

THE NACIONALISTA PARTY, PETITIONER, VS. FELIX ANGELO BAUTISTA, SOLICITOR GENERAL OF THE PHILIPPINES, RESPONDENT.

G.R. No. L-3452. December 07, 1949

Ponente: PADILLA, J.

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PADILLA, J.:

The prayer of the petition filed in this case reads, as follows:

Wherefore, petitioner respectfully prays that after due hearing a writ of prohibition issue commanding the respondent Solicitor General to desist forever from acting as acting member of the Commission on Elections under the designation rendered to him by President Quirino on November 9, 1949 unless he is legally appointed as regular member of the said Commission on Elections * * *.

It is averred, in support of the prayer, that on 9 November 1949, while the respondent held, as he still holds, the office of Solicitor General of the Philippines, the President designated him as acting member of the Commission on Elections, and on that same date the respondent took the oath of office and forthwith proceeded to assume and perform the duties of the office; that at the time of the respondent's designation he had not resigned from the office of Solicitor General of the Philippines nor does he intend to do so but continues to exercise all the powers and duties of the last mentioned office.

It is contended that such designation is invalid, illegal, and unconstitutional, because there was on 9 November 1949 no vacancy in the Commission on Elections, for the acceptance, approval, or granting of the application for retirement filed by Commissioner Francisco Enage on such date constitutes or amounts to abuse of discretion and was done in bad faith by the President and therefore null and void; and because Commissioner Enage is entitled to leave and until after the expiration of such leave he does not cease to be a member of the Commission on Elections. The contention that the granting of the retirement application of Commissioner Enage constitutes an abuse of discretion and was made in bad faith is based upon the allegation and claim that the Commissioner "had voted to suspend the elections in Negros Occidental and Lanao and the Liberal Party fears he might vote to annul said elections."

It is claimed, in the alternative, that even if there was on that date a vacancy in the Commission on Elections, still the respondent's designation to act as such member of the Commission, in addition to his duties, as Solicitor General, pending the appointment of a permanent member, is invalid, illegal, and unconstitutional, because membership in the Commission is a permanent constitutional office with a fixed tenure, and, therefore, no designation of a person or officer in an acting capacity could and can be made; because a member of the Commission cannot at the same time hold any other office; and because the respondent as Solicitor General belongs to the executive department and cannot assume the powers and duties of a member in the Commission.

There are other averments that do not go to the root of the main question raised in this case, such as the subordinate position of the office of the respondent to that of the Secretary of Justice who as a member of the

Cabinet campaigned for the election of the present incumbent to the presidency of the Republic; the defense of the President made by the respondent in the impeachment proceedings in Congress and in the emergency powers cases in this Court; the alleged advice given the President by his advisers, among whom was the respondent, not to suspend the elections in Occidental Negros and Lanao; the alleged setting aside or revocation of the Commission's resolutions on the suspension of elections in Occidental Negros and Lanao by the respondent and Chairman Vera, and, for these reasons, it is claimed that impartiality of judgment in matters concerning the last elections cannot be expected of the respondent, thereby impairing the independence of the Commission on Elections.

The answer of the respondent admits his designation as acting member of the Commission on Elections in a temporary capacity pending the appointment of a permanent one and retention of his office as Solicitor General, and denies the other averments, conclusions, claims and contentions set out in the petition.

The respondent contends that his designation is lawful and valid, not only because the power to appoint vested in the President includes the power to designate, but also because it is expressly so provided in Commonwealth Act No. 588; and that the offices held by him, one permanent and the other temporary, are not incompatible.

The claim that the office held by Commissioner Francisco Enage is not vacant for, the reasons given by the petitioner is without foundation in law and in fact, because Francisco Enage as member of the Commission on Elections applied for retirement in 1941 and reiterated his application in 1946 and 1948 and the President of the Philippines granted it on 9 November 1949, and because even if he were entitled to leave he did not apply for it. So that upon acceptance of his application for retirement without applying for leave, even if he were entitled thereto, Francisco Enage vacated his office in the Commission on Elections. Whether the granting of the application for retirement constitutes an abuse of discretion or was done in bad faith by the President, as alleged and claimed by the petitioner, is a subject matter into which we are not at liberty to inquire because of the well known principle of separation of powers. Besides, the President of the Philippines is not a party to these proceedings. Nevertheless, as petitioner predicates its conclusion of "bad faith" and "abuse of discretion" upon the allegation that the Commission "had voted to suspend the elections in Negros Occidental and Lanao and the Liberal Party fears he might vote to annul said elections," it may be stated to set matters aright that there is no legal basis for this allegation, because the Commission on Elections cannot vote to suspend an election but may vote to recommend or may recommend only to the President the suspension of an election "when for any serious cause the holding of an election should become impossible in any political division or subdivision," pursuant to section 8 of Republic Act No. 180, and because the Commission on Elections cannot "vote to annul said elections" for it has no power to annul an election. What at most it may do is to express its views in the report to be submitted to the President and the Congress on the manner in which such election was conducted, pursuant to section 4, Article X, of the Constitution.

As there was a vacancy in the membership of the Commission on Elections, the next point to determine is whether the designation of the respondent as Acting Member of the Commission on Elections, in addition to his duties as Solicitor General, pending the appointment of a permanent member to fill the vacancy caused by the retirement of Commissioner Francisco Enage, is unlawful and unconstitutional.

Under the Constitution, the Commission on Elections is an independent body or institution (Article X of the Constitution), just as the General Auditing Office is an independent office (Article XI of the Constitution). Whatever may be the nature of the functions of the Commission on Elections, the fact is that the framers of the Constitution wanted it to be independent from the other departments of the Government. The membership of the Commission is for a fixed period of nine years, except as to the first members appointed who were to hold office for nine, six and three years. With these periods, it was the intention to have one position vacant every three years,

so that no President can appoint more than one Commissioner, thereby preserving and safeguarding the independence and impartiality of the Commission. But despite all the precautions, the Constitution failed to plug the loophole or forestall the possibility that a member or members die, resign, retire, as in this case, or be removed by impeachment or disqualified, or become physically or mentally incapable, to perform the duties and functions of the office. By death, resignation, retirement, or removal by impeachment, a vacancy in the Commission is created. In these cases the President may appoint a Commissioner for the unexpired term. When such an event should come to pass the limitation to one appointment by a President would be ineffectual. By disqualification or incapacity no vacancy is created. When this possibility should eventuate to two Commissioners, the Commission's functions would be stopped or paralyzed. Perhaps, a designation of other members during the incumbents temporary disability would not harm the public interest and common weal. But the case at bar is not one of disqualification or incapacity creating no vacancy but of retirement resulting in a vacancy. The principle or rule that the power to appoint implies or includes the authority to designate, in the same way that that power carries with it the authority to remove, under the theory that the whole includes and is greater than the part, is not absolute but subject to certain limitations. Thus, justices of the Court of Appeals appointed by the President with the consent of the Commission on Appointments of the Congress may be removed by impeachment only (sec. 24, Rep. Act No. 296); the President may remove a member of the judiciary only upon recommendation of the Supreme Court, after inquiry, in the case of judges of the Courts of First Instance (sec. 67, Rep. Act No. 296), and upon recommendation of the judge of the Court of First Instance or on the President's own motion, after investigation, in the case of justices of the peace (sec. 97, Rep. Act No. 296); and the President or a department head may remove an officer or employee in the Civil Service, appointed either by him or by the department head upon the recommendation of the bureau head, only for cause as provided by law (sec. 4, Article XII, of the Constitution). Likewise, if it, were not for the express provision of law (secs. 9 and 27, Rep. Act No. 296), the President could not designate a justice of the Court of Appeals or a judge of the Court of First Instance to fill temporarily a vacant office of a justice in the Supreme Court or in the Court of Appeals; and he cannot certainly designate an attorney to fill temporarily such vacancy in the Supreme Court or in the Court of Appeals, but must appoint him ad interim, if Congress is not in session, or nominate him, if Congress is in session. The President cannot designate an attorney to fill temporarily a vacant position of a judge in a Court of First Instance or of a justice of the peace.

By the very nature of their functions, the members of the Commission on Elections must be independent. They must be made to feel that they are secured in the tenure of their office and entitled to fixed emoluments during their incumbency (economic security), so as to make them impartial in the performance of their functions—their powers and duties. They are not allowed to do certain things, such as to engage in the practice of a profession; to intervene, directly or indirectly, in the management or control of any private enterprise; or to be financially interested in any contract with the Government or any subdivision or instrumentality thereof (sec. 3, Article X, of the Constitution). These safeguards are all conducive or tend to Create or bring about a condition or state of mind that will lead the members of the Commission to perform with impartiality their great and important task and functions. That independence and impartiality may be shaken and destroyed by a designation of a person or officer to act temporarily in the Commission on Elections. And, although Commonwealth Act No. 588 provides that such temporary designation "shall in no case continue beyond the date of the adjournment of the regular session of the National Assembly (Congress) following such designation," still such limit to the designation does not remove the cause for the impairment of the independence of one designated in a temporary capacity to the Commission on Elections. It would be more in keeping with the intent, purpose and aim of the framers of the Constitution to appoint a permanent Commissioner than to designate one to act temporarily. Moreover, the permanent office of the respondent may not, from the strict legal point of view, be incompatible with the temporary one to which he has been designated, tested by the nature and character of the functions he has to

perform in both offices, but in a broad sense there is an incompatibility, because his duties and functions as Solicitor General require that all his time be devoted to their efficient, performance. Nothing short of that is required and expected of him.

Before proceeding to dispose of the last point involved in this controversy we notice that the petitioner alleges that it is organized and registered under the laws of the Philippines. It does not aver that it is incorporated to entitle it to bring this action. It may be organized and registered as a political party in or with the Commission on Elections for the purposes of the Revised Election Code (Republic Act No. 180), but for the purpose of bringing an action in the courts of justice such organization and registration are not sufficient. It has to be incorporated under Act 1459 for "only natural or juridical persons may be parties in a civil action." (Sec. 1, Rule 3.) But this technical defect may be cured by allowing the substitution of the real parties in interest for the petitioner.

The last point is whether prohibition is the proper remedy. Strictly speaking, there are no proceedings of the Commission on Elections in the exercise of its judicial or ministerial functions, which are being performed by it without or in excess of its jurisdiction, or with grave abuse of its discretion (sec. 2, Rule 67). The only basis for the petition is that the designation of the respondent as temporary member of the Commission on Elections is illegal and invalid because it offends against the Constitution. This special civil action as our Rules call it, or this extraordinary legal remedy following the classical or chancery nomenclature is in effect to test the validity or legality of the respondent's designation in a temporary capacity as member of the Commission on Elections pending the appointment of a permanent member or Commissioner. It is in the nature of a quo warranto, and as such it may only be instituted by the party who claims to be entitled to the office (sec. 6, Rule 68) or by the Solicitor General (secs. 3, 4, Rule 68). The authorities and decisions of courts are almost unanimous that prohibition will not lie to determine the title of a de facto judicial officer, since its only function is to prevent a usurpation of jurisdiction by a subordinate court (High's Extraordinary Legal Remedies, 3d ed., p. 715; *Tayko vs. Capistrano*, 53 Phil., 866, 871). In the case at bar, however, as we have found that the respondent's designation to act temporarily as member of the Commission on Elections is unlawful because it offends against the provisions of the Constitution creating the Commission on Elections, the dismissal of the petition would deny and deprive the parties that are affected by such designation of a remedy and relief, because no one is entitled now to the office and a party who is not entitled to the office may not institute quo warranto proceedings, and the respondent as Solicitor General, the only other party who may institute the proceedings, would not proceed against himself. In these circumstances, it is incumbent upon and the duty of this Court to grant a remedy. There are cases involving a situation similar to the one under consideration wherein it was ruled that the remedy of prohibition may lie. In his treatise entitled "Extraordinary Legal Remedies," High on this point says:

Thus, when the legislature have, by an unconstitutional statute, referred to a body of judges the determination of the validity of a statute concerning the liability of the state upon bonds issued in aid of railways, prohibition will lie to prevent such body from acting upon the matters thus submitted. So when an act of legislature delegates to a judge powers partly judicial and partly of a legislative character, as regards the determination of petitions for the incorporation of villages, the act being held unconstitutional because assuming to delegate legislative powers to a court or judicial body, prohibition will lie to prevent the exercise of the powers thus conferred. (High's Extraordinary Legal Remedies, 3d ed., p. 708; *Italics supplied.*)

Prohibition will not be granted as a substitute for quo warranto for the purpose of trying title to a judicial office by restraining an intruder or de facto officer from acting, on the ground that he is an intruder or a de facto officer. (22 R.C.L., 17.) However, in *Chambers vs. Jennings* (1702) 2 Salk. 553, 91 Eng. Reprint 469, involving an action in the Court of Honor, "Holt, Ch. J., doubted whether there was or could be any such court, but said a prohibition would lie to a pretended court." (77 A. L. R., 247.) (*Italics supplied.*)

Thus, in *Ex parte Roundtree* (1874) 51 Ala. 42, where the statute in question purported to create "the law and

equity court of Morgan County," and, in contravention of the Constitution, which provided that the judges of inferior courts should be elected by the people, declared that the circuit judge of a designated court should act as judge of the new court, it was held that prohibition was a proper remedy, and, in fact, "the only adequate remedy," to prevent the circuit judge from presiding in the court created, and taking or exercising jurisdiction of a certain cause therein pending against the petitioner, and proceeding against the petitioner, who had been summoned as a juror. The Supreme Court declared that if a court against which a writ of prohibition, is sought is one of established jurisdiction, a plea that the subject matter of a particular suit lies without its jurisdiction, or that the party is not amenable to its cognizance, will ordinarily afford full relief; "but, when the question involves the legal existence and construction of a court,—a denial of all jurisdiction, and not of the particular jurisdiction proposed to be exercised,—a prohibition * * * is the only adequate remedy."

So, in *Curtis vs. Cornish* (1912) 109 Me. 384, 84 A. 799, where a statute was plainly unconstitutional in so far as it provided for the creation of a tribunal of justices to hear and consider accusations of corrupt practices in elections, made no provision for exceptions, and denied the right of appeal, except as to questions of the eligibility of candidates to public office (so that in a particular case there was no means of review except through certiorari or writ of error, neither of which would lie until after the unconstitutional tribunal should have completed its hearings and made futile findings which it had no jurisdiction to make, and both of which were otherwise so defective under the circumstances as to be remedies in form rather than in substance), it was held proper to determine an issue as to the constitutionality of the statute in a prohibition proceeding.

In *State ex rel. Hovey vs. Noble* (1889) 118 Ind., 350, 21 N. E., 244, 4 L. R. A., 101, 10 Am. St. Rep., 143, where a writ of prohibition was issued against certain persons to prevent their acting as supreme court commissioners by appointment made under an unconstitutional statute, the somewhat lengthy opinion contains no suggestion of doubt as to the propriety of the remedy in view of the conclusion that that statute in its entirety was utterly void. The statute purported to create the offices of commissioners of the supreme court as well as to provide for the appointment of commissioners. (113 A; L. R., 799.)

The foregoing authorities are invoked in view of the peculiar and extraordinary circumstances obtaining in this case already referred to, to wit: that as no one is entitled to the office there is no party who in his' name may institute quo warranto proceedings, and that the respondent, the only other party who may institute the proceedings in the name of the Republic of the Philippines, would not proceed against himself. Were it not for this anomalous situation where there would be no remedy to redress a constitutional transgression, we would adhere strictly to the time-honored rule that to test the right to an office quo warranto proceedings is the proper remedy.

The petitioner is granted five days within which to amend its petition so as to substitute the real parties in interest for it (the petitioner), or to show that it is a juridical person entitled to institute these proceedings. Otherwise, or if the petitioner does not amend its petition or does not show that it is a juridical entity, the petition will be dismissed. After the amendment or showing referred to shall have been made, the writ prayed for will issue, without costs.

Moran C.J., and Bengzon, J., concur.

Reyes, J., I concur, except as to the requirement that petitioner amend its petition. Under the Rules, objection to the personality of petitioner is deemed waived if not pleaded.

CONCURRING

OZAETA, J.:

I concur in granting the petition for prohibition.

I do not deem it necessary to pass upon the disputed propriety and legality of the acceptance by the President of Commissioner Enage's application for retirement under the circumstances alleged in the petition, specially because said commissioner is not a party in this case.

Assuming the existence of a vacancy, I agree with the majority that the designation of the respondent Solicitor General as acting member of the Commission on Elections is contrary to the Constitution. My views are briefly as follows:

The Commission on Elections is an independent office created by the Constitution (section 1, Article X). It is not appended to either the Executive, the Legislative, or the Judicial Department of the Government.

The Constitution provides that the Chairman and the two other members shall be appointed by the President with the consent of the Commission on Appointments for a term of nine years and may not be rsappointed. They may be removed from office only by impeachment as provided in the Constitution. Their salaries shall neither be increased nor be diminished during their term of office.

The purpose of the Constitution in providing a fixed and secure tenure of office for the members of the Commission with a fixed salary which may neither be increased nor be diminished during their term of office, is to insure and preserve the independence of that body in the impartial performance of its important arid delicate task of enforcing and administering all laws relative to the conduct of elections.[1] That purpose would be defeated if, instead of appointing, an incumbent for a fixed term removable only by impeachment, the President should fill the position by designation, which he can change at will. Such method would also destroy the schedule of rotation provided by the Constitution whereby a new member of the Commission is appointed every three years.

The President's letter of designation, dated November 9, 1949, and addressed to the respondent, reads in part as follows:

"In the interest of the public service and pursuant to the provisions of Commonwealth Act No. 588, you are hereby designated Acting Member of the Commission on Elections, in addition to your duties as Solicitor General, pending the appointment of a permanent member to fill the vacancy caused by the retirement of Commissioner Francisco Enage, effective at the beginning of office hours today."

Commonwealth Act No. 588 is entitled "An Act authorizing the President of the Philippines to make temporary appointments in certain public offices." It was approved on August 12, 1940, i. e., before the approval of the amendment to the Constitution whereby the Commission on Elections was created. Said Act expressly and only refers to "an officer in the Executive Department of the Government," whose position the President is authorized to fill temporarily by designating "another officer already in the service or any other competent person." Since a member of the Commission on Elections is not an officer in the Executive Department of the Government but is as independent of the executive as a judicial officer is in the performance of his duties, it is to me clear that the Act cited is not applicable. It cannot be and has never been applied to a judicial officer.

Respondent's designation, being repugnant to the Constitution, is null and void ab initio.

It is idle to discuss and decide in this case whether or not the President may designate an acting member of the Commission on Elections when a regular member thereof is unable to perform the duties of his office owing to

illness, absence, or other cause. We could decide that question only when such a case should arise.

Upon the propriety of prohibition as a remedy, I concur in the opinion of Mr. Justice Padilla. However, I do not deem it necessary to require the petitioner to amend the petition as a matter of formality, specially in the absence of any question raised on that point by the adverse party.

Paras, and Tuason, JJ., concur.

[1] Formerly, the enforcement and administration of those laws were entrusted to the Executive Department.

CONCURRING AND DISSENTING

MONTEMAYOR, J.:

It is unnecessary for me to state the facts and issues involved in this case for the reason that they are well stated in the learned majority opinion penned by Mr. Justice Padilla.

I concur in the majority opinion except where it denies to the Chief Executive the right to temporarily fill a permanent vacancy in the Commission on Elections by designation. As regards the retirement of Commissioner Enage resulting in a permanent vacancy in the Commission on Elections, it is to be understood of course that the ruling of this Court on that point is valid only in the present case in the sense that it may not bind Commissioner Enage who took no part in these proceedings.

As a rule and unless qualified by constitutional or statutory provision the power to appoint includes the lesser power to designate. There are times and occasions when a temporary designation, particularly in the Commission on Elections is necessary and imperative. There are only three Commissioners in the Commission. Should one of the three Commissioners be disqualified, or be on leave or be sick and unable to perform his duties, and should there be a deadlock in voting between the two remaining Commissioners, the President must necessarily designate another to act temporarily as Commissioner so as not to interrupt or hamper the functions of the Commission. He cannot make a permanent appointment for the reason that there is no vacancy. In case two of the Commissioners are absent on leave or sick or disqualified, designation of one or two persons to temporarily act in the Commission would still be more necessary and imperative. Fortunately, the majority opinion concedes, though it seems, reluctantly and rather indirectly that in such cases the Chief Executive may make designations temporarily. With this concession, I deem it unnecessary to elaborate on this point.

Now, let us go to the main issue of the legality or illegality of temporarily filling a permanent vacancy with a designation as what happened in the present case. The majority holds that in case of a permanent vacancy, the legal and proper thing to do is for the President to make a permanent or ad interim appointment for the reason that to designate one to act temporarily in the Commission would impair the independence of that body, provided for and guaranteed by the Constitution. I fail to see any difference or distinction between a designation to temporarily fill a vacancy and an ad interim appointment to permanently fill the same vacancy in the Commission on Elections in relation to and in their effect on the independence of that entity. The majority opinion fails to show such alleged distinction or difference or otherwise enlighten us on the point. Both designation and ad interim appointment in my opinion if conferred on the right and proper person do not and will not affect the Commission's independence. I suppose the majority starts from the theory that a person designated temporarily to the Commission cannot act independently because his tenure being temporary, precarious and at the pleasure of the President, he is, so to speak, always under the thumb of the Chief Executive who may withdraw the designation,

and put him out the moment he (the one designated) acted against the interests of the President or of his party. So to keep the designation and continue acting in the Commission, the one designated sacrifices the independence of the Commission and his own self-respect and does the President's bidding.

The flaw in this theory, however, is that it assumes or presupposes the appointing power to be so utterly lacking in mental honesty, fair dealing and plain decency, and the person, designated equally devoid of character, and independence of judgment, but cursed with a mistaken sense of loyalty to the one designating him. I believe that we should not indulge in or entertain such a presumption unless there be valid grounds for the same, based on proof. But assuming for a moment all these evils to be possible, they may and do equally apply to designations to be made by the President where there is no vacancy but only disqualification, physical disability or absence of any of the Commissioners, so that from the point of view of the majority, in every case of designation to the Commission, whether to temporarily fill a vacancy or in case merely of disqualification, sickness or absence of any of the Commissioners, the independence of that body is always menaced and impaired.

It seems that the main, if not the whole objection on the part of the petitioner to the designation made in this particular case lies in the fact that the person designated, the Solicitor General, had previously been representing the Chief Executive in the impeachment proceedings before Congress and in the emergency powers cases brought before this Court; that by reason thereof, said Solicitor General's loyalty to the Chief Executive has so crystallized and definitely settled that in acting now in the Commission, he would consciously or unconsciously be guided and his decisions colored by such loyalty, especially since the present Chief Executive as a candidate in the last presidential election is interested in the acts of the Commission in regard to said elections. But as the majority opinion itself states, there is not much, if any, that the Commission on Elections can do to favor or to prejudice a presidential candidate. According to the majority, the Commission may not suspend the election in any province as two of its Commissioners had voted in a resolution approved by them. Neither may the Commission annul the elections in any province or district as the said two Commissioners had supposedly threatened to do if the elections in some provinces were not postponed. There would therefore be not much, if any, that a person designated by the Chief Executive under these circumstances could do even if want only disposed.

Had the President in this case designated someone else say, a Judge of the Court of First Instance or a Justice of the Court of Appeals or any practising attorney, it is to be doubted if said designation would have been questioned.

Going back to the alleged impairment of the independence of the Commission by a designation to temporarily fill a permanent vacancy, the same danger so much predicted and feared by the majority and the petitioner would equally be present in case of a permanent, though ad interim appointment. To me, it would even be worse because the hazard through which a person with an ad interim appointment has to go is greater. In the case of a designation as was done in the present case, supposing that the Chief Executive held the withdrawal of the designation as a sword of Damocles over the head of the Solicitor General so that the moment the latter displeased the President with his actuations in the Commission the designation will instantly be withdrawn, in such a case Solicitor General Bautista would not suffer or lose anything. Perhaps, after all, the loss of the designation to the Commission was a welcome relief to him because the designation meant additional work and even embarrassment to him as is happening in his case. He did not lose his post as Solicitor General and he would be but glad to return to it. But not so with one favored with an ad interim appointment. Such a person if an officer of the government loses and forfeits his official post the moment he accepts the ad interim appointment. If he is a practising attorney he has to dispose of his pending cases, and dissolve his connections with his law firm, if any, as well as give up all control or management of any private enterprise which may be affected by the functions of his office, including financial interest in any contract with the Government. (Art. X, section 3, Philippine Constitution.) We must bear

in mind that in these examples we are assuming or presupposing an appointing power who is evil-minded, lacking in mental honesty and disposed to go to any extremes to achieve his desire. Let us also remember that we have here the party system where the Chief Executive ordinarily is a member and is the head of the majority party in power. If the person with an ad interim appointment fails to act in the Commission in accordance with the dictates and desires of the President, his confirmation may easily be blocked in the Commission on Appointments. The Commission on Appointments in order to accommodate the Chief Executive may not only fail to confirm the appointment but may even reject it for supposed lack of qualifications in training, education and experience or even of character qualification. The appointee is naturally embarrassed if not disgraced. He loses the appointment; he had already lost his official post that he vacated when he accepted the ad interim appointment, and if he is a private practitioner, he had lost at least temporarily his clients in his law practice. So, I say that if a person designated temporarily to fill a permanent vacancy and one given an ad interim appointment to fill a similar vacancy were both persons with a distorted sense of loyalty to the appointing power, and lacking in character and dignity and a sense of duty, were similarly situated, and under the same pressure and threat from the appointing power, there might be more temptations in the case of the person with an ad interim appointment to abuse his power and discretion in the Commission to favor the Chief Executive, for the reason that the danger and alternative consequences are far greater and more serious.

Considering the circumstances surrounding the designation of Solicitor General Bautista to act in the Commission in a temporary capacity the majority opinion has well said that we may not inquire into the motives prompting said designation. Taking a casual view of the case, it is possible that a happier designation, of someone else could have been made, not in the sense that Solicitor General Bautista is not qualified by education, training and experience or by character to act in the Commission, for he appears to be fully qualified for this post, but because any other person who has had no association or connection with the President if designated would have aroused no speculation or suspicion or fear about his actuations in the Commission. But in favor of the action of the President, it is said that he believed that he was merely following a precedent set by the late President Quezon who, in 1941, designated the then Solicitor General Roman Ozaeta to act temporarily in the Commission on Elections. Said designation is published in the Official Gazette. Justice Ozaeta, however, says that he does not recall any such designation in his favor. There is no reason whatsoever to doubt even for a moment Justice Ozaeta's word. It is highly possible that the designation though officially made may not have been communicated to him and he never acted in the Commission, perhaps because subsequently there was no longer any necessity or occasion for him to do so. Hence his lack of knowledge or inability at recollection. Be that as it may, the President was informed of this precedent and according to Solicitor General Bautista, he was designated merely, if not exclusively on the strength of such precedent.

One may ask why the President could not and did not make a permanent appointment to fill the vacancy in the Commission. We are not in a position to give the right answer. Any answer that one may give would at best be confined to the realm of speculation. But it is not hard to imagine that to permanently fill a vacancy in a constitutional body like the Commission on Elections vested with important delicate functions, with remuneration to the members thereof relatively high, and naturally requiring high and special qualifications of character, training and experience, the Chief Executive may need time to select the right person. To be sure that his appointment will be confirmed, he might find it necessary or advisable to consult the members of the Commission on Appointments or the leaders thereof. The person he has in mind may not be immediately available. He may be absent from the capital or if he is present and is consulted he may need time to decide whether to accept or decline the appointment tendered or offered. Even if he has, decided to accept the offer he may need time to wind up his private affairs and dispose of his pending legal cases, if actively practising the legal profession. On the other hand, the need for someone to act in the Commission to fill the vacancy even temporarily, was pressing and imperative.

There were only two remaining Commissioners and one of them had disqualified himself on some matters pending hearing and action before the Commission. And the Nacionalista Party was threatening to ask for his absolute disqualification in all cases regarding the presidential elections. Furthermore, at least according to the press, there was an alleged difference of opinion about some phases of the presidential elections between these two remaining Commissioners with the possibility, if not probability, of a deadlock or tie when it came to a vote. The President may have deemed it necessary to act quickly. All these things may, or might have prompted the Chief Executive to designate Solicitor General Bautista to act temporarily in the Commission. Of course, he could have designated someone else, not perhaps better qualified but less subject to objection and speculation. But that was the problem, the privilege and the right of the Chief Executive. I am, as it were, merely thinking out loud.

But I believe and hold that the Chief Executive has the inherent right to designate one to act temporarily in an office to fill a vacancy even in the Commission on Elections. That the power may be abused is no argument against its existence.

Section 9 of Republic Act No. 296 provides that in case of vacancy in the Supreme Court or in the event that any of the Justices is absent, disabled or incapacitated to perform his duties, the requisite number of Justices necessary to constitute a quorum or to render a judgment in any given case, is not present, the President of the Philippines upon recommendation of the Chief Justice, may designate such number of Justices of the Court of Appeals or District. Judges as may be necessary to sit temporarily as Justices of the Supreme Court. Section 27 of the same Act makes a similar provision for the Court of Appeals. The majority claims that were it not for those legal provisions, the President would have no power to make designations for the two Courts. I disagree. I believe that the President has the inherent power to make temporary designations in the two courts, power necessarily included in his power to appoint the Justices in said courts. Sections 9 and 27 of Republic Act No. 296 merely limit such power. Without such legal provisions, the President may designate anyone legally qualified, even from outside the Judiciary, in order not to hamper or paralyze the functions of these two tribunals.

But there is another aspect of these two legal provisions. Considering them, the Legislature has evidently seen no objection to or anomaly in the President filling temporarily a permanent vacancy in these two courts by a mere designation. The Legislature does not see any danger to the independence of the Supreme Court or the Court of Appeals by the President making a designation to temporarily fill a vacancy occurring in said Courts, a danger so touch emphasized and feared by the majority. I do not see the danger myself.

In conclusion I hold that the President has the right to designate one to act temporarily to fill a vacancy where he has the right to make the permanent appointment, and that in the present case the Chief Executive has the right to designate the Solicitor General to act temporarily to fill a vacancy in the Commission on Elections especially under circumstances urgently calling for the services of one to act in said Commission. Whether the designation was a happy one, advisable or expedient, is beside the point. As long as the President's designation is valid and constitutional, we may not pass upon its wisdom or propriety.

If I have dwelt a little extensively in this opinion on the power of designation, it is because I regard the present case and its implications very important and of far-reaching consequences. This Court is defining and limiting the power of appointment of the Chief Executive, not only for the present incumbent but for administrations to come, and I feel it my duty to explain my views on the point.

TORRES, J., concurring in the dissenting opinion of Mr. Justice Montemayor:

In addition to the views expressed in his dissenting opinion by Mr. Justice Montemayor in which I fully concur, I deem it proper, however, to say a few words about a theory expounded by counsel of petitioner during the hearing of this case before this Court.

Elaborating on the meaning of the word "independent" found at the beginning of section 1 of Article X of the Constitution, as amended, it has been argued that such word means that the Commission on Elections created thereby is an independent body and, as such, its organization and functions should not be interfered with by the Executive.

Section 1 of Article X of the Constitution says that "There shall be an independent Commission on Elections composed of a Chairman and two other members to be appointed by the President with the consent of the Commission on Appointments, * * *." Does the word "independent" used in the above-quoted constitutional provision mean that the Commission on Elections is a body completely separate, not dependent, not subject to control by other governmental entities, self-governing? My answer is, yes, and no. The Commission on Elections is independent as regards the exercise of its functions; except as provided in section 2 of Article X of the Constitution it can not be interfered with by any other governmental instrumentality, because it was created as a special body charged with the duty of conducting the elections, and as stated by this Court in *Sumulong vs. Commission on Elections*, 40 Off. Gaz., 3663, the power to review the acts of said Commission should, as a general proposition, be used sparingly but firmly in appropriate cases.

Aside from what I have just stated, I hold that the Commission on Elections is not absolutely independent. Under the scheme of our Government as provided in the Constitution, which was framed with the United States Constitution as the model, it consists of three powers or branches known as the legislative, the executive and the judicial branch. This does not mean that each branch or power is completely independent of each other; on the contrary, they are coordinated powers or branches, each linked or connected with the other in such a way that the idea frequently expounded by some that, for instance, the judicial branch is independent from the other two branches, finds no support when we have to deal with practical cases wherein the question of separation of powers is involved.

In effect, in my humble opinion, it is unthinkable to maintain that one of those three powers or branches of the Government is independent of the others, if we take into consideration, that the Executive has to depend on or deal with the legislative branch whenever it wants legislation or appropriation for funds approved by the latter branch in order to carry out its governmental program and maintain the complicated machinery of the Government. It has to submit for confirmation of the Commission nominations or appointments made by it; and it has to deal with the legislative branch in order to assure the success of his administration.

On the other hand, the legislative branch, whose functions consist mainly of passing legislative measures, sees to it that the executive branch puts into effect the legislative program by carrying into execution the measures approved by it during the legislative session. Finally, in the judicial branch, the judicial officers, high and low, are appointed by the President, with the confirmation of the corresponding body of the legislative branch, and, what is more important, the funds which are necessary for the judiciary to function are recommended by the executive in the budget prepared by it and approved by the legislature. In the light of what has just been briefly described, could anyone still maintain that the three branches of the Government are so separate and independent of each other that not a single branch has anything to do with the other two?

It is for this reason that the late Mr. Justice Holmes of the Supreme Court of the United States, in its now famous dissenting opinion in the cases of *Springer vs. Government of the Philippine Islands* and *Agoncillo vs. Government of the Philippine Islands*, 72 Law. ed., U.S., 277, pp. 852-853, said:

"The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we

come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

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"It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."

In the light of the above, I can not, therefore, conceive a governmental instrumentality, such as the Commission on Elections established by the Constitution, completely disassociated, disconnected from the other governmental entities created by the Constitution or the law.

The Government is a machinery composed of many parts, each intended to perform a certain function within the whole of the same, so as to accomplish the purpose for which it has been built. The fact that a specific place is found in the Constitution for the Commission on Elections does not necessarily mean that such body shall work and function in entire disregard of the other governmental entities.

The Commission on Elections was organized when the Executive filled the positions created by section 1 of Article X of the Constitution, and is now carrying out its functions by means of yearly appropriations included in the general budget of the Government passed by the Congress and approved by the Executive. This means that the Commission on Elections did not come into being spontaneously but through positive acts of the Executive and the Congress.

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