

COMMENT:

**AD INTERIM APPOINTMENTS TO THE
COMMISSION ON ELECTIONS
-ANOTHER VIEW**

*Estelito p. Mendoza**

On March 22, 2001, President Gloria Macapagal Arroyo appointed Hon. Alfredo L. Benipayo as Chairman of the Commission on Elections and the Honorable Resurreccion Z. Borra, and Florentino A. Tuason, Jr., as Members "for a term of seven (7) years, expiring on February 2, 2008".

The appointment of Chairman Benipayo reads, as follows:

MALACAÑANG
Manila

March 22, 2001

Sir:

Pursuant to the provisions of existing laws, you are hereby appointed, *ad-interim*, CHAIRMAN ON COMMISSION ON ELECTIONS, "for a term of seven (7) years, expiring on February 2, 2008."

By virtue hereof, you may qualify and enter upon the performance of the duties of the office, furnishing this Office and the Civil Service Commission with copies of your oath of office.¹

(SGD.) GMARROYO

HON. ALFREDO L. BENIPAYO

* LL.B (Cum Laude), U.P. '52; Masters of Laws, Harvard University '54; Member of Faculty, U.P. College of Law (1954-1973); presently, in private practice of law.

¹ Messrs. Resurreccion Z. Borra and Florentino Tuason, Jr. were given similar appointments

Chairman
Commission on Elections
Intramuros, Manila

The appointment, it will be noted, is described as “*ad-interim*” because it was made while Congress was not in session, apparently, pursuant to the following provision of the Constitution under the heading, “Executive Department”:

SEC. 16. x x x

“The President shall have the power to make appointments during the recess of the Congress, whether voluntary or compulsory, but such appointments shall be effective only until disapproval by the Commission on Appointments or until the next adjournment of the Congress.”²

As the respective *ad interim* appointments of Messrs. Benipayo, Borra and Tuason provided that they “may qualify and enter upon the performance of the duties of the office x x x” or even before their respective appointments are confirmed by the Commission on Appointments, they assumed their respective positions immediately.

After the Congress convened, the President submitted the *ad interim* appointments to the Commission on Appointments for confirmation. The Congress adjourned without taking any action on the *ad interim* appointments. Immediately after, new *ad interim* appointments were made to enable them to continue in office. This process was repeated more than eight times.³

The validity of the *ad interim* appointments extended to Messrs. Benipayo, Borra, and Tuason was challenged before the Supreme Court in *Matibag vs. Benipayo, et al.*⁴ It was contended that the *ad interim* appointments were in violation of the Constitution.

The pertinent provisions of the Constitution are the following:

² CONST. Art. VII, Sec. 16.

³ On June 5, 2002 the Honorable Alfredo L. Benipayo was not given a new appointment; instead, Mr. Benjamin S. Abalos was given an *ad interim* appointment as Chairman. Messrs. Borra and Tuason were given new appointments. On September 6, 2002, Congress adjourned without confirming Messrs. Abalos, Borra, and Tuason. Immediately after, the President gave them new *ad interim* appointments and on the basis of these appointments, they continued office.

⁴ G.R. No. 149036

ARTICLE IX**CONSTITUTIONAL COMMISSIONS****A. COMMON PROVISIONS**

“SECTION 1. The Constitutional Commissions, which shall be **independent**, are the Civil Service Commission, the Commission on Elections, and the Commission on Audit.”⁵

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C. THE COMMISSION ON ELECTIONS

“SECTION 1. (1) There shall be a Commission on Elections composed of a Chairman and six Commissioners.

(2) The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, three Members shall hold office for seven years, two Members for five years, and the last Members for three years, without reappointment. Appointment to a vacancy shall be only for the unexpired term of the predecessor. In no case shall any Member be appointed or designated in a temporary or acting capacity.”⁶

In a decision promulgated on April 2, 2002, by a unanimous vote of eleven (11) members, including the Chief Justice, the Supreme Court ruled that the ad interim appointments did not violate the Constitution.⁷

I submit another view.

Firstly, the appointment of the Chairman and the members of the Commission is provided for under Article IX(C), Section 1(2) of the Constitution which reads, as follows:

⁵ CONST. art. IX, A.

⁶ CONST. art. IX, C.

⁷ By a resolution dated June 25, 2002, the Supreme Court denied a motion for reconsideration dated April 24, 2002 of the decision

THE COMMISSION ON ELECTIONS

SECTION 1. x x x

(2) The Chairman and the Commissioners shall be appointed by the President with the consent of the Commission on Appointments for a term of seven years without reappointment. Of those first appointed, three Members shall hold office for seven years, two Members for five years, and the last Members for three years, without reappointment. Appointment to a vacancy shall be only for the un-expired term of the predecessor. **In no case shall any Member be appointed or designated in temporary or acting capacity.**⁸
[emphasis supplied]

Under the above provision, the Chairman and the Commissioners “shall be appointed by the President with the consent of the Commission on Appointments.”⁹ The President may not appoint the Chairman and members of the Commission on Elections without the consent of the Commission of Appointments. The language could not have been clearer. Since *ad interim* appointments are made without the consent of the Commission on Appointments, the *ad interim* appointments of the Chairman and the members of the Commission on Elections are not in accord with the Constitution and, therefore, of no validity.

While Section 16, Article VII of the Constitution⁴ authorizes the President to make *ad interim* appointments, or appointments made during the recess of Congress, and which take effect immediately, the power may not apply in regard the appointment of the Chairman and Members of the Commission on Elections which are specifically provided for in Article IX(C), Section 1(2) of the Constitution.

Secondly, Article IX(C), Section 1 (2) of the Constitution explicitly provides “that the Chairman and the Commissioners (of the Commission on Elections) shall be appointed by the President with the consent of the Commission

⁸ CONST. art. IX, C.

⁹ CONST. art. VII- Executive Department

x x x

x x x

x x x

SECTION 16. The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, x x x and other officers whose appointments are vested in him in this Constitution. He shall also appoint x x x.

The President shall have the power to make appointments during the recess of the Congress, whether voluntary or involuntary, but such appointments shall be effective only until after disapproval by the Commission on Appointments or until the next adjournment of the Congress.

on Appointments for a term of seven years...” While the *ad interim* appointments of Messrs. Benipayo, Borra, and Tuason explicitly state that they are “for a term of seven (7) years, expiring on February 2, 2008”, they are in fact, as *ad interim* appointments, “effective only until disapproval by the Commission on Appointments or until the next adjournment of Congress”.¹⁰ As it turned out, because the Commission on Appointment did not confirm the appointments in the immediately succeeding session of Congress until adjournment, the *ad interim* appointments ceased to be effective and the President had to give Messrs. Benipayo, Borra, and Tuason new *ad interim* appointments in order to enable them to continue in office until the next adjournment of the Congress. The appointments were not “for a term of seven (7) years, expiring on February 2, 2008”.

Thirdly, Section 1, Article IX of the Constitution explicitly provides that the Commission on Elections shall be “independent.”¹¹ This means that once the Chairman and Members of the Commission on Appointments assume office, Commission can hardly be independent of the President and of Congress.

Fourthly, there is, in fact, a unique provision of the Constitution with regard to the Constitutional Commissions. As to the Commission on Elections, it is also provided under Article IX(C), Section 1 (2):

x x x Of those appointed, three Members shall hold office for seven years, two members for five years, and the last Members for three years, **without reappointment**. Appointment to any vacancy shall be only for the unexpired term of the predecessor. **In no case shall any Member be appointed or designated in a temporary or acting capacity.**¹² [emphasis supplied]

The above provision prohibits appointments of the Chairman and members of the Commission on Elections “in a temporary or acting capacity”. Only permanent appointments for the full term of seven (7) years, not until “disapproval by the Commission on Appointments or until the next adjournment of Congress”, are allowed by the Constitution.

In Matibag vs. Benipayo, et al,¹³ the Supreme Court upheld the validity of the *ad interim* appointments because of its view that even as the appointments are “*ad interim*”, and therefore “effective only until disapproval by the Commission on Appointments or until the next adjournment by Congress”, they are “permanent”

¹⁰ See second paragraph, Section 16, Article VII, of the 1987 Constitution.

¹¹ CONST. art. IX, sec. 1.

¹² CONST. art. IX, C, sec. 1 para. 2.

¹³ *Supra* note 4.

because the President may not withdraw the appointment once made. Said the Court:

“An *ad interim* appointment is a permanent appointment because it takes effect immediately and can no longer be withdrawn by the President once the appointee has qualified into office. The fact that it is subject to confirmation by the Commission on Appointments does not alter its permanent character. The Constitution itself makes an *ad interim* appointment permanent in character by making it effective until disapproved by the Commission on Appointments or until the next adjournment of congress. The second paragraph of Section 16, Article VII of the Constitution provides as follows:

‘The President shall have the power to make appointments during the recess of the Congress, whether voluntary or compulsory, but such appointments shall be effective only until disapproval by the Commission on Appointments or until the next adjournment of Congress.’ emphasis supplied]

Thus, the *ad interim* appointment remains effective until such disapproval or next adjournment, signifying that it can no longer be withdrawn or revoked by the President. The fear that the President can withdraw or revoke at any time and for any reason an *ad interim* appointment is utterly without basis.

More than half a century ago, this Court had already ruled that an *ad interim* appointment is permanent in character. In *Summers vs. Ozeta*, decided on October 25, 1948, we held that:

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In the instant case, the President did in fact appoint permanent Commissioners to fill the vacancies in the COMELEC, subject only to confirmation by the Commission on Appointments. Benipayo, Borra and Tuason were extended permanent appointments during the recess of Congress. They were not appointed or designated in a temporary or acting capacity, unlike Commissioner Haydee Yorac in *Brillantes vs. Yorac* and Solicitor General Felix Bautista in *Nacionalista Party vs. Bautista*. The *ad interim* appointments of Benipayo, Borra, and Tuason are expressly allowed by the Constitution which authorizes the President, during the recess of Congress to make appointments that take effect immediately.”¹⁴

An appointment to the position of chairman and Commissioners of the Commission on Elections would be “permanent” in the contemplation of Article

¹⁴ *Id.*

IX(A), Section I and Article IX(C), Section 1(2) of the Constitution only when the appointee is appointed and, when he assumes office, he can remain in office for seven (7) years; in the case of Messrs. Benipayo, Borra and Tuason, until February 2, 2008, as their *ad interim* appointments in fact provided. That the *ad interim* appointments “can no longer be withdrawn by the President once the appointee has qualified into office” does not make the appointments “permanent”. To enable Messrs. Benipayo, Borra and Tuason to stay in office after each adjournment of Congress without their appointments being confirmed, the President had to give them new *ad interim* appointments. As the Court itself stated in its Decision, whether to extend them new *ad interim* appointments is “a matter within the prerogative of the President”. She did not have to withdraw the appointments; what she needed to do only was not give them new *ad interim* appointments. Indeed, the *ad interim* appointments extended by the President are, by their terms, contradictory. They are described as “*ad interim*”, which means “until disapproval by the Commission on Appointments or until the next adjournment of the Congress”, but are stated “for a term of seven (7) years, expiring on February 2, 2008”.

The cases relied upon by the Supreme Court in support of the proposition that *ad interim* appointments are “permanent” in character are inapplicable. Not any of the cases cited involved the appointment of a Chairman and Member of any of the Constitutional Commissions under Article IX (C) of the Constitution. At best, they support the proposition that *ad interim* appointments, once made and accepted, may not be withdrawn by the President or whoever makes the appointment. The constitutionality of the *ad interim* appointments in those cases was not in issue. When the “permanent” character of an *ad interim* appointment was suggested in those cases, it was only in the sense that once made, and accepted, the appointing authority may not withdraw or terminate the appointment.

In *Summers vs. Ozaeta*,¹⁵ the issue was whether or not the acceptance of an *ad interim* appointment by a Cadastral Judge to the position of Judge-at-Large, which appointment was rejected by the Commission on Appointments, “amounted to a waiver of his right to hold the position of cadastral judge during the term fixed and guaranteed by the Constitution”. *Pacete vs. Secretary of Commission on Appointments*,¹⁶ involved only the issue of whether a confirmation of the Commission on Appointment of the *ad interim* appointment of Mr. Pacete as Municipal Judge is set aside by the filing the motion for reconsideration by a member of the Commission on Appointments. And *Pamantasan ng Lungsod ng Maynila vs. Intermediate Appellate Court*,¹⁷ did not involve an appointment by the President of the Philippines but the appointment by the Pamantasan ng Lungsod ng Maynila of a Vice-President for

¹⁵ 81 Phil 754 (1948).

¹⁶ G.R. No. L-25895. 23 July 1971.

¹⁷ G.R. No. L-65439. 18 November 1985.

Administration. *Marabombsar vs. Intermediate Appellate Court*,¹⁸ involve the appointment of an Executive Assistant II in Mindanao State University by the President of the University. And in *Guevarra vs. Innocentes*,¹⁹ the question was whether an *ad interim* appointment, not having been confirmed by the Commission on Appointments, terminated upon the adjournment of a “special session” of Congress instead of a “regular session”. *Visarra vs. Mirasflor*,²⁰ involved the question of whether an Associate Commissioner of the Commission of Elections may be appointed to the position of chairman. *Brillantes vs. Yorac*,²¹ and *Nacionalista Party vs. Bautista*,²² involved temporary appointments and not *ad interim* appointments.

The Court also stated:

While the Constitution mandates that the COMELEC “shall be independent”, this provision should be harmonized with the President’s power to extend *ad interim* appointments. To hold that the independence of the COMELEC requires the Commission on Appointments to first confirm *ad interim* appointees before the appointees can assume office will negate the President’s power to make *ad interim* appointments. This is contrary to the rule on statutory construction to give meaning and effect to every provision of the law. It will also run counter to the clear intent of the framers of the Constitution.

The above assumes that the President has, under the Constitution, the power to make *ad interim* appointments to the position of Chairman and members of the Commission on Elections. But that is precisely the issue. The Court begged the question.

It adds:

“The President’s to extent *ad interim* appointments may indeed briefly but the appointee at the mercy of both the appointing and confirming powers. This situation, however, is only for a short period- from the time of issuance of the *ad interim* appointment until the Commission on Appointments gives or withholds its consent. The Constitution itself sanctions this situation as a trade-off against the evil of disruptions in vital government services. This is also part of the check-and-balance under the separation of powers, as a trade-off against the evil of granting the President absolute and sole power to

¹⁸ 326 SCRA 62 (2000).

¹⁹ G.R. No. L-25577. 15 March 1966.

²⁰ G.R. No. L-20508. 16 May 1963.

²¹ G.R. No. 93867. 18 December 1990.

²² 85 Phil 101 (1949).

appoint. The Constitution was wisely subjected the President's appointing power to the checking power of the legislature."²³

In the case of Messrs. Benipayo, Borra and Tuason, their initial appointments were made on March 22, 2001. By virtue of several successive *ad interim* appointments given to them by the President, Chairman Benipayo continued in office for more than a year as an *ad interim* appointee. The President decided not to give him another *ad interim* appointment, and instead gave Mr. Benjamin Abalos an *ad interim* appointment as Chairman of the Commission on Elections while Messrs. Borra and Tuason are still members of the Commission on Elections, as *ad interim* appointees or, as their *ad interim* appointments on September 9, 2002, for more than a year and a half. That surely is not "a short period" to be "at the mercy of both the appointing and confirming powers". As the decision, in fact, noted:

"Whether the President chooses to nominate the prospective appointee or extend an *ad interim* appointment is a matter within the prerogative of the President because the Constitution grants her that power. This Court cannot inquire into the propriety of the choice made by the President in the exercise of her constitutional power, absent grave abuse of discretion amounting to lack or excess of jurisdiction on her part, which hasn't been shown in the instant case."

It has been suggested that unless *ad interim* appointments to the Commission on Elections are allowed, the Commission on Elections may be paralyzed because of vacancies, which may occur while Congress is not in session. The situation in the Commission on Elections when Messrs. Benipayo, Borra, and Tuason were given *ad interim* appointments is perhaps an adequate response to the apprehension. Without the three members, there would still be four members of the Commission on Elections and they would constitute a quorum. That is why the tenure of the members of the Commission on Elections is staggered. It must also be assumed that the President and the Commission on Appointments will discharge their responsibilities under the Constitution.

Another view therefore, is that *ad interim* appointments of the Chairman and members of the Commission on Elections are not allowed by the Constitution. The language of the Constitution is clear. *Ad interim* appointments are not compatible with the required independence of the Commission on Elections. The President may only submit nominations for appointment to the Commission on Appointments, and only after the Commission on Appointments gives its consent, make the appointments. The Commission on Appointments may not act on *ad interim* appointments to the Commission on Elections.

²³ *Id.*