OUT OF BOUNDS: REASSESSING THE PRESIDENT'S POWER TO APPOINT ELECTIVE OFFICIALS*

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ABSTRACT

In a democratic and republican State, the people should have the right to select their leaders via free, fair, and regularly scheduled elections. Unfortunately, recent laws and jurisprudence have enabled Congress to suspend elections in certain local government units ("LGUs") and use the resulting vacancies to authorize the president to appoint local elective officials. Postpone-and-appoint schemes, which are remnants of the martial law years in our current legal order, deprive the people of the opportunity to vote for their local leaders. The danger in leaving these arrangements unopposed is that they serve as open invitations for future congresses and presidents to come up with other seemingly legitimate reasons to justify suspending polls in other LGUs across the country. This Note assails the constitutionality of postpone-and-appoint schemes. It raises the following arguments: (1) the Appointments Clause does not cover elective officials; (2) the election of local officials is governed by specific rules under Article X of the 1987 Constitution, which precludes interference by national officials; (3) Congress's power of control over local government units does not entitle it to ignore the constitutional rules on elective officials; and (4) the president's power of general supervision does not include the power to appoint elective officials. Under the present Constitution, the people have reserved to themselves the power to directly choose who their local leaders should be. Neither Congress nor the president has the right to violate the sovereign's will.

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"Nothing strengthens authority so much as silence."
—Leonardo da Vinci

INTRODUCTION

This Note aims to answer a simple but important question in constitutional law: Can Congress grant the president the power to appoint local elective officials? On its face, this query may seem paradoxical. The meaning of the term "elective official" appears to be so elementary and self-evident that the framers of the Constitution did not even bother to provide a formal definition. The Omnibus Election Code ("OEC"), the Administrative Code, and the Local Government Code ("LGC") are similarly silent on the matter.[1] Since it is widely understood that elective officials are elected into their public offices, by necessary implication, no person can acquire the right to hold an elective post through a presidential appointment.

And yet, our current statutes and jurisprudence answer the question in the affirmative. In *Kida v. Senate*,[2] the Supreme Court upheld the constitutionality of Republic Act (R.A.) No. 10153. Through this statute, Congress authorized then-President Benigno Aquino III to appoint officers-in-charge ("OICs") for the positions of governor, vice governor, and regional legislative assembly members of the Autonomous Region in Muslim Mindanao (ARMM).[3] This was meant to be a stopgap measure in response to Congress's decision to postpone the erstwhile scheduled August 2011 ARMM elections to May 2013.[4] Aware that a decision sustaining the validity of a law depriving the people of their right to vote and countenancing the president's power to appoint local elective officials would arouse controversy, the *ponencia* attempted to preempt criticism by remarking that the Court had arrived at its

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[1] These statutes lay down the rules, duties, qualifications and disqualifications, and prohibitions imposed on elective officials. However, they do not provide a formal definition of the term or its essential elements—perhaps because these seem rather obvious.

[2] [Hereinafter "*Kida*"], G.R. No. 196271, 659 SCRA 270, Oct. 18, 2011.

[3] Rep. Act No. 10153 (2011), § 3. "The President shall appoint officers-in-charge for the Office of the Regional Governor, Regional Vice Governor and Members of the Regional Legislative Assembly who shall perform the functions pertaining to the said offices until the officials duly elected in the May 2013 elections shall have qualified and assumed office."

[4] § 2. "The regular elections for the Regional Governor, Regional Vice Governor and Members of the Regional Legislative Assembly of the Autonomous Region in Muslim Mindanao (ARMM) shall be held on the second (2nd) Monday of May 2013. Succeeding regular elections shall be held on the same date every three (3) years thereafter."

decision based on the "unique factual and legal circumstances which led to the enactment of R.A. 10153."[5]

But just a decade later, the same case was invoked to justify the enactment of another statute analogous to R.A. 10153.[6] Approved on October 28, 2021, R.A. 11593 postponed the first regular election of the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM) originally scheduled for May 2022 to May 2025.[7] This time around, Congress authorized "the President [to] appoint the eighty (80) new interim members of the [Bangsamoro Transition Authority] who shall serve up to June 30, 2025 or until their successors shall have been elected and qualified."[8]

R.A. 11593 is a logical successor of R.A. 10153. While the two statutes possess certain distinctions,[9] the following elements are present in both

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[5] Datu Michael Abas Kida v. Senate [hereinafter "*Kida Resolution*"], G.R. No. 196271, 667 SCRA 200, 244, Feb. 28, 2012.

[6] Esmael Mangudadatu, *SPONSORSHIP SPEECH: The aspiration and attainment of peace is not only for the benefit of the BARMM but the whole country*, MINDANEWS, Sept. 14, 2021, *at* https://www.mindanews.com/mindaviews/2021/09/sponsorship-speech-the-aspiration-and-attainment-of-peace-is-not-only-for-the-benefit-of-the-barmm-but-the-whole-country/.

In his sponsorship speech in favor of H. No. 10121, 18th Cong., 3rd Sess. (2021), Representative Mangudadatu cited three portions of the Supreme Court's ruling in *Kida,* including: '"The gravest challenge posed by the petitions to the authority to appoint OICs under Section 3 of RA No. 10153 is the assertion that the Constitution requires that the ARMM executive and legislative officials to be "elective and representative of the constituent political units.' This requirement indeed is an express limitation whose non-observance in the assailed law leaves the appointment of OICs constitutionally defective.

After fully examining the issue, we hold that this alleged constitutional problem is more apparent than real and becomes very real only if RA No. 10153 were to be mistakenly read as a law that changes the elective and representative character of ARMM positions. RA No. 10153, however, does not in any way amend what the organic law of the ARMM (RA No. 9054) sets outs [sic] in terms of structure of governance. What RA No. 10153 in fact only does is to 'appoint officers-in-charge for the Office of the Regional Governor, Regional Vice Governor and Members of the Regional Legislative Assembly who shall perform the functions pertaining to the said offices until the officials duly elected in the May 2013 elections shall have qualified and assumed office.' This power is far different from appointing elective ARMM officials for the abbreviated term ending on the assumption to office of the officials elected in the May 2013 elections."

[7] Rep. Act No. 11593 (2021), § 1. "The first regular election for the Bangsamoro Government under this Organic Law shall be held and synchronized with the 2025 national elections."

[8] § 2.

[9] The former statute deals with the ARMM while the latter statute applies to the Bangsamoro Autonomous Region in Muslim Mindanao (BARMM). The former statute empowered the president to appoint both the legislative and executive elective officials of the ARMM, while the latter statute empowered the president to appoint the 80 members of the

statutes: (1) Congress caused the postponement of the elections; (2) due to the postponement, the terms of the elective officials involved expired[10] or will expire[11] before their successors could be elected; and (3) Congress authorized the president to appoint local elective officials to fill the impending vacancies. So, when Congress enacted R.A. 11593, it did so with the confidence that the Court in *Kida* had already ruled favorably on the constitutionality of a substantially similar law: R.A. 10153.

But in this Note, the author will argue that the Court's decision in *Kida* was contrary to the text and spirit of the Constitution. Hence, R.A. 10153, insofar as it authorized President Aquino to appoint local elective officials in lieu of holding elections, should have been declared unconstitutional. This conviction arises from a simple thesis fundamental to our constitutional order: Under our democratic and republican system of government,[12] Congress cannot substitute the will of the president for the will of the people. More specifically, Congress cannot postpone local elections, create vacancies in the elective offices in local government units ("LGUs"), and then use these openings to justify granting the president the power to appoint the persons who shall fill them.

This Note forwards the following arguments:

(i) The Court in *Kida* incorrectly held that the Appointments Clause of the Constitution[13] includes elective officials.

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interim Bangsamoro Parliament. The policy behind the former statute is the synchronization of the date of elections, while the policy behind the latter is to extend the transition period given to the BTA.

[10] Rep. Act No. 9333 (2004), § 2. "The term of office of the Regional Governor, Regional Vice-Governor and Members of the Regional Legislative Assembly of the ARMM shall be for a period of three years, which shall commence at noon on the thirtieth (30th) day of September 2005 and shall end at noon of the same date three years thereafter." The term of the ARMM elective officials who were elected on Aug. 2008 was bound to end on Sept. 30, 2011. An election for the next set of officials was scheduled for Aug. 2011. However, due to the enactment of R.A. 10153, the election was cancelled.

[11] Under Rep. Act No. 11054 (2017), art. XVI, §§ 12–13, the first regular BARMM election and the end of the term of the BTA were supposed to take place in 2022. However, due to the enactment of R.A. 11593, the BARMM election was postponed to May 2025.

[12] CONST. art. II, § 1.

[13] Art. VII, § 16. *The President shall nominate* and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint *all other officers* of the Government whose appointments are not otherwise provided for by law, and *those whom he may be authorized by law to appoint.* The Congress may, by law, vest

(ii) Local elective officials are elected separately and receive their own individual mandates from the voters. Thus, neither the president nor Congress can substitute their judgment for the will of the electorate.

(iii) While it is true that Congress possesses both the power of control over LGUs and the power to determine which positions are classified as local elective posts, once they are classified as such, the constitutional rules on elective officials apply.[14] Consequently, Congress cannot vest in the president the power to appoint the persons who shall fill these local elective posts in lieu of holding elections.

(iv) The president's power of general supervision does not cover the appointment of elective officials.

The author submits that the general rule should be that the president cannot appoint elective officials, even if such appointments are merely in an acting, interim, or OIC capacity. Of course, as is the case with most legal principles, there are reasonable exceptions to this rule. However, the author believes that these exceptions were improperly invoked in *Kida* and the two aforementioned statutes.

I. SCOPE AND LIMITATIONS

Before proceeding further, an important qualification must be made. The focus of this Note is to answer this general question: Can Congress grant the president the power to appoint local elective officials? Arriving at the answer requires a review of the existing laws and jurisprudence on this issue—specifically, R.A. 10153 and R.A. 11593, as well as the Court's decision in *Kida*—as they provide historical context that helps crystallize the issue. That being said, the author would have still pursued this inquiry had *Kida* dealt with the constitutionality of the president's power to appoint any other set of officials in any other province, city, or municipality in the Philippines—for example, the governor and *Sangguniang Panlalawigan* members of Tarlac—instead of the ARMM governor or the members of the Bangsamoro Transition Authority (BTA). This is why the research question is intentionally

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the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards. (Emphasis supplied.)

[14] Art. X, § 8. *See* § 18. *See also* §§ 11–12.

broad: This Note seeks to define the constitutional bounds of the president's power to appoint as it applies to the general class of local elective officials,[15] not just to the specific subset of autonomous region elective officials.[16] This Note should not be construed as an analysis of the constitutionality and wisdom of the legal structure of the BARMM.

II. HISTORICAL BACKGROUND

A. Martial Law and President Marcos, Sr.'s Power to Appoint and Remove Elective Officials

One of the potent tools that the dictator Ferdinand Marcos, Sr. used to concentrate power was to arrogate to himself the ability to appoint and remove local elective officials. The last free local election held prior to the declaration of martial law was in November 1971. The winners were elected for a term of four years, which should have ended on December 31, 1975. But following the issuance of Proclamation No. 1081[17] and the railroading of the 1973 Constitution, Marcos canceled both the 1973 presidential and 1975 local elections. Instead, the New Society's Charter mandated that "[a]ll officials and employees [...] shall continue in office until otherwise provided by law or decreed by the incumbent President of the Philippines."[18] Notably, the text of this provision implied that Marcos could remove an elected official by decree. This intention was confirmed by his following actions.

In February 1975, the dictator called for a national referendum that posed this question to the voters: "At the expiration of the terms of office of your local elective officials on December 31, 1975, how do you want their successors to be chosen?" The electorate was given two options: (1) appointed; or (2) elected. Supposedly, 15,321,779 (77.45% of all) voters opted to surrender their power to choose their local leaders, and instead handed to Marcos a blank check to appoint all local elective officials. On the other hand, 3,278,058 (16.57% of all) voters allegedly chose to retain their right to vote for their LGU leaders.[19] Following this, Marcos operationalized his power to

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[15] § 8. *See also* § 1.

[16] § 18. In *Kida*, 659 SCRA 270, 292, the Court noted: "an autonomous region is considered a form of local government [as] reflected in Section 1, Article X of the Constitution."

[17] Proc. No. 1081 (1972).

[18] CONST. (1973), art. XVII, § 9. *See also* Gen. Order No. 3 (1972), pmbl. ¶ 4.

[19] PRESIDENTIAL COMMUNICATIONS DEVELOPMENT AND STRATEGIC OFFICE, PHILIPPINE ELECTORAL ALMANAC 137 (2015), *available at*

remove and appoint local elective officials by issuing Presidential Decree No. 1576 ("P.D. 1576"), series of 1978, which provided that:

> *Local elective officials* whose terms expired on December 31, 1975 and thereafter continued to hold over shall *continue holding their respective offices until the President appoints any qualified person to succeed them or until elections are called for those positions*. Any vacancy occurring for any reason, whether temporary or permanent, in the office of provincial governor, city or municipal mayor, member of the provincial, city or municipal *sanggunian*, shall also be filled by the President by designation or appointment of any qualified person.[20]

The effect of this decree is clear. By granting himself the power to remove and appoint them, Marcos effectively, if not formally,[21] gained control over local elective officials.[22]

In summary: (1) Marcos caused the postponement of the elections; (2) the postponement exceeded the lawful term of the elective officials; and (3) Marcos then cited the expiration of the said term to justify his decree that gave the president the power to appoint the persons who shall serve in elective posts until the next election could be held.

B. The Power to Appoint Under the 1987 Constitution

After a 14-year dictatorship, the Filipino people, through the 1987 Constitution, restored a democratic and republican system of government.[23]

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https://archive.org/details/philippine-electoral-almanac-revised-and-expanded/page/n1/mode/1up?q=1975. The balance of the voters abstained.

[20] Pres. Dec. No. 1576 (1978), § 1. (Emphasis supplied.) This presidential decree "[p]rovided for the appointment, removal or suspension of local elective officials during the transition period." ¶ 2 made reference to the February 1975 referendum: "WHEREAS, in the referendum held on February 27, 1975, the people expresses their desire that, instead of calling an election upon the expiration of the term of office of local elective officials on December 31, 1975, the incumbent President of the Philippines appoint their successors[.]"

[21] LOCAL GOV'T CODE (1983), § 14. "The President of the Philippines shall exercise general supervision over local governments to ensure that local affairs are administered according to law."

[22] JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 98 (2009 ed.). *See also* Manuel L. Quezon III, *An offer no bureaucrat can refuse,* INQUIRER.NET, Jan. 18, 2017, *at* https://opinion.inquirer.net/100915/offer-no-bureaucrat-can-refuse.

[23] CONST. art. II, § 1. *See* Garcia v. Comm'n on Elections, G.R. No. 111230, 237 SCRA 279, 288, Sept. 30, 1994. "In February 1986, the people took a direct hand in the

A fundamental pillar of a democratic republic is regularly scheduled elections. This is why another tool the dictator used to ensure the concentration of power in himself was the repeated postponement of elections. If the power to remove was the proverbial stick Marcos used to curb potential dissent from local government officials, the power to appoint and the abolition of fixed terms were his carrots. As a result, the new Constitution purposely curtailed the president's powers to postpone elections and extend term limits by providing a definite election schedule[24] and fixed terms for elective officials.[25] Moreover, as it pertained to the power to remove elective officials, the Court in *Pablico v. Villapando*[26] noted that:

> [T]he penalty of dismissal from service upon an erring elective local official may be decreed only by a court of law. Thus, in *Salalima, et al. v. Guingona, et al.*, we held that '[t]he Office of the President is *without any power to remove elected officials, since such power is exclusively vested in the proper courts* as expressly provided for in the last paragraph of the aforequoted Section 60 [of the LGC].[27]

But are there still remnants of Marcos's power to appoint elective officials under our current legal system? For national elective officials,[28] the answer is no. Under the 1987 Constitution, the president cannot appoint the vice-president, who is elected independently of the chief executive and, therefore, has a claim to a separate electoral mandate.[29] And unlike the 1973 Constitution,[30] the present charter prohibits the president from appointing any member of either house of Congress,[31] who not only has a separate electoral mandate but also performs vastly different functions. The lone instance when a president may "appoint" a person to an elective post in the

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determination of their destiny. They toppled down the government of former President Marcos in a historic bloodless revolution. The Constitution was rewritten to embody the lessons of their sad experience."

[24] Osmeña v. Comm'n on Elections [hereinafter "*Osmeña*"], G.R. No. 100318, 199 SCRA 750, July 30, 1991. *See also* CONST. art. XVIII, § 2; art. VI, § 8; art. VII, § 4.

[25] CONST. art. X, § 8; art. VII, § 4; art. VI, §§ 4, 7.

[26] G.R. No. 147870, 385 SCRA 601, July 31, 2002.

[27] *Id.* at 604, *quoting* Salalima v. Guingona, G.R. No. 117589, 257 SCRA 55, May 22, 1996. (Emphasis supplied.)

[28] This includes members of the House of Representatives. Sema v. Comm'n on Elections, G.R. No. 177597, 558 SCRA 700, 734, July 16, 2008. "Indeed, the office of a legislative district representative to Congress is a national office, and its occupant, a Member of the House of Representatives, is a national official."

[29] CONST. art. VII, § 4. Interestingly, in the five presidential elections conducted under the 1987 Constitution, only once did the Filipino people elect a president and vice-president from the same ticket: Gloria Macapagal-Arroyo and Noli de Castro in 2004.

[30] CONST. (1973), art. VIII, § 2.

[31] CONST. art. VI, §§ 2, 5, 7.

national government is when there is a vacancy in the vice-presidency.[32] Even in this situation, the president is not given a free hand. The following requisites must concur before the president can validly select a vice-president: (1) there must have been an elected vice-president;[33] (2) the elected vice-president dies, becomes permanently disabled, is removed, or resigns prior to the end of their elected term;[34] (3) the person nominated by the president to fill the vacancy possesses all the qualifications of an elected vice-president;[35] and (4) the nominee is confirmed by a majority vote of the Senate and the House voting separately.[36] Crucially, Congress cannot just pass a law that would cancel the election for vice-president and give the elected president complete liberty to select who he or she wants to become vice-president. This is because in the case of the vice-president—as is the case for the president and the members of Congress—the Constitution explicitly provides: (1) that these offices are elective positions;[37] (2) the fixed date when elections should be held for these positions;[38] (3) fixed lengths of terms;[39] and (4) relatively detailed procedures for dealing with vacancies in these offices.[40]

However, the specific bounds of the president's power to appoint, as it applies to local elective officials, are not as clear-cut.

C. *Kida v. Senate*

In *Kida*, the Court had the opportunity to rule on whether Congress could postpone or cancel[41] local elections and instead grant the president the

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[32] Art. VII, § 9.

[33] § 9. "Whenever there is a vacancy in the Office of the Vice-President during the term for which he was elected, the President shall nominate a Vice-President from among the Members of the Senate and the House of Representatives who shall assume office upon confirmation by a majority vote of all the Members of both Houses of the Congress, voting separately."

[34] § 9 *in relation to* § 8.

[35] § 9 *in relation to* § 3.

[36] § 9.

[37] § 2. *See* art. VI, §§ 2, 5, 7.

[38] *Osmeña*, 199 SCRA 750. *See also* CONST. art. XVIII, § 2; art. VI, § 8; art. VII, § 4.

[39] CONST. art. VI, §§ 4, 7; art. VII, § 4.

[40] Art. VI, § 9; art. VII, §§ 9, 10.

[41] While the *ponencia* would eventually frame R.A. 10153 as merely causing a temporary postponement of the ARMM polls from 2011 to 2013, former Senator Aquilino "Nene" Pimentel, Jr. characterized it as a "cancellation" of an ARMM regular election. Given that both the Constitution and the ARMM Organic Act require that elections for local elective posts be held every three years, the author agrees with Senator Pimentel's assertion as the effect of the said statute was that no ARMM election was held for five years. Nene Pimentel,

power to appoint local elective officials. While the case was decided in 2011, the controversy began 22 years earlier with the enactment of the ARMM Organic Act. Pursuant to the said law,[42] the first regular ARMM election was held on February 12, 1990. But since ARMM elective officials had a term of three years,[43] the subsequent regional election held in 1993 was not synchronized with the following nationwide local elections held in May 1992.[44] After several amendments to the Organic Act and multiple instances of rescheduling of elections, Republic Act No. 9333 reset the date of the ARMM regular election to August 2005, with succeeding elections to be held upon three-year intervals.[45] The August 2008 election pushed through as intended. However, the August 2011 polls did not, as Congress again postponed the ARMM election—this time to synchronize it with the nationwide May 2013 elections.[46] But unlike in previous instances of rescheduling, where the incumbent officials were allowed to hold over until their successors were elected,[47] Congress significantly changed course when it enacted R.A. 10153, which authorized President Aquino to appoint OICs for the local elective offices in the ARMM.[48] This scheme was challenged by several petitioners before the high court.

In assessing how the officials for the 21-month period of August 2011 to May 2013 should be selected,[49] the Court noted that Congress had three

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COMMENTARY: RA 10153: Unconstitutional, Illegal, Defiling of sacred right of suffrage, MINDANEWS, Aug. 15, 2011, *at* https://www.mindanews.com/mindaviews/2011/08/commentary-ra-10153-unconstitutional-illegal-defiling-of-sacred-right-of-suffrage/.

[42] Rep. Act No. 6734 (1989), art. XIX, § 7.

[43] Art. VII, § 5; art. VIII, § 6; CONST. art. X, § 8.

[44] CONST. art. XVIII, § 2.

[45] Rep. Act No. 9333 (2004), § 2.

[46] Rep. Act No. 10153 (2011), § 2.

[47] *See* Rep. Act No. 7647 (1993), § 1; Rep. Act No. 8176 (1995), § 1; Rep. Act No. 8746 (1999), § 1; Rep. Act No. 8753 (1999), § 3; Rep. Act No. 8953 (2000), § 4; Rep. Act No. 9054 (2001), art. VII, § 7; Rep. Act No. 9140 (2001), § 3; Rep. Act No. 9333 (2004), § 3.

[48] Rep. Act No. 10153 (2011), § 3.

[49] The Court actually had to deal with two controversies in *Kida*: (1) Congress's power to reschedule the ARMM election pursuant to the constitutional policy of synchronizing elections; and (2) Congress's power to authorize the president to appoint OICs for the elective offices in the ARMM.

In justifying Congress's actions as to the first issue, the Court cited its ruling in *Osmeña*, 199 SCRA 750, 758, where it was held that the Constitution's Transitory Provisions require "that the terms of office of Senators, Members of the House of Representatives, the local officials, the President and the Vice-President have been synchronized to end on the same hour, date and year — noon of June 30[.]" The Court also ruled in *Osmeña*, 199 SCRA at 765, that "the election for Senators, Members of the House of Representatives and the local officials (under Sec. 2, Art. XVIII) will have to be synchronized with the election for President

alternative options: (1) holdover of the incumbent elective officials; (2) "special" elections in the ARMM; or (3) authorize the president to appoint OICs. Somewhat surprisingly, the *ponencia* not only upheld the constitutionality of the third option,[50] but also categorically declared that the first and second options were not legally tenable. As to the first option, the Court held that the holdover of the officials elected to serve the term of 2008 to 2011 until their successors were elected in May 2013 was not a viable option as it would unconstitutionally extend the three-year term limit of local elective officials explicitly mandated by the Constitution.[51] An alternative view—that the 21-month period following the expiration of the 2008–2011 term of the elective ARMM officials could be considered a new term—was rejected. The *ponencia* opined that under this scenario, the holdover officials would effectively be congressional appointees, thus intruding into the president's power to appoint.[52]

As to the second option, the Court held that only Congress and the Commission on Elections (COMELEC)[53] have the power to change the date of elections.[54] Congress was justified in rescheduling the August 2011 ARMM polls to May 2013, as it was merely complying with the constitutional policy on synchronization of elections. Moreover, the legislature alone had the power to decide whether to hold a special election to fill the positions for the

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and Vice President (under Sec. 5, Art. XVIII)." These provisions require that the said elections be held on the second Monday of May, beginning in 1992 and followed every three and six years thereafter, depending on the length of the term provided by the Constitution for the respective offices. Since autonomous region offices fall within the scope of local elective offices, the Court deemed that elections for these positions are covered by the rule on synchronization. *See also* Rep. Act No. 7166 (1991), §§ 1–2.

The author agrees with the Court's pronouncement in *Kida* regarding Congress's duty and power to synchronize the ARMM election with the nationwide local elections to be held on the second Monday of May 2013. What the author disagrees with is the notion that the synchronization of elections justifies the "cancellation" of the August 2011 ARMM elections, and worse, the president's appointment of the persons to fill up the vacated local elective offices.

[50] *See infra* Part III.

[51] CONST. art. X, § 8. In *Osmeña,* 199 SCRA at 763, *as cited in Kida*, the Court declared: "It is not competent for the legislature to extend the term of officers by providing that they shall hold over until their successors are elected and qualified where the constitution has in effect or by clear implication prescribed the term and when the Constitution fixes the day on which the official term shall begin, there is no legislative authority to continue the office beyond that period, even though the successors fail to qualify within the time." (Citations omitted.)

[52] CONST. art. VII, § 16.

[53] The legislature has delegated to the Commission on Elections (COMELEC) the power to reschedule elections in cases of unexpected and unforeseen circumstances that prevent the holding or result in the failure of elections. ELECT. CODE, §§ 5–6.

[54] CONST. art. VI, § 7, 8; art. VII, § 4.

21-month interregnum. And since Congress opted not to do so, the Court declared that it could not reverse this legislative policy decision as it would amount to judicial legislation. Furthermore, the Court noted that even if it had the power to compel the COMELEC to hold special elections, under this scenario, the winners in the hypothetical 2011 special elections could only serve until May 2013. This arrangement, the Court claimed, would run afoul of the constitutional mandate that the term of office of local elective officials should be three years.[55]

While the focus of this Note is the president's general power to appoint elective officials, the author could not help but object to how the *ponencia* disposed of some of the specific issues unique to *Kida* such as: (1) the mechanical frame through which it viewed the three-year term for elective officials; (2) its characterization of the proposed "special election"; and (3) its assertion that synchronization justified the forgoing of the 2011 election.

First, the constitutional grant of a three-year term to elective officials is not merely to guarantee their ability to enjoy the rights and privileges of the office for a fixed period.[56] Its more significant purpose is to ensure that voters are given the option to retain or replace their local leaders in the third year via an election.[57] And so while Congress has the power to reset the election day for local officials, the rescheduled date must precede—not exceed—the third year from the date the local officials assumed office. In other words, Congress cannot exercise its power to reschedule elections in a way that would deprive voters of their right to vote for a period exceeding three years.[58] And yet, unfortunately, this is precisely what the Court countenanced in *Kida*. While the author acknowledges that any resolution to the interregnum in *Kida* would have made for an untidy situation, between the two alternatives—(1) holding a "special" election, which would have shortened the victors' terms to less

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[55] Art. X, § 8.

[56] In fact, it could be argued that the removal of the fixed three-year length of term would play to the interests of elective officials since it would theoretically allow them to stay in power for an indefinite period, i.e. as long as they wanted to.

[57] "[C]onstitutional provisions fixing the terms of elective officials serve the ends of democratic republicanism by depriving elective officials of any legal basis to remain in office after the end of their terms, ensuring the holding of elections, and paving the way for the newly elected officials to assume office." *Kida*, 659 SCRA 270, 359 (Carpio, *J.*, *dissenting*), *citing* Bd. of Elections for Franklin County v. State ex. rel. Schneider, 128 Ohio St. 273 (1934).

[58] *See* CONST. art. X, § 8.

than three years[59] but allowed the electorate to vote twice in a two-year span;[60] as against (2) authorizing the president to appoint OICs, which resulted in the citizens of the ARMM being deprived of their right to vote for 21 months after the expiration of the 2008 – 2011 term[61]—the Court should have erred on the side of the former, which is clearly the option more in line with our democratic and republican system.

Second, the *ponencia* incorrectly framed the issue as one involving the Court's power, or lack thereof, to compel the COMELEC to "conduct" a special election. The Court may have described the late 2011 election proposed by petitioners[62] to replace the canceled August 2011 polls as "special" since it was not synchronized with the nationwide local elections held on the second Monday of May. But strictly speaking, the term special election as used in the Constitution,[63] the OEC,[64] and Republic Act No. 7166[65] refers to a by-election.[66] A by-election is held following a vacancy in an office *prior to the expiration of the term* and for which the modes of succession have either not been provided by law or have already been exhausted. On the

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[59] *Kida* was decided in October 2011. Had the Court ordered an election and the immediate assumption of the victors in December 2011, the elected officials would have had an 18-month term that ended on June 30, 2013.

[60] Under the hypothetical scenario discussed in the previous footnote, citizens of the ARMM would have been able to vote for their regional elective officials in 2011 and then again in May 2013.

[61] Since the ARMM regional officials were elected in 2008, their term expired in 2011. But since Congress canceled the August 2011 election, voters were not able to select their leaders until May 2013.

[62] Pimentel, *supra* note 41. "The elections we seek should have been held on August 8. Obviously, the elections could no longer be held on that date. We harp on this fact for the reason that the issues raised in the Petitions at bar should have been resolved a long time ago. But time and circumstance have not been accommodating to the Petitioners. So we submit that we have to make do with what is possible. It is possible to hold the elections in September or even in November. Aside from the fact that originally, the elections were supposed to be held on August 8, there is really no obstacle to holding the polls next month or the month after next. In the past the Comelec has been flexible enough to conduct elections as directed by circumstances. There is no reason why it could not do so today."

[63] CONST. art. VI, § 9 on a special election "[i]n case[s] of vacancy in the Senate or in the House of Representatives"; on a special election "after the vacancy in the offices of the President and Vice-President occurs[.]"

[64] ELECT. CODE, art. I, § 7 on a special election "[i]n case a vacancy arises in the Batasang Pambansa"; art. II, § 14 on a special election "[i]n case a vacancy occurs for the Office of the President and Vice-President[.]"

[65] Rep. Act No. 7166 (1991), § 4 on a special election "[i]n case a permanent vacancy shall occur in the Senate or House of Representatives[.]"

[66] "[A] special election to fill a vacant elective position with an unexpired term[.]" *By-election*, COLLINS DICTIONARY, *at* https://www.collinsdictionary.com/dictionary/english/by-election (last accessed Dec. 12, 2021).

other hand, regular elections are conducted to *fill the vacancies arising from the impending expiration of the term* of the incumbent officials. To frame it another way, once the three-year term of a set of local elective officials is about to expire, it is in the regular course of our constitutional order to hold an election to give voters the opportunity to determine their leaders' successors. Obviously, the subject vacancies in Kida *did not occur prior* to the expiration of the ARMM regional elective officials' terms on September 30, 2011. Instead, they arose precisely because Congress interrupted the "regular course" by unconstitutionally providing that no election would be held in August 2011 notwithstanding the *impending expiration* of the incumbent officials' term.[67]

Hence, had the Court ordered the holding of an election—say, in December 2011—to replace the regular August 2011 polls unconstitutionally canceled by Congress, the December election would not have amounted to a by-election, but rather a postponed or delayed "regular" election. Had the majority decided to impose this corrective measure, the Court would not have been engaging in judicial legislation, but merely upholding the constitutional nature of elective posts.

Third, Congress's compliance with the policy of synchronization of elections did not justify the deprivation of the ARMM electorate's right to elect its regional leaders following the expiration of the incumbent officials' term on September 30, 2011. Suffice to say, the government had the legal duty and the operational capability to conduct both the August 2011 and the May 2013 ARMM regional elections.

III. THE GENERAL RULE: THE PRESIDENT CANNOT APPOINT LOCAL ELECTIVE OFFICIALS

In Part III, the author will expound on the four arguments introduced above to support the thesis that Congress cannot suspend elections and grant the president the power to appoint local elective officials—even if they will serve merely in an acting, interim, or OIC capacity—without violating the 1987 Constitution.

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[67] Rep. Act No. 9333 (2004), § 2. "The term of office of the Regional Governor, Regional Vice-Governor and Members of the Regional Legislative Assembly of the ARMM shall be for a period of three years, which shall commence at noon on the thirtieth (30th) day of September 2005 and shall end at noon of the same date three years thereafter."

A. The Appointments Clause Excludes Elective Officials

The broad nature of the chief executive's power to appoint is not in dispute.[68] Courts have traditionally taken a substantially deferential disposition in resolving cases involving this matter.[69] The point of contention is the specific bounds of this power—particularly, whether the president's power extends to the appointment of persons to public offices legally classified as elective positions. In *Kida*, the Court, in an 8-7 decision, answered this question in the affirmative. To support this opinion, the *ponencia* first looked at the Appointments Clause of the Constitution, which provides:

> SECTION 16. The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards.[70]

Citing the seminal case of *Sarmiento v. Mison*,[71] the Court classified the four groups of presidential appointees: (1) those requiring the confirmation of the Commission on Appointments as provided in the first sentence of the Appointments Clause; (2) officers whose appointments are not otherwise provided by law; (3) officers whom the president is authorized by law to appoint; and (4) lower-ranking officials whom Congress may vest the power to appoint to the president alone.[72] According to the *ponencia*, the factual circumstances in *Kida* fell under the third group of permitted presidential appointments. Hence, since Congress authorized then-President Aquino by law to appoint OICs in the ARMM, R.A. 10153 was constitutional notwithstanding the fact that the positions involved were local elective offices.

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[68] Sarmiento v. Mison [hereinafter "*Sarmiento*"], G.R. No. 79974, 156 SCRA 549, Dec. 17, 1987; Calderon v. Carale, G.R. No. 91636, 208 SCRA 254, Apr. 23, 1992; Bermudez v. Torres, G.R. No. 131429, 311 SCRA 733, Aug. 4, 1999; Manalo v. Sistoza, G.R. No. 107369, 312 SCRA 239, Aug. 11, 1999; Pimentel v. Ermita, G.R. No. 164978, 472 SCRA 587, Oct. 13, 2005; De Castro v. Jud. & Bar Council, G.R. No. 191002, 618 SCRA 639, Apr. 20, 2010.

[69] Oscar Franklin Tan, *Guarding the Guardians: Addressing the Post-1987 Imbalance of Presidential Power and Judicial Review*, 86 PHIL. L.J 524, 603 (2012).

[70] CONST. art. VII, § 16.

[71] *Sarmiento*, 156 SCRA 549.

[72] *Kida*, 659 SCRA 270, *citing Sarmiento*, 156 SCRA 549.

The *ponencia* made it appear that the majority had arrived at its conclusion by adopting a simple textual application of the cited provision.[73] However, a plain reading of the Appointments Clause shows that while Congress can create public offices and authorize the president to appoint who shall serve in these positions, it does not expressly provide whether this principle extends to elective offices. In *Fariñas v. Executive Secretary*,[74] the Court recognized that there are substantial distinctions between elective and appointive officials.[75] As it pertains to the source of their right to hold public office, "[t]he former occupy their office by virtue of the mandate of the electorate," while the latter "hold their office by virtue of their designation thereto by an appointing authority."[76] Moreover, Justice Antonio Carpio, in his dissent in *Quinto v. COMELEC*, noted that appointive officials "are chosen by the appointing power and not elected by the people[,] [. . .] do not have to renew their mandate periodically unlike elective public officials[,] [. . .] [and] do not have term limits unlike elective public officials."[77] The Constitution itself recognizes this dichotomy and provides differing treatments for the two classes of officials.[78] Hence, it would be a mistake to indiscriminately lump the two classes together. While it is obvious that the Appointments Clause covers appointive officials, the text of the provision does not provide a clear-cut answer as to whether it applies to elective officials.

Even just reading the first portion of the second sentence of the Appointments Clause sheds some light on why the *Kida ponencia* erred in ruling that Congress could authorize the presidential appointments of OICs to elective posts. It provides: "[the president] shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law."[79] This necessarily implies that if the power to appoint an official or a class of officials is vested by law to a different person or body, the president

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[73] *Id.* at 319, holding that "[T]he assailed law facially rests on clear constitutional basis."

[74] [Hereinafter "*Fariñas*"], G.R. No. 147387, 417 SCRA 503, Dec. 10, 2003.

[75] *Id. But see* Quinto v. Comm'n on Elections [hereinafter "*Quinto*"], G.R. No. 189698, 606 SCRA 258, Dec. 1, 2009.

[76] *Id.* at 526.

[77] *Quinto*, 606 SCRA at 398 (Carpio, *J., dissenting*).

[78] CONST. art. IX(B), § 7. "No elective official shall be eligible for appointment or designation in any capacity to any public office or position during his tenure.

"Unless otherwise allowed by law or by the primary functions of his position, no appointive official shall hold any other office or employment in the Government or any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries."

See also art. IX(B), § 1; (C), § 1; (D), § 1; art. XI, § 8.

[79] CONST. art. VII, § 16.

is constitutionally barred from appointing the said officials. To give a concrete example, the Constitution declares that the "Constitutional Commissions shall appoint their officials and employees in accordance with law."[80]

Hence, Congress cannot authorize the president via a statute to appoint any of the officials or employees of the COMELEC, the Commission on Audit, and the Civil Service Commission even if such appointees serve merely in an acting, interim, or OIC capacity.[81] Now, it is true that the Constitution does not identify which public official or body shall appoint the officeholders of elective positions. But this is with good reason: because under our democratic and republican system, it is the Filipino people themselves who "appoint" their elective officials through the ballot. And as Justice Presbitero Velasco, Jr. noted in his dissenting opinion in *Kida*: "this Court cannot expand the appointing power of the President to encompass offices expressly required by the Constitution to be 'elective and representative.'"[82] Thus, just as the legislature cannot grant the president the power to appoint the officials and employees of any of the constitutional commissions without violating the fundamental law of the land, it is with even greater reason that the political branches cannot do the same for elective officials.

In response to the petitioners' argument that R.A. 10153 violated the Constitution's requirement that the executive and legislative departments of autonomous regions be "elective and representative[,]"[83] the *ponencia* in *Kida* declared that the appointment of OICs in the regional elective offices did not "[change] the elective and representative character of ARMM positions."[84] But what this pronouncement brushes aside is that any postpone-and-appoint scheme violates one of the fundamental constitutional rules on local elective officials—that voters be allowed to choose their local leaders via a popular election every three years.[85]

The *ponencia* in *Kida* further added that the appointment of OICs was "different from appointing elective ARMM officials for the abbreviated term ending on the assumption to office of the officials elected in the May 2013 elections."[86] However, this distinction is, in effect, irrelevant. Whether a

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[80] Art. IX(A), § 4.

[81] Of course, the exception to this rule is the appointment of the chair and commissioners of the constitutional commissions, which the Constitution explicitly vests in the president. CONST. art. IX (B), § 1(2); (C), § 1(2); (D), § 1(2).

[82] *Kida*, 659 SCRA 270, 382 (Velasco, Jr. *J., dissenting*).

[83] CONST. art. X, § 18.

[84] *Kida*, 659 SCRA at 319.

[85] CONST. art. X, § 8.

[86] *Kida*, 659 SCRA at 319.

presidential appointee is designated merely as an OIC or as a regular elective official, the fact of the matter is he or she occupies an elective post without an electoral mandate. Moreover, the electorate is deprived of its right to vote for a period longer than what the Constitution allows—or perhaps more accurately, for a period longer than what the Filipino people consented to, which is three years.

B. The Separate Electoral Mandates of the President, Congress, and LGU Officials

"How can the judgment of [...] the president [...] substitute for the judgment of 1.8 million voters in the ARMM?"[87] This was the question posed by then-Chief Justice Renato Corona to Solicitor General Jose Anselmo Cadiz during the oral arguments in *Kida*. Under our present constitutional design, the president,[88] the members of Congress,[89] and LGU officials[90] must individually secure, in separate electoral contests, the consent of those whom they govern. But this was not always the case. In several instances in our country's history, municipal officials were appointed by the chief executive rather than elected by the people.[91] But eventually, the legislature's policy during the Commonwealth Government and the Third Republic slowly but steadily veered toward opening up the key leadership posts in local governments to popular elections.[92] However, Marcos, who ushered in the

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[87] Ina Reformina, *SC grills SolGen on ARMM OICs,* ABS-CBN NEWS, Jan. 27, 2012, *at* https://news.abs-cbn.com/nation/regions/08/16/11/sc-grills-sol-gen-armm-polls-suspension.

[88] CONST. art. VII, § 4.

[89] Art. VI, §§ 2, 7. The exception to this are party-list representatives. *See* §§ 5–6.

[90] Art. X, § 8.

[91] ADM. CODE (1917), § 2545. "Appointment of city officials. – The (Governor-General) President of the Philippines shall appoint, with the consent of the (Philippine Senate) Commission on Appointments of the National Assembly, the mayor, the vice-mayor, and one of the other members of the city council, the members of the advisory council, the city health officer, the city engineer, the chief of police, the city treasurer, the city assessor, the city attorney, and the assistant city attorney, and he may remove at pleasure any of the said appointive officers."

[92] The general legislative policy was to open up certain seats in municipal boards to direct elections. However, most mayors were still subject to the appointing power of the president. Com. Act No. 39 (1936), art. III, § 12; Com. Act No. 51 (1936), art. III, § 12; Com. Act No. 520 (1940), art. III, § 11; Rep. Act No. 162 (1947), art. III, § 11; Rep. Act No. 170 (1947), art. III, § 11; Rep. Act No. 183 (1947), art. III, § 12; Rep. Act No. 305 (1948), art. III, § 11; Rep. Act No. 521 (1950), art. III, § 11; Rep. Act No. 523 (1950), art. III, § 11; Rep. Act No. 603 (1951), art. III, § 11.

But for certain Local Government Units (LGUs), Congress also classified the position of mayor as an elective office. Rep. Act No. 321 (1948), art. II, § 7. Charter of the City of Ozamiz. Rep. Act No. 409 (1949), art. II, § 9. Revised Charter of the City of Manila.

Fourth Republic, dramatically changed course by decreeing to himself the power to appoint and remove all local elective officials.[93] The dictator was able to pull this off in part because while both the 1935 and 1973 Constitutions mandated that the president[94] and the members of the legislature[95] be elective officials, the same requirement was not imposed on municipal officials.[96] The two charters also did not fix the lengths of the terms of local officials. These constitutional omissions helped pave the way for Marcos to cancel local elections and instead appoint loyalists in local offices across the Philippines.

An important development[97] in the 1987 Constitution was the significant addition of new provisions in Article X on Local Government, which categorically declare that certain local offices must be elective positions. Section 8 provides: "The term of office of *elective local officials*, except barangay officials, which shall be determined by law, *shall be three years and no such official shall serve for more than three consecutive terms*."[98] Similarly, Section 18 requires that autonomous regions must have executive and legislative departments that are "elective and representative."[99] Moreover, Section 11 impliedly provides the structure of city and municipal government units, which must have local executive and legislative assemblies.[100] Similarly, Section 12 implies that the leaders of the provincial and city governments must be elected by the people.[101] Hence, the present Constitution expressly provides for a class of local elective officials who are subject to the following constitutional rules: (1)

Com. Act No. 58 (1936), art. II, § 7, *amended by* Rep. Act No. 1233 (1955), § 1. Charter of the City of Cebu. Rep. Act No. 525 (1950), art. II, § 7, *amended by* Rep. Act No. 1236 (1955), § 1. Rep. Act No. 5502 (1969), art. II, § 7. Revised Charter of the City of Caloocan.

[93] Pres. Dec. No. 1576 (1978), § 1.

[94] CONST. (1935), art. VII, § 2; CONST. (1973), art. VII, § 3.

[95] CONST. (1935), art. VI, §§ 2, 5; CONST. (1973), art. VIII, § 2. But note that under the 1973 Constitution, in addition to the elected regional representatives, certain cabinet officials chosen by the president may also become members of the Batasang Pambansa.

[96] The sole provision of the 1935 Constitution on LGUs was art. VII, § 11(1), which declared that "The President shall [...] exercise general supervision over all local governments as may be provided by law[.]" While the 1973 Constitution directed the legislature to enact an local government code "providing for the qualifications, election [...] of local officials[,]" it did not categorically declare that local offices were elective posts. Moreover, since the Interim Batasang Pambansa was only formed in 1978, in the interregnum, Marcos granted himself the power to indefinitely postpone local elections and to appoint and remove local elective officials.

[97] Another method of constitutional interpretation is "trac[ing] the historical development of text: by comparing its current iteration with prior counterpart provisions[.]" David v. S. Electoral Tribunal, G.R. No. 221538, 803 SCRA 435, 479, Sept. 20, 2016.

[98] CONST. art. X, § 8. (Emphasis supplied.)

[99] § 18.

[100] § 11.

[101] § 12.

a fixed three-year term of office; and (2) a three-term limit.[102] By mandating these specific rules, the 1987 Constitution closed several loopholes that the dictator took advantage of to cancel local elections and attain the power to appoint and remove independent or opposition local elective officials. Justice Carpio noted that these new provisions "guaranteed not only the elective nature of these offices"[103] but also "the certainty of the holding of regular and periodic elections, securing the voters' right to elect the officials for the new term[.]"[104] Thus, under the present Constitution, neither Congress, despite its broad legislative powers,[105] nor any chief executive—notwithstanding a presidential assertion of residual powers[106]—can cancel elections and deprive the electorate of its right to vote for a period exceeding three years. As the Court has declared: "The ambit of legislative power under Article VI of the Constitution is circumscribed by other constitutional provisions[.]"[107] Consequently, Marcos's successors—whether by decree or by legislative fiat—cannot claim to possess the authority to select which persons should hold local elective offices, as this power belongs exclusively to the sovereign.

In its attempt to justify the "postpone-and-appoint" scheme in *Kida*, the *ponencia* remarked that "[i]n a republican form of government, the majority rules through their chosen few[.]"[108] While this may be true, the "chosen few" must be elected representatives. Although every winner of a presidential election secures a national elective mandate, this mandate is separate from and not transferrable to the other elective officials in the country. Just as the president's mandate does not extend to their preferred vice-presidential candidate as the two officeholders are elected separately, neither can the chief executive presume that the constituencies of certain localities will assent to their appointed local officials. Moreover, the cancellation of elections, as well as the appointment of OICs to elective offices, detracts from the

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[102] § 8.

[103] *Kida*, 659 SCRA 270, 360 (Carpio, *J.*, *dissenting*).

[104] *Id.* at 362 (Carpio, *J.*, *dissenting*).

[105] Representative Mangudadatu invoked the discussion in *Kida* on Congress's broad legislative powers to justify the postponement of the 2022 BARMM election. Mangudadatu, *supra* note 6.

[106] Then-Justice Secretary Leila de Lima advised the House that "[a]ppointment is difficult to justify at first glance but it is legally defensible. It is supported by the principle of residual powers of the President which is not yet used but maybe we can give it a go this time." An Issue Brief on H. No. 4146, 15th Cong., 1st Sess. (2011). The author received a copy of this brief from the House of Representatives Legislative Library and Archives.

[107] Gonzales v. OP, G.R. No. 196231, 714 SCRA 611, 656, Jan. 28, 2014, *quoting* Macalintal v. Comm'n on Elections, G.R. No. 157013, 405 SCRA 614, 655, July 10, 2003.

[108] *Kida*, 659 SCRA at 323, *quoting* Menzon v. Petilla, G.R. No. 90762, 197 SCRA 251, 259 May 20, 1991.

representative nature of these positions.[109] Justice Carpio noted that the "region is not autonomous if its leaders are not elected by the people of the region but appointed by the central government in Manila[.]"[110] And since all LGUs "enjoy local autonomy[,]"[111] his observation would hold true even if the appointments in *Kida* were made in non-autonomous regions or LGUs.

Postpone-and-appoint arrangements also engender doubts in the public's mind as to whether the appointees are accountable to the constituents or to their appointing power, the president.[112] This is especially true in the case of R.A. 11593, as the sponsors of the Senate and House bills, Senator Francis Tolentino[113] and Representative Esmael Mangudadatu,[114] respectively, confirmed that the appointees under this statute could not only be appointed but also removed by the president. Furthermore, the appointment of local leaders renders inoperative a key mechanism available to voters to curtail their elective LGU officials: recall. Since only local elective officials are susceptible to a recall,[115] the electorate is left with no direct remedy against OIC appointees who act against their community's interests. Thus, these arrangements not only disregard the historical developments embodied under the new provisions of the 1987 Constitution, but also "nullif[y] the will of the electorate,"[116] devalue the representative character of

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[109] Petitioner Representative Edcel Lagman remarked during the oral arguments in *Kida* that "an appointive OIC is not representative of the constituent political units[.]" Ina Reformina, *PNoy-MILF meet a sidebar in ARMM polls oral arguments,* ABS-CBN NEWS, Aug. 10, 2011, *at* https://news.abs-cbn.com/-depth/08/10/11/pnoy-milf-meet-sidebar-armm-polls-oral-arguments.

[110] *Kida*, 659 SCRA at 366 (Carpio, *J.*, *dissenting*).

[111] CONST. art. X, § 2.

[112] "Kung appointed lamang kahit pa ng highest elected official natin, to whom are they accountable? Hindi na sa mga constituents nila na dapat. How can voters exercise our right to choose our officials at that most basic level of government?" While Senator Risa Hontiveros made these particular comments in relation to the aforementioned scheme involving barangay elective posts proposed under S. No. 1584 by Senators Gordon and Sotto, similar questions can be raised for any "postpone-and-appoint" scheme in any LGU. ABS-CBN News, *2 senators nix appointment of barangay officials,* ABS-CBN NEWS, Sept. 13, 2017, *at* https://news.abs-cbn.com/news/09/13/17/2-senators-nix-appointment-of-barangay-officials.

[113] S. Journal 20, 18th Cong., 3rd Sess., 30-31 (Sept. 27, 2021).

[114] "The BTA members are Presidential appointees, thus the established tradition that the appointees serve at the pleasure of the appointing authority. Meaning, the co-terminous nature of the appointment of BTA members is still being upheld. Should the President decide to end the term of a particular BTA member even before June 30, 2022, then he can always do so because, being the appointing authority, the President can always cause the expiration of the term of any of his appointees." Mangudadatu, *supra* note 6.

[115] LOCAL GOV'T CODE, §§ 72–74.

[116] *Kida*, 659 SCRA 270, 385 (Velasco, Jr. *J.*, *dissenting*).

elective offices, and prevent the electorate not only from choosing their leaders but also from holding them accountable.

C. Harmonizing Congress's Power of Control Over LGUs with the Constitutional Rules on Elective Officials

Under our legal system, Congress has the power of control over LGUs. Even during the effectivity of the 1935 Constitution, "local governments [we]re subject to the control of *Congress* which ha[d] the authority to prescribe the procedure by which the President may perform his constitutional power of general supervision."[117] In *Magtajas v. Pryce Properties Corp.*,[118] the Court, speaking through Justice Isagani Cruz, confirmed that under the 1987 Constitution, "Congress retains control of the local government units although in significantly reduced degree now than under our previous Constitutions. The power to create still includes the power to destroy. The power to grant still includes the power to withhold or recall."[119] Congress's ability to create and destroy not only applies to LGUs, but also to local offices. This may lead some to reasonably ask: If Congress possesses these powers, then why can it not determine who should be the appointing authority to fill these positions? There seems to be an apparent tension between Congress's power of control and Justice Carpio's pronouncement that "[o]ffices declared by the Constitution as elective must be filled up by election and not by appointment" that needs to be resolved.[120]

Given that the 1935 and 1973 Constitutions did not provide for a constitutional class of elective officials, the legislatures at the time were free to determine which local offices would be appointive and which—if any—would be elective. Marcos, who also exercised legislative powers under the 1973 Constitution,[121] used the wide discretion given to him[122] to issue P.D. 1576, which effectively classified all local elective officials as appointive

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[117] Hebron v. Reyes [hereinafter "*Hebron*"], 104 Phil. 175 (1958), *citing* VICENTE SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 695–697 (10th ed. 1954). (Emphases in the original.)

[118] G.R. No. 111097, 234 SCRA 255, July 20, 1994

[119] *Id.* at 273.

[120] *Kida*, 659 SCRA 270, 349 (Carpio, *J.*, *dissenting*).

[121] CONST. (1973, 1976 amend.), ¶ 5. "The incumbent President shall continue to exercise legislative powers until martial law shall have been lifted."

[122] I.e., he gave to himself.

officials.[123] This classification was largely retained until the nationwide local elections for governors, vice-governors, mayors, and vice-mayors in 1980.

Under the 1987 Constitution, Congress still has the discretion to determine which local offices shall be appointive as against those which shall be elective. This is because while the present Constitution provides for a constitutional class of local elective officials, it does not specify which positions belong to this class.[124] Thus, consistent with the national legislature's power of control over LGUs, it can create and abolish local offices and decide which ones shall fall under the said class. Congress even possesses the ability to reclassify offices that it had previously categorized as appointive positions to elective positions and vice versa. However, once Congress provides in the LGC that certain positions are elective offices, the constitutional rules on elective offices apply. As such, these officers can only acquire their right to hold the said offices through an election, not a presidential appointment.

To illustrate, the 1987 Constitution does not provide that mayors and vice-mayors[125] belong to the class of local elective officials, just as it does not require that city[126] and municipal treasurers[127] be appointive officials. The discretion as to how to classify these positions—whether they should be appointive or elective—is left to Congress to decide under the LGC.[128] Hence, Congress, via an amendment to the LGC, may reclassify vice-mayors as appointive officials or even abolish the position entirely. Similarly, Congress may hypothetically create the office of the provincial attorney-general and designate it as an elective post. It can also reclassify the existing posts of city and municipal treasurers to elective offices. The national legislature can do all manner of reclassification precisely because the Constitution has granted it

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[123] Pres. Dec. No. 1576 (1978), § 1. But it could be argued that local elective officials were essentially functioning as appointive officials as early as Sept. 22, 1972, when President Marcos issued Gen. Order No. 3 (1972), pmbl. ¶ 4: "I, Ferdinand E. Marcos, Commander-in-Chief of all the Armed Forces of the Philippines, and pursuant to; Proclamation No. 1081 dated Sept. 21, 1972, do hereby order that [...] all governments of all the provinces, cities, municipalities and barrios throughout the land shall continue to function under their present officers and employees and in accordance with existing laws, until otherwise ordered; by me or by my duly designated representative." This provision gave the dictator the power to remove any elective official. Similarly, CONST. (1973), art. XVII, § 9 provides: "All officials and employees in the existing Government of the Republic of the Philippines shall continue in office until otherwise provided by law or decreed by the incumbent President of the Philippines."

[124] CONST. art. X, § 8.

[125] LOCAL GOV'T CODE, § 39 (b)–(c).

[126] § 454(a)–(d).

[127] § 443(a)–(d).

[128] Of course, Congress's exercise of its discretion is tempered by CONST. art. X, §§ 8, 11, 12, 18; *supra* Part III(B).

the power of control over LGUs. However, for as long as Congress designates the offices of mayor and vice-mayor as elective posts, voters have the inviolable right to determine who the mayor and vice-mayor of their city or municipality should be via periodic elections, which are constitutionally mandated to be held every three years. Consequently, Congress cannot pass a law suspending the elections for the positions of mayor and vice-mayor, thus creating vacancies in these positions, and then authorize the president to appoint OICs to fill the vacancies.

D. The President's Power of General Supervision Does Not Extend to the Power to Appoint

The Constitution provides that the president shall exercise general supervision over LGUs,[129] including autonomous regions.[130] In *Pimentel v. Aguirre*,[131] the Court, speaking through Justice Artemio Panganiban, defined general supervision as the "power [of the president] to see to it that LGUs and their officials execute their tasks in accordance with law."[132] General supervision essentially covers two questions: (1) are local officials fulfilling the tasks the law requires them to do; and (2) are local officials performing such tasks lawfully? If the answer to either or both of these questions is no, *Drilon v. Lim*[133] prescribes the recourse of the president:

> [Supervising officials] merely see to it that the rules are followed, but [they themselves do] not lay down such rules, nor [do they] have the discretion to modify or replace them. If the rules are not observed, *[they] may order the work done or redone, but only to conform to such rules*. [They] may not prescribe [their] own manner of execution of the act. [They have] no judgment on this matter except to see to it that the rules are followed.[134]

Since jurisprudence has declared that the president, under the power of general supervision, cannot impose new rules or dictate how a local official must execute an act, then it is with greater reason that the president should not be able to select which persons should perform the said act. Unlike in the

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[129] CONST. art. X, § 8.

[130] Art. X, § 16. "The power of the President over autonomous regions is the same as his power over local governments — only one of 'general supervision,' that is, the power to ensure that subordinate officers execute and act within existing laws." JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 1139–40 (2009 ed.). (Emphasis in the original.)

[131] [Hereinafter "*Aguirre*"], G.R. No. 132988, 336 SCRA 201, July 19, 2000.

[132] *Id.* at 208–09.

[133] G.R. No. 112497, 235 SCRA 135, Aug. 4, 1994.

[134] *Id.* at 142. (Emphasis supplied.)

case of appointments of cabinet members over whom the president exercises the power of control, the power of general supervision neither requires nor permits the chief executive to select who he or she believes is the best person to perform such tasks. If there is non-performance or unlawful performance, the president's remedy is merely to order the *local officials elected by the people* to perform such tasks lawfully.

By granting the president the power to appoint local elective officials, Congress is in effect increasing the president's power over LGUs from general supervision to control—in contravention of the express provisions of the fundamental law.[135] The Court has recognized that Congress cannot, by way of legislation, expand the president's power over LGUs from supervision to control. In *Hebron v. Reyes*, the Court cited the work of its *amicus curiae*, then-University of the Philippines College of Law Dean Vicente Sinco, who wrote:

> Supervisory power, when contrasted with control, is the power of mere oversight over an inferior body; *it does not include any restraining authority over the supervised party.* Hence, *the power of general supervision over local governments should exclude, in the strict sense, the authority to appoint and remove local officials.*
>
> The Congress of the Philippines may pass laws which shall guide the President in the exercise of his power of supervision over provinces and municipalities; but *it may not pass laws enlarging the extent of his supervisory authority to the power of control.* To do so would be assuming the right to amend the Constitution which expressly limits the power of the President over local governments to general supervision.
>
> *The question then arises: How should disciplinary action be taken against a local office who might be guilty of dereliction of duty? The legal procedure in such cases will have to be judicial, not administrative.*[136]

In *Pelaez v. The Auditor General*,[137] the Court struck down as unconstitutional Section 68 of the 1917 Administrative Code, which had given the president the power to create new LGUs.[138] President Diosdado

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[135] In his petition, Rep. Lagman argued that "[t]he Constitution grants only the power of general supervision, not control, to the President over ARMM officials. The statutory grant to the President to appoint officers-in-charge in ARMM under RA 10153 is unconstitutional because the power to appoint and remove OICs is a veritable power of control." Rey Panaligan, *ARMM polls delay upheld*[,] *Election postponement constitutional, SC rules*, MANILA BULLETIN, Oct. 19, 2011, at 1.

[136] *Hebron*, *citing* SINCO, *supra note* 117, at 695–697. (Emphases in the original.)

[137] [Hereinafter "*Pelaez*"], G.R. No. 23825, 15 SCRA 569, Dec. 24, 1965.

[138] *Id.*

Macapagal had invoked the said statute to issue a series of executive orders that led to the creation of 33 new municipalities. The decision, penned by Justice Roberto Concepcion, declared that this delegation of legislative power to the president violated the 1935 Constitution,[139] which, similar to its present counterpart, limited the chief executive's power over LGUs to merely general supervision:

> Upon the other hand if the President could create a municipality, he could, in effect, *remove any of its officials*, by creating a new municipality and including therein the barrio in which the official concerned resides, for his office would thereby become vacant. Thus, by merely brandishing the power to create a new municipality (if he had it), without actually creating it, he could compel local officials to submit to his dictation, thereby, in effect, exercising over them the power of control denied to him by the Constitution.[140]

It can be gleaned from these two cases that legislative mechanisms that grant the chief executive—whether directly or indirectly—the power to appoint local elective officials, as well as the power to remove them without any cause, are unconstitutional as they amount to expansions of the president's authority from general supervision to control.

IV. EXCEPTIONS AND CONTINGENCIES

A. The Danger of the Judicial and Legislative Precedents Set by *Kida* and R.A. 11593

Interestingly, the petitioners, legislators, and the members of the Court all recognized—albeit with different degrees of concern—the possibility of *Kida* being invoked to justify similar schemes in other LGUs in the country. Quite surprisingly, one of the most vocal dissenters to R.A. 10153 was the dictator's namesake, then-Senator Ferdinand Marcos, Jr., who pointed out the dangers of the law:

> What would have been the effect if the President, and the House, and the Senate would then put through legislation through Congress? And we are saying that to any region, aside from ARMM,

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[139] CONST. (1935), art. VII, § 10(1). "The President shall have control of all the executive departments, bureaus, or offices, exercise general supervision over all local governments as may be provided by law, and take care that the laws be faithfully executed."

[140] *Pelaez*, 15 SCRA 569, 583. (Emphasis supplied.)

> and we will tell that region: 'Your elections are now cancelled, and in lieu of those elections, we will appoint the officials to elective positions.' That is entirely unacceptable to any region, any province, any local government unit in the Philippines, much more so, I believe, in what is referred to and described and recognized as an autonomous region.
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> * * *
>
> But, more importantly, Mr. President, if we are to take that argument to its logical conclusion and seeing that the financial situation of the Philippines is in great difficulty and we always want to save money, if we follow that same logic, then we could just cancel all elections that will allow us to save Php12 billion, Php13 billion or Php14 billion every three years. But, of course, that is completely anathema to the entire system that we operate under.
>
> * * *
>
> I used the word "cancel", the reason being, "postponement" implies that a date is moved back. We are not moving back any date in this election. We are cancelling the elections and we are exchanging those elections and filling up the elective positions with appointments made by the President.[141]

Justice Carpio also made a similar warning:

> [I]t is a terribly dangerous precedent for this Court to legitimize the cancelation of scheduled local elections in the ARMM and allow the appointment of OICs in place of elected local officials for the purpose of reforming the ARMM society and curing all social, political and economic ills plaguing it. If this can be done to the ARMM, it can also be done to other regions, provinces, cities and municipalities, and worse, it can even be done to the entire Philippines: cancel scheduled elections, appoint OICs in place of elective officials, all for the ostensible purpose of reforming society — a purpose that is perpetually a work-in-progress. This Court cannot allow itself to be co-opted into such a social re-engineering in clear violation of the Constitution.[142]

Even the Court's majority foresaw that its decision in *Kida* could serve as precedent to future similar schemes in other localities in the country. The

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[141] Senate of the Philippines, *Privilege Speech of Senator Ferdinand "Bongbong" R. Marcos, Jr., on the Postponement of ARMM Elections*, SENATE OF THE PHILIPPINES WEBSITE, May 31, 2011, *at* https://legacy.senate.gov.ph/press_release/2011/0531_marcos1.asp.

[142] *Kida*, 659 SCRA 270, 364 (Carpio, *J.*, *dissenting*).

Court recognized the dangers of a potential proliferation of postpone-and-appoint schemes:

> Admittedly, the grant of the power to the President under other situations or where the power of appointment would extend beyond the adjustment period for synchronization would be to foster a government that is not "democratic and republican." For then, the people's right to choose the leaders to govern them may be said to be systemically withdrawn to the point of fostering an undemocratic regime.[143]

But the *ponencia* attempted to allay fears[144] by stating that Congress "is limited in what it can legislatively undertake with respect to elections" and that the legal justification for the "interim measures" taken by the legislature following its cancellation of the August 2011 ARMM polls "cannot be transferred or applied to any other cause for the cancellation of elections [other than synchronization.]"[145]

Certainly, it would be unfair to claim that *Kida* directly led to the enactment of R.A. 11593. For one, the BARMM was not yet even in existence when *Kida* was decided. There are also differences in the circumstances surrounding R.A. 10153 and R.A. 11593.[146] Furthermore, there are compelling

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[143] *Id.* at 320. (Emphasis omitted.)

[144] As an additional note, the petitioners in their motion for reconsideration in *Kida* raised the concern that the "[d]ecision has virtually given the President the power and authority to appoint 672,416 OICs in the event that the elections of barangay and Sangguniang Kabataan officials are postponed or cancelled." The *ponencia* rebuked this claim, noting that it amounted to "speculation nothing short of fear-mongering." *Kida Resolution,* 667 SCRA 200, 243-44. But just five years later, then-Senate Majority Leader Vicente Sotto III and Senator Richard Gordon proposed legislation that would have once again postponed the nationwide barangay elections and opened the possibility for President to appoint OICs in the elective barangay and *Sanggunian Kabataan* posts—similar to what the petitioners had forewarned. S. No. 1584, 17th Cong., 2nd Sess., § 3 (2017); S. Rpt. 163, 17th Cong., 2nd Sess. (2017). Committees on Electoral Reform and People's Participation; Finance. Representative Robert Barbers proposed a similar measure in the House. H. No. 5359, 17th Cong., 1st Sess. (2017).

The sponsors in the Senate did qualify that the President could only appoint OICs in the said elective posts if the incumbents were included in the President's drug list. But the problem with this proposal is rather evident. Since the drug list was prepared by the President, this effectively gave him unbridled discretion to name which barangay officials were part of the list. Fortunately, the "appointment" provision was removed in the final version of the bill, although the postponement was still enacted into law—Rep. Act No. 10952 (2017). At any rate, this again shows that the Court's pronouncements do not operate in a vacuum and may provide political—if not legal—cover for officials of the political branches who seek to stretch the limits of what is constitutionally permissible.

[145] *Kida*, 659 SCRA 270, 322.

[146] *See supra* note 9.

policy arguments to support the proposition that postponement of the first regular BARMM elections from May 2022 to May 2025 was a logistically—if not legally—sound course of action. But while these distinctions may lead one to argue that the Court's holding in *Kida* cannot serve as judicial precedent to a case challenging the constitutionality of RA 11593 or its hypothetical next iteration, what cannot be disputed is that *Kida* gave the 18th Congress the political cover to justify its act of again suspending regional elections and authorizing the president to appoint the second set of members of the BTA.[147] The pitfall of justifying an unconstitutional arrangement based on the seeming reasonability of the policy behind it—e.g. synchronization for R.A. 10153 or the difficulties in the BARMM's transition arising from the COVID-19 pandemic for R.A. 11593—rather than its legal merits is that this invites the political branches to look for other "reasonable" grounds to justify a repetition of the unconstitutional scheme.[148] As Justice Carpio remarked: "In reviewing legislative measures impinging on core constitutional principles such as democratic republicanism, the Court, as the last bulwark of democracy, must necessarily be deontological. The Court must determine the constitutionality of a law based on the law's adherence to the Constitution, not on the law's supposed beneficial consequences."[149]

In dismissing the petitioners' arguments that the aforementioned scheme violated the ARMM's local autonomy and exceeded general supervision, the Court in *Kida* noted that "petitioners' apprehension regarding the President's alleged power of control over the OICs is rooted in their belief that the President's appointment power includes the power to remove these officials at will."[150] And since Section 3 of R.A. 10153 only provided the power to appoint but did not authorize President Aquino to remove his OIC appointees, the majority concluded that Congress did not grant the power of control over the ARMM to the President. But even if we discount the effects of *utang na loob* and momentarily set aside all the constitutional defects of postpone-and-appoint arrangements as this Note has propounded above, the supposed safeguard relied upon by the Court in R.A. 10153 has now been removed in R.A. 11593. As alluded to earlier, in the Senate deliberations leading up to the passage of the latter statute, Senator Tolentino confirmed that the grant of authority to the president to appoint the "second" set of

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[147] Mangudadatu, *supra* note 6.

[148] Mara Cepeda, *Arroyo son urges poll body to postpone 2022 elections*, RAPPLER, Sept. 24, 2020, *at* https://www.rappler.com/nation/arroyo-son-urges-comelec-postpone-2022-elections/; Gabriel Pabico Lalu, *De Lima: Maybe what Cusi-led faction really wants is no-election scenario*, INQUIRER.NET, Jan. 3, 2022, *at* https://newsinfo.inquirer.net/1535576/de-lima-claims-maybe-what-cusi-led-pdp-laban-faction-really-wants-is-no-election-scenario.

[149] *Kida*, 659 SCRA 270, 367 (Carpio, *J.*, *dissenting*).

[150] *Kida Resolution*, 667 SCRA 200, 238.

BTA officials also included the power to remove. To be fair, Representative Mangudadatu—who cited three separate portions of the *Kida ponencia* during his sponsorship speech to justify the postpone-and-appoint arrangement in R.A. 11593—asserted during the House deliberations that the BTA appointees could only be removed by the president for cause.[151] Tolentino initially also echoed this line. But as Senate Minority Leader Franklin Drilon keenly pointed out, there was no provision in R.A. 11593 providing for the so-called "grounds" for removal. Eventually, Tolentino had to concede that President Rodrigo Duterte and his successor may remove any member of the BTA at any time, for any reason.[152] Ironically, Section 3 of R.A. 10153—which the Court invoked to support its interpretation that President Aquino was not given the power to remove his OICs in the ARMM elective posts—and Section 2 of R.A. 11593—which several senators of the 18th Congress interpreted as giving President Duterte and his successor the unencumbered power to remove the BTA appointees[153]—share substantially similar language.[154]

Defenders of the recent statute will point to the fact that unlike R.A. 10153, R.A. 11593 involves the extension of a transition period for a new

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[151] "The BTA members are Presidential appointees, thus the established tradition that the appointees serve at the pleasure of the appointing authority. Meaning, the co-terminous nature of the appointment of BTA members is still being upheld. Should the President decide to end the term of a particular BTA member even before June 30, 2022, then he can always do so because, being the appointing authority, the President can always cause the expiration of the term of any of his appointees. [...] I wish to reiterate that this intent of Section 2 does not clip the authority of the next President to make changes in BTA appointments, but such changes must be for a cause. Meaning, the expiration before June 20, 2025 of the term of a BTA member, as to be declared by the President to be elected during the May 2022 elections, must be for a valid cause meriting such expiration or end of term." Mangudadatu, *supra* note 6.

[152] S. Journal 20, 18th Cong., 3rd Sess., 31 (Sept. 27, 2021).

[153] Senate President Sotto, Majority Leader Zubiri, as well as Senators Drilon, Gordon, Pangilinan, and Villanueva voted "yes" to S. No. 2214, 18th Cong., 3rd Sess. (2021). However, they all qualified their affirmative votes by stating that their intent and understanding as legislators was that President Duterte and his successor can remove any BTA appointee for any cause, at any time, until the winners of the first regular BARMM elections to be held in May 2025 take office.

[154] *Compare* Rep. Act No. 10153 (2011), § 3. "The President shall appoint officers-in-charge for the Office of the Regional Governor, Regional Vice Governor and Members of the Regional Legislative Assembly who shall perform the functions pertaining to the said offices until the officials duly elected in the May 2013 elections shall have qualified and assumed office."; *with* Rep. Act No. 11593 (2021), § 2. "That the President may appoint the eighty (80) new interim members of the BTA who shall serve up to June 30, 2025 or until their successors shall have been elected and qualified."

LGU—the BARMM.[155] Indeed, Congress was standing on legal ground when it authorized President Duterte via the Bangsamoro Organic Law ("BOL") to appoint the "first set" of BTA officials for the initial transitory period of 2019–2022.[156] However, the congressional authorization for the President's appointment of the "second set" of BTA officials arose from the postponement of the first regular BARMM election scheduled for May 2022 to May 2025. While there be may valid policy arguments for it, the fact of the matter is this postpone-and-appoint arrangement in favor of the second set of BTA officials has unconstitutionally deprived the people of the BARMM of their right to vote for their local elective officials for a period exceeding three years.[157] And as Justice Carpio stressed, "disenfranchising voters [...] even for a single electoral cycle[ ] den[ies] them their fundamental right of electing their leaders and representatives[.]"[158]

This is a worrying trend, as there is now not only judicial precedent for a postpone-and-appoint arrangement, but also a legislative precedent that gives the president free rein to remove the appointees in elective posts. The combination of the *Kida* precedent and R.A. 11593 opens the possibility for a future congress to "postpone" elections in other LGUs and authorize the president to both appoint and remove OICs in elective offices—thereby effectively giving the chief executive control over LGUs. As Representative Lagman warned, such measures would defeat the purpose of local autonomy as the appointive officials would be "beholden to the president, accountable to the president, and removable by the president."[159]

But even if such a scheme is enacted into law, a future government may still argue—as the Solicitor General in *Kida* did—that this still would not amount to an enlargement of the president's power from general supervision to control given that the affected LGUs would retain their structure[160] and the chief executive would still not be able to override or invalidate the decisions of his or her OIC appointees.[161] To illustrate the practical problem with these arguments, let us consider a hypothetical example of a law authorizing a postpone-and-appoint/remove scheme in Pasig City. Under this scenario, the president has immense leverage over the OIC Pasig City mayor. If, for

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[155] This is as compared to the scenario under R.A. 10153, where the ARMM already had an operational government and conducted several regular elections prior to the cancellation of the 2011 election.

[156] Rep. Act No. 11054 (2017), art. XVI, § 2.

[157] CONST. art. X, § 8.

[158] *Kida*, 659 SCRA 270, 366 (Carpio, *J.*, *dissenting*).

[159] Reformina, *supra* note 109.

[160] Reformina, *supra* note 87.

[161] *Id.*

example, the appointing power and the appointee disagree on the appropriate course of action in a project involving the Pasig River, even if the president cannot technically reverse the decision of the OIC Pasig City mayor, the chief executive can simply remove the appointee and replace him or her with a different OIC who will obey the president's wishes. As Manolo Quezon remarked, once a president is able to appoint and remove local elective officials as President Marcos, Sr., did, he essentially can demand them to "[c]ooperate, or else."[162]

B. Exceptions: When the President Can Constitutionally Appoint Elective Officials

This Note's criticism of *Kida* and the two aforementioned postpone-and-appoint statutes should not be taken as a suggestion that the prohibition against the presidential appointment of local elective officials is an ironclad rule unbending to all contingencies. The author recognizes that the Constitution is not a suicide pact[163] and that the law abhors a vacuum.[164] Instead, what the author asserts is that Congress and the *Kida* Court—by legislative fiat and inopportune judicial deference—have unconstitutionally expanded what should be a narrow list of exceptions to the general rule: that the voters alone can decide who their elective officials shall be. But of course, there are circumstances where the Constitution not only permits, but the practical necessities of governance require, that the president fill such vacuums with appointees.

1. New and Transitory LGUs

One such instance where the president may be permitted to appoint local elective officials without running afoul of the Constitution is when there is a new or transitory LGU.[165] As Justice Carpio readily recognized, in these cases "it becomes absolutely necessary and unavoidable for the legislature to authorize the President to appoint interim officials in elective local offices to insure that essential government services start to function."[166] Here, the president is allowed to appoint the first set of elective officials in "incipient or transitioning [LGUs]."[167] A recent example of this is when the BOL

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[162] Quezon, *supra* note 22.

[163] Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, *J.*, *dissenting*).

[164] Lecaroz v. Sandiganbayan, G.R. No. 130872, 305 SCRA 396, 406, Mar. 25, 1999.

[165] *See* LOCAL GOV'T CODE, § 462.

[166] *Kida*, 659 SCRA 270, 352 (Carpio, *J.*, *dissenting*).

[167] *Id.* at 351 (Carpio, *J.*, *dissenting*).

authorized President Duterte to appoint the members of the BTA.[168] But, as discussed in the previous section,[169] this exception does not extend to the second and subsequent sets of elective officials.

2. The Concurrence of a Permanent Vacancy and the Unavailability of Automatic Succession

Section 45(a) of the LGC is a constitutionally sanctioned instance of when Congress authorizes the president to appoint local elective officials. It provides that:

> a) Permanent vacancies in the *sangguniang* where automatic succession provided above do not apply shall be filled by appointment in the following manner:
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> > (1) The President, through the Executive Secretary, in the case of the *sangguniang panlalawigan* and the *sangguniang panlungsod* of highly urbanized cities and independent component cities[.][170]

Interestingly, subsection (2) of the same provision gives the power to appoint to local executive officials instead of the president. When a permanent vacancy arises "in the *sangguniang panlungsod* of component cities and the *sangguniang bayan*[,]"[171] the power to appoint shall be exercised by the governor. Similarly, subsection (3) states that when a permanent vacancy arises in the *sangguniang barangay*, the power to appoint belongs to the mayor subject to the "recommendation of the *sangguniang* barangay concerned."[172]

There are two crucial distinctions between the mechanisms under Section 45 of the LGC as against the abovementioned postpone-and-appoint schemes. First, the vacancies that gave rise to the postpone-and-appoint arrangements were a result of the expiration of the terms of all the incumbent elective officials in the ARMM and BTA, respectively, and Congress's cancellation of the election for their successors. Senator Nene Pimentel described the scheme in *Kida* as a "vacuum [which] was artificially created so that simulated circumstances are used to justify the exercise of arbitrary power

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[168] Rep. Act No. 11054 (2017), art. XVI, § 2.
[169] *See supra* Part V(A).
[170] LOCAL GOV'T CODE, § 45(a)(1).
[171] § 45(a)(2).
[172] § 45(a)(3).

such as the President's appointing OICs in the ARMM[.]"[173] In contrast, a Section 45 vacancy occurs when a *sanggunian* member elected in the most recent election "fills a higher vacant office,[174] refuses to assume office, fails to qualify, dies, is removed from office, voluntarily resigns, or is otherwise permanently incapacitated to discharge the functions of his office."[175] Here, there is no violation of the Constitution because the permanent vacancy is not a result of the cancellation of an election, but rather a supervening event following the holding of an election. And since it would be imprudent to leave the vacated office without an officeholder until the next regular election can be held, the president's exercise of the power to appoint in order to fill such vacancy in this scenario is "absolutely necessary and unavoidable"[176] under these circumstances. The second key distinction is that under Section 45, the president or governor does not have a completely free hand as to whom he or she may appoint to fill the vacancy. The appointing authority must still take into account the will of the electorate expressed in the last election:

> Only the nominee of the political party under which the *sanggunian* member concerned had been elected and whose elevation to the position next higher in rank created the last vacancy in the *sanggunian* shall be appointed in the manner hereinabove provided. The appointee shall come from the same political party as that of the *sanggunian* member who caused the vacancy and shall serve the unexpired term of the vacant office. In the appointment herein mentioned, a nomination and a certificate of membership of the appointee from the highest official of the political party concerned are conditions sine qua non, and any appointment without such nomination and certification shall be null and void ab initio[.][177]

Conversely, under the postpone-and-appoint schemes, the president is unbound from the will of the electorate and does not have to consider their party composition preferences when making appointments.

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[173] Pimentel, *supra* note 41.

[174] This refers to the operation of the automatic succession scheme under LOCAL GOV'T CODE, § 44. "Permanent Vacancies in the Offices of the Governor, Vice Governor, Mayor, and Vice-Mayor. – […] If a permanent vacancy occurs in the offices of the governor, vice-governor, Mayor, or vice-mayor, the highest ranking Sanggunian member or, in case of his permanent inability, the second highest ranking Sanggunian member, shall become the governor, vice-governor, Mayor or vice-mayor, as the case may be."

[175] § 44(d).

[176] *Kida*, 659 SCRA 270, 335 (Carpio, *J.*, *dissenting*).

[177] § 45(b).

C. The Proper Remedy for Genuine Postponement or Failure of Election Scenarios

Two other situations that give rise to permanent vacancies in local elective offices are the postponement or failure of elections, which are defined by Sections 5 and 6 of the OEC, respectively. The *Kida ponencia* stated that the former transpires when:

> [E]lections have already been scheduled to take place but have to be postponed because of (a) violence, (b) terrorism, (c) loss or destruction of election paraphernalia or records, (d) *force majeure*, and (e) other analogous causes *of such a nature that the holding of a free, orderly and honest election should become impossible in any political subdivision*.[178]

On the other hand, the latter occurs when:

> [E]lections have already been scheduled but do not take place because of (a) force majeure, (b) violence, (c) terrorism, (d) fraud, or (e) other analogous causes the election in any polling place has not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect.[179]

In either case, the election that was postponed or resulted in a failure to elect must be rescheduled to "a reasonably close [. . .] date"[180] to the original election day. If the rescheduled election transpires before the end of the three-year term of the outgoing local elective officials—which in the regular course of events is before June 30 of an election year[181]—then no problem in the continuity of governance in the LGU arises because the COMELEC will likely be able to proclaim the winning candidates before the end of the incumbent LGU officials' terms. However, if the "unforeseen or unexpected events that prevent the holding of the scheduled elections"[182] persist beyond June 30, then the end of the term of the outgoing officials will arrive without any successors qualifying into office. Thus, a stopgap measure must be put in place so that there are OICs in the LGU who will ensure the continued performance

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[178] *Kida*, 659 SCRA 270, 315. (Emphasis in the original.)
[179] *Id.* (Emphasis omitted.)
[180] ELECT. CODE, §§ 5–6.
[181] *Osmeña*, 199 SCRA 750.
[182] *Kida*, 659 SCRA 270, 315. (Emphasis omitted.)

of vital government functions until an election can be held within "thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect."[183]

The question then arises: How should the "stopgap OICs" be selected? There are two possible interim measures: (1) temporary presidential appointment of OICs; or (2) holdover by the incumbent local elective officials. None of our general election laws prescribe a definite course of action.[184] But while the Court categorically declared that the factual circumstances in *Kida* did not amount to a postponement or failure of election scenario under the OEC,[185] the authors of the two dissenting opinions tangentially discussed the proper constitutional remedy in case either scenario occurs. Justice Carpio, who argued for the first interim measure, noted that the power of general supervision over LGUs authorizes the president to appoint OICs in instances where "the law does not provide for succession, or where succession is inapplicable because the terms of elective officials have expired."[186] He may have espoused this view in light of his agreement with the Court's majority insofar as the unconstitutionality of the holdover of local elective officials is concerned.[187] There is no statutory precedent for this

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[183] ELECT. CODE, §§ 5–6.

[184] The holdover provisions in the OEC have been rendered inoperative by the 1987 Constitution; ELECT. CODE, art. V, § 36; art. IX, § 64. Other relevant general election laws prescribe neither a holdover of the incumbent officials nor a presidential appointment of OICs: Rep. Act No. 6646 (1988); Rep. Act No. 7166 (1991); Rep. Act No. 8436 (1997); Rep. Act No. 9369 (2007).

[185] *Kida*, 659 SCRA 270, 315. "In the present case, the postponement of the ARMM elections is by law — i.e.[,] by congressional policy — and is pursuant to the constitutional mandate of synchronization of national and local elections. By no stretch of the imagination can these reasons be given the same character as the circumstances contemplated by Section 5 or Section 6 of BP 881, which all pertain to extralegal causes that obstruct the holding of elections."

[186] *Id.* at 355 (Carpio, *J.*, *dissenting*).

[187] *Id.* at 362 (Carpio, *J.*, *dissenting*). "Section 7 (1), Article VII of RA 9054, allowing for the hold over of elective local officials in the ARMM, finds no basis in the Constitution. Indeed, Section 7 (1) contravenes the Constitution by extending the term of office of such elective local officials beyond the three year period fixed in Section 8, Article X of the Constitution."

The aforementioned statutory provision states: "Terms of Office of Elective Regional Officials. - (1) Terms of Office. The terms of office of the Regional Governor, Regional Vice Governor and members of the Regional Assembly shall be for a period of three (3) years, which shall begin at noon on the 30th day of September next following the day of the election and shall end at noon of the same date three (3) years thereafter. *The incumbent elective officials of the autonomous region shall continue in effect until their successors are elected and qualified.*" Rep. Act No. 9054 (2001), art. VII, § 7(1). (Emphasis supplied.)

For a more detailed discussion on the Court's position as to why holdover is unconstitutional, *see supra* Part II(C).

course of action. However, in 1998, President Joseph Estrada issued Administrative Order No. 2, which provided that if the COMELEC declared failure of elections in certain LGUs for that year's election, the Chief Executive would fill the vacancies in the offices "of the governor, vice-governor, mayor, vice-mayor and the members of the *sangguniang*,"[188] as the case may be, through appointments.

Meanwhile, Justice Velasco agreed with his colleagues regarding "the necessity of providing for a successor in the office contested in the last elections in case of failure of elections[.]"[189] However, he believed that the constitutional remedy is holdover. Unlike the first measure, instituting holdover schemes to address potential vacancies in local elective offices was the longstanding legislative policy up until the *Kida* Court declared them unconstitutional.[190] In fact, as alluded to earlier, on eight separate occasions, Congress enacted statutes mandating the holdover of the incumbent ARMM elective officials.[191] The author concedes that these arrangements were a result of Congress's repeated rescheduling of ARMM elections and are, thus, not on all fours with the postponement and failure of election scenarios under Sections 5 and 6 of the OEC. But they share substantial similarities in the following aspects: (1) the incumbent elective officials' three-year terms will expire; (2) the expiration of the incumbents' term will arrive before their successors can be elected; and (3) there will be vacancies in these local elective offices as a result.

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[188] Adm. Ord. No. 2 (1998), § 1. The relevant section provides in full: "No Proclamation/Failure of Election. — (a) In LGUs where all of the local elective officials have not been proclaimed or where a failure of election had been declared by the Commission on Elections, the President of the Philippines shall designate Officers-in-Charge for the offices of the governor, vice-governor, mayor, vice-mayor and the members of the *sangguniang panlalawigan, sangguniang panlungsod* and *sangguniang bayan*: Provided, however, That any designee has not been a candidate for any elective position during the recently concluded elections; and Provided, further, That the OIC-designate possesses all the qualifications and none of the disqualifications prescribed for elective offices."

It is interesting to note that the same Administrative Order reserved the power to appoint local elective officials in case of failure of elections in the ARMM to its Regional Governor. Adm. Ord. No. 2 (1998), § 3: "For LGUs Within the Autonomous Region in Muslim Mindanao. — (a) In case the temporary vacancy in the local elective offices is brought about by a failure of election declared by the Commission on Elections or where all of the local elective officials have not been proclaimed, the ARMM Regional Governor shall designate officers-in-charge for the offices of the governor, vice governor, mayor, vice mayor, and members of the *sangguniang panlalawigan, sangguniang panlungsod* and *sangguniang bayan* upon the recommendation of the Regional Secretary of the Department of the Interior and Local Government, ARMM: Provided, however, That any designee has not been a candidate for any elective position during the recently concluded elections[.]"

[189] *Kida*, 659 SCRA 270, 380 (Velasco, Jr., *J.*, *dissenting*).

[190] *Id.* at 311–12.

[191] *See supra* note 46.

The author concurs with Justice Velasco's view[192] that the second interim measure—holdover of the incumbent local elective officials—is the proper and constitutional remedy to deal with the vacancies caused by postponement and failure of election scenarios. First, the holdover of the officials elected in the last election is more in keeping with our democratic and republican form of government[193] and the constitutional rules on local elective officials.[194] Under this scenario, the will of the people as to who their local leaders should be as expressed in the last election is retained until they can once again vote for the successors. This is compared to the alternative situation where the president is given free rein to appoint whomever he or she wants without being required to consider the preference of the local electorate. As Justice Velasco asserts: "to allow the President to substitute his discretion for the will of the electorate by allowing him to appoint, no matter how briefly,"[195] violates the elective nature of local elective offices.

Second, neither Article X, Section 8 of the Constitution nor the LGC prohibits holdover. Admittedly, holdover spawns two potential concerns—the former raised by the *ponencia* and the latter by Justice Carpio: (1) it allegedly violates the constitutional rule that local elective officials shall only serve for three years; and (2) it may incentivize Congress to repeatedly postpone elections. On this, Justice Velasco, citing American jurisprudence, argued that "a holdover occasioned by a legislation postponing an election, which is not passed for the sole purpose of extending official terms but which merely effects an extension as an incidental result, is valid[.]"[196] Applying this standard, the holdover of the incumbent officials is merely an incidental extension resulting from a reasonable ground for the postponement of elections: the extralegal or *force majeure* events under Sections 5 and 6 of the OEC. It: (1) is not intended to extend the term of incumbents; (2) applies only to the limited situations listed in said provisions of the OEC;[197] and (3) is certainly not destructive of the elective character of the office in the way that

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[192] Three other magistrates joined Justice Velasco's dissenting opinion: then-Chief Justice Corona and Justices Teresita Leonardo-de Castro and Roberto Abad.

[193] CONST. art. II, § 1.

[194] *See supra* Part III(B); CONST. art. X, §§ 8, 18.

[195] *Kida*, 659 SCRA 270, 381 (Velasco, Jr., *J.*, *dissenting*).

[196] *Id.* at 377 n.15 (Velasco, Jr. *J.*, *dissenting*). "[L]egislation postponing an election which is not passed for the sole purpose of extending official terms, but which merely effects an extension as an incidental result, does not affect a legislative appointment of his successor. [...] Postponement of an election by the legislature does not fly in the face of the Constitution so long as such postponement is reasonable and does not destroy the elective character of the office affected."

[197] It goes without saying that an economic recession or a two-year pandemic do not fall within these grounds.

the presidential appointment of persons to elective offices is. The holdover incumbents serve as *de facto* officers solely to ensure the continuity of governance in the LGU and only until the vacancies are filled by the election of their successors once the extralegal or *force majeure* grounds cease.

Third, the presidential power of general supervision, as discussed earlier,[198] does not carry with it the power to appoint local elective officials. The chief executive may only exercise the power to appoint in the circumstances mentioned above: (1) new or transitory LGUs; and (2) the exhaustion of automatic succession mechanisms. To illustrate, suppose there is a ground for postponement or failure of election that persists beyond June 30 in a province. The incumbent governor should continue to perform the duties of the office in a holdover capacity until the rescheduled election can be held. But what if the said governor ran for and won a seat in the Senate, rendering her unable to remain in the same office? Then the vice-governor, or the highest-ranking *sanggunian* member, by the automatic succession mechanism of Section 44 of the LGC, should serve as "holdover governor" until the rescheduled election could be held. Only in the absence of a statutory successor is the president justified, under the power of general supervision over LGUs, to step in to appoint a "holdover governor."[199]

CONCLUSION

Chief executives prior to President Marcos, Sr., possessed, in varying degrees, the power to appoint officials in vital local leadership positions.[200] But the dictator was the originator of the postpone-and-appoint arrangement.[201] As alluded to earlier, there are significant similarities between

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[198] *See supra* Part III(D).

[199] As an additional note, these mechanisms in Section 45 are sufficient to cover even a hypothetical catastrophic event where all LGU officials in a province simultaneously die or become permanently disabled. In this scenario, the president may fill all vacant seats in the *sangguniang panlalawigan* subject to the nominations of the relevant political parties. The persons appointed to replace the erstwhile most senior and second-most senior provincial board members shall then, by automatic succession under Section 44, ascend to the governorship and vice-governorship, respectively. The governor shall then fill the seats in the *sangguniang panlungsod* or *bayan* as the case may be, subject also to the electorate's decision as to the party composition of the city and municipal boards involved. Similarly, the appointees to replace the two most senior board members in each city and municipality shall then serve as the mayors and vice-mayors of their LGUs.

[200] *See supra* note 92.

[201] Following World War II, local elections were regularly held every four years beginning in 1947. This quadrennial cycle ended in 1975 when Marcos cancelled that year's

Marcos's scheme and its modern counterparts in that: (1) they involved laws postponing local elections; (2) the postponements transpired despite the fact that the general laws legally mandated that local elections be held;[202] (3) there were no *force majeure* scenarios that logistically prevented the conduct of elections; (4) due to the postponement, the terms of the elective officials involved expired before their successors could be elected; and (5) the resulting vacancies were used to justify the president's authorization to appoint persons to fill such vacancies. So, the recent postpone-and-appoint arrangements can be characterized as yet another one of the many unfortunate remnants of Marcos's legacy in our current legal order. When Marcos issued P.D. 1576, his motivations were clear. He used his ability to appoint and remove local elective officials to eliminate rival sources of authority and concentrate power in himself. But his scheme also betrayed a fundamental distrust, if not fear, of voters and of a pluralistic system of governance. As Father Joaquin Bernas noted: "Presidential Decrees issued under the 1973 Constitution touching on local governments manifested a less than zealous eagerness to *relinquish central control over the affairs of local government*. Moreover, the authoritarian structure itself of the Marcos regime was inhospitable to local autonomy."[203]

This model is now completely incompatible with the 1987 Constitution, which has not only substantially restored the primacy of the consent of the governed, but has also placed limitations on the power of the central government and expanded the autonomy of LGUs.[204] As this Note

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nationwide local elections and instead called for a referendum where voters ostensibly gave him the power to appoint local elective officials. Severino Samonte, *Filipinos used to vote every 2 years from 1946 to 1971*, PHILIPPINE NEWS AGENCY, Apr. 27, 2019, *at* https://www.pna.gov.ph/articles/1068358.

[202] Rep. Act No. 180 (1947), § 7.

[203] Bernas, *supra* note 22. (Emphasis supplied.)

[204] San Juan v. Civil Service Comm'n, G.R. No. 92299, 196 SCRA 69, 76, Apr. 19, 1991. "Where a law is capable of two interpretations, one in favor of centralized power in Malacañang and the other beneficial to local autonomy, the scales must be weighed in favor of autonomy.

The exercise by local governments of meaningful power has been a national goal since the turn of the century. And yet, inspite of constitutional provisions and, as in this case, legislation mandating greater autonomy for local officials, national officers cannot seem to let go of centralized powers. They deny or water down what little grants of autonomy have so far been given to municipal corporations.

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Our national officials should not only comply with the constitutional provisions on local autonomy but should also appreciate the spirit of liberty upon which these provisions are based."

Sarmiento, 156 SCRA 549, 579 (Cruz, *J.*, *dissenting*). "It must be borne in mind that one of the purposes of the Constitutional Commission was to restrict the powers of the Presidency and so prevent the recurrence of another dictatorship."

has shown, key among the innovations brought about by the present Constitution is the introduction of a constitutional class of local elective officials[205] as provided by the new provisions in Article X. By expressly providing for a definite term of office for LGU officials, the Constitution ensures the right of voters to choose their local leaders in regularly scheduled elections,[206] which must be held every three years. This interpretation is consistent with the nature of the electoral mandates secured by LGU officials, who are elected separately and independently from their national counterparts. Unlike the president's power of control over members of the executive branch, who source their right to hold public office from and serve at the pleasure of the chief executive, the president's power of general supervision does not extend to the power to appoint LGU officials. Instead, "the heads of political subdivisions are elected by the people. Their sovereign powers emanate from the electorate, to whom they are directly accountable."[207]

The thesis forwarded by this Note is not at odds and can be harmonized with the broad legislative power of control possessed by Congress over LGUs. The legislature still has the ability to create, destroy, and abolish local offices, as well as the authority to determine which of these positions are to be classified as elective and appointive. But once these offices are classified as elective, the Constitution requires that their officeholders be subjected to the will of the electorate every three years. Hence, subject to the limited exceptions of (1) new and transitory LGUs and (2) situations where a permanent vacancy and the unavailability of automatic successions concur, the general rule is that local elections cannot be indefinitely suspended or cancelled, and the president cannot be authorized to fill the resulting vacancies in the local elective offices.

Unfortunately, neither R.A. 10153, due to the Court's decision in *Kida*, nor R.A. 11593, due to the absence of a proper challenge in court, has been declared unconstitutional. If viewed in a vacuum, the justifications underpinning these two postpone-and-appoint laws may seem sound; and in the case of the latter, even brought about by legitimate policy considerations. But as Justice Carpio reminds us: "The laudable ends of legislative measures cannot justify the denial, even if temporal, of the sovereign people's constitutional right of suffrage — to choose freely and periodically 'those whom they please to govern them.'"[208] The danger in leaving *Kida* and the two

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[205] CONST. art. X, §§ 8, 18. *See supra* Part III(B).
[206] *Osmeña*, 199 SCRA 750, 762.
[207] *Aguirre*, 336 SCRA 201, 215.
[208] *Kida*, 659 SCRA 270, 367 (Carpio, *J.*, *dissenting*).

aforementioned statutes unopposed is that they serve as open invitations for future congresses and overly ambitious presidents to come up with other seemingly "legitimate" reasons—e.g. economic recessions, protests, or waning pandemics—to justify suspending polls in other LGUs across the country. And in case a future government attempts to replicate this scheme, it is the duty of the public and the members of the legal profession to remind those in power that they cannot claim to possess the authority that the sovereign Filipino people have decidedly reserved for themselves: the power to directly choose who their local leaders should be.

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