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Manufacturers of the Philippines (APMP). Accordingly, the Writ is *DISSOLVED*, and the case *REMANDED* to the court of origin for further appropriate proceedings.

SO ORDERED.

Corona, C.J., Carpio, Velasco, Jr., Nachura, Leonardo-de Castro, Brion, Peralta, Bersamin, Del Castillo, Abad, Villarama, Jr., Perez, and *Mendoza, JJ.,* concur.

Sereno, J., no part.

EN BANC

[G.R. No. 177131. June 7, 2011]

BOY SCOUTS OF THE PHILIPPINES, *petitioner, vs.* **COMMISSION ON AUDIT,** *respondent.*

SYLLABUS

1. POLITICAL LAW; COMMISSION ON AUDIT (COA); AUDIT JURISDICTION; INCLUDES FUNDS OF THE BOY SCOUTS OF THE PHILIPPINES (BSP) WHICH IS A PUBLIC CORPORATION.— After looking at the legislative history of its amended charter and carefully studying the applicable laws and the arguments of both parties, we find that the BSP is a public corporation and its funds are subject to the COA's audit jurisdiction. The BSP Charter (Commonwealth Act No. 111, approved on October 31, 1936), entitled "*An Act to Create a Public Corporation to be Known as the Boy Scouts of the Philippines, and to Define its Powers and Purposes*" created the BSP as a "public corporation" to serve the following public interest or purpose: Sec. 3. The purpose of this corporation shall be to promote through organization and cooperation with other agencies, the ability of boys to do useful things for themselves and others, to train them in scoutcraft, and to inculcate

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in them patriotism, civic consciousness and responsibility, courage, self-reliance, discipline and kindred virtues, and moral values, using the method which are in common use by boy scouts.

2. ID.; ID.; PUBLIC CORPORATIONS; BSP CLASSIFIED AS SUCH UNDER THE CIVIL CODE.— There are three classes of juridical persons under Article 44 of the Civil Code and the BSP, as presently constituted under Republic Act No. 7278, **falls under the second classification**. Article 44 reads: Art. 44. The following are juridical persons: (1) The State and its political subdivisions; (2) **Other corporations, institutions and entities for public interest or purpose created by law; their personality begins as soon as they have been constituted according to law**; (3) Corporations, partnerships and associations for **private interest or purpose** to which the law grants a juridical personality, separate and distinct from that of each shareholder, partner or member. The BSP, which is a corporation created for a public interest or purpose, is subject to the law creating it under Article 45 of the Civil Code, which provides: **Art. 45. Juridical persons mentioned in Nos. 1 and 2 of the preceding article are governed by the laws creating or recognizing them.** x x x The purpose of the BSP as stated in its amended charter shows that it was created in order to implement a State policy declared in Article II, Section 13 of the Constitution, which reads: ARTICLE II - DECLARATION OF PRINCIPLES AND STATE POLICIES Section 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs. Evidently, the BSP, which was created by a special law to serve a public purpose in pursuit of a constitutional mandate, comes within the class of "public corporations" defined by paragraph 2, Article 44 of the Civil Code and governed by the law which creates it, pursuant to Article 45 of the same Code.

3. ID.; ID.; ID.; BSP CLASSIFIED AS AN ATTACHED AGENCY OF THE DECS UNDER THE ADMINISTRATIVE CODE OF 1987.— The public, rather than private, character of the BSP is recognized by the fact that, along with the Girl Scouts of the Philippines, it is classified as an **attached agency** of the DECS under Executive Order No. 292, or the **Administrative**

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Code of 1987. x x x The administrative relationship of an attached agency to the department is defined in the Administrative Code of 1987. x x x As an attached agency, the BSP enjoys operational autonomy, as long as policy and program coordination is achieved by having **at least one representative of government in its governing board**, which in the case of the BSP is the DECS Secretary. In this sense, the BSP is not under government control or "supervision and control." Still this characteristic does not make the attached chartered agency a private corporation covered by the constitutional proscription in question.

4. ID.; CONSTITUTIONAL LAW; NATIONAL ECONOMY AND PATRIMONY; SCOPE AND COVERAGE.— The scope and coverage of Section 16, Article XII of the Constitution can be seen from the declaration of state policies and goals which pertains to **national economy** and **patrimony** and the **interests of the people in economic development**. Section 16, Article XII deals with "**the formation, organization, or regulation of private corporations**," which should be done through a general law enacted by Congress, provides for an exception, that is: if the corporation is government owned or controlled; its creation is in the interest of the common good; and it meets the test of economic viability. The rationale behind Article XII, Section 16 of the 1987 Constitution was explained in *Feliciano v. Commission on Audit*, in the following manner: The Constitution emphatically prohibits the creation of private corporations except by a general law applicable to all citizens. **The purpose of this constitutional provision is to ban private corporations created by special charters, which historically gave certain individuals, families or groups special privileges denied to other citizens**. It may be gleaned from the above discussion that Article XII, Section 16 bans the creation of "**private corporations**" by special law. The said constitutional provision should not be construed so as to prohibit the creation of **public corporations** or a corporate agency or instrumentality of the government intended to serve a public interest or purpose, which should not be measured on the basis of economic viability, but according to the public interest or purpose it serves as envisioned by **paragraph (2), of Article 44 of the Civil Code** and the pertinent provisions of the **Administrative Code of 1987**.

5. ID.; ADMINISTRATIVE LAW; PUBLIC CORPORATIONS; BSP AS PUBLIC CORPORATION IS NOT SUBJECT TO

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THE TEST OF GOVERNMENT OWNERSHIP OR CONTROL AND ECONOMIC VIABILITY.— The BSP is a public corporation or a government agency or instrumentality with juridical personality, which does not fall within the constitutional prohibition in Article XII, Section 16, notwithstanding the amendments to its charter. Not all corporations, which are **not** government owned or controlled, are *ipso facto* to be considered private corporations as there exists another distinct class of corporations or chartered institutions which are otherwise known as "public corporations." These corporations are treated by law as agencies or instrumentalities of the government which are not subject to the tests of ownership or control and economic viability but to different criteria relating to their public purposes/interests or constitutional policies and objectives and their administrative relationship to the government or any of its Departments or Offices.

6. ID.; ID.; ADMINISTRATIVE CODE OF 1987; EXISTENCE OF PUBLIC CORPORATE OR JURIDICAL ENTITIES OR CHARTERED INSTITUTIONS BY LEGISLATIVE FIAT DISTINGUISHED FROM PRIVATE CORPORATIONS AND GOVERNMENT OWNED OR CONTROLLED CORPORATION.— The existence of public or government corporate or juridical entities or chartered institutions by legislative fiat distinct from private corporations and government owned or controlled corporation is best exemplified by the 1987 Administrative Code cited above, which we quote in part: Sec. 2. *General Terms Defined*. – Unless the specific words of the text, or the context as a whole, or a particular statute, shall require a different meaning: x x x (10) "**Instrumentality**" refers to any agency of the National Government, not integrated within the department framework, vested with special functions or jurisdiction by law, **endowed with some if not all corporate powers,** administering special funds, and **enjoying operational autonomy, usually through a charter.** This term includes regulatory agencies, chartered institutions and government-owned or controlled corporations. x x x (12) "**Chartered institution**" refers to any agency organized or operating under a special charter, and vested by law with functions **relating to specific constitutional policies or objectives**. This term includes the state universities and colleges and the monetary authority of the State. (13) "**Government-owned or controlled corporation**"

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refers to any agency organized as a stock or non-stock corporation, vested with functions relating to public needs whether **governmental or proprietary in nature**, and owned by the Government directly or through its instrumentalities either wholly, or, where applicable as in the case of stock corporations, to the extent of at least fifty-one (51) per cent of its capital stock: Provided, **That government-owned or controlled corporations may be further categorized by the Department of the Budget, the Civil Service Commission, and the Commission on Audit for purposes of the exercise and discharge of their respective powers, functions and responsibilities with respect to such corporations**. Assuming for the sake of argument that the BSP ceases to be owned or controlled by the government because of reduction of the number of representatives of the government in the BSP Board, it does not follow that it also ceases to be a government instrumentality as it still retains all the characteristics of the latter as an attached agency of the DECS under the Administrative Code. Vesting corporate powers to an attached agency or instrumentality of the government is not constitutionally prohibited and is allowed by the above-mentioned provisions of the Civil Code and the 1987 Administrative Code.

7. STATUTORY CONSTRUCTION; REQUISITES WHERE CONSTITUTIONALITY OF THE LAW IS QUESTIONED.— When questions of constitutional significance are raised, the Court can exercise its power of judicial review only if the following requisites are present: **(1) the existence of an actual and appropriate case; (2) the existence of personal and substantial interest on the part of the party raising the constitutional question; (3) recourse to judicial review is made at the earliest opportunity; and (4) the constitutional question is the *lis mota* of the case**. Thus, when it comes to the exercise of the power of judicial review, the constitutional issue should be the very *lis mota*, or threshold issue, of the case, and that it should be raised by either of the parties. These requirements would be ignored under the dissent's rather overreaching view of how this case should have been decided. True, it was the Court that asked the parties to comment, but the Court cannot be the one to raise a constitutional issue. Thus, the Court chooses to once more exhibit restraint in the exercise of its power to pass upon the validity of a law.

8. POLITICAL LAW; COMMISSION ON AUDIT; JURISDICTION OVER THE BSP, UPHELD.— Regarding the COA's jurisdiction over the BSP, Section 8 of its amended charter allows the BSP to receive contributions or donations from the government. x x x The sources of funds to maintain the BSP were identified before the House Committee on Government Enterprises while the bill was being deliberated. x x x The nature of the funds of the BSP and the COA's audit jurisdiction were likewise brought up in said congressional deliberations. x x x Historically, the BSP had been subjected to government audit in so far as public funds had been infused thereto. However, this practice should not preclude the exercise of the audit jurisdiction of COA, clearly set forth under the Constitution, which pertinently provides: 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 and controlled corporations with original charters.** x x x Since the BSP, under its amended charter, continues to be a public corporation or a government instrumentality, we come to the inevitable conclusion that it is subject to the exercise by the COA of its audit jurisdiction in the manner consistent with the provisions of the BSP Charter.

CARPIO, *J.*, *dissenting opinion*:

1. POLITICAL LAW; COMMISSION ON AUDIT (COA); AUDIT JURISDICTION; DISCUSSED.— Section 2(1), Article IX-D of the Constitution provides for COA's audit jurisdiction. x x x Based on this Constitutional provision, the COA exercises jurisdiction on a pre-audit basis over the (1) Government, (2) any of its subdivisions, (3) agencies, (4) instrumentalities, and (5) GOCCs with original charters. The COA also has jurisdiction on a post-audit basis over (1) constitutional bodies, commissions and offices that have been granted fiscal autonomy under the Constitution; (2) autonomous state colleges and universities; (3) other GOCCs and their subsidiaries; and (4) 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

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subsidy or equity. Hence, if an entity is properly identified and categorized as among those enumerated in Section 2(1), Article IX-D of the Constitution, then the COA can indisputably "examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property" of that particular entity.

2. ID.; ID.; DETERMINING FACTOR OF COA'S AUDIT JURISDICTION IS GOVERNMENT OWNERSHIP OR CONTROL OF THE CORPORATION.— In *Feliciano v. Commission on Audit*, the Court declared that the determining factor of COA's audit jurisdiction is **government ownership or control** of the corporation. Citing *Philippine Veterans Bank Employees Union-NUBE v. Philippine Veterans Bank*, the Court held in *Feliciano* that the **criterion of ownership and control is more important than the issue of original charter**. x x x Employing the test laid down in Feliciano in determining COA's jurisdiction, we find that the BSP is not a GOCC.

3. ID.; REVISED ADMINISTRATIVE CODE; GOVERNMENT OWNED AND CONTROLLED CORPORATIONS (GOCC); UNDER THE DEFINITION OF GOCC, BSP IS NOT OWNED BY THE GOVERNMENT.— Under Section 2(13) of the Revised Administrative Code, a GOCC refers to any agency organized as a stock or non-stock corporation, vested with functions relating to public needs whether governmental or proprietary in nature, and owned by the Government directly or through its instrumentalities either wholly, or, where applicable as in the case of stock corporations, to the extent of at least fifty-one (51) per cent of its capital stock. Under the above definition, a GOCC must be **owned** or **controlled** by the government, and in the case of a stock corporation, at least a majority of its capital stock must be owned by the government. In the case of a non-stock corporation, by analogy, at least a majority of the members must be government officials holding such membership by appointment or designation by the government. In this case, the BSP is a non-stock and non-profit organization composed **almost entirely of members coming from the private sector**, more particularly boys ranging from ages four (known as KID Scouts) to seventeen (known as SENIOR Scouts). The BSP is one of the largest Scout organizations in the world today (after Gerakan Pramuka of Indonesia and the Boy Scouts of America, first and second, respectively) and is

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one of the world's National Scout Associations having the highest penetration rate (Scout density), with one Scout out of two boys of Scouting age enrolled in the Scouting program. Since the BSP is composed almost entirely of members and officers from the private sector, the BSP is clearly not owned by the government.

4. ID.; ID.; ID.; UNDER THE DEFINITION OF GOCC, BSP IS NOT CONTROLLED BY THE GOVERNMENT.— [U]nder RA 7278 only one Cabinet Secretary remains a member of the National Executive Board, as opposed to the previous composition where the President of the Philippines and six cabinet secretaries were members of the same board. x x x Significantly, the lone cabinet member, who is the Education Secretary, merely serves as an *ex-officio* member. x x x Except for the Education Secretary, none of the other members of the National Executive Board is a government official or holds such position or membership through appointment or designation by the government. Moreover, the government lacks the power to fill up vacancies in the National Executive Board of the BSP or remove any of its members. In fact, "vacancies in the National Executive Board shall be filled by a majority vote of the remaining members." **This structural set-up and membership of BSP's governing body under RA 7278, where all except one come from the private sector, glaringly negate any form of government control over the BSP.** Moreover, if the BSP is a GOCC, as what the COA insists, then it must be under the President's power of control. x x x However, there is absolutely nothing which demonstrates that the President of the Philippines exercises control over the acts or decisions of the BSP's National Executive Board or any of its members. The President does not have the power to alter or modify or nullify or set aside what the BSP's National Executive Board does in the performance of its duties and to substitute the judgment of the former for that of the latter. The title "Chief Scout" does not confer on the President any power of control over the affairs and management of the BSP. This absence of any form of presidential control reinforces the fact that the government does not control the BSP. In short, the President, while holding the title of "Chief Scout," does not control the BSP.

5. ID.; ID.; ID.; THE BSP IS NOT A GOCC AS THE FUNDS OF THE BSP ARE PRIVATE IN NATURE.— The Court

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noted in *BSP v. NLRC* that the original assets of the BSP were acquired by purchase or gift or other equitable arrangement with the Boy Scouts of America, of which the BSP was part before the establishment of the Commonwealth of the Philippines. The BSP charter, however, does not indicate that such assets were public or statal in character or had originated from the government. No public capital was invested in the BSP. **According to the BSP, its operating funds used for carrying out its purposes and programs are derived principally from membership dues paid by the Boy Scouts themselves and from property rentals. The BSP does not have government assets and does not receive any appropriation from Congress.** x x x Further, BSP's properties are being managed and operated by the BSP itself, not by the government or any of its agencies. Therefore, it is crystal-clear that the funds of the BSP come from private sources. As such, the BSP funds are necessarily beyond the jurisdiction of the COA, which exclusively audits public funds and assets.

6. ID.; ID.; ID.; THE PUBLIC PURPOSE OF THE BSP DOES NOT MAKE IT A GOCC.— Indeed, the BSP performs functions which may be classified as public in character, in the sense that it promotes "virtues of citizenship and patriotism and the general improvement of the moral spirit and fiber of our youth." However, this fact alone does not automatically make the BSP a GOCC. Significantly, the Court declared in *Philippine Society for the Prevention of Cruelty to Animals v. Commission on Audit*, **"the fact that a certain juridical entity is impressed with public interest does not, by that circumstance alone, make the entity a public corporation, inasmuch as a corporation may be private although its charter contains provisions of a public character, incorporated solely for the public good."**

7. ID.; CONSTITUTIONAL LAW; GOCC SUBJECT TO THE TEST OF ECONOMIC VIABILITY; VIEW THAT BSP IS A PUBLIC CORPORATION NOT SUBJECT TO THE TEST OF ECONOMIC VIABILITY IS PATENTLY ERRONEOUS AND BASELESS.— Section 16, Article XII of the Constitution provides: Sec. 16. The Congress shall not, except by general law, provide for the formation, organization, or regulation of **private corporations. Government-owned or controlled corporations** may be created or established by special charters

in the interest of the common good and **subject to the test of economic viability**. x x x In *Manila International Airport Authority (MIAA) v. Court of Appeals*, where the Court ruled that MIAA is a government instrumentality, the Court explained the importance of the "test of economic viability," in this wise: x x x **The intent of the Constitution is to prevent the creation of government-owned or controlled corporations that cannot survive on their own in the market place and thus merely drain the public coffers.** x x x [T]he creation by Congress of a government owned or controlled corporation not satisfying the test of economic viability clearly runs counter to the express mandate of Section 16, Article XII of the Constitution. x x x [T]he majority's view that BSP is a "public corporation" which does not fall under either of the classifications of corporation recognized under Section 16, Article XII of the Constitution, and consequently not subject to the test of economic viability, is patently erroneous and baseless.

8. ID.; ADMINISTRATIVE LAW; PUBLIC CORPORATIONS; THAT AN ENTITY IS IMPRESSED WITH PUBLIC INTEREST DOES NOT MAKE IT A PUBLIC CORPORATION, NEITHER DOES ADMINISTRATIVE RELATIONSHIP TO THE GOVERNMENT MAKE IT WITHIN THE PURVIEW OF THE COA'S AUDIT JURISDICTION.— As the Court emphatically stated in *Philippine Society for the Prevention of Cruelty to Animals*, **"the fact that a certain juridical entity is impressed with public interest does not, by that circumstance alone, make the entity a public corporation, inasmuch as a corporation may be private although its charter contains provisions of a public character, incorporated solely for the public good."** Neither does "administrative relationship to the government" indicate that an entity is an instrumentality within the purview of the COA's audit jurisdiction. Only corporations controlled and owned by the government, which are subject to the test of economic viability, and government instrumentalities, as defined by the Administrative Code, fall under COA's audit jurisdiction. The BSP is neither; hence, it is beyond the COA's audit jurisdiction.

9. ID.; ID.; GOVERNMENT INSTRUMENTALITY; DEFINED.— A government instrumentality is defined by the Revised Administrative Code as "any agency of the National Government,

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not integrated within the department framework vested with special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter." In other words, to be considered a government instrumentality, an entity must be (1) **an agency of the National Government;** (2) outside the department framework of the National Government; (3) **vested with special functions or jurisdiction by law;** (4) endowed with some, if not all, corporate powers; (5) **administering special funds;** and (6) enjoying operational autonomy.

10. ID.; ID.; ID.; BSP IS NOT A GOVERNMENT INSTRUMENTALITY.— The BSP is not an agency of the National Government because the BSP is not a unit of the National Government, like a "department, bureau, office, instrumentality or government owned or controlled corporation, or a local government or a distinct unit therein." **There is also no dispute that the BSP does not administer special funds of the government.** While the BSP may receive donations or contributions from the government just like other non-government organizations, the same cannot be characterized as special funds. **Moreover, the BSP is not vested with special functions or jurisdiction *by law*. Hence, the BSP is not a government instrumentality.**

11. COMMERCIAL LAW; CORPORATION LAW; BSP IS A PRIVATE, NON-STOCK AND NON-PROFIT CORPORATION PERFORMING PUBLIC FUNCTIONS.— Scouting is a non-partisan, **non-governmental** worldwide youth movement geared towards the "development of young people in achieving their full physical, mental, social, intellectual and spiritual potentials as individuals, as responsible citizens and as members of their local, national and international communities." Scouting complements the school and the family, filling the needs not met by either. "It belongs to the category of non-formal education since, while it takes place outside the formal educational system, it is an organized institution with an educational aim and is addressed to a specific clientele." x x x The fact that the BSP, like the BSA, is a private, non-stock, non-profit corporation is consistent with the clear intent of the Legislature in enacting RA 7278. x x x **There is no question that RA 7278 was enacted precisely to remove government**

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control and return the BSP to the private sector and to its non-governmental status. In other words, the government lost control over the BSP to the private sector upon the effectivity of RA 7278. The absence of government control or ownership, coupled with the private nature of BSP funds, makes the BSP a private corporation beyond the audit jurisdiction of the COA. Clearly, the attributes of BSP's relationship with the State that point to its being a private non-stock corporation are overwhelming and irrefutable.

12. STATUTORY CONSTRUCTION; CONSTITUTIONALITY OF BSP CHARTER, AS AMENDED; DISCUSSED.— Since the BSP is not a GOCC, can Congress create, organize and regulate the BSP by enacting its charter, or Commonwealth Act No. 111, as amended by PD 460 and further amended by RA 7278? The answer is in the negative. x x x While both BSP and COA submit that Commonwealth Act No. 111 and its amendatory laws do not violate Section 16, Article XII of the Constitution, the Court should reject such contention. Considering that the BSP is not a GOCC, it follows that the law creating and regulating the BSP clearly violates Section 16, Article XII of the Constitution which specifically states that "Congress shall not, except by general law, provide for the formation, organization, or regulation of private corporations," unless such corporations are owned or controlled by the Government or any of its subdivision or instrumentality. x x x The Constitution prohibits the creation of a private corporation through a special law. The Constitutional prohibition under Section 16, Article XII is clear, categorical, absolute, and admits of no exception. Since the BSP is a private corporation and not a government owned or controlled corporation, Sections 1, 2, 3, 5, 6, 7, 9, and 11 of Commonwealth Act No. 111, as amended, are unconstitutional, and hence void, for contravening the Constitutional proscription against the creation, organization, and regulation of private corporations by Congress. The rest of the provisions, namely, Sections 4, 8, and 10 of Commonwealth Act No. 111, as amended, remain valid as these do not refer to BSP's creation as a corporation and thus, do not violate the prohibition under Section 16, Article XII of the Constitution. Moreover, Section 5 of RA 7278, amending Commonwealth Act No. 111, provides for a separability clause.

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APPEARANCES OF COUNSEL

Chato & Vinzons-Chato for petitioner.
The Solicitor General for respondent.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

The jurisdiction of the Commission on Audit (COA) over the Boy Scouts of the Philippines (BSP) is the subject matter of this controversy that reached us *via* petition for prohibition[1] filed by the BSP under Rule 65 of the 1997 Rules of Court. In this petition, the BSP seeks that the COA be prohibited from implementing its June 18, 2002 **Decision**,[2] its February 21, 2007 **Resolution,**[3] as well as all other issuances arising therefrom, and that all of the foregoing be rendered null and void.[4]

Antecedent Facts and Background of the Case

This case arose when the COA issued **Resolution No. 99-011**[5] on August 19, 1999 ("the COA Resolution"), with the subject "*Defining the Commission's policy with respect to the audit of the Boy Scouts of the Philippines.*" In its whereas clauses, the COA Resolution stated that the BSP was created as a public corporation under Commonwealth Act No. 111, as amended by Presidential Decree No. 460 and Republic Act No. 7278; that in *Boy Scouts of the Philippines v. National Labor Relations Commission*,[6] the Supreme Court ruled that

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[1] With prayer for preliminary injunction and/or temporary restraining order.

[2] *Rollo,* pp. 35-38; COA Decision No. 2002-107.

[3] *Id.* at 39-41; COA Decision No. 2007-008.

[4] *Id.* at 29.

[5] *Id.* at 42-43.

[6] G.R. No. 80767, April 22, 1991, 196 SCRA 176.

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the BSP, as constituted under its charter, was a "government-controlled corporation within the meaning of Article IX(B)(2)(1) of the Constitution"; and that "the BSP is appropriately regarded as a government instrumentality under the 1987 Administrative Code."[7] The COA Resolution also cited its constitutional mandate under Section 2(1), Article IX (D). Finally, the COA Resolution reads:

> NOW THEREFORE, in consideration of the foregoing premises, the COMMISSION PROPER HAS RESOLVED, AS IT DOES HEREBY RESOLVE, **to conduct an annual financial audit of the Boy Scouts of the Philippines in accordance with generally accepted auditing standards**, and express an opinion on whether the financial statements which include the Balance Sheet, the Income Statement and the Statement of Cash Flows present fairly its financial position and results of operations.
>
> x x x x x x x x x
>
> BE IT RESOLVED FURTHERMORE, that for purposes of audit supervision, **the Boy Scouts of the Philippines shall be classified among the government corporations belonging to the Educational, Social, Scientific, Civic and Research Sector** under the Corporate Audit Office I, to be audited, similar to the subsidiary corporations, by employing the team audit approach.[8] (Emphases supplied.)

The BSP sought reconsideration of the COA Resolution in a **letter**[9] dated November 26, 1999 signed by the BSP National President Jejomar C. Binay, who is now the Vice President of the Republic, wherein he wrote:

> It is the position of the BSP, with all due respect, that it is not subject to the Commission's jurisdiction on the following grounds:
>
> 1. We reckon that the ruling in the case of Boy Scouts of the *Philippines vs. National Labor Relations Commission, et al.* (G.R. No. 80767) classifying the BSP as a government-controlled

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[7] *Rollo,* p. 42.

[8] *Id.* at 42-43.

[9] *Id.* at 44-46.

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corporation is anchored on the "substantial Government participation" in the National Executive Board of the BSP. It is to be noted that the case was decided when the BSP Charter is defined by Commonwealth Act No. 111 as amended by Presidential Decree 460.

However, may we humbly refer you to Republic Act No. 7278 which amended the BSP's charter after the cited case was decided. The most salient of all amendments in RA No. 7278 is the alteration of the composition of the National Executive Board of the BSP.

The said RA virtually eliminated the "substantial government participation" in the National Executive Board by removing: (i) the President of the Philippines and executive secretaries, with the exception of the Secretary of Education, as members thereof; and (ii) the appointment and confirmation power of the President of the Philippines, as Chief Scout, over the members of the said Board.

The BSP believes that the cited case has been superseded by RA 7278. Thereby weakening the case's conclusion that the BSP is a government-controlled corporation (*sic*). The 1987 Administrative Code itself, of which the *BSP vs. NLRC* relied on for some terms, defines government-owned and controlled corporations as agencies organized as stock or non-stock corporations which the BSP, under its present charter, is not.

Also, the Government, like in other GOCCs, does not have funds invested in the BSP. What RA 7278 only provides is that the Government or any of its subdivisions, branches, offices, agencies and instrumentalities can from time to time donate and contribute funds to the BSP.

x x x x x x x x x

Also the BSP respectfully believes that the BSP is not "appropriately regarded as a government instrumentality under the 1987 Administrative Code" as stated in the COA resolution. As defined by Section 2(10) of the said code, instrumentality refers to "any agency of the National Government, not integrated within the department framework, vested with special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter."

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> The BSP is not an entity administering special funds. It is not even included in the DECS National Budget. x x x
>
> It may be argued also that the BSP is not an "agency" of the Government. The 1987 Administrative Code, merely referred the BSP as an "attached agency" of the DECS as distinguished from an actual line agency of departments that are included in the National Budget. The BSP believes that an "attached agency" is different from an "agency." Agency, as defined in Section 2(4) of the Administrative Code, is defined as any of the various units of the Government including a department, bureau, office, instrumentality, government-owned or controlled corporation or local government or distinct unit therein.
>
> Under the above definition, the BSP is neither a unit of the Government; a department which refers to an executive department as created by law (Section 2[7] of the Administrative Code); nor a bureau which refers to any principal subdivision or unit of any department (Section 2[8], Administrative Code).[10]

Subsequently, requests for reconsideration of the COA Resolution were also made separately by Robert P. Valdellon, Regional Scout Director, Western Visayas Region, Iloilo City and Eugenio F. Capreso, Council Scout Executive of Calbayog City.[11]

In a **letter**[12] dated July 3, 2000, Director Crescencio S. Sunico, Corporate Audit Officer (CAO) I of the COA, furnished the BSP with a copy of the **Memorandum**[13] dated June 20, 2000 of Atty. Santos M. Alquizalas, the COA General Counsel. In said Memorandum, the COA General Counsel opined that Republic Act No. 7278 did not supersede the Court's ruling in *Boy Scouts of the Philippines v. National Labor Relations Commission*, even though said law eliminated the substantial government participation in the selection of members of the

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[10] *Id.* at 44-46.

[11] *Id.* at 8.

[12] *Id.* at 47.

[13] *Id.* at 48-50.

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National Executive Board of the BSP. The Memorandum further provides:

Analysis of the said case disclosed that the substantial government participation is only one (1) of the three (3) grounds relied upon by the Court in the resolution of the case. Other considerations include the character of the BSP's purposes and functions which has a public aspect and the statutory designation of the BSP as a "public corporation". These grounds have not been deleted by R.A. No. 7278. On the contrary, these were strengthened as evidenced by the amendment made relative to BSP's purposes stated in Section 3 of R.A. No. 7278.

On the argument that BSP is not appropriately regarded as "a government instrumentality" and "agency" of the government, such has already been answered and clarified. The Supreme Court has elucidated this matter in the BSP case when it declared that BSP is regarded as, both a "government-controlled corporation with an original charter" and as an "instrumentality" of the Government. Likewise, it is not disputed that the Administrative Code of 1987 designated the BSP as one of the attached agencies of DECS. Being an attached agency, however, it does not change its nature as a government-controlled corporation with original charter and, necessarily, subject to COA audit jurisdiction. Besides, Section 2(1), Article IX-D of the Constitution provides that COA 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.[14]

Based on the Memorandum of the COA General Counsel, Director Sunico wrote:

In view of the points clarified by said Memorandum upholding COA Resolution No. 99-011, we have to comply with the provisions of the latter, among which is to conduct an annual financial audit of the Boy Scouts of the Philippines.[15]

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[14] *Id.* at 49-50.

[15] *Id.* at 47.

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In a letter dated November 20, 2000 signed by Director Amorsonia B. Escarda, CAO I, the COA informed the BSP that a preliminary survey of its organizational structure, operations and accounting system/records shall be conducted on November 21 to 22, 2000.[16]

Upon the BSP's request, the audit was deferred for thirty (30) days. The BSP then filed a Petition for Review with Prayer for Preliminary Injunction and/or Temporary Restraining Order before the COA. This was **denied** by the COA in its questioned Decision, which held that the BSP is under its audit jurisdiction. The BSP moved for reconsideration but this was likewise denied under its questioned Resolution.[17]

This led to the filing by the BSP of this petition for prohibition with preliminary injunction and temporary restraining order against the COA.

The Issue

As stated earlier, the sole issue to be resolved in this case is whether the BSP falls under the COA's audit jurisdiction.

The Parties' Respective Arguments

The BSP contends that *Boy Scouts of the Philippines v. National Labor Relations Commission* is inapplicable for purposes of determining the audit jurisdiction of the COA as the issue therein was the jurisdiction of the National Labor Relations Commission over a case for illegal dismissal and unfair labor practice filed by certain BSP employees.[18]

While the BSP concedes that its functions do relate to those that the government might otherwise completely assume on its own, it avers that this alone was not determinative of the COA's audit jurisdiction over it. The BSP further avers that the Court in *Boy Scouts of the Philippines v. National Labor Relations*

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[16] *Id.* at 51.

[17] *Id.* at 9.

[18] *Id.* at 11.

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Commission "simply stated x x x that in respect of functions, the BSP is *akin* to a public corporation" but this was not synonymous to holding that the BSP is a government corporation or entity subject to audit by the COA.[19]

The BSP contends that Republic Act No. 7278 introduced crucial amendments to its charter; hence, the findings of the Court in *Boy Scouts of the Philippines v. National Labor Relations Commission* are no longer valid as the government has ceased to play a controlling influence in it. The BSP claims that the pronouncements of the Court therein must be taken only within the context of that case; that the Court had categorically found that its assets were acquired from the Boy Scouts of America and not from the Philippine government, and that its operations are financed chiefly from membership dues of the Boy Scouts themselves as well as from property rentals; and that "the BSP may correctly be characterized as non-governmental, and hence, beyond the audit jurisdiction of the COA." It further claims that the designation by the Court of the BSP as a government agency or instrumentality is mere *obiter dictum*.[20]

The BSP maintains that the provisions of Republic Act No. 7278 suggest that "governance of BSP has come to be overwhelmingly a private affair or nature, with government participation restricted to the seat of the Secretary of Education, Culture and Sports."[21] It cites *Philippine Airlines Inc. v. Commission on Audit*[22] wherein the Court declared that, "PAL, having ceased to be a government-owned or controlled corporation is no longer under the audit jurisdiction of the COA."[23] Claiming that the amendments introduced by Republic Act No. 7278 constituted a supervening event that changed

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[19] *Id.* at 13.

[20] *Id.* at 15-16.

[21] *Id.* at 18.

[22] 314 Phil. 896 (1995).

[23] *Id* at 903.

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the BSP's corporate identity in the same way that the government's privatization program changed PAL's, the BSP makes the case that the government no longer has control over it; thus, the COA cannot use *the Boy Scouts of the Philippines v. National Labor Relations Commission* as its basis for the exercise of its jurisdiction and the issuance of COA Resolution No. 99-011.[24] The BSP further claims as follows:

> It is not far-fetched, in fact, to concede that BSP's funds and assets are private in character. Unlike ordinary public corporations, such as provinces, cities, and municipalities, or government-owned and controlled corporations, such as Land Bank of the Philippines and the Development Bank of the Philippines, the assets and funds of BSP are not derived from any government grant. For its operations, BSP is not dependent in any way on any government appropriation; as a matter of fact, it has not even been included in any appropriations for the government. To be sure, COA has not alleged, in its Resolution No. 99-011 or in the Memorandum of its General Counsel, that BSP received, receives or continues to receive assets and funds from any agency of the government. The foregoing simply point to the private nature of the funds and assets of petitioner BSP.
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> x x x x x x x x x
>
> As stated in petitioner's third argument, BSP's assets and funds were never acquired from the government. Its operations are not in any way financed by the government, as BSP has never been included in any appropriations act for the government. Neither has the government invested funds with BSP. BSP, has not been, at any time, a user of government property or funds; nor have properties of the government been held in trust by BSP. This is precisely the reason why, until this time, the COA has not attempted to subject BSP to its audit jurisdiction. x x x.[25]

To summarize its other arguments, the BSP contends that it is not a government-owned or controlled corporation; neither is it an instrumentality, agency, or subdivision of the government.

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[24] *Rollo,* pp. 19-20.

[25] *Id.* at 21-22.

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In its **Comment**,[26] the COA argues as follows:

1. The BSP is a public corporation created under Commonwealth Act No. 111 dated October 31, 1936, and whose functions relate to the fostering of public virtues of citizenship and patriotism and the general improvement of the moral spirit and fiber of the youth. The manner of creation and the purpose for which the BSP was created indubitably prove that it is a government agency.

2. Being a government agency, the funds and property owned or held in trust by the BSP are subject to the audit authority of respondent Commission on Audit pursuant to Section 2 (1), Article IX-D of the 1987 Constitution.

3. Republic Act No. 7278 did not change the character of the BSP as a government-owned or controlled corporation and government instrumentality.[27]

The COA maintains that the functions of the BSP that include, among others, the teaching to the youth of patriotism, courage, self-reliance, and kindred virtues, are undeniably sovereign functions enshrined under the Constitution and discussed by the Court in *Boy Scouts of the Philippines v. National Labor Relations Commission.* The COA contends that any attempt to classify the BSP as a private corporation would be incomprehensible since no less than the law which created it had designated it as a public corporation and its statutory mandate embraces performance of sovereign functions.[28]

The COA claims that the only reason why the BSP employees fell within the scope of the Civil Service Commission even before the 1987 Constitution was the fact that it was a government-owned or controlled corporation; that as an attached agency of the Department of Education, Culture and Sports (DECS), the BSP is an agency of the government; and that the

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[26] *Id.* at 61-82.

[27] *Id.* at 67.

[28] *Id.* at 70-71.

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BSP is a chartered institution under Section 1(12) of the Revised Administrative Code of 1987, embraced under the term government instrumentality.[29]

The COA concludes that being a government agency, the funds and property owned or held by the BSP are subject to the audit authority of the COA pursuant to Section 2(1), Article IX (D) of the 1987 Constitution.

In support of its arguments, the COA cites *The Veterans Federation of the Philippines (VFP) v. Reyes*,[30] wherein the Court held that among the reasons why the VFP is a public corporation is that its charter, Republic Act No. 2640, designates it as one. Furthermore, the COA quotes the Court as saying in that case:

> In several cases, we have dealt with the issue of whether certain specific activities can be classified as sovereign functions. These cases, which deal with activities not immediately apparent to be sovereign functions, upheld the public sovereign nature of operations needed either to promote social justice or to stimulate patriotic sentiments and love of country.
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> x x x x x x x x x
>
> Petitioner claims that its funds are not public funds because no budgetary appropriations or government funds have been released to the VFP directly or indirectly from the DBM, and because VFP funds come from membership dues and lease rentals earned from administering government lands reserved for the VFP.
>
> The fact that no budgetary appropriations have been released to the VFP does not prove that it is a private corporation. The DBM indeed did not see it fit to propose budgetary appropriations to the VFP, having itself believed that the VFP is a private corporation. If the DBM, however, is mistaken as to its conclusion regarding the nature of VFP's incorporation, its previous assertions will not prevent future budgetary appropriations to the VFP. The erroneous application

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[29] *Id.* at 72-73.

[30] G.R. No. 155027, February 28, 2006, 483 SCRA 426.

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of the law by public officers does not bar a subsequent correct application of the law.[31] (Citations omitted.)

The COA points out that the government is not precluded by law from extending financial support to the BSP and adding to its funds, and that "as a government instrumentality which continues to perform a vital function imbued with public interest and reflective of the government's policy to stimulate patriotic sentiments and love of country, the BSP's funds from whatever source are public funds, and can be used solely for public purpose in pursuance of the provisions of Republic Act No. [7278]."[32]

The COA claims that the fact that it has not yet audited the BSP's funds may not bar the subsequent exercise of its audit jurisdiction.

The BSP filed its **Reply**[33] on August 29, 2007 maintaining that its statutory designation as a "public corporation" and the public character of its purpose and functions are not determinative of the COA's audit jurisdiction; reiterating its stand that *Boy Scouts of the Philippines v. National Labor Relations Commission* is not applicable anymore because the aspect of government ownership and control has been removed by Republic Act No. 7278; and concluding that the funds and property that it either owned or held in trust are not public funds and are not subject to the COA's audit jurisdiction.

Thereafter, considering the BSP's claim that it is a private corporation, this Court, in a **Resolution**[34] dated July 20, 2010, required the parties to file, within a period of twenty (20) days from receipt of said Resolution, their respective comments on the issue of whether Commonwealth Act No. 111, as amended by Republic Act No. 7278, is constitutional.

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[31] *Id.* at 553-556.

[32] *Rollo*, p. 76.

[33] *Id.* at 86-104.

[34] *Id.* at 129-130.

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In compliance with the Court's resolution, the parties filed their respective Comments.

In its **Comment**[35] dated October 22, 2010, the COA argues that the constitutionality of Commonwealth Act No. 111, as amended, is not determinative of the resolution of the present controversy on the COA's audit jurisdiction over petitioner, and in fact, the controversy may be resolved on other grounds; thus, the requisites before a judicial inquiry may be made, as set forth in *Commissioner of Internal Revenue v. Court of Tax Appeals*,[36] have not been fully met.[37] Moreover, the COA maintains that behind every law lies the presumption of constitutionality.[38] The COA likewise argues that contrary to the BSP's position, repeal of a law by implication is not favored.[39] Lastly, the COA claims that there was no violation of Section 16, Article XII of the 1987 Constitution with the creation or declaration of the BSP as a government corporation. Citing *Philippine Society for the Prevention of Cruelty to Animals v. Commission on Audit*,[40] the COA further alleges:

> The true criterion, therefore, to determine whether a corporation is public or private is found in the totality of the relation of the corporation to the State. If the corporation is created by the State as the latter's own agency or instrumentality to help it in carrying out its governmental functions, then that corporation is considered public; otherwise, it is private. x x x.[41]

For its part, in its **Comment**[42] filed on December 3, 2010, the BSP submits that its charter, Commonwealth Act No. 111,

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[35] *Id.* at 143-159.

[36] G.R. No. 44007, March 20, 1991, 195 SCRA 444.

[37] *Rollo,* pp. 147-148.

[38] *Id.* at 149.

[39] *Id.* at 152.

[40] G.R. No. 169752, September 25, 2007, 534 SCRA 112.

[41] *Id.* at 132.

[42] The BSP's Comment, filed on December 3, 2010, has yet to be incorporated in the *rollo.*

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as amended by Republic Act No. 7278, is constitutional as it does not violate Section 16, Article XII of the Constitution. The BSP alleges that "while [it] is not a public corporation within the purview of COA's audit jurisdiction, neither is it a private corporation created by special law falling within the ambit of the constitutional prohibition x x x."[43] The BSP further alleges:

> Petitioner's purpose is embodied in Section 3 of C.A. No. 111, as amended by Section 1 of R.A. No. 7278, thus:
>
> x x x x x x x x x
>
> A reading of the foregoing provision shows that petitioner was created to advance the interest of the youth, specifically of young boys, and to mold them into becoming good citizens. Ultimately, the creation of petitioner redounds to the benefit, not only of those boys, but of the public good or welfare. Hence, it can be said that petitioner's purpose and functions are more of a public rather than a private character. Petitioner caters to all boys who wish to join the organization without any distinction. It does not limit its membership to a particular class of boys. Petitioner's members are trained in scoutcraft and taught patriotism, civic consciousness and responsibility, courage, self-reliance, discipline and kindred virtues, and moral values, preparing them to become model citizens and outstanding leaders of the country.[44]

The BSP reiterates its stand that the public character of its purpose and functions do not place it within the ambit of the audit jurisdiction of the COA as it lacks the government ownership or control that the Constitution requires before an entity may be subject of said jurisdiction.[45] It avers that it merely stated in its Reply that the withdrawal of government control is akin to privatization, but it does not necessarily mean that petitioner is a private corporation.[46] The BSP claims that it has a unique characteristic which "neither classifies it as a purely

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[43] *Id.* at 2.

[44] *Id.* at 3.

[45] *Id.* at 4.

[46] *Id.* at 6.

public nor a purely private corporation";[47] that it is not a quasi-public corporation; and that it may belong to a different class altogether.[48]

The BSP claims that assuming *arguendo* that it is a private corporation, its creation is not contrary to the purpose of Section 16, Article XII of the Constitution; and that the evil sought to be avoided by said provision is inexistent in the enactment of the BSP's charter,[49] as, (i) it was not created for any pecuniary purpose; (ii) those who will primarily benefit from its creation are not its officers but its entire membership consisting of boys being trained in scoutcraft all over the country; (iii) it caters to all boys who wish to join the organization without any distinction; and (iv) it does not limit its membership to a particular class or group of boys. Thus, the enactment of its charter confers no special privilege to particular individuals, families, or groups; nor does it bring about the danger of granting undue favors to certain groups to the prejudice of others or of the interest of the country, which are the evils sought to be prevented by the constitutional provision involved.[50]

Finally, the BSP states that the presumption of constitutionality of a legislative enactment prevails absent any clear showing of its repugnancy to the Constitution.[51]

The Ruling of the Court

After looking at the legislative history of its amended charter and carefully studying the applicable laws and the arguments of both parties, we find that the BSP is a public corporation and its funds are subject to the COA's audit jurisdiction.

The BSP Charter (Commonwealth Act No. 111, approved on October 31, 1936), entitled "*An Act to Create a Public*

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[47] *Id.* at 7.

[48] *Id.* at 8.

[49] *Id.*

[50] *Id.* at 9.

[51] *Id.* at 13, citing 16 Am Jur 2d 645 and 647.

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Corporation to be Known as the Boy Scouts of the Philippines, and to Define its Powers and Purposes" created the BSP as a "public corporation" to serve the following public interest or purpose:

Sec. 3. The purpose of this corporation shall be to promote through organization and cooperation with other agencies, the ability of boys to do useful things for themselves and others, to train them in scoutcraft, and to inculcate in them patriotism, civic consciousness and responsibility, courage, self-reliance, discipline and kindred virtues, and moral values, using the method which are in common use by boy scouts.

Presidential Decree No. 460, approved on May 17, 1974, amended Commonwealth Act No. 111 and provided substantial changes in the BSP organizational structure. Pertinent provisions are quoted below:

Section II. Section 5 of the said Act is also amended to read as follows:

The governing body of the said corporation shall consist of a National Executive Board composed of (a) the President of the Philippines or his representative; (b) the charter and life members of the Boy Scouts of the Philippines; (c) the Chairman of the Board of Trustees of the Philippine Scouting Foundation; (d) the Regional Chairman of the Scout Regions of the Philippines; (e) the Secretary of Education and Culture, the Secretary of Social Welfare, the Secretary of National Defense, the Secretary of Labor, the Secretary of Finance, the Secretary of Youth and Sports, and the Secretary of Local Government and Community Development; (f) an equal number of individuals from the private sector; (g) the National President of the Girl Scouts of the Philippines; (h) one Scout of Senior age from each Scout Region to represent the boy membership; and (i) three representatives of the cultural minorities. Except for the Regional Chairman who shall be elected by the Regional Scout Councils during their annual meetings, and the Scouts of their respective regions, all members of the National Executive Board shall be either by appointment or cooption, subject to ratification and confirmation by the Chief Scout, who shall be the Head of State. Vacancies in the Executive Board shall be filled by a majority vote of the remaining members, subject to ratification and confirmation by the Chief Scout. The by-laws may prescribe the number of members of the National Executive Board necessary to constitute

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a quorum of the board, which number may be less than a majority of the whole number of the board. The National Executive Board shall have power to make and to amend the by-laws, and, by a two-thirds vote of the whole board at a meeting called for this purpose, may authorize and cause to be executed mortgages and liens upon the property of the corporation.

Subsequently, on March 24, 1992, Republic Act No. 7278 further amended Commonwealth Act No. 111 "by strengthening the volunteer and democratic character" of the BSP and reducing government representation in its governing body, as follows:

Section 1. Sections 2 and 3 of Commonwealth Act. No. 111, as amended, is hereby amended to read as follows:

"Sec. 2. The said corporation shall have the powers of perpetual succession, to sue and be sued; to enter into contracts; to acquire, own, lease, convey and dispose of such real and personal estate, land grants, rights and choses in action as shall be necessary for corporate purposes, and to accept and receive funds, real and personal property by gift, devise, bequest or other means, to conduct fund-raising activities; to adopt and use a seal, and the same to alter and destroy; to have offices and conduct its business and affairs in Metropolitan Manila and in the regions, provinces, cities, municipalities, and barangays of the Philippines, to make and adopt by-laws, rules and regulations not inconsistent with this Act and the laws of the Philippines, and generally to do all such acts and things, including the establishment of regulations for the election of associates and successors, as may be necessary to carry into effect the provisions of this Act and promote the purposes of said corporation: Provided, That said corporation shall have no power to issue certificates of stock or to declare or pay dividends, its objectives and purposes being solely of benevolent character and not for pecuniary profit of its members.

"Sec. 3. **The purpose of this corporation shall be to promote through organization and cooperation with other agencies, the ability of boys to do useful things for themselves and others, to train them in scoutcraft, and to inculcate in them patriotism, civic consciousness and responsibility, courage, self-reliance, discipline and kindred virtues, and moral values, using the method which are in common use by boy scouts**."

Sec. 2. Section 4 of Commonwealth Act No. 111, as amended, is hereby repealed and in lieu thereof, Section 4 shall read as follows:

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"Sec. 4. The President of the Philippines shall be the Chief Scout of the Boy Scouts of the Philippines."

Sec. 3. Sections 5, 6, 7 and 8 of Commonwealth Act No. 111, as amended, are hereby amended to read as follows:

"Sec. 5. **The governing body of the said corporation shall consist of a National Executive Board**, the members of which shall be Filipino citizens of good moral character. **The Board shall be composed of the following**:

"(a) One (1) charter member of the Boy Scouts of the Philippines who shall be elected by the members of the National Council at its meeting called for this purpose;

"(b) The regional chairmen of the scout regions who shall be elected by the representatives of all the local scout councils of the region during its meeting called for this purpose: Provided, That a candidate for regional chairman need not be the chairman of a local scout council;

"(c) **The Secretary of Education, Culture and Sports**;

"(d) The National President of the Girl Scouts of the Philippines;

"(e) One (1) senior scout, each from Luzon, Visayas and Mindanao areas, to be elected by the senior scout delegates of the local scout councils to the scout youth forums in their respective areas, in its meeting called for this purpose, to represent the boy scout membership;

"(f) Twelve (12) regular members to be elected by the members of the National Council in its meeting called for this purpose;

"(g) At least ten (10) but not more than fifteen (15) additional members from the private sector who shall be elected by the members of the National Executive Board referred to in the immediately preceding paragraphs (a), (b), (c), (d), (e) and (f) at the organizational meeting of the newly reconstituted National Executive Board which shall be held immediately after the meeting of the National Council wherein the twelve (12) regular members and the one (1) charter member were elected.

x x x x x x x x x

"Sec. 8. Any donation or contribution which from time to time may be made to the Boy Scouts of the Philippines by the Government or any of its subdivisions, branches, offices, agencies or instrumentalities or by a foreign government or by private, entities

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and individuals shall be expended by the National Executive Board in pursuance of this Act.

The BSP as a Public Corporation under Par. 2, Art. 2 of the Civil Code

There are three classes of juridical persons under Article 44 of the Civil Code and the BSP, as presently constituted under Republic Act No. 7278, **falls under the second classification**. Article 44 reads:

Art. 44. The following are juridical persons:

(1) The State and its political subdivisions;

(2) **Other corporations, institutions and entities for public interest or purpose created by law; their personality begins as soon as they have been constituted according to law**;

(3) Corporations, partnerships and associations for **private interest or purpose** to which the law grants a juridical personality, separate and distinct from that of each shareholder, partner or member. (Emphases supplied.)

The BSP, which is a corporation created for a public interest or purpose, is subject to the law creating it under Article 45 of the Civil Code, which provides:

Art. 45. Juridical persons mentioned in Nos. 1 and 2 of the preceding article are governed by the laws creating or recognizing them.

Private corporations are regulated by laws of general application on the subject.

Partnerships and associations for private interest or purpose are governed by the provisions of this Code concerning partnerships. (Emphasis and underscoring supplied.)

The purpose of the BSP as stated in its amended charter shows that it was created in order to implement a State policy declared in Article II, Section 13 of the Constitution, which reads:

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ARTICLE II - DECLARATION OF PRINCIPLES AND STATE POLICIES

Section 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

Evidently, the BSP, which was created by a special law to serve a public purpose in pursuit of a constitutional mandate, comes within the class of "public corporations" defined by paragraph 2, Article 44 of the Civil Code and governed by the law which creates it, pursuant to Article 45 of the same Code.

The BSP's Classification Under the Administrative Code of 1987

The public, rather than private, character of the BSP is recognized by the fact that, along with the Girl Scouts of the Philippines, it is classified as an **attached agency** of the DECS under Executive Order No. 292, or the **Administrative Code of 1987**, which states:

TITLE VI – EDUCATION, CULTURE AND SPORTS

Chapter 8 – Attached Agencies

SEC. 20. ***Attached Agencies***. – The following agencies are hereby attached to the Department:

x x x x x x x x x

(12) **Boy Scouts of the Philippines**;

(13) Girl Scouts of the Philippines.

The administrative relationship of an attached agency to the department is defined in the Administrative Code of 1987 as follows:

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BOOK IV

THE EXECUTIVE BRANCH

Chapter 7 – ADMINISTRATIVE RELATIONSHIP

SEC. 38. *Definition of Administrative Relationship*. – Unless otherwise expressly stated in the Code or in other laws defining the special relationships of particular agencies, administrative relationships shall be categorized and defined as follows:

x x x x x x x x x

(3) ***Attachment***. – (a) This refers to the lateral relationship between the department or its equivalent and the attached agency or corporation **for purposes of policy and program coordination**. **The coordination may be accomplished by having the department represented in the governing board of the attached agency or corporation, either as chairman or as a member, with or without voting rights, if this is permitted by the charter;** having the attached corporation or agency comply with a system of periodic reporting which shall reflect the progress of programs and projects; and having the department or its equivalent provide general policies through its representative in the board, which shall serve as the framework for the internal policies of the attached corporation or agency. (Emphasis ours.)

As an attached agency, the BSP enjoys operational autonomy, as long as policy and program coordination is achieved by having **at least one representative of government in its governing board**, which in the case of the BSP is the DECS Secretary. In this sense, the BSP is not under government control or "supervision and control." Still this characteristic does not make the attached chartered agency a private corporation covered by the constitutional proscription in question.

Art. XII, Sec. 16 of the Constitution refers to "private corporations" created by government for proprietary or economic/business purposes

At the outset, it should be noted that the provision of Section 16 in issue is found in **Article XII** of the Constitution, entitled "**National Economy and Patrimony**." Section 1 of Article XII is quoted as follows:

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SECTION 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

The scope and coverage of Section 16, Article XII of the Constitution can be seen from the aforementioned declaration of state policies and goals which pertains to **national economy** and **patrimony** and the **interests of the people in economic development**.

Section 16, Article XII deals with "**the formation, organization, or regulation of private corporations**,"[52] which should be done through a general law enacted by Congress, provides for an exception, that is: if the corporation is government owned or controlled; its creation is in the interest of the common good; and it meets the test of economic viability. The rationale behind Article XII, Section 16 of the 1987 Constitution was explained in *Feliciano v. Commission on Audit*,[53] in the following manner:

The Constitution emphatically prohibits the creation of private corporations except by a general law applicable to all citizens. **The**

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[52] Record of the 1986 Constitutional Commission, Vol. 3, August 13, 1986, p. 260.

[53] 464 Phil. 439 (2004).

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purpose of this constitutional provision is to ban private corporations created by special charters, which historically gave certain individuals, families or groups special privileges denied to other citizens.[54] (Emphasis added.)

It may be gleaned from the above discussion that Article XII, Section 16 bans the creation of "**private corporations**" by special law. The said constitutional provision should not be construed so as to prohibit the creation of **public corporations** or a corporate agency or instrumentality of the government intended to serve a public interest or purpose, which should not be measured on the basis of economic viability, but according to the public interest or purpose it serves as envisioned by **paragraph (2), of Article 44 of the Civil Code** and the pertinent provisions of the **Administrative Code of 1987**.

The BSP is a Public Corporation Not Subject to the Test of Government Ownership or Control and Economic Viability

The BSP is a public corporation or a government agency or instrumentality with juridical personality, which does not fall within the constitutional prohibition in Article XII, Section 16, notwithstanding the amendments to its charter. Not all corporations, which are **not** government owned or controlled, are *ipso facto* to be considered private corporations as there exists another distinct class of corporations or chartered institutions which are otherwise known as "public corporations." These corporations are treated by law as agencies or instrumentalities of the government which are not subject to the tests of ownership or control and economic viability but to different criteria relating to their public purposes/interests or constitutional policies and objectives and their administrative relationship to the government or any of its Departments or Offices.

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[54] *Id.* at 454, citing Bernas, *The 1987 Constitution of the Republic of the Philippines*: A Commentary 1181 (2003).

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Classification of Corporations Under Section 16, Article XII of the Constitution on National Economy and Patrimony

The dissenting opinion of Associate Justice Antonio T. Carpio, citing a line of cases, insists that the Constitution recognizes only two classes of corporations: *private* corporations under a **general** law, and *government-owned or controlled corporations* created by **special** charters.

We strongly disagree. Section 16, Article XII should not be construed so as to prohibit Congress from creating public corporations. In fact, Congress has enacted numerous laws creating public corporations or government agencies or instrumentalities vested with corporate powers. Moreover, Section 16, Article XII, which relates to National Economy and Patrimony, could not have tied the hands of Congress in creating public corporations to serve any of the constitutional policies or objectives.

In his dissent, Justice Carpio contends that this *ponente* introduces "a totally different species of corporation, which is neither a private corporation nor a government owned or controlled corporation" and, in so doing, is missing the fact that the BSP, "which was created as a non-stock, non-profit corporation, can only be either a private corporation or a government owned or controlled corporation."

Note that in *Boy Scouts of the Philippines v. National Labor Relations Commission*, the BSP, under its former charter, was regarded as both a government owned or controlled corporation with original charter **and** a "public corporation." The said case pertinently stated:

While the BSP may be seen to be a mixed type of entity, combining aspects of both public and private entities, we believe that considering the character of its purposes and its functions, the statutory designation of the BSP as "**a public corporation**" **and** the substantial participation of the Government in the selection of members of the National Executive Board of the BSP, the BSP, as presently

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constituted under its charter, is **a government-controlled corporation** within the meaning of Article IX (B) (2) (1) of the Constitution.

We are fortified in this conclusion when we note that the Administrative Code of 1987 designates the BSP as one of the attached agencies of the Department of Education, Culture and Sports ("DECS"). An "agency of the Government" is defined as referring to any of the various units of the Government including a department, bureau, office, instrumentality, government-owned or controlled corporation, or local government or distinct unit therein. "Government instrumentality" is in turn defined in the 1987 Administrative Code in the following manner:

> *Instrumentality* - refers to any agency of the National Government, not integrated within the department framework, vested with special functions or jurisdiction by law, **endowed with some if not all corporate powers**, administering special funds, and enjoying operational autonomy usually through a charter. This term includes regulatory agencies, chartered institutions and government-owned or controlled corporations.

The same Code describes a "chartered institution" in the following terms:

> *Chartered institution* - refers to any **agency organized or operating under a special charter**, and vested by law with functions relating to specific constitutional policies or objectives. This term includes the state universities and colleges, and the monetary authority of the State.

We believe that the BSP is appropriately regarded as "a government instrumentality" under the 1987 Administrative Code.

It thus appears that the BSP may be regarded as both a "government controlled corporation with an original charter" and as an "instrumentality" of the Government within the meaning of Article IX (B) (2) (1) of the Constitution. x x x.[55] (Emphases supplied.)

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[55] *Boy Scouts of the Philippines v. National Labor Relations Commission, supra* note 6 at 186-187.

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The existence of public or government corporate or juridical entities or chartered institutions by legislative fiat distinct from private corporations and government owned or controlled corporation is best exemplified by the 1987 Administrative Code cited above, which we quote in part:

> Sec. 2. *General Terms Defined*. – Unless the specific words of the text, or the context as a whole, or a particular statute, shall require a different meaning:
>
> x x x x x x x x x
>
> (10) "**Instrumentality**" refers to any agency of the National Government, not integrated within the department framework, vested with special functions or jurisdiction by law, **endowed with some if not all corporate powers,** administering special funds, and **enjoying operational autonomy, usually through a charter.** This term includes regulatory agencies, chartered institutions and government-owned or controlled corporations.
>
> x x x x x x x x x
>
> (12) "**Chartered institution**" refers to any agency organized or operating under a special charter, and vested by law with functions **relating to specific constitutional policies or objectives**. This term includes the state universities and colleges and the monetary authority of the State.
>
> (13) "**Government-owned or controlled corporation**" refers to any agency organized as a stock or non-stock corporation, vested with functions relating to public needs whether **governmental or proprietary in nature**, and owned by the Government directly or through its instrumentalities either wholly, or, where applicable as in the case of stock corporations, to the extent of at least fifty-one (51) per cent of its capital stock: Provided, **That government-owned or controlled corporations may be further categorized by the Department of the Budget, the Civil Service Commission, and the Commission on Audit for purposes of the exercise and discharge of their respective powers, functions and responsibilities with respect to such corporations**.

Assuming for the sake of argument that the BSP ceases to be owned or controlled by the government because of reduction of the number of representatives of the government in the BSP

Board, it does not follow that it also ceases to be a government instrumentality as it still retains all the characteristics of the latter as an attached agency of the DECS under the Administrative Code. Vesting corporate powers to an attached agency or instrumentality of the government is not constitutionally prohibited and is allowed by the above-mentioned provisions of the Civil Code and the 1987 Administrative Code.

Economic Viability and Ownership and Control Tests Inapplicable to Public Corporations

As presently constituted, the BSP still remains an **instrumentality** of the national government. It is a public corporation created by law for a public purpose, attached to the DECS pursuant to its Charter and the Administrative Code of 1987. It is not a private corporation which is required to be owned or controlled by the government and be economically viable to justify its existence under a special law.

The dissent of Justice Carpio also submits that by recognizing "a new class of public corporation(s)" created by special charter that will not be subject to the test of economic viability, the constitutional provision will be circumvented.

However, a review of the Record of the 1986 Constitutional Convention reveals the intent of the framers of the highest law of our land to distinguish between **government corporations performing governmental functions and corporations involved in business or proprietary functions**:

THE PRESIDENT. Commissioner Foz is recognized.

MR. FOZ. Madam President, I support the proposal to insert "ECONOMIC VIABILITY" as one of the grounds for organizing government corporations. x x x.

MR. OPLE. Madam President, the reason for this concern is really that when the government creates a corporation, there is a sense in which this corporation becomes exempt from the test of economic

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performance. We know what happened in the past. If a government corporation loses, then it makes its claim upon the taxpayers' money through new equity infusions from the government and what is always invoked is the common good. x x x

Therefore, when we insert the phrase "ECONOMIC VIABILITY" together with the "common good," this becomes a restraint on future enthusiasts for state capitalism to excuse themselves from the responsibility of meeting the market test so that they become viable. x x x.

x x x x x x x x x

THE PRESIDENT. Commissioner Quesada is recognized.

MS. QUESADA. Madam President, may we be clarified by the committee on what is meant by economic viability?

THE PRESIDENT. Please proceed.

MR. MONSOD. Economic viability normally is determined by cost-benefit ratio that takes into consideration all benefits, including economic external as well as internal benefits. These are what they call externalities in economics, so that these are not strictly financial criteria. Economic viability involves what we call economic returns or benefits of the country that are not quantifiable in financial terms. x x x.

x x x x x x x x x

MS. QUESADA. So, would this particular formulation now really limit the entry of government corporations into activities engaged in by corporations?

MR. MONSOD. **Yes, because it is also consistent with the economic philosophy that this Commission approved – that there should be minimum government participation and intervention in the economy**.

MS. QUESDA (sic). Sometimes this Commission would just refer to Congress to provide the particular requirements when the government

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would get into corporations. But this time around, we specifically mentioned economic viability. x x x.

MR. VILLEGAS. Commissioner Ople will restate the reason for his introducing that amendment.

MR. OPLE. I am obliged to repeat what I said earlier in moving for this particular amendment jointly with Commissioner Foz. During the past three decades, there had been a proliferation of government corporations, very few of which have succeeded, and many of which are now earmarked by the Presidential Reorganization Commission for liquidation because they failed the economic test. x x x.

x x x x x x x x x

MS. QUESADA. But would not the Commissioner say that the reason why many of the government-owned or controlled corporations failed to come up with the economic test is due to the management of these corporations, and not the idea itself of government corporations? It is a problem of efficiency and effectiveness of management of these corporations which could be remedied, not by eliminating government corporations or the idea of getting into state-owned corporations, but improving management which our technocrats should be able to do, given the training and the experience.

MR. OPLE. That is part of the economic viability, Madam President.

MS. QUESADA. So, is the Commissioner saying then that the Filipinos will benefit more if these government-controlled corporations were given to private hands, and that there will be more goods and services that will be affordable and within the reach of the ordinary citizens?

MR. OPLE. Yes. There is nothing here, Madam President, that will prevent the formation of a government corporation in accordance with a special charter given by Congress. However, we are raising the standard a little bit so that, in the future, corporations established by the government will meet the test of the common good but within that framework we should also build a certain standard of economic viability.

x x x x x x x x x

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THE PRESIDENT. Commissioner Padilla is recognized.

MR. PADILLA. This is an inquiry to the committee. With regard to corporations created by a special charter for government-owned or controlled corporations, will these be in the pioneer fields or in places where the private enterprise does not or cannot enter? Or is this so general that these government corporations can compete with private corporations organized under a general law?

MR. MONSOD. Madam President, x x x. **There are two types of government corporations –** those that are involved in **performing governmental functions**, like garbage disposal, Manila waterworks, and so on; and those government corporations that are **involved in business functions**. As we said earlier, there are **two criteria that should be followed for corporations that want to go into business. First** is for government corporations to first prove that they can be efficient in the areas of their proper functions. This is one of the problems now because they go into all kinds of activities but are not even efficient in their proper functions. **Secondly**, they should not go into activities that the private sector can do better.

MR. PADILLA. There is no question about corporations performing governmental functions or functions that are impressed with public interest. But the question is with regard to matters that are covered, perhaps not exhaustively, by private enterprise. It seems that under this provision the only qualification is economic viability and common good, but shall government, through government-controlled corporations, compete with private enterprise?

MR. MONSOD. No, Madam President. As we said, the government should not engage in activities that private enterprise is engaged in and can do better. x x x.[56] (Emphases supplied.)

Thus, the test of economic viability clearly does not apply to public corporations dealing with governmental functions, to which category the BSP belongs. The discussion above conveys the constitutional intent not to apply this constitutional

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[56] Record of the 1986 Constitutional Commission, Vol. 3, August 22, 1986, pp. 623-626.

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ban on the creation of public corporations where the economic viability test would be irrelevant. The said test would only apply if the corporation is engaged in some economic activity or business function for the government.

It is undisputed that the BSP performs functions that are impressed with public interest. In fact, during the consideration of the Senate Bill that eventually became Republic Act No. 7278, which amended the BSP Charter, one of the bill's sponsors, Senator Joey Lina, described the BSP as follows:

> **Senator Lina.** Yes, I can only think of two organizations involving the masses of our youth, Mr. President, that should be given this kind of a privilege – the Boy Scouts of the Philippines and the Girl Scouts of the Philippines. Outside of these two groups, I do not think there are other groups similarly situated.
>
> **The Boy Scouts of the Philippines has a long history of providing value formation to our young, and considering how huge the population of the young people is, at this point in time, and also considering the importance of having an organization such as this that will inculcate moral uprightness among the young people, and further considering that the development of these young people at that tender age of seven to sixteen is vital in the development of the country producing good citizens**, I believe that we can make an exception of the Boy Scouting movement of the Philippines from this general prohibition against providing tax exemption and privileges.[57]

Furthermore, this Court cannot agree with the dissenting opinion which equates the changes introduced by Republic Act No. 7278 to the BSP Charter as clear manifestation of the intent of Congress "to return the BSP to the private sector." It was not the intent of Congress in enacting Republic Act No. 7278 to give up all interests in this basic youth organization, which has been its partner in forming responsible citizens for decades.

In fact, as may be seen in the deliberation of the House Bills that eventually resulted to Republic Act No. 7278, Congress

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[57] Record of the Senate, Monday, November 5, 1990, p. 1533.

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worked closely with the BSP to rejuvenate the organization, to bring it back to its former glory reached under its original charter, Commonwealth Act No. 111, and to correct the perceived ills introduced by the amendments to its Charter under Presidential Decree No. 460. The BSP suffered from low morale and decrease in number because the Secretaries of the different departments in government who were too busy to attend the meetings of the BSP's National Executive Board ("the Board") sent representatives who, as it turned out, changed from meeting to meeting. Thus, the Scouting Councils established in the provinces and cities were not in touch with what was happening on the national level, but they were left to implement what was decided by the Board.[58]

A portion of the legislators' discussion is quoted below to clearly show their intent:

HON. DEL MAR. x x x **I need not mention to you the value and the tremendous good that the Boy Scout Movement has done not only for the youth in particular but for the country in general. And that is why, if we look around, our past and present national leaders, prominent men in the various fields of endeavor, public servants in government offices, and civic leaders in the communities all over the land, and not only in our country but all over the world many if not most of them have at one time or another been beneficiaries of the Scouting Movement**. And so, it is along this line, Mr. Chairman, that we would like to have the early approval of this measure if only to pay back what we owe much to the Scouting Movement. Now, going to the meat of the matter, Mr. Chairman, if I may just – the Scouting Movement was enacted into law in October 31, 1936 under Commonwealth Act No. 111. x x x [W]e were acknowledged as the third biggest scouting organization in the world x x x. And to our mind, Mr. Chairman, this erratic growth and this decrease in membership [number] is because of the bad policy measures that were enunciated with the enactment or promulgation by the President before of Presidential Decree No. 460 which we feel is the culprit of the ills that is flagging the Boy Scout Movement today. And so, this is specifically what we are attacking, Mr. Chairman, the disenfranchisement of the National Council in the election of the

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[58] Committee on Government Enterprises, February 13, 1991, pp. 8-11.

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national board. x x x. And so, this is what we would like to be appraised of by the officers of the Boy [Scouts] of the Philippines whom we are also confident, have the best interest of the Boy Scout Movement at heart and it is in this spirit, Mr. Chairman, that we see no impediment towards working together, the Boy Scout of the Philippines officers working together with the House of Representatives in coming out with a measure that will put back the vigor and enthusiasm of the Boy Scout Movement. x x x.[59] (Emphasis ours.)

The following is another excerpt from the discussion on the House version of the bill, in the Committee on Government Enterprises:

HON. AQUINO: x x x Well, obviously, the two bills as well as the previous laws that have created the Boy Scouts of the Philippines did not provide for any direct government support by way of appropriation from the national budget to support the activities of this organization. The point here is, and at the same time they have been subjected to a governmental intervention, which to their mind has been inimical to the objectives and to the institution per se, that is why they are seeking legislative fiat to restore back the original mandate that they had under Commonwealth Act 111. **Such having been the experience in the hands of government, meaning, there has been negative interference on their part and inasmuch as their mandate is coming from a legislative fiat, then shouldn't it be, this rhetorical question, shouldn't it be better for this organization to seek a mandate from, let's say, the government the Corporation Code of the Philippines and register with the SEC as non-profit non-stock corporation so that government intervention could be very very minimal**. Maybe that's a rhetorical question, they may or they may not answer, ano. I don't know what would be the benefit of a charter or a mandate being provided for by way of legislation versus a registration with the SEC under the Corporation Code of the Philippines inasmuch as they don't get anything from the government anyway insofar as direct funding. In fact, the only thing that they got from government was intervention in their affairs. Maybe we can solicit some commentary comments from the resource persons. Incidentally, don't take that as an objection, I'm not objecting. I'm all for the objectives of these two bills. It just

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[59] *Id.* at 5-8.

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occurred to me that since you have had very bad experience in the hands of government and you will always be open to such possible intervention even in the future as long as you have a legislative mandate or your mandate or your charter coming from legislative action.

x x x x x x x x x

MR. ESCUDERO: **Mr. Chairman, there may be a disadvantage if the Boy Scouts of the Philippines will be required to register with the SEC.** If we are registered with the SEC, there could be a danger of proliferation of scout organization. Anybody can organize and then register with the SEC. If there will be a proliferation of this, then the organization will lose control of the entire organization. Another disadvantage, Mr. Chairman, anybody can file a complaint in the SEC against the Boy Scouts of the Philippines and the SEC may suspend the operation or freeze the assets of the organization and hamper the operation of the organization. I don't know, Mr. Chairman, how you look at it but there could be a danger for anybody filing a complaint against the organization in the SEC and the SEC might suspend the registration permit of the organization and we will not be able to operate.

HON. AQUINO: Well, that I think would be a problem that will not be exclusive to corporations registered with the SEC because even if you are government corporation, court action may be taken against you in other judicial bodies because the SEC is simply another quasi-judicial body. **But, I think, the first point would be very interesting, the first point that you raised. In effect, what you are saying is that with the legislative mandate creating your charter, in effect, you have been given some sort of a franchise with this movement.**

MR. ESCUDERO: Yes.

HON. AQUINO: Exclusive franchise of that movement?

MR. ESCUDERO: Yes.

HON. AQUINO: Well, that's very well taken so I will proceed with other issues, Mr. Chairman. x x x.[60] (Emphases added.)

Therefore, even though the amended BSP charter did away with most of the governmental presence in the BSP Board,

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[60] *Id.* at 35-37.

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this was done to more strongly promote the BSP's objectives, which were not supported under Presidential Decree No. 460. The BSP objectives, as pointed out earlier, are consistent with the **public purpose** of the promotion of the well-being of the youth, the future leaders of the country. The amendments were **not** done with the view of changing the character of the BSP into a privatized corporation. The BSP remains an agency attached to a department of the government, the DECS, and it was not at all stripped of its public character.

The ownership and control test is likewise irrelevant for a public corporation like the BSP. To reiterate, the relationship of the BSP, an attached agency, to the government, through the DECS, is defined in the Revised Administrative Code of 1987. The BSP meets the minimum statutory requirement of an attached government agency as the DECS Secretary sits at the BSP Board *ex officio,* thus facilitating the policy and program coordination between the BSP and the DECS.

Requisites for Declaration of Unconstitutionality Not Met in this Case

The dissenting opinion of Justice Carpio improperly raised the issue of unconstitutionality of certain provisions of the BSP Charter. Even if the parties were asked to Comment on the validity of the BSP charter **by the Court**, this alone does not comply with the requisites for judicial review, which were clearly set forth in a recent case:

> When questions of constitutional significance are raised, the Court can exercise its power of judicial review only if the following requisites are present: **(1) the existence of an actual and appropriate case; (2) the existence of personal and substantial interest on the part of the party raising the constitutional question; (3) recourse to judicial review is made at the earliest opportunity; and (4) the constitutional question is the *lis mota* of the case**.[61] (Emphasis added.)

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[61] *Hon. Luis Mario M. General v. Hon. Alejandro S. Urro*, G.R. No. 191560, March 29, 2011, citing *Integrated Bar of the Philippines v. Zamora*, 392 Phil. 618, 632 (2000).

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Thus, when it comes to the exercise of the power of judicial review, the constitutional issue should be the very *lis mota*, or threshold issue, of the case, and that it should be raised by either of the parties. These requirements would be ignored under the dissent's rather overreaching view of how this case should have been decided. True, it was the Court that asked the parties to comment, but the Court cannot be the one to raise a constitutional issue. Thus, the Court chooses to once more exhibit restraint in the exercise of its power to pass upon the validity of a law.

Re: the COA's Jurisdiction

Regarding the COA's jurisdiction over the BSP, Section 8 of its amended charter allows the BSP to receive contributions or donations from the government. Section 8 reads:

> Section 8. **Any donation or contribution which from time to time may be made to the Boy Scouts of the Philippines by the Government or any of its subdivisions, branches, offices, agencies or instrumentalities shall be expended by the Executive Board in pursuance of this Act.**

The sources of funds to maintain the BSP were identified before the House Committee on Government Enterprises while the bill was being deliberated, and the pertinent portion of the discussion is quoted below:

> MR. ESCUDERO. Yes, Mr. Chairman. The question is the sources of funds of the organization. First, Mr. Chairman, the Boy Scouts of the Philippines do not receive annual allotment from the government. The organization has to raise its own funds through fund drives and fund campaigns or fund raising activities. Aside from this, we have some revenue producing projects in the organization that gives us funds to support the operation. x x x From time to time, Mr. Chairman, when we have special activities we request for assistance or financial assistance from government agencies, from private business and corporations, but this is only during special activities that the Boy Scouts of the Philippines would conduct during the year. Otherwise, we have to raise our own funds to support the organization.[62]

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[62] Committee on Government Enterprises, February 13, 1991, p. 16.

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The nature of the funds of the BSP and the COA's audit jurisdiction were likewise brought up in said congressional deliberations, to wit:

HON. AQUINO: x x x Insofar as this organization being a government created organization, in fact, a government corporation classified as such, are your funds or your finances subjected to the COA audit?

MR. ESCUDERO: Mr. Chairman, we are not. Our funds is not subjected. We don't fall under the jurisdiction of the COA.

HON. AQUINO: All right, but before were you?

MR. ESCUDERO: No, Mr. Chairman.

MR. JESUS: May I? As historical backgrounder, Commonwealth Act 111 was written by then Secretary Jorge Vargas and before and up to the middle of the Martial Law years, the BSP was receiving a subsidy in the form of an annual… a one draw from the Sweepstakes. And, this was the case also with the Girl Scouts at the Anti-TB, but then this was… and **the Boy Scouts then because of this funding partly from government was being subjected to audit in the contributions being made in the part of the Sweepstakes.** But this was removed later during the Martial Law years with the creation of the Human Settlements Commission. So the situation right now is that the Boy Scouts does not receive any funding from government, but then in the case of the local councils and this legislative charter, so to speak, enables the local councils even the national headquarters in view of the provisions in the existing law to receive donations from the government or any of its instrumentalities, which would be difficult if the Boy Scouts is registered as a private corporation with the Securities and Exchange Commission. Government bodies would be estopped from making donations to the Boy Scouts, which at present is not the case because there is the Boy Scouts charter, this Commonwealth Act 111 as amended by PD 463.

x x x x x x x x x

HON. AMATONG: Mr. Chairman, in connection with that.

THE CHAIRMAN: Yeah, Gentleman from Zamboanga.

HON. AMATONG: There is no auditing being made because there's no money put in the organization, but how about donated funds to

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this organization? What are the remedies of the donors of how will they know how their money are being spent?

MR. ESCUDERO: May I answer, Mr. Chairman?

THE CHAIRMAN: Yes, gentleman.

MR. ESCUDERO: The Boy Scouts of the Philippines has an external auditor and by the charter we are required to submit a financial report at the end of each year to the National Executive Board. So all the funds donated or otherwise is accounted for at the end of the year by our external auditor. In this case the SGV.[63]

Historically, therefore, the BSP had been subjected to government audit in so far as public funds had been infused thereto. However, this practice should not preclude the exercise of the audit jurisdiction of COA, clearly set forth under the Constitution, which pertinently provides:

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 and 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 with original charters 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 of the granting institution to submit to such audit as a condition of subsidy or equity. x x x.[64]

Since the BSP, under its amended charter, continues to be a public corporation or a government instrumentality, we come to the inevitable conclusion that it is subject to the exercise by

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[63] *Id.* at 37-39.

[64] 1987 Constitution, Article IX (D).

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the COA of its audit jurisdiction in the manner consistent with the provisions of the BSP Charter.

WHEREFORE, premises considered, the instant petition for prohibition is *DISMISSED*.

SO ORDERED.

Corona, C.J., Velasco, Jr., Nachura, Brion, Peralta, Bersamin, del Castillo, Abad, Villarama, Jr., and *Mendoza, JJ.*, concur.

Carpio, J., see dissenting opinion.

Carpio Morales, Perez, and *Sereno, JJ.*, join *J.* Carpio's dissent.

DISSENTING OPINION

CARPIO, *J.*:

I dissent.

The Boy Scouts of the Philippines (BSP) is neither a government-owned or controlled corporation nor a government instrumentality subject to the Commission on Audit's (COA) jurisdiction. The BSP is a private, non-stock, and non-profit corporation beyond the COA's audit jurisdiction.

I.
COA's Audit Jurisdiction

Section 2(1), Article IX-D of the Constitution provides for COA's audit jurisdiction, as follows:

> 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 and 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

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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.

Based on this Constitutional provision, the COA exercises jurisdiction on a pre-audit basis over the (1) Government, (2) any of its subdivisions, (3) agencies, (4) instrumentalities, and (5) GOCCs with original charters.

The COA also has jurisdiction on a post-audit basis over (1) constitutional bodies, commissions and offices that have been granted fiscal autonomy under the Constitution; (2) autonomous state colleges and universities; (3) other GOCCs[1] and their subsidiaries; and (4) 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.

Hence, if an entity is properly identified and categorized as among those enumerated in Section 2(1), Article IX-D of the Constitution, then the COA can indisputably "examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property" of that particular entity.

II.
History of the BSP

The Boy Scouts of the Philippines began in 1923 with the establishment of the Philippine Council of the Boy Scouts of

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[1] These are GOCCs without original charters which refer to corporations created under the Corporation Code but are owned or controlled by the government. (*Feliciano v. Commission on Audit,* 464 Phil. 439 [2004])

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America, when the Philippines was an American possession at the time.[2]

On 31 October 1936, the Philippine National Assembly enacted Commonwealth Act No. 111, or *An Act to Create a Public Corporation to be Known as the Boy Scouts of the Philippines, and to Define its Powers and Purposes*, the pertinent provisions of which read:

Section 1. J. E. H. Stevenot, A. N. Luz, C. P. Romulo, Vicente Lim, Manuel Camus, Jorge B. Vargas, and G. A. Daza; all of Manila, Philippines, their associates and successors, are hereby created a body corporate and politic in deed and in law, by the name, style and title of "Boy Scouts of the Philippines" (hereinafter called the corporation). x x x

Section 3. The purpose of this corporation shall be to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by boy scouts.

Section 4. Until such time as the corporation shall have acquired by purchase, gift or other equitable arrangement from and with the Boy Scouts of America all of the existing assets and properties of the aforesaid Boy Scouts of America in the Philippines, it shall carry on its operations in accordance with such arrangements as it may make with said Boy Scouts of America; and the corporation created by this Act shall defray and provide for any debts or liabilities to the discharge of which said assets of the Boy Scouts of America shall be applicable, but said corporation shall have no power to issue certificates of stock or to declare or pay dividends, its objects and purposes being solely of a benevolent character and not for pecuniary profit by its members.

Section 5. The governing body of the said corporation shall consist of an executive board composed of residents of the Philippines. The number, qualifications, and terms of office of members of the executive board shall be prescribed by the by-laws. x x x

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[2] See http://www.mbcenter.org/pub/pdf/notes_history101.pdf (accessed 7 June 2011). See also http://scouts.org.ph/about-scouting/birth-of-bsp/ (accessed 7 June 2011).

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On 17 May 1974, then President Ferdinand E. Marcos issued Presidential Decree No. 460, *Amending Certain Provisions of Commonwealth Act No. 111, Otherwise Known as the National Charter of the Boy Scouts of the Philippines.* One of its Whereas clauses reads:

> WHEREAS, recent events have shown that it has become necessary to effect reforms in the organization's structure in order to revitalize and strengthen its operational capabilities, enhance its effectiveness as an instrument to promote the youth development program of the nation, and insure the full and active cooperation, involvement and support of all sectors of the community, public and private; x x x

One of the amendments introduced by PD 460 pertained to the composition of the BSP's governing body. PD 460 reorganized and restructured[3] the BSP's executive board, thus:

> Section II. Section 5 of the said Act is also amended to read as follows:
>
> "The governing body of the said corporation shall consist of a National Executive Board composed of (a) the President of the Philippines or his representative; (b) the charter and life members of the Boy Scouts of the Philippines; (c) the Chairman of the Board of Trustees of the Philippine Scouting Foundation; (d) the Regional Chairman of the Scout Regions of the Philippines; (e) the Secretary of Education and Culture, the Secretary of Social Welfare, the Secretary of Labor, the Secretary of Finance, the Secretary of Youth and Sports, and the Secretary of Local Government and Community Development; (f) an equal number of individuals from the private sector; (g) the National President of the Girl Scouts of the Philippines; (h) one Scout of Senior age from each Scout Region to represent the boy membership;

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[3] Section V. The same Act is further amended by adding the following section immediately after Section 10:

"Until such time as the reorganization and restructuring of the Executive Board, in accordance with Section 5 as amended is effected, the Honorable Carlos P. Romulo, Chairman of the Golden Jubilee Board and one of the founders of the Organization and a charter member thereof, is hereby appointed Interim Chairman of the Board and President of the Organization and authorized to organize an interim body to conduct the affairs of the Boy Scouts of the Philippines and to take the necessary steps to effect such reorganization within six (6) months from date of this decree."

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and (i) three representatives of the cultural minorities. **Except for the Regional Chairman who shall be elected by the Regional Scout Councils during their annual meetings, and the Scouts of their respective regions, all members of the National Executive Board shall be either by appointment or cooption, subject to ratification and confirmation by the Chief Scout, who shall be the Head of the State. Vacancies in the Executive Board shall be filled by a majority vote of the remaining members, subject to ratification and confirmation by the Chief Scout.** The by-laws may prescribe the number of members of the National Executive Board necessary to constitute a quorum of the board, which number may be less than a majority of the whole number of the board. The National Executive Board shall have power to make and to amend the by-laws, and, by a two-thirds vote of the whole board at a meeting called for this purpose, may authorize and cause to be executed mortgages and liens upon the property of the corporation.

x x x x x x x x x" (Emphasis supplied)

On 6 December 1991, then President Corazon C. Aquino, pursuant to her delegated legislative authority under Section 22 of Proclamation No. 50, issued Executive Order No. 495 converting the BSP, together with the Philippine Shippers' Council and the Girl Scouts of the Philippines, into a private corporation. However, on 4 March 1992, President Aquino issued Executive Order No. 509 revoking the dissolution and conversion of the BSP into a private corporation, and restored Commonwealth Act No. 111 and PD 460 prior to their repeal under EO 495.

On 24 March 1992, Republic Act No. 7278, further amending Commonwealth Act No. 111, as amended by PD 460, was enacted. Aimed at strengthening the volunteer and democratic character of the BSP, RA 7278 amended the composition of BSP's governing body by drastically reducing the number of Cabinet secretaries in the National Executive Board, to wit:

SEC. 3. Sections 5, 6, 7 and 8 of Commonwealth Act No. 111, as amended, are hereby amended to read as follows:

"SEC. 5. The governing body of the said corporation shall consist of a National Executive Board, the members of which shall be Filipino

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citizens of good moral character. The Board shall be composed of the following:

"(a) One (1) charter member of the Boy Scouts of the Philippines who shall be elected by the members of the National Council at its meeting called for this purpose;

"(b) The regional chairmen of the scouts regions who shall be elected by the representatives of all the local scouts councils of the region during its meeting called for this purpose: Provided, That a candidate for regional chairman need not be the chairman of a local scout council;

"(c) The Secretary of Education, Culture and Sports;

"(d) The National President of the Girl Scouts of the Philippines;

"(e) One (1) senior scout, each from Luzon, Visayas and Mindanao areas, to be elected by the senior scout delegates of the local scout councils to the scout youth forums in their respective areas, in its meeting called for this purpose, to represent the boy scout membership;

"(f) Twelve (12) regular members to be elected by the members of the National Council in its meeting called for this purpose;

"(g) At least ten (10) but not more than fifteen (15) additional members from the private sector who shall be elected by the members of the National Executive Board referred to in the immediately preceding paragraphs (a), (b), (c), (d), (e) and (f) at the organizational meeting of the newly reconstituted National Executive Board which shall be held immediately after the meeting of the National Council wherein the twelve (12) regular members and the one (1) charter member were elected.

x x x x x x x x x"

III.
The ruling in BSP v. NLRC

The COA relies on the Court's ruling in *Boy Scouts of the Philippines v. National Labor Relations Commission*,[4] promulgated on 22 April 1991, declaring the BSP both a GOCC

[4] G.R. No. 80767, 22 April 1991, 196 SCRA 176.

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and a government instrumentality[5] within the meaning of Section 2(1) of Article IX-B of the Constitution[6] based on the following criteria:

Firstly, BSP's functions as set out in its statutory charter do have a public aspect. BSP's functions do relate to the fostering of the public virtues of citizenship and patriotism and the general improvement of the moral spirit and fiber of our youth.

x x x x x x x x x

The second aspect that the Court must take into account relates to the governance of the BSP. The composition of the National Executive Board of the BSP includes x x x seven (7) Secretaries of Executive Departments. x x x We must note at the same time that the appointments of members of the National Executive Board, except only the appointments of the Regional Chairman and Scouts of Senior age from the various Scout Regions, are subject to ratification and confirmation by the Chief Scout, who is the President of the Philippines. x x x It does appear therefore that **there is substantial governmental (*i.e.*, Presidential) participation or intervention in the choice of the majority of the members of the National Executive Board of the BSP.**

The third aspect relates to the character of the assets and funds of the BSP. The original assets of the BSP were acquired by purchase or gift or other equitable arrangement with the Boy Scouts of America, of which the BSP was part before the establishment of the Commonwealth of the Philippines. x x x **In this respect, the BSP appears similar to private non-stock, non-profit corporations, although its charter expressly envisages donations and**

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[5] Section 2(10) of the Administrative Code of 1987 defines an instrumentality as "any agency of the National Government, not integrated within the department framework vested within special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter. This term includes regulatory agencies, chartered institutions and government-owned or controlled corporations."

[6] Sec. 2(1). The civil service embraces all branches, subdivisions, instrumentalities, and agencies of the Government, including government-owned or controlled corporations with original charters.

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contributions to it from the Government and any of its agencies and instrumentalities.[7] (Emphasis supplied)

IV.
Republic Act No. 7278 reduced the number of Cabinet secretaries in the BSP governing body.

When PD 460, amending Commonwealth Act No. 111, was issued by then President Marcos, the President of the Philippines and six Cabinet Secretaries were among the members of the BSP's National Executive Board. The President even had the final say on the private sector representation in the BSP's governing body.[8] The leadership of the BSP was virtually under the Office of the President.

With the enactment of RA 7278, only one Cabinet Secretary, that is, the Secretary of Education, remains a member of the BSP's National Executive Board. The BSP relies on this drastic change in the composition of its governing body for its claim that the BSP is not a GOCC subject to COA's audit jurisdiction. According to the BSP, **"RA 7278 took out the element of government control, which is akin to privatization. It follows then that the finding in *BSP v. NLRC* that the BSP is a GOCC with original charter no longer holds water."** RA 7278 was enacted after *BSP v. NLRC*.

V.
The BSP is not a GOCC.

1. Control test

In *Feliciano v. Commission on Audit*,[9] the Court declared that the determining factor of COA's audit jurisdiction is **government ownership or control** of the corporation. Citing *Philippine Veterans Bank Employees Union-NUBE v. Philippine*

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[7] *Supra* at 184-186.

[8] http://www.mbcenter.org/history/p9_martiallaw.php (accessed 7 June 2011).

[9] 464 Phil. 439 (2004).

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Veterans Bank,[10] the Court held in *Feliciano* that the **criterion of ownership and control is more important than the issue of original charter**, thus:

> This point is important because the Constitution provides in its Article IX-B, Section 2(1) that "the Civil Service embraces all branches, subdivisions, instrumentalities, and agencies of the Government, including government-owned or controlled corporations with original charters." **As the Bank is not owned or controlled by the Government although it does have an original charter in the form of R.A. No. 3518, it clearly does not fall under the Civil Service and should be regarded as an ordinary commercial corporation**. Section 28 of the said law so provides. The consequence is that the relations of the Bank with its employees should be governed by the labor laws, under which in fact they have already been paid some of their claims.[11] (Emphasis supplied)

Employing the test laid down in *Feliciano* in determining COA's jurisdiction, we find that the BSP is not a GOCC.

A. The government does not own the BSP.

Under Section 2(13) of the Revised Administrative Code,[12] a GOCC refers to any agency organized as a stock or non-stock corporation, vested with functions relating to public needs whether governmental or proprietary in nature, and owned by the Government directly or through its instrumentalities either wholly, or, where applicable as in the case of stock corporations, to the extent of at least fifty-one (51) per cent of its capital stock.

Under the above definition, a GOCC must be **owned** or **controlled** by the government, and in the case of a stock corporation, at least a majority of its capital stock must be owned by the government. In the case of a non-stock corporation, by analogy, at least a majority of the members must be

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[10] G.R. Nos. 67125 and 82337, 24 August 1990, 189 SCRA 14, 30.

[11] *Feliciano v. Commission on Audit*, *supra* at 462.

[12] Executive Order No. 292. Effective on 25 July 1987.

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government officials holding such membership by appointment or designation by the government.[13]

In this case, the BSP is a non-stock and non-profit organization composed **almost entirely of members coming from the private sector**, more particularly boys ranging from ages four (known as KID Scouts) to seventeen (known as SENIOR Scouts). The BSP is one of the largest Scout organizations in the world today (after Gerakan Pramuka of Indonesia and the Boy Scouts of America, first and second, respectively) and is one of the world's National Scout Associations having the highest penetration rate (Scout density), with one Scout out of two boys of Scouting age enrolled in the Scouting program.[14] Since the BSP is composed almost entirely of members and officers from the private sector, the BSP is clearly not owned by the government.

B. The government does not control the BSP.

Prior to RA 7278, the President of the Philippines and six Cabinet Secretaries were among the members of the National Executive Board. According to Senator Jose A. Lina during the Senate deliberations on RA 7278, "the [voluntary] character and the nongovernmental character of the Boy Scouts of the Philippines was altered" by the old law, thus necessitating its amendment. **More importantly, prior to RA 7278, the appointment of "all other members of the governing board, except the elected regional chairmen and senior scout representatives, were made subject to the ratification and confirmation of the President of the Philippines."**[15] There is therefore no doubt that prior to RA 7278, the government had effective control of the structure and membership of the National Executive Board. However, as clearly intended in RA

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[13] *Liban v. Gordon*, G.R. No. 175352, 15 July 2009, 593 SCRA 68, 88.

[14] See http://scouts.org.ph/about-scouting/bsps-pride/?replytocom=31 (accessed 7 June 2011).

[15] *Id.*

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7278, the government lost control over the BSP to the private sector upon the effectivity of RA 7278.

In *Feliciano*,[16] we found that local water districts (LWDs) were GOCCs considering that, among other factors, "the government controls LWDs because under PD 198 the municipal or city mayor, or the provincial governor, appoints all the board directors of an LWD for a fixed term of six years. x x x LWDs have no private stockholders or members. The board of directors and other personnel of LWDs are government employees subject to civil service laws and anti-graft laws." In other words, where the government appoints at least a majority of the members of the board of directors of an entity, such entity is undoubtedly under the control of the government. Likewise, if the government has the power to fill up at least a majority of the vacancies in the governing body of an entity, then such an entity is definitely government controlled.[17]

The foregoing circumstances manifesting government control over an entity are wanting in BSP's case under RA 7278.

As pointed out by the BSP, under RA 7278 only one Cabinet Secretary remains a member of the National Executive Board, as opposed to the previous composition where the President of the Philippines and six cabinet secretaries were members of the same board. To repeat, the National Executive Board is presently composed of (1) a charter member of the BSP; (2) the regional chairmen of the scouts regions; (3) the Secretary of Education, Culture and Sports; (4) National President of the Girl Scouts of the Philippines; (5) a senior scout, one each from Luzon, Visayas and Mindanao; (6) twelve regular members to be elected by the members of the National Council; (7) at least ten but not more than fifteen additional members from the private sector. **Significantly, the lone cabinet member, who is the Education Secretary, merely**

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[16] *Supra* note 9.

[17] See *City of Baltimore Development Corp. v. Carmel Realty Associates,* 395 Md. 299, 910 A.2d 406 Md.,2006.

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serves as an *ex-officio* member.[18] Meanwhile, the President of the Philippines is no longer a member of the National Executive Board and simply acts as the Chief Scout of the BSP. **Except for the Education Secretary, none of the other members of the National Executive Board is a government official or holds such position or membership through appointment or designation by the government**. Moreover, the government lacks the power to fill up vacancies in the National Executive Board of the BSP or remove any of its members. In fact, "vacancies in the National Executive Board shall be filled by a majority vote of the remaining members."[19] **This structural set-up and membership of BSP's governing body under RA 7278, where all except one come from the private sector, glaringly negate any form of government control over the BSP.**

Moreover, if the BSP is a GOCC, as what the COA insists, then it must be under the President's power of control. In *Rufino v. Endriga*,[20] which involved "the battle for Cultural Center of the Philippines' (CCP) leadership between the Rufino and Endriga groups," the Court explained exhaustively the President's power of control, thus:

> Under our system of government, all Executive departments, bureaus, and offices are under the control of the President of the Philippines. Section 17, Article VII of the 1987 Constitution provides:
>
> > The President shall have **control of all the executive departments, bureaus, and offices.** He shall ensure that the laws be faithfully executed. (Emphasis supplied)
>
> The presidential power of control over the Executive branch of government extends to all executive employees from the Department

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[18] As stated by Senator Jose Lina during the Senate deliberations before the passage of RA 7278, "the *ex-officio* members are the Secretary of the Department of Education, Culture and Sports and the President of the Girl Scouts of the Philippines." (Record of the Senate, Vol. II, No. 44, p. 1532).

[19] Section 5, RA 7278.

[20] G.R. No. 139554, 21 July 2006, 496 SCRA 13.

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Secretary to the lowliest clerk. This constitutional power of the President is self-executing and does not require any implementing law. Congress cannot limit or curtail the President's power of control over the Executive branch.

x x x x x x x x x

The President's power of control applies to the acts or decisions of all officers in the Executive branch. This is true whether such officers are appointed by the President or by heads of departments, agencies, commissions, or boards. The power of control means the power to revise or reverse the acts or decisions of a subordinate officer involving the exercise of discretion.

In short, the President sits at the apex of the Executive branch, and exercises "control of all the executive departments, bureaus, and offices." There can be no instance under the Constitution where an officer of the Executive branch is outside the control of the President. The Executive branch is unitary since there is only one President vested with executive power exercising control over the entire Executive branch. Any office in the Executive branch that is not under the control of the President is a lost command whose existence is without any legal or constitutional basis.[21]

However, in this case, unlike in CCP's case,[22] there is absolutely nothing which demonstrates that the President of the Philippines exercises control over the acts or decisions of the BSP's National Executive Board or any of its members.[23] The President does not have the power to alter or modify or nullify or set aside what the BSP's National Executive Board does in the performance of its duties and to substitute the

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[21] *Id.* at 62-63, 64-65.

[22] CCP is under the supervision of the National Commission for Culture and the Arts, and it is attached to the Office of President. (http://en.wikipilipinas.org/index.php? title=Cultural_Center_of_the_Philippines#Arts_Resident_Companies_of_CCP)

[23] See *Carpio v. Executive Secretary*, G.R. No. 96409, 14 February 1992, 206 SCRA 290.

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judgment of the former for that of the latter.[24] The title "Chief Scout" does not confer on the President any power of control over the affairs and management of the BSP. This absence of any form of presidential control reinforces the fact that the government does not control the BSP. In short, the President, while holding the title of "Chief Scout," does not control the BSP.

C. The funds of the BSP are private in nature.

The Court noted in *BSP v. NLRC* that the original assets of the BSP were acquired by purchase or gift or other equitable arrangement with the Boy Scouts of America, of which the BSP was part before the establishment of the Commonwealth of the Philippines. The BSP charter, however, does not indicate that such assets were public or statal in character or had originated from the government. No public capital was invested in the BSP.[25] **According to the BSP, its operating funds used for carrying out its purposes and programs are derived principally from membership dues paid by the Boy Scouts themselves and from property rentals. The BSP does not**

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[24] *Mondano v. Silvosa*, 97 Phil. 143, 147-148 (1955), where the Court stated: "In administrative law supervision means overseeing or the power or authority of an officer to see that subordinate officers perform their duties. If the latter fail or neglect to fulfill them the former may take such action or step as prescribed by law to make them perform their duties. Control, on the other hand, means the power of an officer to alter or modify or nullify or set aside what a subordinate officer had done in the performance of his duties and to substitute the judgment of the former for that of the latter."

[25] In *Feliciano*, *supra* note 9, where the Court held that the Local Water Districts are government-owned or controlled corporations, the seed capital assets of the Local Water Districts, such as waterworks and sewerage facilities, were public property which were managed, operated by or under the control of the city, municipality or province before the assets were transferred to the Local Water Districts. The Local Water Districts also receive subsidies and loans from the Local Water Utilities Administration. **There is no private capital invested in the Local Water Districts**. The capital assets and operating funds of the Local Water Districts all come from the government, either through transfer of assets, loans, subsidies or the income from such assets or funds.

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have government assets and does not receive any appropriation from Congress. This was revealed during the deliberations in the House of Representatives on RA 7278, thus:

> MR. ESCUDERO. Yes, Mr. Chairman. The question is the sources of funds of the organization. **First, Mr. Chairman, the Boy Scouts of the Philippines do not receive annual allotment from the government. The organization has to raise its own funds through fund drives and fund campaigns or fund raising activities**. Aside from this, we have some revenue producing projects in the organization that gives us funds to support the operation. x x x[26]

Further, BSP's properties are being managed and operated by the BSP itself, not by the government or any of its agencies. Therefore, it is crystal-clear that the funds of the BSP come from private sources. As such, the BSP funds are necessarily beyond the jurisdiction of the COA, which exclusively audits public funds and assets.

D. Public purpose of BSP is not determinative of status.

Indeed, the BSP performs functions which may be classified as public in character, in the sense that it promotes "virtues of citizenship and patriotism and the general improvement of the moral spirit and fiber of our youth." However, this fact alone does not automatically make the BSP a GOCC. Significantly, the Court declared in *Philippine Society for the Prevention of Cruelty to Animals v. Commission on Audit*,[27] **"the fact that a certain juridical entity is impressed with public interest does not, by that circumstance alone, make the entity a public corporation, inasmuch as a corporation may be private although its charter contains provisions of a public character, incorporated solely for the public good."**[28] The Court further held:

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[26] Quoted in Majority Opinion (Committee on Government Enterprises, 13 February 1991, p. 16).

[27] G.R. No. 169752, 25 September 2007, 534 SCRA 112.

[28] *Id.* at 131.

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Authorities are of the view that the purpose alone of the corporation cannot be taken as a safe guide, for the fact is that almost all corporations are nowadays created to promote the interest, good, or convenience of the public. A bank, for example, is a private corporation; yet, it is created for a public benefit. Private schools and universities are likewise private corporations; and yet, they are rendering public service. Private hospitals and wards are charged with heavy social responsibilities. More so with all common carriers. On the other hand, there may exist a public corporation even if it is endowed with gifts or donations from private individuals.

The true criterion, therefore, to determine whether a corporation is public or private is found in the totality of the relation of the corporation to the State. If the corporation is created by the State as the latter's own agency or instrumentality to help it in carrying out its governmental functions, then that corporation is considered public; otherwise, it is private. Applying the above test, provinces, chartered cities, and *barangays* can best exemplify public corporations. They are created by the State as its own device and agency for the accomplishment of parts of its own public works.[29] (Emphasis supplied)

2. Economic viability test

The Constitution recognizes only two classes of corporations.[30] The first refers to private corporations created under a general law.[31] The second refers to government-owned or controlled corporations created by special charters.[32] Section 16, Article XII of the Constitution provides:

Sec. 16. The Congress shall not, except by general law, provide for the formation, organization, or regulation of **private corporations. Government-owned or controlled corporations** may be created or established by special charters in the interest of the common good and **subject to the test of economic viability.** (Emphasis supplied)

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[29] *Id.* at 132.

[30] *Feliciano v. Commission on Audit, supra* note 9.

[31] *Id.*

[32] *Id.*

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Contrary to this constitutional provision, the majority introduces a totally different species of corporation, which is neither a private corporation nor a government owned or controlled corporation. The majority gravely misses the fact that the BSP, which was created as a non-stock, non-profit corporation, can only be either a private corporation or a government owned or controlled corporation. The Legislature's usage in Commonwealth Act No. 111 of the term "public corporation"[33] to designate the BSP must never be construed as creating an entirely new type of corporation, neither private nor government owned or controlled. Otherwise, such an interpretation will unjustifiably and unlawfully expand the classes of corporations expressly recognized by the Constitution in Section 16, Article XII, putting the new class of corporation outside the coverage of Section 16. In short, such new class of public corporation **created by special charter** will not be subject to the **"test of economic viability,"** a blatant circumvention of the Constitution.

In *Manila International Airport Authority (MIAA) v. Court of Appeals*,[34] where the Court ruled that MIAA is a government instrumentality, the Court explained the importance of the "test of economic viability," in this wise:

> **The Constitution expressly authorizes the legislature to create "government-owned or controlled corporations" through special charters only if these entities are required to meet the twin conditions of common good and *economic viability*.** In other words, **Congress has no power to create government-owned or controlled corporations with special charters unless they are made to comply with the two conditions of common good and economic viability.** The test of economic viability applies only to government-owned or controlled corporations that perform economic or commercial activities and need to compete in the market place. Being essentially economic vehicles of the State for the common good — meaning for economic

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[33] Must not be confused with "public corporations" such as barangay, municipality, city and province, which are also known as political subdivisions.

[34] G.R. No. 155650, 20 July 2006, 495 SCRA 591.

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development purposes — these government-owned or controlled corporations with special charters are usually organized as stock corporations just like ordinary private corporations.

x x x **The intent of the Constitution is to prevent the creation of government-owned or controlled corporations that cannot survive on their own in the market place and thus merely drain the public coffers.**

Commissioner Blas F. Ople, proponent of the test of economic viability, explained to the Constitutional Commission the purpose of this test, as follows:

> MR. OPLE: Madam President, the reason for this concern is really that when the government creates a corporation, there is a sense in which this corporation becomes exempt from the test of economic performance. We know what happened in the past. If a government corporation loses, then it makes its claim upon the taxpayers' money through new equity infusions from the government and what is always invoked is the common good. That is the reason why this year, out of a budget of ₱115 billion for the entire government, about ₱28 billion of this will go into equity infusions to support a few government financial institutions. And this is all taxpayers' money which could have been relocated to agrarian reform, to social services like health and education, to augment the salaries of grossly underpaid public employees. And yet this is all going down the drain.
>
> Therefore, when we insert the phrase "ECONOMIC VIABILITY" together with the "common good," this becomes a restraint on future enthusiasts for state capitalism to excuse themselves from the responsibility of meeting the market test so that they become viable. And so, Madam President, I reiterate, for the committee's consideration and I am glad that I am joined in this proposal by Commissioner Foz, the insertion of the standard of "ECONOMIC VIABILITY OR THE ECONOMIC TEST," together with the common good.

Father Joaquin G. Bernas, a leading member of the Constitutional Commission, explains in his textbook The 1987 Constitution of the Republic of the Philippines: A Commentary:

> The second sentence was added by the 1986 Constitutional Commission. The significant addition, however, is the phrase "in the interest of the common good and subject to the test of economic

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> viability." The addition includes the ideas that they must show capacity to function efficiently in business and that they should not go into activities which the private sector can do better. Moreover, economic viability is more than financial viability but also includes capability to make profit and generate benefits not quantifiable in financial terms.[35] (Emphasis supplied)

Indisputably, a government owned or controlled corporation created by special charter must necessarily meet the test of economic viability. Otherwise, the creation by Congress of a government owned or controlled corporation not satisfying the test of economic viability clearly runs counter to the express mandate of Section 16, Article XII of the Constitution. **Congress has no power to create government-owned or controlled corporations with special charters unless they are made to comply with the two conditions of common good and economic viability.** To repeat, "government-owned or controlled corporations may be created or established by special charters x x x **subject to the test of economic viability**." Therefore, there can be no "public corporation" or government owned or controlled corporation that cannot be subject to the test of economic viability. In short, the majority's view that BSP is a "public corporation" which does not fall under either of the classifications of corporation recognized under Section 16, Article XII of the Constitution, and consequently not subject to the test of economic viability, is patently erroneous and baseless.

The term "public corporation" refers to a government owned or controlled corporation as referred to in Section 16, Article XII of the Constitution. However, in this case, the usage of the term "public corporation" in Commonwealth Act No. 111 to designate BSP is no longer controlling in determining the real nature of the BSP. **As amended by RA 7278**, Commonwealth Act No. 111 now refers to a corporation owned, managed and controlled by the private sector although the purpose of the corporation remains public.

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[35] *Id.* at 639-641.

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The majority theorizes that public corporations are "treated by law as agencies or instrumentalities of the government which are not subject to the tests of ownership or control and economic viability but to different criteria relating to their public purposes/ interests or constitutional policies and objectives and their administrative relationship to the government or any of its Departments or Offices."

This theory finds no basis in law. As the Court emphatically stated in *Philippine Society for the Prevention of Cruelty to Animals*, **"the fact that a certain juridical entity is impressed with public interest does not, by that circumstance alone, make the entity a public corporation, inasmuch as a corporation may be private although its charter contains provisions of a public character, incorporated solely for the public good."**[36] Neither does "administrative relationship to the government" indicate that an entity is an instrumentality within the purview of the COA's audit jurisdiction. Only corporations controlled and owned by the government, which are subject to the test of economic viability, and government instrumentalities, as defined by the Administrative Code, fall under COA's audit jurisdiction. The BSP is neither; hence, it is beyond the COA's audit jurisdiction.

VI.

Neither is the BSP a government instrumentality.

A government instrumentality is defined by the Revised Administrative Code as "any agency of the National Government, not integrated within the department framework vested with special functions or jurisdiction by law, endowed with some if not all corporate powers, administering special funds, and enjoying operational autonomy, usually through a charter." In other words, to be considered a government instrumentality, an entity must be (1) **an agency of the National Government;** (2) outside the department framework of the National Government; (3) **vested with special functions or jurisdiction by law;** (4) endowed with some, if not all, corporate powers;

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[36] *Supra* note 27 at 131.

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(5) **administering special funds;** and (6) enjoying operational autonomy.

The BSP is not an agency of the National Government because the BSP is not a unit of the National Government, like a "department, bureau, office, instrumentality or government owned or controlled corporation, or a local government or a distinct unit therein."[37] **There is also no dispute that the BSP does not administer special funds of the government.** While the BSP may receive donations or contributions from the government just like other non-government organizations, the same cannot be characterized as special funds. **Moreover, the BSP is not vested with special functions or jurisdiction *by law*. Hence, the BSP is not a government instrumentality.**

If the BSP is a government instrumentality, the following consequences are inevitable: (1) pursuant to Section 2(1), Article IX-D of the Constitution[38] it will be subject to COA's pre-audit, and not post-audit; (2) it will be subject to the Government Procurement Reform Act or Republic Act No. 9184; and (3) the BSP's officers and employees will be considered government personnel who are (a) subject to Civil Service laws;[39] (b) covered

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[37] Section 1(3) of the Administrative Code of 1987.

[38] Section 2, Article X of the Constitution pertinently provides:

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, 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. x x x (Emphasis supplied)

[39] Republic Act No. 6713, otherwise known as the "Code of Conduct and Ethical Standards for Public Officials and Employees." Section 3(a) thereof provides:

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by the Government Service Insurance System;[40] (c) subject to the Salary Standardization Law;[41] (d) required to file Statements of Assets, Liabilities and Networth;[42] (e) under the jurisdiction of the Ombudsman;[43] and (f) subject to the control of the President.

Under the Administrative Code of 1987, the BSP is an attached agency of the Department of Education for purposes of policy and program coordination. However, this was changed with

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Section 3. *Definition of Terms.* - As used in this Act, the term:

(a) "Government" includes the National Government, the local governments, and all other instrumentalities, agencies or branches of the Republic of the Philippines including government-owned or controlled corporations, and their subsidiaries.

[40] Section 2 of this law provides:

SEC. 2. *Definition of terms.*- Unless the context otherwise indicates, the following terms shall mean:

x x x x x x x x x

(c) *Employer* - The national government, its political subdivisions, branches, agencies or instrumentalities, including government-owned or controlled corporations, and financial institutions with original charters, the constitutional commissions and the judiciary;

[41] Republic Act No. 6758 entitled "An Act Prescribing A Revised Compensation and Position Classification System in the Government and for Other Puposes."

[42] Section 34 of Executive Order No. 292 or the Administrative Code of 1987 provides:

Sec. 34. Declaration of Assets, Liabilities and Net Worth. - A public officer or employee shall upon assumption of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities, and net worth.

[43] Section 13 of RA 6770 provides:

Section 13. *Mandate*. — The Ombudsman and his Deputies, as protectors of the people, shall act promptly on complaints filed in any form or manner against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and enforce their administrative, civil and criminal liability in every case where the evidence warrants in order to promote efficient service by the Government to the people.

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the enactment of RA 7278 which removed government control over the BSP. To repeat, the determining factor of COA's audit jurisdiction is government ownership or control. Conversely, without such ownership or control, the BSP is beyond the COA's audit jurisdiction. Surprisingly, the majority states that the BSP "**is not under government control**" although it is an "attached agency" to the Department of Education. Needless to say, the Department of Education and any agency or unit attached to it is under the control of the President pursuant to Section 17, Article VII of the Constitution, which mandates that "**the President shall have control of all the executive departments, bureaus, and offices.**" If a government office, unit, or instrumentality is subject to the control of the President, then it is obviously under government control.

VII.
The BSP is a private, non-stock and non-profit corporation performing public functions.

Scouting is a non-partisan, **non-governmental** worldwide youth movement geared towards the "development of young people in achieving their full physical, mental, social, intellectual and spiritual potentials as individuals, as responsible citizens and as members of their local, national and international communities."[44] Scouting complements the school and the family, filling the needs not met by either.[45] "It belongs to the category of non-formal education since, while it takes place outside the formal educational system, it is an organized institution with an educational aim and is addressed to a specific clientele."[46]

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[44] http://scout.org/en/about_scouting/educational_methods/an_educational_movement_for_young_people (accessed 7 June 2011)

[45] See http://scout.org/en/about_scouting/facts_figures/fact_sheets [Fact sheet - Scouting Is.pdf] (accessed 7 June 2011).

[46] http://scout.org/en/about_scouting/educational_methods/an_educational_movement_for_young_people (accessed 7 June 2011) See also *Boy Scouts of the Phil. v. Araos*, 102 Phil. 1080 (1958).

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In *Boy Scouts of America v. Dale*,[47] which involved a suit for reinstatement and damages filed by an Assistant scoutmaster, who was expelled after he publicly declared he was homosexual, against Boy Scouts of America (BSA), the Supreme Court of the United States stated that **"the Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people."**

The fact that the BSP, like the BSA, is a private, non-stock, non-profit corporation is consistent with the clear intent of the Legislature in enacting RA 7278. The following exchanges during the deliberations in the Senate on RA 7278 reveal **the intent of the Legislature to restore the non-governmental and private character of the BSP**, thus:

SPONSORSHIP SPEECH OF SENATOR LINA

Senator Lina. Thank you, Mr. President.

The measure before us this evening, Senate Bill No. 132, seeks to strengthen the nature of Scouting, restore the democratic and nongovernmental process to the movement, and provide a framework of leadership which shall give direction and purpose to the two million boys and young men, ages seven to 17. Representatives of the vital group of our youth were here this afternoon, waiting that this bill be sponsored today.[48]

x x x x x x x x x

Senator Lina. Before I answer that question, Mr. President, originally, t**he boy scouting movement in this country is intrinsically democratic and its strength derives from the efforts of the nongovernmental sector. The Constitution of the movement declares that it is independent, voluntary, nonpolitical, nonsectarian, and nongovernmental.** The local and national leadership of the Boys Scout Movement, from its inception up to 1974, when it was amended by Presidential Decree No. 460, came from elected members of local councils, volunteers who have worked

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[47] 530 U.S. 640, 120 S.Ct. 2446, U.S.N.J., 2000.

[48] Record of the Senate, Vol. II, No. 43, p. 1502.

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for many years of their lives for the development of young boys so that they will learn and heed the scout oath and law.

However, Mr. President, in May 1974, this character of the local boy scouting movement was altered because the old dispensation issued a Presidential Decree which included in the membership of the governing board the President of the Philippines and seven Members of the Cabinet. That was the major change in Commonwealth Act No. 111.

So, the President of the Philippines and seven Cabinet Members were included and institutionalized as members of the governing body of the Boy Scouts of the Philippines. So, the nonvoluntary [sic] character and the nongovernmental character of the Boy Scouts of the Philippines was altered. Not only that.

All other members of the governing board, except the elected regional chairmen and senior scout representatives were made subject to the ratification and confirmation of the President of the Philippines. So, *iyon po ang naging* major amendment *na inistrodyus ng* PD No. 460. And as a result of this, *marami po ang na*-discourage *sa* boy scouting movement, *sapagkat dati-rati talagang* democratic *iyan*, *walang* so much imposition from government and its officials. Also, as a result of PD No. 460, the voluntary character of the boy scouting movement was changed. *Halos naging gobyerno*, and imagine, the dictatorial character of that previous Government was transferred to the Boy Scouts of the Philippines, *kasi* the members of the governing board have to be subjected to confirmation by the President. So, *napulitika rin po iyong* boy scouting the movement.

Ngayon, ang ginagawa po natin, basically, is to remove this undemocratic feature of the law creating the Boy Scouts, and also to remove from the Constitution of the present Boy Scouts of the Philippines the other features that make the boy scouting movement now undemocractic.

Senator Guingona. The intent of this bill is to make more democratic the membership in the Boy Scouts of the Philippines.

Senator Lina. Well, **to lessen government direct interference**.[49]

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[49] Record of the Senate, Vol. II, No. 44, pp. 1529-1530.

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Senator Lina. x x x

Noong araw ay mas aktibo ang boy scouting movement. *Pero noong* 1974, when Presidential Decree was issued by the then President amending Commonwealth Act No. 111, *iyon pong* National Executive Board, the governing body, *ay napasukan ng halos pitong* Cabinet Members. *Dari-rati po, wala iyon. Iyon po lamang* Department of Education, Culture and Sports and *kasama sa* Boy Scouts of the Philippines. *Kung sino ang* Secretary, *iyon ang nagiging ex officio* or institutionalized member. *Pero, nang madagdagan ito ng miyembro mula sa* Department of National Defense, from the other departments, *pati* DSWD, *naging* government *halos ang* character *nito. Nawala na iyong* spirit of voluntarism. Since the Cabinet Members are busy doing other things, *hindi po ito nabigyan ng gaanong pansin kung kaya nag*-deteriorate *nang malaki ang* scouting movement of the Philippines. *Ngayon lamang po ito nare*-revive, because Secretary Carino is the President. Right now he is very much involved. He as president before he became the Secretary of Education, Culture and Sports. Under his leadership, things are shaping up. There is greater recruitment and more activities.

Senator Romulo. ***Kaya po, mahalaga ang*** **bill** ***na ito, sapagkat ibinabalik natin ito sa*** **private sector** *at nang sa ganoon, gaya noong nakaraan,* **this is more conducive to voluntarism and therefore, to the growth of the Boy Scout movement.**

Senator Lina. *Opo.*[50] (Emphasis supplied)

There is no question that RA 7278 was enacted precisely to remove government control and return the BSP to the private sector and to its non-governmental status. In other words, the government lost control over the BSP to the private sector upon the effectivity of RA 7278. The absence of government control or ownership, coupled with the private nature of BSP funds, makes the BSP a private corporation beyond the audit jurisdiction of the COA. Clearly, the attributes of BSP's

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[50] Record of the Senate,Vol. II, No. 46, p. 1592.

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relationship with the State that point to its being a private non-stock corporation are overwhelming and irrefutable.[51]

VIII.
Constitutionality of BSP charter, as amended

Since the BSP is not a GOCC, can Congress create, organize and regulate the BSP by enacting its charter, or Commonwealth Act No. 111, as amended by PD 460 and further amended by RA 7278?

The answer is in the negative.

Section 7, Article XIV of the 1935 Constitution, as amended, was in force when the BSP was created by special charter on 31 October 1936. Section 7, Article XIV of the 1935 Constitution, as amended, reads:

> SEC. 7. The Congress shall not, except by general law, provide for the formation, organization, or regulation of private corporations, unless such corporations are owned or controlled by the Government or any subdivision or instrumentality thereof.

The subsequent 1973 and 1987 Constitutions contain similar provisions. Thus, Section 4, Article XIV of the 1973 Constitution provides:

> SEC. 4. The National Assembly shall not, except by general law, provide for the formation, organization, or regulation of private corporations, unless such corporations are owned or controlled by the Government or any subdivision or instrumentality thereof.

The 1987 Constitution substantially reiterated the above provision in Section 16, Article XII, to wit:

> SEC. 16. The Congress shall not, except by general law, provide for the formation, organization, or regulation of private corporations. Government-owned or controlled corporations may be created or established by special charters in the interest of the common good and subject to the test of economic viability.

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[51] See *Napata v. University of Maryland Medical System Corp.*, 417 Md. 724, 12 A.3d 144 Md.,2011.

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In *Feliciano*,[52] the Court discussed the significance of the above Constitutional provision in this wise:

> The Constitution emphatically prohibits the creation of private corporations except by a general law applicable to all citizens. **The purpose of this constitutional provision is to ban private corporations created by special charters, which historically gave certain individuals, families or groups special privileges denied to other citizens.**
>
> **In short, Congress cannot enact a law creating a private corporation with a special charter. Such legislation would be unconstitutional. Private corporations may exist only under a general law. If the corporation is private, it must necessarily exist under a general law.** Stated differently, only corporations created under a general law can qualify as private corporations. Under existing laws, that general law is the Corporation Code, except that the Cooperative Code governs the incorporation of cooperatives.
>
> The Constitution authorizes Congress to create government-owned or controlled corporations through special charters. Since private corporations cannot have special charters, it follows that Congress can create corporations with special charters only if such corporations are government-owned or controlled. (Emphasis supplied)

While both BSP and COA submit that Commonwealth Act No. 111 and its amendatory laws do not violate Section 16, Article XII of the Constitution, the Court should reject such contention. Considering that the BSP is not a GOCC, it follows that the law creating and regulating the BSP clearly violates Section 16, Article XII of the Constitution which specifically states that "Congress shall not, except by general law, provide for the formation, organization, or regulation of private corporations," unless such corporations are owned or controlled by the Government or any of its subdivision or instrumentality.

In this case, the Court directed the parties to comment on the issue of the constitutionality of Commonwealth Act No. 111, as amended. This is precisely because the constitutionality of Commonwealth Act No. 111, as amended, is inextricably

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[52] *Supra* note 9 at 454-455.

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linked to the issue of whether the BSP is subject to COA's audit jurisdiction, which in turn depends on whether the BSP is a private or a government owned or controlled corporation. Hence, this issue was properly addressed and exhaustively argued upon by the parties.

That the parties did not specifically raise the issue on the constitutionality of Commonwealth Act No. 111, as amended, does not preclude this Court from resolving such issue since it is absolutely indispensable for the complete disposition of this case. In fact, in exceptional cases, such as this, it is within the Court's discretion when a constitutional issue may be ruled upon. It is likewise the duty of this Court to pass upon the constitutionality of Commonwealth Act No. 111, as amended, since it clearly appears that **a determination of the constitutional question is necessary to decide this case.** In *People v. Vera*,[53] the Court held:

> It is true that, as a general rule, the question of constitutionality must be raised at the earliest opportunity, so that if not raised by the pleadings, ordinarily it may not be raised at the trial, and if not raised in the trial court, it will not considered on appeal. But we must state that the general rule admits of exceptions. **Courts, in the exercise of sounds (sic) discretion, may determine the time when a question affecting the constitutionality of a statute should be presented.** Thus, in criminal cases, although there is a very sharp conflict of authorities, it is said that the question may be raised for the first time at any stage of the proceedings, either in the trial court or on appeal. Even in civil cases, it has been held that **it is the duty of a court to pass on the constitutional question, though raised for the first time on appeal, if it appears that a determination of the question is necessary to a decision of the case.**

Unless, therefore, the constitutional question is thus timely raised and presented, it will be considered waived, except in extraordinary cases noted in *People and Hongkong & Shanghai Banking Corporation vs. Vera and Cu Unjieng, supra,* or **in exceptional cases where, the opinion of this court, the question may be said to be fairly involved**

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[53] 65 Phil. 56, 88 (1935).

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upon the face of the undisputed record. (Emphasis supplied; citations omitted)

In *Robb v. People*,[54] the Court reiterated:

Unless, therefore, the constitutional question is thus timely raised and presented, it will be considered waived, except in extraordinary cases noted in *People and Hongkong & Shanghai Banking Corporation vs. Vera and Cu Unjieng, supra,* or **in exceptional cases where, the opinion of this court, the question may be said to be fairly involved upon the face of the undisputed record.** (Emphasis supplied)

In *Moldex Realty, Inc. v. Housing and Land Use Regulatory Board*,[55] this Court held that constitutional challenge can be made anytime:

That the question of constitutionality has not been raised before is not a valid reason for refusing to allow it to be raised later. A contrary rule would mean that a law, otherwise unconstitutional, would lapse into constitutionality by the mere failure of the proper party to promptly file a case to challenge the same. (Emphasis supplied)

The Constitution prohibits the creation of a private corporation through a special law. The Constitutional prohibition under Section 16, Article XII is clear, categorical, absolute, and admits of no exception. Since the BSP is a private corporation and not a government owned or controlled corporation, Sections 1,[56] 2,[57]

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[54] 68 Phil. 320, 326 (1939).

[55] G.R. No. 149719, 21 June 2007, 525 SCRA 198, 204.

[56] Section 1. J. E. H. Stevenot, A. N. Luz, C. P. Romulo, Vicente Lim, Manuel Camus, Jorge B. Vargas, and G. A. Daza; all of Manila, Philippines, their associates and successors, are hereby created a body corporate and politic in deed and in law, by the name, style and title of "Boy Scouts of the Philippines" (hereinafter called the corporation). The principal office of the corporation shall be in Metropolitan Manila, Philippines.

[57] Section 2. The said corporation shall have the powers of perpetual succession, to sue and be sued; to enter into contracts; to acquire, own, lease, convey and dispose of such real and personal estate, land grants, rights and choses in action as shall be necessary for corporate purposes, and to accept and receive funds, real and personal property by gift, devise, bequest or other means, to conduct fund-raising activities; to adopt and use

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3,[58] 5,[59] 6,[60] 7,[61] 9,[62] and 11[63] of Commonwealth Act No. 111, as amended, are unconstitutional, and hence void, for

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a seal, and the same to alter and destroy; to have offices and conduct its business and affairs in Metropolitan Manila and in the regions, provinces, cities, municipalities, and barangays of the Philippines, to make and adopt by-laws, rules and regulations not inconsistent with this Act and the laws of the Philippines, and generally to do all such acts and things, including the establishment of regulations for the election of associates and successors, as may be necessary to carry into effect the provisions of this Act and promote the purpose of said corporation: Provided, That said corporation shall have no power to issue certificates of stock or to declare or pay dividends, its objectives and purposes being solely of benevolent character and not for pecuniary profit of its members.

[58] Section 3. The purpose of this corporation shall be to promote through organization and cooperation with other agencies, the ability of boys to do useful things for themselves and others, to train them in scoutcraft, and to inculcate in them patriotism, civic consciousness and responsibility, courage, self-reliance, discipline and kindred virtues, and moral values, using the method which are in common use by boy scouts.

[59] Section 5. The governing body of the said corporation shall consist of a National Executive Board, the members of which shall be Filipino citizens of good moral character. The Board shall be composed of the following:

(a) One (1) charter member of the Boy Scouts of the Philippines who shall be elected by the members of the National Council at its meeting called for this purpose;

(b) The regional chairmen of the scouts regions who shall be elected by the representatives of all the local scout councils of the region during its meeting called for this purpose: Provided, That a candidate for regional chairman need not be the chairman of a local scout council;

(c) The Secretary of Education, Culture and Sports;

(d) The National President of the Girl Scouts of the Philippines;

(e) One (1) senior scout, each from Luzon, Visayas and Mindanao areas, to be elected by the senior scout delegates of the local scout councils to the scout youth forums in their respective areas, in its meeting called for this purpose, to represent the boy scout membership;

(f) Twelve (12) regular members to be elected by the members of the National Council in its meeting called for this purpose;

(g) At least ten (10) but not more than fifteen (15) additional members from the private sector who shall be elected by the members of the National Executive Board referred to in the immediately preceding paragraphs (a),

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contravening the Constitutional proscription against the creation, organization, and regulation of private corporations by Congress.

(b), (c), (d), (e) and (f) at the organizational meeting of the newly reconstituted National Executive Board which shall be held immediately after the meeting of the National Council wherein the twelve (12) regular members and the one (1) charter member were elected.

Thereafter, the National Executive Board as herein fully constituted shall elect from among themselves the following officers of the corporation:

(a) President;

(b) Senior Vice-President;

(c) One (1) Vice-President each from Luzon, Visayas and Mindanao areas; and

(d) Such other officers as the Board may deem necessary.

The numerical composition of the National Executive Board shall be provided for in the by-laws of the Boy Scouts of the Philippines: Provided, That said numerical composition shall be at least thirty (30) and not more than forty-five (45) for all elected, life and *ex officio* members.

The term of office of the members of the National Executive Board shall be one (1) year, except for the regular members to be elected by the National Council whose term of office shall be three (3) years: Provided, That for the first twelve (12) regular members to be elected by the National Council, the term of office shall be as follows: the members garnering the first four (4) highest number of votes shall serve for a term of three (3) years; the member garnering the second four (4) highest number of votes shall serve for a term of two (2) years; and the members garnering the last four (4) number of votes shall serve for a term of one (1) year.

Vacancies in the National Executive Board shall be filled by a majority vote of the remaining members and a member thus elected shall serve only for the unexpired term.

The by-laws may prescribe the number of members of the National Executive Board necessary to constitute a quorum of the Board, which number shall not be less than the majority of the entire membership of the Board.

The National Executive Board shall exercise the following powers and functions:

(a) To make and to amend the by-laws subject to the ratification by a majority vote of the members present at a meeting of the National Council or at a special meeting called for this purpose;

(b) To authorize and caused to be executed mortgages and liens upon the property of the corporation by a two-thirds (2/3) vote of the whole Board at a meeting called for this purpose;

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(c) To designate five (5) or more their number to constitute an executive or governing committee, of which a majority shall constitute a quorum, through a resolution passed by majority of the whole Board. Such Committee, to the extent provided in said resolution or in the by-laws of the corporation, shall have and exercise the powers of the National Executive Board in the management of the business affairs of the corporation, and may have the power to authorize the seal of the corporation to be affixed to all papers which may require it;

(d) To create standing committees and appoint the chairman and members thereof from among themselves by the affirmative vote of a majority of the whole Board. Such standing committees shall exercise such powers as may be authorized by the by-laws;

(e) To dispose in any manner a part or the whole property of the corporation with the consent in writing and pursuant to an affirmative vote of two-thirds (2/3) of the members of the National Council; and

(f) To hold regular meetings at least once every two (2) months at a time and place to be designated in the by-laws. Special meetings of the Board may be called upon such notice as may be prescribed in the by-laws.

[60] Section 6. The National Council shall be composed of the following members:

(a) The members of the National Executive Board;

(b) The charter members;

(c) The regional commissioners;

(d) The chairmen and commissioners of all local scout councils; and

(e) Other duly accredited delegates of local scout councils as may be provided in the by-laws.

The qualifications, terms of office, and the manner of electing the abovementioned members of the National Council shall be prescribed in the by-laws of the corporation.

The numerical composition of the National Council shall be provided for in the by-laws of the Boy Scouts of the Philippines: Provided, That all regions and all local councils shall be duly represented therein by at least two (2) duly accredited delegates, in addition to those who are members of the National Executive Board as provided for under Section 5 of this Act.

The annual meeting of the National Council shall be held at such time and place as shall be prescribed in the by-laws, at which meeting the annual reports of the officers of the National Executive Board shall be presented and the election of members to the National Executive Board.

Special meetings of the National Council may be called upon such notice as may be prescribed in the by-laws. One-third (1/3) of the members of the

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The rest of the provisions, namely, Sections 4,[64] 8,[65] and

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National Council shall constitute a quorum to do business at any annual or special meeting. The National Council and the National Executive Board shall have the power to hold their meetings and keep the seal, books, documents, and papers of the corporation within or without the Metropolitan Manila.

The National President of the corporation shall preside over the meetings of the National Council.

Each local scout council represented in the annual or special meeting of the National Council shall be entitled to four (4) votes plus one (1) vote for every ten thousand (10,000) of their scout membership. The members of the National Executive Board and the life members shall each be entitled to one (1) vote.

[61] Section 7. The corporation created by this Act shall adopt and shall have the sole and exclusive right to use distinctive titles, emblems, descriptive or designing marks, words and phrases,badges, uniforms and insignia for the Boy Scouts of the Philippines in carrying out its program in accordance with the purposes of this Act, and which shall be published in the Official Gazette or in any newspaper of general circulation in the Philippines.

[62] Section 9. On or before the first of April of each year, the said corporation shall make and transmit to the President of the Philippines a report of its proceedings for the year ending December thirty-first preceding, including a full, complete, and itemized report of receipts and expenditures of whatever kind.

[63] Section 11. Until such time as the reorganization and restructuring of the Boy Scouts of the Philippines in accordance with this Act is effected, the incumbent officers and members of the National Executive Board and the present and past national presidents of the Boy Scouts of the Philippines shall continue to conduct the affairs of the Boy Scouts of the Philippines and to take the necessary steps to effect such reorganization until a new National Executive Board and a new set of national officers shall have been elected within six (6) months from the effectivity of this Act.

[64] Section 4. The President of the Philippines shall be the Chief Scout of the Boy Scouts of the Philippines.

[65] Section 8. Any donation or contribution which from time to time may be made to the Boy Scouts of the Philippines by the Government or any of its subdivisions, branches, offices, agencies or instrumentalities or by a foreign government or by private entities and individuals shall be expended by the National Executive Board in pursuance of this Act.

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10[66] of Commonwealth Act No. 111, as amended, remain valid as these do not refer to BSP's creation as a corporation and

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The corporation shall be entitled to the following tax and duty privileges:

(a) Exemption from income tax pursuant to Section 26(e), (g) and (h) of the National Internal Revenue Code, as amended;

(b) Exemption from donor's tax pursuant to Section 94(a) (3) of the National Internal Revenue Code, as amended;

(c) Full deductibility of donations from the donor's gross income for purposes of computing taxable income; and

(d) Tax and/or duty exemption of donations from foreign countries as provided under the relevant laws such as, but not limited to, Section 105 of the Tariff and Customs Code of the Philippines, as amended, Section 103 of the National Internal Revenue Code, as amended.

Any other provisions of law to the contrary notwithstanding, there shall be no discrimination in tax treatment of the Boy and Girl Scouts of the Philippines.

[66] Section 10. From and after the passage of this Act, it shall be unlawful for any person within the jurisdiction of the Philippines to falsely and fraudulently call himself as, or represent himself to be, a member of, or an agent for, the Boy Scouts of the Philippines; and any person who violates any of the provisions of this Act shall be punished by *prision correccional* in its minimum period or a fine not exceeding Five thousand pesos (₱5,000.00) or both, at the discretion of the court.

It shall be unlawful for any person to manufacture, sell or distribute or cause to be manufactured, sold or distributed fraudulently or without the official knowledge and written consent or permission of the National Executive Board of the Boy Scouts of the Philippines badges, uniforms, insignia, or any other boy scout paraphernalia; or to use, apply, feature or portray said badges, uniforms, insignia or scouting paraphernalia or the photos or visuals of a boy scout or boy scouts in uniform, or the logo, seal, or corporate name of the Boy Scouts of the Philippines, in any print ad, radio or television commercial, billboard, collateral material or any form of advertisement; or to use the name of the Boy Scouts of the Philippines for any illegal purpose or personal gain. Any violation of any of the provisions of Section 7 and of this section shall be punished by *prision correccional* in its medium period to *prision mayor* in its minimum period or a fine of not less than Ten thousand pesos (₱10,000.00) nor more than One hundred thousand pesos (₱100,000.00), or both, at the discretion of the court: Provided, That, in case of corporations, partnerships, associations, societies or companies, the manager, administrator or the person in charge of the management or administration of the business shall be criminally responsible for any such violation. These penalties shall be without prejudice to the proper civil action for recovery of civil damages,

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thus, do not violate the prohibition under Section 16, Article XII of the Constitution. Moreover, Section 5 of RA 7278, amending Commonwealth Act No. 111, provides for a separability clause.[67]

In sum, the BSP is a private corporation beyond the audit jurisdiction of the COA. Accordingly, the specific provisions in the BSP charter creating the BSP as a private corporation are void. Considering the Constitutional infirmity of its creation, BSP's recourse is either to incorporate under the Corporation Code of the Philippines or to exist as an unincorporated association.

ACCORDINGLY, I vote to *GRANT* the petition. The Boy Scouts of the Philippines is a private corporation beyond the audit jurisdiction of the Commission on Audit. Sections 1, 2, 3, 5, 6, 7, 9, and 11 of Commonwealth Act No. 111, as amended by Presidential Decree No. 460 and Republic Act No. 7278, are void for being violative of the prohibition in Section 16, Article XII of the Constitution.

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which may be instituted together with or independently of the criminal prosecution.

[67] Section 5. If any section or provision of this Act is held invalid, all the other provisions not affected thereby shall remain valid.