

COMMENT:

A SEPARATE OPINION ON THE COMELEC AD INTERIM  
APPOINTMENTS

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Atty. Estelito P. Mendoza, in his article “Ad Interim Appointments to the Commission on Elections – Another View,”<sup>1</sup> propounds the theses that *ad interim* appointments of the Chairman and the Commissioners of the Commission on Elections (COMELEC) are not allowed because (1) it is proscribed by the Constitution, (2) such appointments are incompatible with the independence of the COMELEC, (3) the President may only nominate said officials then submit their nominations to the Commission on Appointments for the required consent and only after such consent is given will the President make the appointments, and (4) the Commission on Appointments may not act on *ad interim* appointments to the COMELEC. Simply put, the position of Atty. Mendoza is that during the recess of Congress, no appointments of the Chairman or Commissioners of the COMELEC may be made *ad interim* by the President even if there is an urgent need to fill a vacancy in these positions, and that it is only the *regular* appointments that the President may make and only while the Congress is in session. This article will demonstrate the absurdity of his theory.

I will present seriatim the arguments of Mendoza with my corresponding comments.

According to Atty. Mendoza:

Under the above provision [Const. art. IX(C), sec. 1, par. (2)], the Chairman and the Commissioners ‘shall be appointed by the President with the consent of the Commission on Appointments.’ The President may not appoint the Chairman and members of the COMELEC without the consent of the Commission on Appointments. The language could not have been clearer. Since *ad interim* appointments are made without the consent of the

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<sup>1</sup> 77 PHIL. L.J. 96 (2002).

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.<sup>2</sup> (citation omitted).

This is an overly simplistic reasoning. When the Constitution provides that the President's appointment of the COMELEC Chairman and Commissioners shall be made "with the consent of the Commission of Appointments," it does not specify *when* such consent may be given. It does not qualify the consent as "prior" to the appointment, otherwise, the proviso could have read "with the prior consent of the Commission on Appointments."

Thus, the desired consent of the Commission on Appointments need not be obtained before the appointment is made. From the constitutional standpoint, it may be given afterwards. It may well be an *a posteriori* consent. The subject proviso may well be read and construed as *subject to the consent of the Commission on Appointments* and still be faithful to the spirit of the Constitution.

An *ad interim* appointment is also made with the consent of the Commission on Appointments except that the consent, through confirmation, of the Commission comes *after* the appointment is made. In other words, the appointment is made during the legislative recess and becomes immediately effective, subject to the confirmation by the Commission on Appointments during the next legislative session. This is, as it should be, because the Commission on Appointments meets only while the Congress is in session – it is constituted within 30 days after both Houses of Congress shall have been organized.<sup>3</sup> Obviously then, during the recess of Congress, there is no Commission on Appointments to speak of that will give consent to the *ad interim* appointments made by the President. It is when the Commission on Appointments meets during the next legislative session, after it shall have been constituted, that its consent to the *ad interim* appointments can be given. In the final analysis, an *ad interim* appointment is still an appointment made "with the consent of the Commission on Appointments" as contemplated by the Constitution.

Atty. Mendoza further argued:

While Section 16, Article VII of the Constitution authorizes the President to make *ad interim* appointments, or appointments made during the recess of

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<sup>2</sup> *Id.* at 99.

<sup>3</sup> CONST., art. VI, sec. 19, which states: "The Electoral Tribunals and the Commission on Appointments shall be constituted within thirty days after the Senate and the House of Representatives shall have been organized with the election of the President and the Speaker. The Commission on Appointments shall meet only while the Congress is in session, at the call of its Chairman or a majority of all its Members, to discharge such powers and functions as are herein conferred upon it."

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 (sic) specifically provided for in Article IX(C), Section 1(2) of the Constitution.<sup>4</sup>

In keeping with a cardinal rule of statutory construction applicable to constitutional construction and interpretation, Section 1(2), Article IX-C<sup>5</sup>, specifically providing for the regular appointment of the Members of the COMELEC, and Section 16 (2), Article VII<sup>6</sup>, providing for the general powers of the President to make *ad interim* appointments, *should be read and construed together*, not singly or separately, so as to give effect to the entire Constitution. One provision cannot be taken and viewed in isolation from or without regard for the rest of the Constitution. Both provisions must be given effect so that one is read in relation to the other. After all, the Constitution has been framed as a whole and not in parts or sections.

The subject provisions are not conflicting or contradictory. They, in fact, complement each other: the appointment of the COMELEC Chairman and Commissioners may be either *regular* (during a legislative session) or *ad interim* (during a legislative recess) in character without being offensive to the Constitution.

Indeed, if it were the Constitutional intent to proscribe *ad interim* appointments of the COMELEC Chairman and Commissioners insisted upon by Atty. Mendoza, the last sentence of Section 1(2), Article IX-C of the 1987 Constitution could have easily provided: "in no case shall any member be appointed or designated *ad interim* or in a temporary or acting capacity," thereby foreclosing the applicability to COMELEC of Section 16 par. 2, Article VII of the same Constitution providing for *ad interim* appointments.

Atty. Mendoza's second argument states:

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<sup>4</sup> CONST., Art. VI, Sec. 19.

<sup>5</sup> Which states: "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 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."

<sup>6</sup> Which states: "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."

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 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'. As it turned out, because the Commission on Appointments 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'.<sup>7</sup>

There is apparently some confusion in this passage between the *effectivity* of an *ad interim* appointment, on one hand, and the *term of office* of the appointee, on the other. The *effectivity* of the appointment refers to the lifetime of the appointment *per se* during which it is in force and effect, while the term of office refers to the period during which the appointment may legally hold the office under the appointment. The *term* attaches to the office and its duration is fixed at a certain number of years by the Constitution. The *effectivity* of the appointment is separately determined to last until the happening of an event (the disapproval by the Commission on Appointments or adjournment of Congress) which is beyond the control of the appointee and the President and does not affect the running of the term of said appointee. Should it happen that the *ad interim* appointment is rejected by the Commission on Appointments or lapses upon adjournment of Congress during the running of the term, then the appointee ceases in office and the period of his actual occupancy of the office would correspond to his tenure which is shorter in duration than the term. Being attached to the office as fixed by the Constitution, the term continues to run despite the appointee's cessation in office. Differently stated, the term does not lapse with the demise of the appointment. So long as the office exists, the term exists.

Thirdly, Atty. Mendoza argues:

Section 1, Article IX of the Constitution explicitly provides that the Commission on Elections shall be 'independent'. This means that once the Chairman and the Members of the Commission on Appointments (sic)

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<sup>7</sup> Mendoza, *supra* note 1, at 99-100.

assume office, [the] Commission can hardly be independent of the President and of Congress.<sup>8</sup>

The paragraph, at first blush, does not make any sense. But if read in the light of the next succeeding passage, it seems to convey the thought that an *ad interim* appointment is incompatible with the independence of the COMELEC.

There is no incompatibility. Worth noticing is that this attribute of independence pertains to the COMELEC as an institution regardless of its composition, by virtue of which it is placed outside the administrative control and supervision of the three (3) branches of government. The lapse in effectivity of the *ad interim* appointment of a Member thereof neither detracts from, nor is in derogation, of the independence of the COMELEC. The plain fact is that the COMELEC, as a constitutional body, remains administratively independent of the legislative, executive, and judicial departments of the government during the effectivity of said appointments and even thereafter. While holding the office under an *ad interim* appointment and during its effectivity, a Member of the COMELEC may not be interfered with, influenced, or controlled by the President and the Congress in the exercise of his functions and performance of his duties. This is the independence enjoyed by the COMELEC Members contemplated by the Constitution. It is not impaired to any degree by the contingency of disapproval of the *ad interim* appointment by the Commission on Appointments or the next adjournment of Congress. These are supervening events that affect the tenure of the appointee, not the permanency of the *ad interim* appointment. Verily, the *ad interim* appointment with its permanent character and the independence of the COMELEC can go hand in hand; they can co-exist in harmony. There is no perceivable contrariety and antagonism between them.

Fourthly, he argues:

[T]here 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):

'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 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.*'

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<sup>8</sup> *Id.* at 100 (There is obviously a typographical error in this passage with some portions having been omitted).

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.<sup>9</sup>

Again, the confusion persists. The term of office of seven years is being equated and confused with the effectivity of the *ad interim* appointment. It bears repeating that the effectivity of said appointment which reaches its terminal point either upon disapproval by the Commission on Appointments or adjournment of Congress, should any of these events transpire, is apart and distinct from the term which attaches to the office, whether this is filled or not, so much so that even as the appointment itself lapses, the term continues to run.

Atty. Mendoza's article implies that an *ad interim* appointment is in the nature of an appointment "in a temporary or acting capacity" and, therefore, not permanent because it is effective only until "disapproval by the Commission on Appointments or until the next adjournment of Congress" This view loses sight of the fact that an appointment in a temporary or acting capacity is one that may be revoked *at any time* by, or at the pleasure of, the President as the appointing power. Hence, the prohibition is addressed to the President. On the other hand, an *ad interim* appointment, once made and the appointee has already assumed office thereunder cannot be revoked by the President so long as it is effective and in force. Verily, the effectivity of the *ad interim* appointment and its termination are beyond the control of the President and the appointee. Put differently, a temporary or acting appointment is revocable at will by the President, while an *ad interim* appointment is terminable by the Commission on Appointments or the Congress.

Atty. Mendoza adds:

An appointment to the position of the Chairman and Commissioners of the Commission on Elections would be 'permanent' in the contemplation of Article IX(A), 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 appointment 'permanent'. x x x 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

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<sup>9</sup> *Ibid.*

the next adjournment of the Congress', but are stated 'for a term of seven (7) years, expiring on February 2, 2008.'<sup>10</sup>

This reasoning defies logic; its fallacy is self-evident. Even if an appointment is permanent in character, the appointee may not necessarily remain in office for or serve out the full term for which he or she was appointed. He may well serve for a lesser period for one reason or another. The mere circumstance that he does not complete his term does not detract from the permanent nature of the appointment. The *ad interim* appointment is permanent because it cannot be withdrawn any time by the President during its effectivity, not because the office may be held for the full term by the appointee. The permanency of the appointment should not be determined or equated with the eventuality of the office being held for the full term by the appointee.

It is quite clear under Section 16 (2), Article VII of the 1987 Constitution<sup>11</sup> that the terminal point of effectivity is such appointment by the President made during the recess of the Congress, not to the term of office of the appointee, which is not even mentioned by the provision. To be sure, the running of the term of office is not parallel with the effectivity of the appointment itself.

Finally, Atty. Mendoza states:

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 while 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.<sup>12</sup>

But supposing the situation is that there are 4, 5, or 6 vacancies in the positions of Chairman and Commissioners of the COMELEC during a legislative

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<sup>10</sup> *Id.* at 101.

<sup>11</sup> Which states: "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 disapproval by the Commission on Appointments or until the next adjournment of the Congress."

<sup>12</sup> Mendoza, *supra* note 1, at 104.

recess, then, no quorum would remain and the COMELEC would be paralyzed. And in the case of the Commission on Audit or the Civil Service Commission, which is similarly situated as the COMELEC regarding the appointment of its members, should there be 2 vacancies out of its 3 members, there would certainly result a paralysis if the President would make no appointment, *ad interim*.

In any event, it is settled jurisprudence that the obvious purpose of the grant to the President of the power to make appointments *ad interim* is to prevent any interruption in the operation of the government, or any impairment in its efficiency caused by the absence or removal of any officer during a legislative recess. It is intended "to prevent a hiatus in the discharge of official duties. Obviously, the public office would be immobilized to the prejudice of the people if the President had to wait for the Congress and the Commission on Appointments to reconvene before he could fill a vacancy occurring during the recess."<sup>13</sup>

Indeed, it was never the intent of the Constitution to compel the President to wait until Congress meets in session before nominating one, by regular appointment, to fill an existing vacancy arising from the resignation, death, removal, or permanent incapacity of an incumbent Chairman or Commissioner in the COMELEC, or in the other constitutional commissions, for that matter. Meanwhile, the vacancy persists during the legislative recess and even onwards to the next session so long as the nominee cannot yet assume the position pending its confirmation by the Commission on Appointments. Temporary appointment is proscribed by the Constitution and, if the view of Atty. Mendoza is adopted, an *ad interim* appointment would be similarly unavailing, so the interruption in the service lingers on to the detriment of the public.

Under the circumstances, not being able to make either a regular appointment, an *ad interim* appointment, in the view espoused by Atty. Mendoza, or a temporary designation, the President would be immobilized and virtually placed in a straitjacket. The uncertainty caused by the vacancy remaining unfilled creates a vacuum that should be eschewed. *Natura vacuum abhorret*.

In fine, the better and more realistic view is that when a vacancy in the membership of the COMELEC arises when Congress is in recess, the President should be allowed to make an *ad interim* appointment.

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<sup>13</sup> I. CRUZ, CONSTITUTIONAL LAW 207 (2001).