or **any investment of public funds**, from the jurisdiction of the Commission on Audit.

SECTION 4. The Commission shall submit to the President and the Congress, within the time fixed by law, an annual report covering the financial condition and operation of the Government, its subdivisions, agencies, and instrumentalities, including government-owned or controlled corporations, and non-governmental entities subject to its audit, and recommend measures necessary to improve their effectiveness and efficiency. It shall submit such other reports as may be required by law.[4] (Emphases supplied)

Verily, COA is **now empowered**, nay, **duty-bound**, to **determine** whether government and even non-government entities to a certain extent comply with laws and regulations in disbursing government funds **and** to disallow illegal or irregular disbursements of government funds.

The Court's ruling in *Bayani Fernando v. COA*[5] is *apropos:*

The COA was envisioned by our Constitutional framers to be a dynamic, effective, efficient[,] and independent watchdog of the Government. **It granted the COA the authority to determine whether government entities comply with laws and regulations in disbursing government funds, and to disallow illegal or irregular disbursements of government funds.**

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[3] The 1987 Constitution, February 2, 1987.

[4] *Id.*

[5] 844 Phil. 644 (2018) [Per J. Tijam, *En Banc*].

In the case of *Funa v. Manila Economic and Cultural Office, et al.*, this Court enumerated and clarified the COA's jurisdiction over various governmental entities. In that case, this Court stated that the COA's audit jurisdiction extends to the following entities:

> 1. The government, or any of its subdivisions, agencies[,] and instrumentalities;
> 2. GOCCs with original charters;
> 3. GOCCs without original charters;
> 4. Constitutional bodies, commissions[,] and offices that have been granted fiscal autonomy under the Constitution; and
> 5. Non-governmental entities receiving subsidy or equity, directly or indirectly, from or through the government, which are required by law or the granting institution to submit to the COA for audit as a condition of subsidy or equity.

COA's authority to examine and audit the accounts of government and, to a certain extent, non-governmental entities, is consistent with Section (Sec.) 29(1) of Presidential Decree (P.D.) No. 1445 otherwise known as the Auditing Code of the Philippines, which grants the COA visitorial authority over the following non-governmental entities:

> 1. Non-governmental entities "subsidized by the government";
> 2. Non-governmental entities "required to pay levy or government share";
> 3. Non-governmental entities that have "received counterpart funds from the government"; and
> 4. Non-governmental entities "partly funded by donations through the Government."

COA's audit jurisdiction is also laid down in Section 11, Chapter 4, Subtitle B, Title I, Book V of the Administrative Code of 1987:

> **SECTION 11.** General Jurisdiction.—(1) The Commission on Audit shall have the power, authority, and duty to examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by, or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned or controlled corporations with original charters, and on a post-audit basis: (a) constitutional bodies, commissions and offices that have been granted fiscal autonomy under this Constitution; (b) autonomous state colleges and universities; (c) other government-owned or controlled corporations and their subsidiaries; and (d) such non-governmental entities receiving subsidy or equity, directly or indirectly, from or through the Government, which are required by law or the granting institution to submit to such audit as a condition of subsidy or equity. However, where the internal control system of the audited agencies is inadequate, the Commission may adopt such measures, including temporary or special pre-audit, as are necessary and appropriate to correct the deficiencies. It shall keep the general accounts of the Government and, for such period as may be provided by law, preserve the vouchers and other supporting papers pertaining thereto.

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> ... [T]he fact that such funds come from purported private sources, do not convert the same to private funds. Such funds must be viewed with the public purpose for which it was solicited, . . . In *Confederation of Coconut Farmers Organizations of the Philippines, Inc. (CCFOP) v. His Excellency President Benigno Simeon C. Aquino III, et al.*, reiterating this Court's ruling in *Republic of the Philippines v. COCOFED*:
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> > Even if the money is allocated for a special purpose and raised by special means, it is still public in character. In the case before us, the funds were even used to organize and finance State offices. In *Cocofed v. PCGG*, the Court observed that certain agencies or enterprises "were organized and financed with revenues derived from coconut levies imposed under a succession of laws of the late dictatorship . . . with deposed Ferdinand Marcos and his cronies as the suspected authors and chief beneficiaries of the resulting coconut industry monopoly." The Court continued: ". . . It cannot be denied that the coconut industry is one of the major industries supporting the national economy. It is, therefore, the State's concern to make it a strong and secure source not only of the livelihood of a significant segment of the population, but also of export earnings the sustained growth of which is one of the imperatives of economic stability."
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> In *The Veterans Federation of the Phils. represented by Esmeraldo R. Acordo v. Hon. Reyes*, this Court also declared as public funds contributions from affiliate organizations of the VFP:
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> > . . . In the case at bar, some of the funds were raised by even more special means, as the contributions from affiliate organizations of the VFP can hardly be regarded as enforced contributions as to be considered taxes. They are more in the nature of donations which have always been recognized as a source of public funding. (Emphasis supplied; citations omitted)

Unquestionably, PAGCOR is a GOCC organized and existing under PD 1869.[6] As such, **PAGCOR and all of its funds are subject to COA's audit jurisdiction.**

In any case, the **plain and patent inconsistency** between COA's **constitutional** jurisdiction and its **scrimped** jurisdiction as mentioned in Section 15 of PD 1869 **has long been resolved** by the **repealing clause** itself embodied in Section 3, Article 18 of the ***Constitution***:[7]

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6 See *Del Mar v. Phil. Amusement and Gaming Corp.*, 400 Phil. 307-388 (2000) [Per J. Puno, *En Banc*].

7 SECTION 3. All existing laws, decrees, executive orders, proclamations, letters of instructions, and other executive issuances not inconsistent with this Constitution shall remain operative until amended, repealed, or revoked.

> **SECTION 3.** All existing laws, decrees, executive orders, proclamations, letters of instructions, and other executive issuances **not inconsistent with this Constitution** shall remain operative until amended, repealed, or revoked.

The **clear import** of this provision is that **all existing** laws, executive orders, proclamations, letters of instructions, and other executive **issuances inconsistent** or **repugnant** to the ***Constitution*** are **repealed.**[8] Surely, we **cannot choose to continue** to close our eyes to this **plain and patent transgression** of our ***Constitution.***

It should be understood, therefore, that all of PAGCOR's funds, **without distinction**, should be subject to the COA's audit jurisdiction. PAGCOR and its officers cannot be allowed to hide behind the flimsy protection of an outdated audit rule that is clearly against the intention of the ***Constitution.***

II.

To my mind, the issue of the constitutionality of Section 15 of PD 1869 has arisen from a direct attack proceeding. While on its face, petitioners' suit seeks to reverse the disallowance made by COA and the imposition of civil liabilities against them, their basis is COA's lack of audit jurisdiction pursuant to Section 15 of PD 1869. Thus, petitioners themselves have brought the issue to the fore. Further, it would be the height of unfairness to disallow COA from responding to assert its jurisdiction.

I agree with COA that raising a constitutional defense to petitioners' claim of lack of jurisdiction is not, without more, an impermissible collateral attack. This is not inappropriate. A direct attack that has for its sole purpose to determine COA's jurisdiction is not exactly a more efficient process to have this issue decided.

For one, all the arguments about this issue have already been brought forth by the parties in this case. More, the jurisdictional issue is intimately connected to petitioners' specific claim to reverse the disallowance and the liabilities imposed upon them. Hence, there is no danger of either delaying or confusing the issues about the disallowance and the ensuing liabilities.

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8 *PCGG v. Sandiganbayan*, 562 Phil. 557 (2007) [Per J. Sandoval-Gutierrez, First Division].

To be sure, dealing here and now with the jurisdictional issue prevents multiplicity of suits and results in a full settlement of the issues that have come to fore. More important, this approach gives real context to the Court's role as the guardian of the ***Constitution***. If a statute is inconsistent with the ***Constitution***, the overriding effect of invalidity is to give the Court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer of force or effect.

Finally, on this point, instead of immediately rebuffing collateral attacks on the constitutionality of statutes, due regard must be given to contextual factors in deciding whether to allow the collateral attack to proceed or to require a direct attack instead. Among these factors are:

(a) The remedies for direct attack that are available;

(b) Any efforts made by the defendant to challenge the provision;

(c) Whether the underlying event was an isolated incident in order to create a test case;

(d) Whether the proceeding is a suitable, effective and fair way to investigate the constitutionality of the assailed law, looking at the shifting burdens of proof, the absence of notice to the Office of the Solicitor General, the nature of the issues, the probability of confusing and confounding these issues, and the absence of remedies to obtain disclosures;

(e) The potential penalty arising from the proceeding where the issue of validity is raised;

(f) The effect that the collateral attack will have on the objectives of the law and the regime it has established, including the probability of the unintended effect of encouraging breaches and disobedience of the law and the probable period of time to await the resolution of the case;

(g) The nature of the constitutional defect alleged. An argument that there is no jurisdiction at all to act or regulate would be one factor supporting collateral attack; and

(h) The effect and any unfairness and hardship that will fall on the defendant if she or he is not permitted to collaterally attack the law and have to abide by the law. The absence of hardship when combined with the lack of any efforts to even advise of any objections to assailed law is a factor that speaks against allowing a collateral attack.

III.

As for petitioner's liability for the disallowed amount, the public or private character of the project in question becomes relevant. To be sure, the Court has the power to review whether a particular project has a public character.[9] Public purpose or public use in the context of disbursing public funds means:

> . . . means **any purpose or use directly available to the general public as a matter of right**. Thus, it has also been defined as "**an activity as will serve as benefit to [the] community as a body** and which at the same time is **directly related function of government**." However, the concept of **public use is not limited to traditional purposes**. Here as elsewhere, the idea that **"public use" is strictly limited to clear cases of "use by the public" has been discarded**. In fact, this Court has already categorically stated that **the term "public purpose" is not defined**, since it is **an elastic concept** that can be hammered to fit modern standards. It should be given a broad interpretation; therefore, it **does not only pertain to those purposes that which are traditionally viewed as essentially government functions, such as building roads and delivery of basic services**, but also **includes those purposes designed to promote social justice**. Thus, public money may now be used for the **relocation of illegal settlers, low-cost housing[,]** and **urban or agrarian reform**. In short, **public use is now equated with public interest**, and that it is **not unconstitutional merely because it incidentally benefits a limited number of persons**.[10] (Emphases supplied, citations omitted)

Public purpose or use has also been held to be synonymous with "public interest," "public benefit," "public welfare," and "public convenience."[11] Indeed, whatever may be beneficially employed for the general welfare satisfies the requirement of public use.[12]

In its more recent iteration, the concept of public use now includes the broader notion of **<u>indirect</u> public benefit or advantage**.[13] Thus, a project retains its public use character although only a few persons could actually benefit therefrom.[14] That a greater benefit is derived by a particular class or group of persons from a government project, **does not diminish the essence and character of public use**.[15]

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[9] See *MORE Electric and Power Corporation v. Panay Electric Company, Inc.*, G.R. No. 248061, September 15, 2020 [Per J. Reyes, *En Banc*], citing *Lagcao v. Labra*, 483 Phil. 303 (2004) [Per J. Corona, *En Banc*].

[10] *Yap v. Commission on Audit*, 633 Phil. 174, 187–188 (2010) [Per J. Leonardo-De Castro, *EnBanc*].

[11] *Reyes v. National Housing Authority*, 443 Phil. 603, 610–611 (2003) [Per J. Puno, Third Division].

[12] *Estate of Salud Jimenez v. Philippine Economic Zone Authority*, 402 Phil. 271, 291 (2001) [Per J. De Leon, Second Division].

[13] See *Manapat v. Court of Appeals*, 562 Phil. 31 (2007) [Per J. Nachura, Third Division].

[14] See *Filstream International Incorporated v. Court of Appeals, et al.*, 348 Phil. 756 (1998) [Per J. Francisco, Third Division]; See also, *Manosca v. Court of Appeals, et al.*, 322 Phil. 442 (1996) [Per J. Vitug, First Division].

[15] See *Jesus is Lord Christian School Foundation, Inc. v. Municipality (now City) of Pasig*, 503 Phil. 845 (2005) [Per J. Callejo Sr., Second Division]; citing *Manosca v. Court of Appeals*, supra.

These principles squarely apply here. Verily, flood control initiatives have recognized benefits to the general welfare, *viz.*:

> Inadequate flood protection and control could certainly contribute to the creation [or] continuation of a slum or blighted area. Likewise, **adequate flood protection is certainly essential to the proper [development or] redevelopment of an area of a city - just as essential as adequate streets, drainage and the like.**[16] (Emphasis supplied)

That the flood control initiative is located within Pleasant Village Subdivision is of no moment. Generally, when floodwaters reach a critical mass, they are no longer susceptible to human control and direction. They will ravage every thoroughfare, residence and crevice that they can course through, **even beyond the confines of Pleasant Village Subdivision**. As such, the presence of a flood control system within Pleasant Village Subdivision **redounds not only to the benefit of its residents, but also to those of adjacent neighborhoods and localities.**

Further, the flood control initiative also ensures the sustainability of the ecosystems within and around Pleasant Village Subdivision because it addresses the substantial detrimental effects commonly associated with floods such as: (a) reduced tree and vegetative cover; (b) reduced soil fertility; (c) accumulation of wastes and water pollution; (d) deformed land topography; and (e) reduced viability of ecosystems, among others.[17] It is therefore indisputable that said flood control system serves a public purpose or use.

Consequently, the primordial reason for the disallowance, *i.e.,* that public funds were spent for a private purpose, disappears. As the *ponencia* states, "the socio-economic projects mentioned in PD 1869 may be allocated with public funds, provided that the requirement of public purpose is satisfied."[18] In fact, PD 1869 directs the PAGCOR to generate sources of revenue to fund infrastructure, and socio-civic projects such as flood control programs and other essential public services.[19] To pursue the directive, PAGCOR may perform "such other powers, functions and duties ... as may be necessary for the accomplishment of its purposes and objectives"[20] *i.e.,* through its Corporate Social Responsibility programs.

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16 *Monroe Redevelopment Agency v. Faulk*, 287 So. 2d 578, 1973 La. App., November 13, 1973.

17 See Israel, D. and Briones, R., Impacts of Natural Disasters on Agriculture, Food Security, Natural Resources and Environment in the Philippines, *Surian sa mga Pag-aaral Pangkaunlaran ng Pilipinas* No. 2012-36.

18 Draft Decision, p. 14.

19 PD 1869, Section 1(b).

20 PD 1869, Section 7(e).

Nevertheless, safeguards must be adopted so that the constitutional requirement that government funds or property shall be spent or used solely for public purposes is given adequate protection. The idea behind these safeguards is to prevent the trivialization of this exception and the opportunity to siphon public funds to dubious and fly-by night organizations for allegedly community-based projects. While homeowners' associations have a peculiar standing given by the law itself in the communities they serve, this alone is not enough to categorize the public funding as one for a public purpose.

The nature of the organization itself must be scrutinized. Does it have a peculiar standing in the community as recognized and accorded by the law itself? The activity to be funded must also be allied with and relevant to traditional government functions. There must be on-sight and pre-activity coordination with and endorsement from concerned government agencies. This should address why it is this organization, and not the government agency tasked to do the job, that is implementing the activity? What has happened to the public trust mandate of this government agency? Has there been a failure of governance? The organization must itself register with COA for proper auditing measures, such as the identification of the key persons answerable for the disbursement of the public funds, the audit times and mechanisms, and all the other requirements on accountability and transparency, including bidding and conflict of interest, must apply to the organization. In the process, to be able to avail of public funds, the organization and its personalities become public officers subject to the corrective and punitive mechanisms otherwise applicable to public officials and employees.

These factors have not been canvassed in the case at bar. This is because the approach of the *ponencia* is to deny the public purpose character of the public funding. This notwithstanding, I maintain that an examination of the foregoing factors is necessary. Such safeguards will ensure that future transactions of this same kind will not be compromised. With better accountability and transparency mechanisms are in place, this revitalized concept of public purpose vis-à-vis public funding is not abused to become a mode of thievery of the public coffers.

IV.

As for petitioner's liability for the disallowed amount, the Rules of Return laid down in *Madera v. Commission on Audit*[21] is inapplicable here.

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[21] G.R. No. 244128, September 8, 2020 [Per J. Caguioa, *En Banc*].

As aptly pointed out by then Senior Associate Justice Estela M. Perlas-Bernabe during our deliberations in *Torreta v. Commission on Audit*,[22] the *Madera* Rules of Return were specifically borne from the context of disallowance cases involving employee incentives and benefits, hence, said rules find no application to government contracts for the procurement of goods and services. On this score, I am of the view that the *Madera* Rules of Return are likewise inapplicable to government grants of financial assistance to private entities, as here.

In any event, *Torreta* instructs that the errant approving and certifying officers may still be held liable under Sections 38 and 43 of the Administrative Code upon which the *Madera* Rules of Return were partly based, thus:

> Section 38. *Liability of Superior Officers.* - (1) A public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice[,] or gross negligence.
>
> (2) Any public officer who, without just cause, neglects to perform a duty within a period fixed by law or regulation, or within a reasonable period if none is fixed, shall be liable for damages to the private party concerned without prejudice to such other liability as may be prescribed by law.
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> (3) A head of a department or a superior officer shall not be civilly liable for the wrongful acts, omissions of duty, negligence, or misfeasance of his subordinates, unless he has actually authorized by written order the specific act or misconduct complained of.
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> x x x x
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> Section 43. *Liability for Illegal Expenditures.* - Every expenditure or obligation authorized or incurred in violation of the provisions of this Code or of the general and special provisions contained in the annual General or other Appropriations Act shall be void. Every payment made in violation of said provisions shall be illegal and every official or employee authorizing or making such payment, or taking part therein, and every person receiving such payment shall be jointly and severally liable to the Government for the full amount so paid or received.
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> Any official or employee of the Government knowingly incurring any obligation, or authorizing any expenditure in violation of the provisions herein, or taking part therein, shall be dismissed from the service, after due notice and hearing by the duly authorized appointing official. If the appointing official is other than the President and should he fail to remove such official or employee, the President may exercise the power of removal.

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[22] G.R. No. 242925, November 10, 2020 [Per J. Gaerlan, *En Banc*].

All told, I vote to partially **GRANT** the Motion for Reconsideration filed by the Commission on Audit insofar as it pertains to the Commission's authority to audit PAGCOR funds. I maintain however, that the assistance granted to Pleasant Village Subdivision for its flood control initiatives qualifies as an expenditure for a public purpose.

AMY C. LAZARO-JAVIER