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[G.R. No. 133132. February 15, 2001]

ALEXIS C. CANONIZADO, EDGAR DULA TORRES and ROGELIO A. PUREZA, *petitioners, vs.* **HON. ALEXANDER P. AGUIRRE, as Executive Secretary, HON. EMILIA T. BONCODIN as Secretary of Budget and Management, JOSE PERCIVAL L. ADIONG, ROMEO L. CAIRME and VIRGINIA U. CRISTOBAL,** *respondents.*

SYNOPSIS

This is a motion for reconsideration to the Court's decision declaring Section 8 of Republic Act No. 8551 void for being violative of petitioners' constitutional guaranteed right to security of tenure.

Petitioners, Commissioners of the National Police Commission, with the effectivity of the law, were removed from office and in their stead appointed respondents Aguirre, Adiong and two other generals. Petitioners seasonably assailed the constitutionality of the said law. Meanwhile, pending appeal, petitioner Canonizado was appointed and assumed the Office of Inspector General of the Internal Affairs Service (IAS) of the Philippine National Police (PNP). The respondents alleged that petitioner's appointment constituted abandonment of his claim for reinstatement since the offices of NAPOLCOM and Inspector General of the IAS are incompatible.

It is held that there is no question that the positions of NAPOLCOM Commissioner and Inspector General of the IAS are incompatible with each other. However, the rule does not apply where there was no discharge of functions of the two offices simultaneously; and that acceptance of a second position pending appeal does not constitute abandonment. He had the right to live during the pendency of his appeal and naturally the right to accept any form of employment. Prohibiting petitioner from accepting a second position during the pendency of his petition would be to unjustly compel him to bear the consequences of an unconstitutional act which under no circumstances can be attributed to him.

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SYLLABUS

1. ADMINISTRATIVE LAW; PUBLIC OFFICE; ABANDONMENT; DEFINITION. — Abandonment of an office is the voluntary relinquishment of an office by the holder, with the intention of terminating his possession and control thereof. In order to constitute abandonment of office, it must be total and under such circumstances as clearly to indicate an absolute relinquishment. There must be a complete abandonment of duties of such continuance that the law will infer a relinquishment. Abandonment of duties is a voluntary act; it springs from and is accompanied by deliberation and freedom of choice. There are, therefore, two essential elements of abandonment: *first*, an intention to abandon and *second* an overt or "external" act by which the intention is carried into effect.

2. ID.; ID.; ID.; HOW COMMITTED. — Generally speaking, a person holding a public office may abandon such office by nonuser or acquiescence. Non-user refers to a neglect to use a right or privilege or to exercise an office. However, nonperformance of the duties of an office does not constitute abandonment where such nonperformance results from temporary disability or from involuntary failure to perform. Abandonment may also result from an acquiescence by the officer in his wrongful removal or discharge, for instance, after a summary removal, an unreasonable delay by an officer illegally removed in taking steps to vindicate his rights may constitute an abandonment of the office. Where, while desiring and intending to hold the office, and with no willful desire or intention to abandon it, the public officer vacates it in deference to the requirements of a statute which is afterwards declared unconstitutional, such a surrender will not be deemed an abandonment and the officer may recover the office.

3. ID.; ID.; ID.; NOT APPRECIATED WHERE PUBLIC OFFICIAL WAS COMPELLED TO LEAVE POST. — By accepting the position of Inspector General during the pendency of the present case — brought precisely to assail the constitutionality of his removal from the NAPOLCOM— Canonizado cannot be deemed to have abandoned his claim for reinstatement to the latter position. First of all, Canonizado did not voluntarily leave his post as Commissioner, but was compelled to do so on the strength of Section 8 of RA 8551. In our decision of 25 January

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2000, we struck down the abovequoted provision for being violative of petitioners' constitutionally guaranteed right to security of tenure. Thus, Canonizado harbored no willful desire or intention to abandon his official duties. In fact, Canonizado, together with petitioners Edgar Dula Torres and Rogelio A. Pureza, lost no time disputing what they perceived to be an illegal removal; a few weeks after RA 8551 took effect on 6 March 1998, petitioners instituted the current action on 15 April 1998, assailing the constitutionality of certain provisions of said law. The removal of petitioners from their positions by virtue of a constitutionally infirm act necessarily negates a finding of voluntary relinquishment.

4. ID.; ID.; INCOMPATIBLE OFFICE; CONSTRUED. — It is a well settled rule that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* vacates the first office and his title is thereby terminated without any other act or proceeding. Public policy considerations dictate against allowing the same individual to perform inconsistent and incompatible duties. The incompatibility contemplated is not the mere physical impossibility of one person's performing the duties of the two offices due to a lack of time or the inability to be in two places at the same moment, but that which proceeds from the nature and relations of the two positions to each other as to give rise to contrariety and antagonism should one person attempt to faithfully and impartially discharge the duties of one toward the incumbent of the other.

5. ID.; ID.; ID; RULE THEREON WILL NOT APPLY WHERE THERE IS NO DISCHARGE OF BOTH FUNCTIONS. — There is no question that the positions of NAPOLCOM Commissioner and Inspector General of the IAS are incompatible with each other. As pointed out by respondents, RA 8551 prohibits any personnel of the IAS from sitting in a committee charged with the task of deliberating on the appointment, promotion, or assignment of any PNP personnel, whereas the NAPOLCOM has the power of control and supervision over the PNP. However, the rule on incompatibility of duties will not apply to the case at bar because at no point did Canonizado discharge the functions of the two offices simultaneously. Canonizado was forced out of his first office by the enactment of Section 8 of RA 8551. Thus, when Canonizado was appointed as Inspector General on 30 June 1998, he had ceased to discharge

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his official functions as NAPOLCOM Commissioner. As a matter of fact, it was on this same date that Leo S. Magahum and Cleofe M. Factoran were appointed as NAPOLCOM Commissioners by then President Estrada, to join Romeo L. Cairme and Jose Percival L. Adiong — who were earlier appointed and given a term extension, respectively, by then President Ramos — thereby completing the appointments of the four regular members of the NAPOLCOM, pursuant to Section 4 of the amendatory law. Thus, to reiterate, the incompatibility of duties rule never had a chance to come into play for petitioner never occupied the two positions, of Commissioner and Inspector General, nor discharged their respective functions, concurrently.

6. ID.; ID.; ABANDONMENT; "RIGHT TO LIVE"; RECOGNIZED IN ACCEPTANCE OF SECOND POSITION PENDING APPEAL OF CASE DEPRIVING HIM OF HIS OFFICE. — At this juncture, two cases should be mentioned for their factual circumstances almost nearly coincide with that of petitioners. The first is *Tan v. Gimenez* followed by *Gonzales vs. Hernandez*. The Court held that accepting this second position did not constitute abandonment of his former position because — [h]e was ordered to resign from the service with prejudice to reinstatement pursuant to the decision of the Commissioner of Civil Service and by virtue thereof was prevented from exercising the functions of his position and receiving the corresponding compensation therefor. While thus deprived of his office and emoluments thereunto appertaining the petitioner had to find means to support himself and his family. The fact that during the time his appeal was pending and was thus deprived of his office and salary, he sought and found employment in another branch of the government does not constitute abandonment of his former position. To deny him the right to collect his back salaries during such period would be tantamount to punishing him after his exoneration from the charge which caused his dismissal from the service. x x x

7. CONSTITUTIONAL LAW; AN UNCONSTITUTIONAL ACT IS NOT A LAW, CONFERS NO RIGHTS, IMPOSES NO DUTIES AND AFFORDS NO PROTECTION; CASE AT BAR. — An unconstitutional act is not a law; it confers no rights, imposes no duties, and affords no protection. Therefore, the unavoidable consequence of the Court's declaration that Section 8 of RA 8551 violates the fundamental law is that all acts done pursuant

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to such provision shall be null and void, including the removal of petitioners and Adiong from their positions in the NAPOLCOM and the appointment of new commissioners in their stead. When a regular government employee is illegally dismissed, his position does not become vacant and the new appointment made in order to replace him is null and void *ab initio*. Rudimentary is the precept that there can be no valid appointment to a non-vacant position. Accordingly, Adiong's appointment on 11 March 1998 for a term of two years, pursuant to Section 8 of RA 8551, is null and void. However, he should now be permitted to enjoy the remainder of his term under RA 6975. Therefore, based on our foregoing disquisition, there should no longer be any doubt as to the proper execution of our 25 January 2000 decision — all the Commissioners appointed under RA 8551 should be removed from office, in order to give way to the reinstatement of petitioners and respondent Adiong.

8. REMEDIAL LAW; ACTIONS; ESTOPPEL; PERSONS WILLING TO BE BOUND BY THIS COURT'S DECISION CAN NOT LATER ATTACK THE JUDGMENT; CASE AT BAR. — First and foremost, the petition filed before this Court sought a ruling on the constitutionality of Sections 4 and 8 of RA 8551. The inevitable consequence of this Court's declaration that Section 8 of said law is unconstitutional is the removal of Adiong, Cairme, Magahum and Factoran from the NAPOLCOM and the reinstatement thereto of petitioners, including Adiong, although under his original appointment under RA 6975. As discussed earlier, an unconstitutional law is not a law at all; it is in legal contemplation, as inoperative as though it had never been passed. There being no vacancy created in the first place in the office of the NAPOLCOM, the appointments of Magahum, Factoran, Cairme and Adiong pursuant to RA 8551 are legal nullities, which cannot be the source of any rights. It is noted that Magahum and Factoran were appointed after more than two months from the time the present petition was filed with the Court, which explains why they were originally not impleaded. Had they been interested in defending the validity of their appointments, Magahum and Factoran could have filed a motion to intervene with this Court. It is highly improbable that they were not aware of the present petition since their colleagues, Cairme and Adiong, were respondents therein. The fact that they did not intervene could only mean that they were willing to be bound by the

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Court's decision in this case. In addition, it is noted that respondents did not raise this issue when they filed their comment to the petition on 21 September 1998, even though at that time both Magahum and Factoran were already appointed; albeit invalidly, to the NAPOLCOM. Only after the promulgation of our 25 January 2000 decision did respondents belatedly insist that Magahum and Factoran should be made parties to this case. It is not for a party to participate in the proceedings, submit his case for decision and accept the judgment if it is favorable to him but attack it for any reason when it is adverse.

9. **ID.; ID.; PAYMENT OF SALARIES, BENEFITS AND EMOLUMENTS ACCRUING TO UNEXPIRED PORTION OF TERMS NOT PRAYED FOR, NOT INCLUDED IN GENERAL PHRASE FOR SUCH OTHER RELIEFS JUST AND EQUITABLE.** — We cannot grant respondents' prayer for the application of the abovequoted dispositive portion of *Mayor* in G.R. No. 91547 and G.R. No. 91730 to the case at bar based on one crucial point of distinction — unlike in *Mayor*, petitioners herein did not make any alternative prayer for the payment of the salaries, benefits, and emoluments accruing to them for the unexpired portions of their terms in lieu of reinstatement. Contrary to respondents' contention, the general prayer of petitioners for "such other reliefs just and equitable" cannot be deemed as an alternative to their specific prayer for reinstatement. We agree with petitioners' view that any remedy necessarily included in this general phrase should be consistent with the specific prayers of petitioners.

10. **ID.; ID.; APPEAL; ISSUES CANNOT BE RAISED FOR FIRST TIME ON APPEAL.** — Finally, respondents contend that the re-appointment of petitioners under RA 6975 violates Section 16 of such law. Once again, respondents did not raise this issue in their comment to the petition, and are therefore estopped from doing so at this late stage. Moreover, the validity of the appointments under RA 6975 was never the issue in this case and accordingly, the Court will not pass upon the same.

APPEARANCES OF COUNSEL

Go and Castro Law Offices for petitioners.
Solicitor General for respondents.

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RESOLUTION

GONZAGA-REYES, *J.*:

Respondents are seeking a reconsideration of the Court's 25 January 2000 decision, wherein we declared Section 8 of Republic Act No. 8551 (RA 8551) to be violative of petitioners' constitutionally mandated right to security of tenure. As a consequence of our ruling, we held that petitioners' removal as Commissioners of the National Police Commission (NAPOLCOM) and the appointment of new Commissioners in their stead were nullities and ordered the reinstatement of petitioners and the payment of full backwages to be computed from the date they were removed from office.[1]

Some of the errors assigned by the Solicitor General, acting in behalf of respondents, in the motion for reconsideration have been more than adequately discussed and disposed of by this Court and hence, do not merit further attention.

Respondents insist that the Court should take judicial notice of then President Estrada's appointment of Alexis C. Canonizado to the position of Inspector General of the Internal Affairs Service (IAS) of the Philippine National Police (PNP) on 30 June 1998, and of Canonizado's acceptance and of his having qualified for such position by taking his oath on 2 July 1998 before then Department of Interior and Local Government Undersecretary Ronaldo Puno and again, on 7 July 1998, this time before the President, since these "partake of official acts of the Executive Department," which are matters of mandatory judicial notice, pursuant to Section 1 of Rule 129 of the Rules of Court.[2] By accepting such position, respondents contend that Canonizado is deemed to have abandoned his claim for reinstatement to the NAPOLCOM since the offices of NAPOLCOM Commissioner and Inspector General of the IAS are incompatible.

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[1] *Rollo*, 115-127.

[2] *Ibid.*, 137-140.

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Although petitioners do not deny the appointment of Canonizado as Inspector General, they maintain that Canonizado's initiation and tenacious pursuance of the present case would belie any intention to abandon his former office. Petitioners assert that Canonizado should not be faulted for seeking gainful employment during the pendency of this case. Furthermore, petitioners point out that from the time Canonizado assumed office as Inspector General he never received the salary pertaining to such position, annexing to their comment a certification issued by the Finance Service Office of the PNP stating this fact.[3]

Abandonment of an office is the voluntary relinquishment of an office by the holder, with the intention of terminating his possession and control thereof.[4] In order to constitute abandonment of office, it must be total and under such circumstances as clearly to indicate an absolute relinquishment.[5] There must be a complete abandonment of duties of such continuance that the law will infer a relinquishment.[6] Abandonment of duties is a voluntary act;[7] it springs from and is accompanied by deliberation and freedom of choice.[8] There are, therefore, two essential elements of abandonment: *first*, an intention to abandon and *second*, an overt or "external" act by which the intention is carried into effect.[9]

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[3] Comment of Petitioners to Motion for Reconsideration, 4-6.

[4] *Sangguniang Bayan of San Andres, Catanduanes v. Court of Appeals,* 284 SCRA 276 (1998), citing Words and Phrases, vol. 1, 127.

[5] *Airoso v. De Guzman,* 49 Phil. 371 (1926), citing 22 R. C. L., p. 560, par. 264; *Santiago v. Agustin,* 46 Phil. 14 (1924); 67 C.J.S. Officers § 100, citing *Rainwater v. State ex rel. Strickland,* 187 So. 484, 487, 237 Ala. 482, 121 A.L.R. 981.

[6] 67 C.J.S. Officers § 100, citing *Cosby v. Moore,* 65 So.2d 178, 259 Ala. 41.

[7] *Ibid.*, citing *Steingruber v. San Antonio,* Comm.App., 220 S.W. 77, 78.

[8] *Jorge v. Mayor,* 10 SCRA 331 (1964) , citing *Teves v. Sindiong,* 81 Phil. 658 (1948).

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Generally speaking, a person holding a public office may abandon such office by nonuser or acquiescence.[10] Non-user refers to a neglect to use a right or privilege or to exercise an office.[11] However, nonperformance of the duties of an office does not constitute abandonment where such nonperformance results from temporary disability or from involuntary failure to perform.[12] Abandonment may also result from an acquiescence by the officer in his wrongful removal or discharge, for instance, after a summary removal, an unreasonable delay by an officer illegally removed in taking steps to vindicate his rights may constitute an abandonment of the office.[13] Where, while desiring and intending to hold the office, and with no willful desire or intention to abandon it, the public officer vacates it in deference to the requirements of a statute which is afterwards declared unconstitutional, such a surrender will not be deemed an abandonment and the officer may recover the office.[14]

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[9] 67 C.J.S. Officers § 100, citing *Rainwater v. State ex rel. Strickland,* 178 So. 484, 237 Ala. 482, 121 A.L.R. 981; *Fatten v. Miller,* 8 S.E.2d 757, 190; *Parks v. Ash,* 149 S.E. 207, 168 Ga. 868; *State v. McDermott,* 17 P.2d 343, 52 Idaho 602; *State ex el. Flynn v. Ellis,* 98 P.2d 879, 110 Mont. 43; *Vanderbach v. Hudson County Bd. of Taxation,* 42 A.2d 848, 133 N.J.Law 126; *City of Tulsa v. Johnson,* 163 P.2d 993, 196 Okl. 213; 46 C.J., p. 981, citing *Powers ex rel. Foley v. Caswell,* 86 A.2d 379, 383, 79 R.I. 188; *Thompson v. Nichols,* 65 S.E.2d 603, 208 Ga. 147; *Parkerson v. Hart,* 38 S.E. 2d 397, 200 Ga. 660.

[10] *Ibid.,* citing *Herbert v. State Oil and Gas Bd.,* 250 So.2d 597, 287 Ala. 221; *Bailey v. Berry,* 265 N.Y.S. 865, 240 App.Div. 771.

[11] *Sangguniang Bayan of San Andres, Catanduanes v. Court of Appeals, supra,* citing Cycolpedic Law Dictionary, 3rd ed. and Black's Law Dictionary, 6th ed.

[12] 67 C.J.S. Officers § 100, citing *Doris v. Heroux,* 47 A.2d 633, 71 R.I. 491.

[13] *Ibid.,* citing *Nicholas v. U.S.,* Ct.Cl., 42 S.Ct.7, 257 U.S. 71, 66 L.Ed. 133; Corpus Juris Secundum quoted in *Thompson v. Nichols,* 65 S.E.2d 603, 604, 208 Ga. 147; *Haack v. Ranieri,* 200 A.2d 522, 83 N.J.Super. 526; *People ex rel. Warren v. Christian,* 123 P.2d 368, 58 Wy. 39.

[14] Mechem, *A Treatise on the Law of Public Offices and Officers,* 1890 edition, p. 279, citing *Turnipseed v. Hudson,* 50 Miss. 429, 19 Am. Rep. 15. See also 67 C.J.S. Officers § 100, citing *Johnson v. Brooks,* 78 S.E. 37, 139 Ga. 787.

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By accepting the position of Inspector General during the pendency of the present case — brought precisely to assail the constitutionality of his removal from the NAPOLCOM — Canonizado cannot be deemed to have abandoned his claim for reinstatement to the latter position. First of all, Canonizado did not voluntarily leave his post as Commissioner, but was compelled to do so on the strength of Section 8 of RA 8551, which provides —

> Upon the effectivity of this Act, the terms of office of the current Commissioners are deemed expired which shall constitute a bar to their reappointment or an extension of their terms in the Commission except for current Commissioners who have served less than two (2) years of their terms of office who may be appointed by the President for a maximum terms of two (2) years.

In our decision of 25 January 2000, we struck down the abovequoted provision for being violative of petitioners' constitutionally guaranteed right to security of tenure. Thus, Canonizado harbored no willful desire or intention to abandon his official duties. In fact, Canonizado, together with petitioners Edgar Dula Torres and Rogelio A. Pureza, lost no time disputing what they perceived to be an illegal removal; a few weeks after RA 8551 took effect on 6 March 1998, petitioners instituted the current action on 15 April 1998, assailing the constitutionality of certain provisions of said law. The removal of petitioners from their positions by virtue of a constitutionally infirm act necessarily negates a finding of voluntary relinquishment.

The next issue is whether Canonizado's appointment to and acceptance of the position of Inspector General should result in an abandonment of his claim for reinstatement to the NAPOLCOM. It is a well settled rule that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* vacates the first office and his title is thereby terminated without any other act or proceeding.[15] Public policy considerations

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[15] Mechem, *A Treatise on the Law of Public Offices and Officers*, 1890 edition, p. 267, citing *Milward v. Thatcher*, 2 T.R. 81; *Rex v. Patteson*, 4 B. & Ad. 9; *Rex v. Hughes*, 5 B. & C. 886; Rex & Tizzard, 9 B. & C. 418;

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dictate against allowing the same individual to perform inconsistent and incompatible duties.[16] The incompatibility contemplated is not the mere physical impossibility of one person's performing the duties of the two offices due to a lack of time or the inability to be in two places at the same moment, but that which proceeds from the nature and relations of the two positions to each other as to give rise to contrariety and antagonism should one person attempt to faithfully and impartially discharge the duties of one toward the incumbent of the other.[17]

There is no question that the positions of NAPOLCOM Commissioner and Inspector General of the IAS are incompatible with each other. As pointed out by respondents, RA 8551 prohibits any personnel of the IAS from sitting in a committee charged with the task of deliberating on the appointment, promotion, or assignment of any PNP personnel,[18] whereas the NAPOLCOM has the power of control and supervision over the PNP.[19] However, the rule on incompatibility of duties will not apply to the case at bar because at no point did Canonizado discharge the functions of the two offices simultaneously. Canonizado was forced out of his first office by the enactment of Section 8 of RA 8551. Thus, when Canonizado was appointed as Inspector General on 30 June 1998, he had ceased to discharge his official functions as NAPOLCOM Commissioner. As a matter of fact, it was on this same date that Leo S. Magahum and Cleofe M. Factoran were appointed as NAPOLCOM Commissioners by then President Estrada, to join Romeo L. Cairme and Jose

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State v. Brinkerhoff, 66 Tex. 45; *Pooler v. Reed,* 73 Me. 129; *State v. Dellwood,* 33 La. Ann. 1229; *State v. West,* 33 La. Ann. 1261; *Stubbs v. Lee,* 64 Me. 195, 18 Am. Rep. 251; *State v. Goff,* 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. Rep. 226; *State v. Buttz,* 9 S.C. 156; *People v. Carrique,* 2 Hill (N.Y.) 93; *People v. Hanifan,* 96 Ill. 420; *Cotton v. Phillips,* 56 N. H. 220; *Kenney v. Goergen,* 36 Minn. 190; *Maggie v. Stoddard,* 25 Conn. 565, 68 Am. Dec. 375; *People v. Nostrand,* 46 N. Y. 375; *State v. Brinkerhoff,* 66 Tex. 45; *Biencourt v. Pasker,* 27 Tex. 562; *Ex parte,* Call. 2 Tex. App. 497.[16] *Ibid.*

[17] *Ibid.,* p. 269.

[18] Section 45.

[19] RA 8551, section 5.

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Percival L. Adiong — who were earlier appointed and given a term extension, respectively, by then President Ramos — thereby completing the appointments of the four regular members of the NAPOLCOM, pursuant to Section 4[20] of the amendatory law. Thus, to reiterate, the incompatibility of duties rule never had a chance to come into play for petitioner never occupied the two positions, of Commissioner and Inspector General, nor discharged their respective functions, concurrently.

At this juncture, two cases should be mentioned for their factual circumstances almost nearly coincide with that of petitioners. The first is *Tan v. Gimenez*[21] wherein petitioner Francisco Tan, a public school teacher, was required to resign by the Commissioner of Civil Service for gross misconduct. Tan appealed to the Civil Service Board of Appeals, which reversed the decision of the Commissioner and acquitted him of the charge. During the pendency of Tan's appeal, he worked as a clerk in the Office of the Provincial Treasurer of Leyte. The Court held that accepting this second position did not constitute abandonment of his former position because —

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[20] *Id.*, SEC. 4. Section 13 of Republic Act NO. 6975 is hereby amended to read as follows:
"SEC. 13. *Creation and Composition.* — A National Police Commission, hereinafter referred to as the Commission, is hereby created for the purpose of effectively discharging the functions prescribed in the Constitution and provided in this Act. The Commission shall be an agency attached to the Department for policy and program coordination. It shall be composed of a Chairperson, four (4) regular Commissioners, and the Chief of the PNP as *ex-officio* member. Three (3) of the regular commissioners shall come from the civilian sector who are neither active nor former members of the police or military, one (1) of whom shall be designated as vice chairperson by the President. The fourth regular commissioner shall come from the law enforcement sector either active or retired: *Provided*, That an active member of a law enforcement agency shall be considered resigned from said agency once appointed to the Commission: *Provided, further,* That at least one (1) of the Commissioners shall be a woman. The Secretary of the Department shall be the *ex-officio* Chairperson of the Commission, while the Vice Chairperson shall act as the executive officer of the Commission."

[21] 107 Phil. 17 (1960).

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[h]e was ordered to resign from the service with prejudice to reinstatement pursuant to the decision of the Commissioner of Civil Service and by virtue thereof was prevented from exercising the functions of his position and receiving the corresponding compensation therefor. While thus deprived of his office and emoluments thereunto appertaining the petitioner had to find means to support himself and his family. The fact that during the time his appeal was pending and was thus deprived of his office and salary, he sought and found employment in another branch of the government does not constitute abandonment of his former position. To deny him the right to collect his back salaries during such period would be tantamount to punishing him after his exoneration from the charge which caused his dismissal from the service. x x x

Very similar to *Tan* is the case of *Gonzales v. Hernandez*.[22] In this 1961 case, petitioner Guillermo Gonzales sought reinstatement to his former position as attorney-general of the Investigation and Secret Service Division of the Department of Finance. As in *Tan*, Gonzales was compelled to resign from office by the Commissioner of Civil Service, who found him guilty of disreputable conduct. During the pendency of his appeal with the Civil Service Board of Appeals, petitioner applied for and accepted employment as an emergency helper in the Government Service Insurance System. The Board of Appeals eventually modified the Commissioner's finding by lowering the penalty from removal from office to suspension of two months without pay. In response to the question of whether Gonzales was deemed to have abandoned his position by accepting another position in the GSIS, the Court held that —

Plaintiff's position in the GSIS was temporary in nature, during the period of an emergency only. He had the right to live during the pendency of his appeal and naturally the right to accept any form of employment. In any case as the court below found, this temporary employment is not incompatible with his old position; he could resign this temporary position any time as soon as his case has been definitely decided in his favor. x x x

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[22] 2 SCRA 228 (1961) .

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Although the Court found that the second position accepted by Gonzales was only temporary in nature, the rule on incompatibility of duties makes no such distinction between a permanent or temporary second office. Moreover, the Court still invoked the rationale previously cited in *Tan* — that petitioner's "right to live" justified his acceptance of other employment during the pendency of his appeal. The Court held that Gonzales's second position was not "incompatible" with the first since he could resign from the second position when the case is finally decided in his favor and before he re-assumes his previous office.

As in the *Tan* and *Gonzales* cases, Canonizado was compelled to leave his position as Commissioner, not by an erroneous decision, but by an unconstitutional provision of law. Canonizado, like the petitioners in the above mentioned cases, held a second office during the period that his appeal was pending. As stated in the Comment filed by petitioners, Canonizado was impelled to accept this subsequent position by a desire to continue serving the country, in whatever capacity.[23] Surely, this selfless and noble aspiration deserves to be placed on at least equal footing with the worthy goal of providing for oneself and one's family, either of which are sufficient to justify Canonizado's acceptance of the position of Inspector General. A contrary ruling would deprive petitioner of his right to live, which contemplates not only a right to earn a living, as held in previous cases, but also a right to lead a useful and productive life. Furthermore, prohibiting Canonizado from accepting a second position during the pendency of his petition would be to unjustly compel him to bear the consequences of an unconstitutional act which under no circumstance can be attributed to him. However, before Canonizado can re-assume his post as Commissioner, he should first resign as Inspector General of the IAS-PNP.

Respondents also raise some questions regarding the execution of the Court's decision. They cite the fact that because there are three petitioners who were ordered reinstated and four persons currently acting as NAPOLCOM commissioners, namely

[23] Comment of Petitioners to Motion for Reconsideration, 5.

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Romeo L. Cairme, Jose Percival L. Adiong,[24] Leo S. Magahum and Cleofe M. Factoran,[25] it is unclear who of the current commissioners will be replaced by petitioners. Respondents point out that the execution of the decision becomes particularly complicated when it comes to Adiong, who was a member of the NAPOLCOM under Republic Act No. 6975 (RA 6975), but was removed therefrom and subsequently re-appointed for a two-year term, pursuant to RA 8551. According to respondents, given Adiong's peculiar situation, it is unclear whether the latter should also be entitled to reinstatement as a result of the assailed decision.[26] Adiong, on his own behalf, filed a Motion for Clarification[27] with this Court contending that, if the Court should uphold the declaration of nullity of Section 8 of RA 8551, then he is also entitled to reinstatement to the NAPOLCOM pursuant to his appointment under RA 6975.

An unconstitutional act is not a law; it confers no rights, imposes no duties, and affords no protection.[28] Therefore, the unavoidable consequence of the Court's declaration that Section 8 of RA 8551 violates the fundamental law is that all acts done pursuant to such provision shall be null and void, including the removal of petitioners and Adiong from their positions in the NAPOLCOM and the appointment of new commissioners in their stead. When a regular government employee is illegally dismissed, his position does not become vacant and the new appointment made in order to replace him is null and void *ab*

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[24] Both Cairme and Adiong were appointed by President Ramos on March 11, 1998. Cairme was appointed for a full six-year term, but Adiong was appointed for a term of two years only since he had served less than two years of his previous term, pursuant to Section 8 of RA 8551. Cairme and Adiong took their oaths of office on April 6, 1998.

[25] Both Magahum and Factoran were appointed by President Estrada on June 30, 1998 and they both took their oaths of office on July 2, 1998.

[26] *Rollo,* 142-143.

[27] *Ibid.,* 155-159.

[28] *Fernandez v. Cuerva,* 21 SCRA 1095, 1106 (1967), as cited in Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary,* 1996 edition, 864-865.

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initio.[29] Rudimentary is the precept that there can be no valid appointment to a non-vacant position.[30] Accordingly, Adiong's appointment on 11 March 1998 for a term of two years, pursuant to Section 8 of RA 8551, is null and void. However, he should now be permitted to enjoy the remainder of his term under RA 6975. Therefore, based on our foregoing disquisition, there should no longer be any doubt as to the proper execution of our 25 January 2000 decision — all the Commissioners appointed under RA 8551 should be removed from office, in order to give way to the reinstatement of petitioners and respondent Adiong.

Respondents insist that the present case is similar to a *quo warranto* proceeding since petitioners prayed for the removal of the incumbent commissioners and for their reinstatement. Therefore, they claim that Magahum and Factoran should have been impleaded as respondents and given the opportunity to defend their positions.[31] We disagree. First and foremost, the petition filed before this Court sought a ruling on the constitutionality of Sections 4 and 8 of RA 8551. The inevitable consequence of this Court's declaration that Section 8 of said law is unconstitutional is the removal of Adiong, Cairme, Magahum and Factoran from the NAPOLCOM and the reinstatement thereto of petitioners, including Adiong, although under his original appointment under RA 6975. As discussed earlier, an unconstitutional law is not a law at all; it is in legal contemplation, as inoperative as though it had never been passed. There being no vacancy created in the first place in the office of the NAPOLCOM, the appointments of Magahum, Factoran, Cairme and Adiong pursuant to RA 8551 are legal nullities, which cannot be the source of any rights.[32] It is noted that

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[29] *Aquino v. Civil Service Commission*, 208 SCRA 240 (1992), citing *Costin v. Quimbo*, 120 SCRA 159 (1983); *Morata v. Court of Appeals*, 11 SCRA 42 (1964).

[30] *Garces v. Court of Appeals*, 259 SCRA 99 (1996); *Costin v. Quimbo, supra*.

[31] *Rollo*, 143.

[32] *Department of Transportation and Communication v. Civil Service Commission*, 202 SCRA 340 (1991); *Floreza v. Ongpin*, 182 SCRA 692 (1990).

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Magahum and Factoran were appointed after more than two months from the time the present petition was filed with the Court, which explains why they were originally not impleaded. Had they been interested in defending the validity of their appointments, Magahum and Factoran could have filed a motion to intervene with this Court. It is highly improbable that they were not aware of the present petition since their colleagues, Cairme and Adiong, were respondents therein. The fact that they did not intervene could only mean that they were willing to be bound by the Court's decision in this case. In addition, it is noted that respondents did not raise this issue when they filed their comment to the petition on 21 September 1998, even though at that time both Magahum and Factoran were already appointed, albeit invalidly, to the NAPOLCOM. Only after the promulgation of our 25 January 2000 decision did respondents belatedly insist that Magahum and Factoran should be made parties to this case. It is not for a party to participate in the proceedings, submit his case for decision and accept the judgment if it is favorable to him but attack it for any reason when it is adverse.[33]

In the event that the Court should affirm its decision, respondents pray that the Court apply the ruling in *Mayor v. Macaraig*[34] which provided that —

> In *G.R. No. 91547*, and *G.R. No. 91730*, the removal of petitioners Rosario G. Encarnacion, Daniel M. Lucas, Jr., Ceferino E. Dulay, and Conrado Maglaya as Commissioners of the NLRC is ruled unconstitutional and void; however, to avoid displacement of any of the incumbent Commissioners now serving, it not appearing that any of them is unfit or has given cause for removal, and conformably to the alternative prayer of the petitioners themselves, it is ORDERED that said petitioners be paid all salaries, benefits and emoluments accruing to them for the unexpired portions of their six-year terms and allowed to enjoy retirement benefits under applicable laws, pursuant to RA No. 910 and this Court's Resolution in *Ortiz v. Commission on Elections*, G.R. No. 79857, 161 SCRA 812; x x x

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[33] *Ruby Industrial Corporation v. Court of Appeals,* 284 SCRA 445 (1998).

[34] 194 SCRA 672 (1991).

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We cannot grant respondents' prayer for the application of the abovequoted dispositive portion of *Mayor* in G.R. No. 91547 and G.R. No. 91730 to the case at bar based on one crucial point of distinction — unlike in *Mayor*, petitioners herein did not make any alternative prayer for the payment of the salaries, benefits, and emoluments accruing to them for the unexpired portions of their terms in lieu of reinstatement. Contrary to respondents' contention, the general prayer of petitioners for "such other reliefs just and equitable" cannot be deemed as an alternative to their specific prayer for reinstatement. We agree with petitioners' view that any remedy necessarily included in this general phrase should be consistent with the specific prayers of petitioners.

Finally, respondents contend that the re-appointment of petitioners under RA 6975 violates section 16[35] of such law.[36] Once again, respondents did not raise this issue in their comment to the petition, and are therefore estopped from doing so at this late stage. Moreover, the validity of the appointments under RA 6975 was never the issue in this case and accordingly, the Court will not pass upon the same.

WHEREFORE, respondents' motion for reconsideration is hereby *DENIED*. However, it is hereby clarified that our 25 January 2000 decision mandates the reinstatement of Jose Percival L. Adiong to the NAPOLCOM, together with petitioners herein, pursuant to his appointment under RA 6975.

SO ORDERED.

Davide, Jr., C. J. (Chairman), Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Pardo, Buena, Ynares-Santiago, De Leon, Jr., and *Sandoval-Gutierrez, JJ.,* concur.

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[35] Sec. 16. *Term of Office.* – The four (4) regular and full-time Commissioners shall be appointed by the President upon the recommendation of the Secretary. Of the first four (4) commissioners to be appointed, two (2) commissioners shall serve for six (6) years and the two (2) other commissioners for four (4) years. All subsequent appointments shall be for a period of six (6) years each, without reappointment or extension.

[36] *Rollo,* 141.