Comment

THE CASE OF AYTONA v. CASTILLO: A SECOND LOOK

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This paper is not an attempt to resurrect questions of propriety in the case of *Aytona v. Castillo*. Rather, this is an attempt to consider in the purely legal sense the tenability of the Supreme Court's decision in that case.

I. THE LETTER AND SPIRIT OF THE CONSTITUTION

The principal basis of the Supreme Court's decision in the Aytona case obviously was its conviction that the appointment of Aytona as Governor of the Central Bank was a patent violation of the spirit and intent of ad-interim appointments provided for in the Constitution, the appointment having been made at a time when the appointing power was about to close his term. In pursuit of such spirit, however, the Court had to discard a principle it had repeatedly enunciated in the past, the principle that where the letter of the provision does not suffer from ambiguity, inquiry as to its spirit cannot be allowed. Thus, in the case of *Tañada v. Cuenco* [1] for instance, the Court parenthetically stated that where the law is free and clear from any ambiguity the letter of it is not to be disregarded on the pretext of pursuing its spirit. In other words, "where the language of a statute adequately expresses the intention of the legislature, it must be given effect *regardless of the consequences.*" [2]

At any rate, if there is anything clear at all about the spirit of the constitutional provision in question, it is the settled principle in constitutional law that the President must have the power to make ad-interim appointments so that he may fill in any vacancy that may arise in the government when Congress is not in session and thereby avoid the interruption of governmental processes.

It was the intention of the framers of the Constitution to make all offices created by law and necessary to carry on the operations of government always filled or, at all events, to avoid the protrac-

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* Notes and Comments editor, *Philippine Law Journal*.

[1] G.R. No. L-10520.

[2] 82 C.J.S. pp. 621-622. It has also been held that construction cannot be "read into the provisions of a Constitution (which would have the effect of putting into it) some unexpressed general policy or spirit supposed to underlie and pervade the instrument and to render it consonant to the genius of the institutions of the State x x x" Forsythe v. Hammond, 68 U.S. 583; People v. Rucker, 5 Colo. 455; Vernon's Pet., 17 Rel. 202, 40 A. 60. "The language of a constitutional provision should be construed as it is written x x x and the words employed should be given their natural and obvious significance x x x" Wright v. U.S., 58 S. Ct. 395, 302 U.S. 583, 82 L.Ed. 439; *See also* Interstate Natural Gas Co. v. Gully, D.C. Miss., 4 F. Supp. 697, 54 S.Ct. 564, 292 U.S. 16, 78 L.Ed. 1088.

tion or delay of all appointments to such vacancies.[3] This duty to see to it that the vacancies are filled is with the President. If Congress is in session, it must assent to his nomination, otherwise the vacancy must be filled by the President alone.[4]

> "In such cases, their acts are his acts and whatever opinion may have been entertained of the manner in which executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political x x x"[5]

The question therefore of whether or not an appointment to an office is made wisely or at the proper time is not within the competence of the Court to resolve. Thus, since the Constitution in so certain terms grants the President the power to make ad-interim appointments, there is, likewise, given the President the sole discretion to determine when the need for such recess appointment exists, and it is the Commission on Appointments, not the courts, that is empowered to reject or affirm the act of the President. If there was then any violation of the spirit and purpose of ad-interim appointments provided for in the Constitution and if redress had to be sought, the remedy did not lie in the courts but in the Commission on Appointments to which has been granted the constitutional power of checking any possible abuse of the appointing power by the President. As the Court stated on one occasion, "there is certainly a large field of constitutional provision which does not come before the Judiciary for enforcement, and may remain unenforced without any possibility of judicial remedy."[6]

II. THE CONCEPT OF "PRESIDENTIAL CARETAKER"

But more significant than the Court's ruling that the spirit of the law may be invoked in spite of the patent clearness of its letter, was its doctrine that an outgoing President loses his presidential powers and assumes instead the position of a mere caretaker of the presidential office. This doctrine is new and does not seem to find support anywhere in the Constitution. And this fact is evident from the Constitution itself which provides that the President "shall hold office during the term of four years and his power as such shall end at noon on the thirtieth day of December following the expiration of four years after his election and the term of his successor shall begin from such time."[7]

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[3] Power of President to fill vacancies, 1832, 2 Op. Atty. Gen. 527.
[4] President's Power of Appointment, 1866, 12 Op. Atty. 32.
[5] Marbury v. Madison, 1 Cranch 137.
[6] Mabanag v. Lopez Vito, 78 Phil. 16.
[7] Art. VII, Sec. 4.

"The term of office begins from the time, if any fixed by law, and not necessarily from the date of qualification. The rule is that where no time is fixed by the Constitution or by statute, the term begins, in the case of elective officers, on the date of election.[8]

"It is only where the Constitution or statute fails to prescribe when the term of office shall begin when it begins on election x x x."[9]

"Where under a constitutional provision the year commences and all offices terminate upon a day fixed, strictly speaking outgoing officers do not pass out of office x x x"[10]

"x x x constitutional provisions as to terms of office may be so worded as to be construed to affect offices established by the Constitution but the Court will not extend the plain meaning of such provision by construction."[11]

It is clear then that where the Constitution expressly provides for a term of office such term commences and expires only according to the period fixed by the Constitution and the Court cannot construe in any other manner the period of such commencement or termination.

III. THE VALIDITY OF THE APPOINTMENT UNDER THE CONSTITUTION

The Constitution provides that the President shall have the power "to make appointments during the recess of the Congress, but such appointments shall be effective only until disapproval by the Commission on Appointments or until the next adjournment of Congress."[12]

In this connection, the following facts were conclusive: first, the position to which Aytona was appointed was vacant at the time the appointment was made; second, the appointment of Aytona was made while Congress was not in session. The question raised was whether or not the appointment of Aytona was made "during a recess." Obviously, it was. It is clear from a cursory reading of the Constitution that no distinction is made and can be found between a recess of any *first* or *second* or *third* congress; rather, it is obvious that the Constitution only refers to the recess of Congress as a continuing body. No such distinction is made by the Constitution because such distinction would, if made, lead to self-defeating, inconsistent results. For while on the one hand the Constitution itself would grant the President the power to make ad-interim appointments, it would, on the other hand, deny the President the power, at

[8] Prowell v. State, 142 Ala. 80, 39 S. 164; *see also* People v. Nickel, 9 Cal. A. 783.
[9] Whitney v. Patrick, 4 Miss. 191, NY 550.
[10] State v. McIntosh, 199 Minn. 18, 22.
[11] Becker v. Boyle, 221 NY 681, 117 N.E. 610; *see also* State v. Johnson, 176 Wis. 107, 184 N.W. 683.
[12] Art. VII, par. 4, Sec. 10.

least, insofar as the period between two congresses is concerned. There seems to be no cogent reason for the proposition that an ad-interim appointment made between two congresses is void. The principle that guided the framers of the Constitution in granting the power to make ad-interim appointments to the President applies with equal force and cogency even if such appointments are made between May, when Congress ends, and January, when the next Congress begins.

> "The constitutional provision is intended to prevent any interruption in the business of the government or any impairment in its efficiency caused by the absence or removal of any officer during a legislative recess. The period of actual occurrence of the vacancy is immaterial. Whether the vacancy happens during the session of Congress or after its adjournment, the President may fill it temporarily during the recess, if the office has not been filled during the session and no provision to the contrary appears." [13]

> "All that is to be looked to is that there is a vacancy x x x and there must be a power to fill it x x x for the public exigency which requires the officer may be as cogent and more compelling during the recess than during the session." [14]

The purpose of ad-interim appointments, therefore, is clear. It is without basis to believe that the framers of our Constitution intended to deny the President any power to make recess appointments during the period between two congresses even when in his opinion the exercise of such power is necessary to the public interest. Furthermore, under such proposition the appointments made by President Macapagal himself having been made before the regular Congress convened in late January would perforce be void since the President, using the same argument, has no power to make appointments during the period between two congresses. And under this argument, what would be the validity of President Macapagal's Administrative Order No. 2? It would necessarily be of suspicious legality because such administrative order recalled, revoked and nullified the appointments made by President Garcia only insofar as they were made after Dec. 13, 1961. President Macapagal, by implication, acknowledged the validity of the appointments made by former President Garcia between May, when Congress ended, and Dec. 12, this, in spite of the argument that the President has no power to make appointments between two congresses.

It becomes inevitable then that the word "recess" must not be given self-contradicting, self-defeating and inconsistent significations, that it must be construed in its ordinary sense.

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[13] In re Farrow, 8 Fed. 112.
[14] President's Power to make Appointments, 1866, 12, Atty. Gen. 32.

> "It was evidently intended by the framers of the Constitution that it should be given a meaning that is real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understands it. It means, in our judgment, the period of time when the Senate is not sitting in regular session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when the members owe no duty of attendance; when its chambers are empty; when because of its absence, it can not receive communications from the President or participate as a body in making appointments." [15]

This interpretation is not something new in this country. All the presidents in the past, most especially the founder of the Liberal Party, followed this interpretation, evidently because it is the most logical one.

IV. THE IRREVOCABILITY OF AYTONA'S APPOINTMENT

Aytona's appointment, therefore, being neither illegal nor contrary to the spirit of the Constitution, was irrevocable. No less than Mr. Chief Justice Bengzon himself, in his concurring opinion in the case of *Eraña v. Vergel de Dios* [16] cited an American precedent, thus:

> "At first sight, it would seem entirely reasonable and in accord with public policy to allow the appointive power the privilege of reconsideration. From the point of view of one appointed to office, however, to permit such reconsideration after the power of appointment has been completely and finally exercised in the manner prescribed by law and the title to the office has become fixed, is to take from him a vested title. Also from the point of view of stability and certainty in the administration of public affairs, it is desirable that there should be some point of time at which an appointment to office becomes finally and irrevocably fixed. As said in the famous case of Marbury v. Madison: Some point of time must be taken when the power of an executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised."
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> "Although there are circumstances under which an appointment to office may be reconsidered and revoked, it may be stated as a general rule that an appointment once made is irrevocable and not subject to reconsideration. This view represents the great weight of authority." [17]

And as stated in the case of *State v. Dowling*,[18]

> "Until now it has never been doubted perhaps because no one has thought of denying that, when the term of an appointive office expires during a recess of the Senate, the person appointed to succeed to the

[15] Hinds' Precedents of the House of Representatives, Vol. 5, pp. 852-853.
[16] 85 Phil. 17, 26.
[17] Note found at page 135 of 89 American Law Reports, supported by innumerable decisions.
[18] 120 Southern Reporter 593, 599.

> office may immediately qualify and enter upon his official duties, without waiting for his appointment to be confirmed by the Senate."

It is clear then that under the Constitution, once the appointee has taken his oath of office, he may enter upon his duties as an officer, his appointment being complete and irrevocable.

> "x x x and (the) appointment vests in the appointee the right to hold and discharge the duties of such office for the full term, subject only to the non-concurrence of the Senate." [19]

In this connection the ALR states:

> "In reaching this result, the court emphasized the difference between a nomination and an appointment, holding that where the statute relating to appointments by the governor with the consent of the Senate, provides that the governor shall appoint persons to the office with the consent of the Senate, rather than merely nominate persons to the office for the reconsideration of the Senate the appointment is final and conclusive without such confirmation." [20]

And with regard to the case of *McChesney v. Sampson,* it has been observed that:

> "the act of the governor in making a recess appointment was held to be not merely a nomination subject to revocation by the governor at any time prior to action thereon by the Senate, but a final and irrevocable appointment subject only to rejection by the Senate. In support of this result it was said: "It is argued that appointment to the office consists of two separate acts, one by the governor and one by the Senate, and until both have acted there is no appointment such as to bring the incumbent within the protection of the law. Even so, the two powers that act concurrently, but consecutively, and action once taken and completed by the Executive is not subject to reconsideration or recall. The fact that the title to the office and the tenure of the officer, are subject yet to the action of the Senate, does not render incomplete the act of the Chief Executive in making the appointment. The appointment alone confers upon the appointee for the time being the right to take and hold the office and constitutes the last act respecting the matter to be performed by the Executive power." [21]

The doctrine of irrevocability of appointments, clearly enough, has the support of American cases and authorities [22] and with respect to which Justice Bengzon once said: "On several occasions we have followed United States precedents in relation to administrative law

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[19] People v. Addison, 10 Cal. 1.

[20] 89 American Law Reports 139. In the case of Barret v. Duff, 217 Pac. 918, the Court held that "where the power of the Governor has been exercised by the appointment to an office, and the appointee has qualified and been vested with the powers and prerogatives of the office, neither the governor nor his successor has any further control over the appointment unless and until the appointee has been rejected by the Senate."

[21] McChesney v. Sampson, 232 Ky. 395; *see also* 89 American Law Reports 140 for extensive comment on the Sampson case.

[22] People ex rel. Ryder v. Mizner, 7 Cal. 519; People ex rel. Wetherbee v. Casneau, 20 Cal. 504; Harrington v. Pardee, 1 Cal. App. 278; McChesney v. Sampson, *supra;* Barret v. Duff, *supra.*

and public affairs; and there is no reason to depart now from such justified practice."

Indeed, for to render an ad-interim appointment revocable by an administrative order is, in effect, to create a new ground for the termination of recess appointments, a ground that is sanctioned by neither the spirit nor the letter of the Constitution.

V. THE EXCEPTIONS TO THE RULE OF IRREVOCABILITY

The irrevocability of Aytona's appointment becomes more apparent when one considers the fact that the circumstances under which it was made do not come within the grounds under which an appointment may be reconsidered and revoked.

There, generally, are five exceptions to the doctrine of irrevocability and a summary of them will support this observation.

The first exception is, when the law simply grants the appointing authority the power of "nomination" subject to confirmation by an appropriate body, the nomination may be withdrawn or reconsidered before the same has been confirmed by the body authorized so to do.[23]

The second exception is, when the appointing authority is a collective body and its rules of order permit reconsideration of matters passed upon by it, including appointments, the rule is that an appointment made by such a body is "subject to reconsideration upon the conditions and within the time provided for in such rules." [24]

The third exception is, when the appointing authority is a collective body and the ballot taken for the purpose of electing the person to office is defective or irregular, or where there is some question in the minds of the members as to its regularity, the rule is that an appointment made on such questionable ballot is not considered as final and irrevocable.[25]

The fourth exception is, where the appointment is made under a law which provides that the issuance of a commission or the execution of a writing evidencing the appointment is an essential part of the appointment before the performance of these acts the appointment is not considered final and complete and may therefore be withdrawn, but where there is no statutory provision requiring the issuance or execution of a commission, the appointment becomes final and irrevocable even before the issuance or execution of the commission.[26]

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[23] People v. Mizner, *supra*; Harrington v. Pardee, *supra*; *See also* cases cited in footnote 22.
[24] 89 American Law Reports 152-155.
[25] *See* cases and discussion in 89 ALR 150-152.
[26] *See* cases and discussion in 89 ALR 156-158.

And, finally, when the act of appointment was made in the exercise of the executive rather than the legislative function, the act of appointment becomes irrevocable upon its exercise, but if the act of appointment was made in the exercise of legislative function, as when done by a collective body, the act may still be open for reconsideration.[27]

VI. THE POWER OF THE COURT TO REVIEW THE ACT OF THE PRESIDENT

It is also quite obvious that the court could not question the President's act of appointing Aytona to the position, for under the doctrine of separation of powers, the courts cannot review the acts of an executive officer when such acts are the functions of his office.[28]

> "Executive officers intrusted by the Constitution or by statute with the power of appointment to office are not subject to judicial control in the exercise of their discretion in selecting an appointee.[29]
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> "The appointment to an office in the government even if it is simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant—whether or not he is the proper one to discharge the duties of the position; therefore it is one of those acts over which the courts have no general supervision.[30]
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> "The theory that (the act) may be declared void when deemed to be opposed to natural justice and equity although they do not violate any constitutional provisions has some support in the dicta of judges but has not been approved so far as we know by any authoritative adjudication and is repudiated by numerous authorities." [31]

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[27] *See* cases in 89 ALR 144-145.

[28] People ex rel. Saranac Land and Timber Co. v. Extraordinary Special and Trial Term of Supreme Court, 116 N.E. 384, 220 N.Y. s. 132, 177 App. Dix. 378.

[29] State ex inf. Barret ex rel. Bradschar v. Hedrick, 241 S.W. 402, 411, 294 Mo. 21, quoting Corpus Juris, 12 C.J. p. 897 note 56.

[30] Keim v. U.S. 1900, 20 S. Ct. 574. *See also* Hall on Constitutional Law, and the cases cited therein, sec. 42, p. 42; People v. Draper, 15 N.Y. 532.

[31] Berholf v. O'Reilly, 74 N.Y. 509.