G.R. No. 203372 - ATTY. CHELOY E. VELICARIA-GARAFIL, *petitioner v.* OFFICE OF THE PRESIDENT, ET AL., *respondents.*

G.R. No. 206290 – ATTY. DINDO G. VENTURANZA, *petitioner v.* OFFICE OF THE PRESIDENT, ET AL., *respondents.*

G.R. No. 209138 – IRMA A. VILLANUEVA and FRANCISCA B. ROSQUITA, *petitioners, v.* COURT OF APPEALS and THE OFFICE OF THE PRESIDENT, *respondents.*

G.R. No. 212030 – EDDIE U. TAMONDONG, *petitioner v.* Executive Secretary PAQUITO N. OCHOA, JR., *respondent.*

Promulgated:

June 16, 2015

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CONCURRING AND DISSENTING OPINION

BRION, *J.*:

I was the original Member-in-Charge assigned to this case and in this capacity, submitted a draft Opinion to the Court, which draft the Court did not approve in an 8 to 6 vote in favor of the present *ponente*.

Due to the close 8-6 vote, I find it appropriate to simply reiterate in this Concurring and Dissenting Opinion the legal arguments and positions that I had originally submitted to the Court *en banc* for its consideration.

The present consolidated cases stemmed from the petitioners' presidential appointments that were revoked pursuant to Executive Order *(E.O.)* No. 2, entitled *"Recalling, Withdrawing and Revoking Appointments Issued by the Previous Administration in Violation of the Constitutional Ban on Midnight Appointments and for Other Purposes,"* issued by President Benigno S. Aquino, III.

Directly at issue, as framed and presented by the petitioners and as counter-argued by the respondents, is the validity of Section 1(a) of EO No. 2 in relation with the constitutional ban on midnight appointments under Section 15, Article VII of the Constitution.

I concur with the *ponencia*'s findings that the petitions for review on *certiorari* should be denied and the petition for *certiorari* should be dismissed as I will discuss below.

I object, however, to the *ponencia*'s arguments and conclusions to support the conclusion that the phrase, "*including all appointments bearing dates prior to March 11, 2010 where the appointee has* ***accepted****, or* ***taken his oath****, or* ***assumed public office on or after March 11, 2010****"* in Section 1(a) of E.O. No. 2, is valid. In my view, Executive Order No. 2, by incorporating this phrase, should be **declared partially unconstitutional for unduly expanding the scope of the prohibition on presidential appointments under Section 15, Article VII of the Constitution.**

This constitutional provision provides that: "*[t]wo months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make* ***appointments****, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety."*

According to the *ponencia*, the term "appointments" contemplated in Section 15, Article VII pertains to **appointment as a process** – *i.e.*, from the signing of the appointment, to its issuance and to the appointee's acceptance – rather than being **confined solely to the President's exercise of his appointing power or to the acts that are under the President's control in the totality of the appointment process**.

Under this latter view, only the signing of the appointment and its issuance should be covered by the constitutional ban; when these presidential actions are completed before the ban sets in, then the appointee can take his oath and assume office even after the ban has set in.

The plain textual language of Section 15, Article VII is clear and requires no interpretation of the term "appointments." The prohibition under this constitutional provision pertains to ***the President's discretionary executive act*** of determining who should occupy a given vacant position; it does not cover other actions in the appointment process, specifically, the discretionary determination of whether or not to accept the position which belongs to the appointee.

In fact, ***Section 15, Article VII of the 1987 Constitution is directed only against an outgoing President and against no other***. By providing that the President shall not *make appointments* within the specified period, the Constitution could not have barred the President from doing acts that are not within his power to accomplish as appointing authority, such as the acts required or expected of the appointee. Notably, the appointee's acts are not even alluded to or mentioned at all in this constitutional provision.

By interpreting the term "appointments" as a process, the *ponencia* effectively undertook judicial legislation by expanding the limitation on the President's appointment power under Section 15, Article VII; it applied the concept of appointment as a process despite the otherwise clear and

unambiguous reference of this constitutional provision to *appointment* as an executive act.

For these reasons, I maintain my position that for an appointment to be valid under Section 15, Article VII, the appointment papers must have already been **signed, issued or released prior to the constitutional ban**, addressed to the head of the office concerned or the appointee himself. Once this is accomplished, the appointee's acceptance through an oath, assumption of office, or any positive act need not be done before the constitutional ban.

Thus, the phrase in Section 1(a) of E.O. No. 2 that states *"including all appointments bearing dates prior to March 11, 2010 where the appointee has accepted, or taken his oath, or assumed public office on or after March 11, 2010"* **should be held unconstitutional as it unduly expands the scope of the prohibition on presidential appointments under Section 15, Article VII of the Constitution.**

I elaborate on all these arguments in the following discussions.

THE CASES

Before the Court are three petitions for review on *certiorari*[1] and one petition for *certiorari*[2] that have been consolidated because they raise a common question of law, *i.e.*, the validity of the President's issuance of E.O. No. 2 dated July 30, 2010.

The petitioners seek the reversal of the Court of Appeals' decision[3] that separately dismissed their petitions and upheld the constitutionality of E.O. No. 2.

FACTUAL ANTECEDENTS

A. The Petitions

a. G.R. No. 203372

On February 14, 2010, Atty. Cheloy E. Velicaria-Garafil (*Garafil*), then a prosecutor at the Department of Justice (*DOJ*), applied for a lawyer position in the Office of the Solicitor General (*OSG*).[4] In an **appointment**

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1 Under Rule 45 of the Rules of Court.

2 Under Rule 65 of the Rules of Court.

3 Both dated August 31, 2012 for petitioner in G.R. No. 203372 (*rollo*, p. 45) and G.R. No. 206290 (*rollo*, p. 10); and August 28, 2013 for petitioners in G.R. No. 209138 (*rollo*, p. 39).

4 *Rollo* (G.R. No. 203372), p. 16.

letter dated March 5, 2010, President Gloria Macapagal-Arroyo (*PGMA*) appointed Garafil to the position of State Solicitor II at the OSG.[5]

Although there was a **transmittal letter** from the Office of the Executive Secretary (*OES*) to the DOJ,[6] the letter failed to state when it (together with the appointment paper) was actually sent to (and received by) the DOJ.[7]

On **March 22, 2010**, Garafil took her oath of office. On **April 6, 2010**, she **assumed** office after winding up her work and official business with the DOJ.[8]

For unknown reasons, Garafil's appointment paper was not officially released through the Malacañang Records Office (*MRO*). The OES merely turned over Garafil's appointment papers to the MRO on **May 13, 2010**.[9]

b. <u>G.R. No. 206290</u>

Atty. Dindo Venturanza (*Venturanza*) rose from the ranks at the DOJ, eventually becoming a Prosecutor III on July 26, 2005. After PGMA appointed then Quezon City Prosecutor Claro Arellano as the new Prosecutor General, Venturanza applied for the position that Claro Arellano vacated.[10]

As in the case of Garafil, PGMA issued Venturanza an **appointment letter dated February 23, 2010**[11] as City Prosecutor of Quezon City. Upon verbal advice of his promotion from the Malacañang, Venturanza immediately secured the necessary clearances.[12]

On **March 12, 2010**, the OES forwarded Venturanza's original appointment letter and **transmittal letter dated March 9, 2010,** to the MRO. Also on March 12, 2010, then DOJ Secretary Alberto Agra officially received Venturanza's appointment paper and transmittal letter from the MRO.[13] On **March 15, 2010**, Venturanza took his oath and assumed his duties as City Prosecutor of Quezon City.[14]

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5 Id. at 99.
6 CA *rollo*, Volume I, p. 948; *rollo* (G.R. No. 206290), p. 583.
7 *Rollo* (G.R. No. 203372), pp. 92-93.
8 Id. at 18.
9 *Rollo* (G.R. No. 206290), p. 410.
10 Id. at 52-53.
11 Id. at 115.
12 Id. at 53.
13 Id. at 121 and 461.
14 Id. at 116-117.

c. G.R. No. 209138

PGMA issued Irma Villanueva (*Villanueva*) an **appointment letter dated March 3, 2010**,[15] as Administrator for Visayas of the Board of Administrators of the Cooperative Development Authority. PGMA also issued Francisca Rosquita (*Rosquita*) an **appointment letter dated March 5, 2010**[16] as Commissioner of the National Commission on Indigenous Peoples. Villanueva and Rosquita took their oaths of office on **April 13, 2010**, and **March 18, 2010**, respectively.[17]

Like Garafil, the appointment papers and transmittal letters of Villanueva and Rosquita (both dated March 8, 2010[18]) were not coursed through, but were merely turned over to the MRO later on May 4, 2010, and May 13, 2010, respectively.[19]

d. **G. R. No. 212030**

Atty. Eddie U. Tamondong (*Tamondong*) served as acting director of the Subic Bay Metropolitan Authority (*SBMA*) starting January 16, 2008.[20] After more than two years of continuous (but acting) service in this position, PGMA issued him an appointment letter dated **March 1, 2010**,[21] as a regular member of the SBMA's board of directors.

On **March 25, 2010**, Tamondong received his appointment letter through the office of the SBMA Chairman. On the same date, he took his oath of office before SBMA Chairman Feliciano G. Salonga and assumed his SBMA post, this time in a regular capacity.[22]

As had happened to the other petitioners, Tamondong's letter of appointment was not coursed through the MRO. The MRO only received the letter on **May 6, 2010**, more than two months after his appointment.[23]

B. Issuance of E.O. No. 2

On June 30, 2010, President Benigno S. Aquino III took his oath of office as the 15th President of the Republic of the Philippines. On August 4, 2010, Malacañang issued E.O. No. 2 whose salient portions read:

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15 *Rollo* (G.R. No. 209138), p. 25.
16 Id. at 26.
17 Id. at 4.
18 *Rollo* (G.R. No. 206290), pp. 611 and 607.
19 Id. at 416.
20 Id. at 71.
21 Id. at 72.
22 Id. at 73.
23 Comment in G.R. No. 212030, p. 2.

> SECTION 1. Midnight Appointments Defined. – The following appointments made by the former President and other appointing authorities in departments, agencies, offices, and instrumentalities, including government-owned or -controlled corporations, shall be considered as midnight appointments:
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> (a) Those made on or after March 11, 2010, **including all appointments bearing dates prior to March 11, 2010 where the appointee has accepted, or taken his oath, or assumed public office on or after March 11, 2010**, except temporary appointments in the executive positions when continued vacancies will prejudice public service or endanger public safety as may be determined by the appointing authority.
>
> (b) Those made prior to March 11, 2010, but to take effect after said date or appointments to office that would be vacant only after March 11, 2010.
>
> (c) Appointments and promotions made during the period of 45 days prior to the May 10, 2010 elections in violation of Section 261 of the Omnibus Election Code.
>
> SECTION 2. Recall, Withdraw, and Revocation of Midnight Appointments. **Midnight appointments, as defined under Section 1, are hereby recalled, withdrawn, and revoked**. The positions covered or otherwise affected are hereby declared vacant.
>
> SECTION 3. Temporary designations. – When necessary to maintain efficiency in public service and ensure the continuity of government operations, the Executive Secretary may designate an officer-in-charge (OIC) to perform the duties and discharge the responsibilities of any of those whose appointment has been recalled, until the replacement of the OIC has been appointed and qualified.

C. Subsequent Events

The present predicament of Garafil, Venturanza, Villanueva, Rosquita and Tamondong (*petitioners*) started with the issuance of E.O. No. 2.

a. The present petitioners

i. G.R. No. 203372 (*Atty. Garafil)*

Then Solicitor General, Anselmo Cadiz, informed all OSG officers/employees affected by E.O. No. 2 that their appointments had been recalled effective August 7, 2010. Since Garafil's appointment fell within the definition of midnight appointment under E.O. No. 2, Garafil was removed from the OSG. On August 9, 2010, upon reporting for work, she

was apprised of the revocation of her appointment as State Solicitor II due to the implementation of E.O. No. 2.[24]

ii. G.R. No. 206290 (*Atty. Venturanza*)

On September 1, 2010, Venturanza received a copy of Department Order (*D.O.*) No. 566 issued by DOJ Secretary Leila de Lima. D.O. No. 566 designated Senior Deputy State Prosecutor Richard Anthony Fadullon (*Fadullon*) as Officer in Charge in the Office of the City Prosecutor, Quezon City. On September 15, 2010, Venturanza wrote separate letters (i) to DOJ Sec. de Lima protesting the designation of Fadullon, and (ii) to President Aquino seeking the re-affirmation of his promotion as City Prosecutor.

DOJ Sec. de Lima informed Veturanza that he is covered by E.O. No. 2; thus, he should not further perform his functions as Quezon City Prosecutor.[25] Records fail to show if the President acted at all on Veturanza's letter.

iii. G.R. No. 209138 (*Villanueva and Rosquita*)

Rosquita's appointment was recalled through the October 1, 2010 memorandum of Executive Secretary Paquito Ochoa.[26] Villanueva's and Rosquita's salaries had also been withheld starting August 1, 2010.[27]

iv. G.R. No. 212030 (*Atty. Tamondong*)

In view of the mounting public interest in PGMA's alleged midnight appointments, Tamondong took another oath of office on July 6, 2010, as an added precaution. Notwithstanding this move, Tamondong was removed from his position as a regular member of the SBMA board of directors effective July 30, 2010.[28]

b. The earlier petitions before the Court

The petitioners and several others filed separate petitions[29] and motions for intervention[30] before the Court assailing the constitutionality of

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24 *Rollo* (G.R. No. 203372), pp. 19-20.
25 *Rollo* (G.R. No. 193327), pp. 56-57.
26 *Rollo* (G.R. No. 209138), p. 29.
27 Id. at 5.
28 *Rollo* (G.R. No. 212030), p. 13.
29 G.R. No. 192987 (*Eddie Tamondong v. Executive Secretary Paquito N. Ochoa Junior*); G.R. No. 193519 (*Bai-Omera D. Dianalan-Lucman v. Executive Secretary Paquito N. Ochoa, Jr.);* G.R. No. 193867 (*Atty. Dindo G. Venturanza, as City Prosecutor of Quezon City v. Office of the President*); G.R. No. 194135 (*Manuel D. Andal v. Paquito N. Ochoa, Jr.*); and G.R. No. 194398 (*Atty. Charito Planas v. Executive Secretary Paquito N. Ochoa Jr.*).
30 Dr. Ronald L. Adamat, Angelita De Jesus-Cruz, Jose Sonny G. Matula, Noel F. Felongco.

E.O. No. 2. In a resolution dated January 31, 2012, the Court defined the issues raised in these petitions as follows:

> 1. Whether the appointment of the petitioners and intervenors were midnight appointments within the coverage of EO 2;
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> 2. Whether all midnight appointments, including those of the petitioners and intervenors, were invalid;
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> 3. Whether the appointments of the petitioners and intervenors were made with undue haste, hurried maneuvers, for partisan reasons, and not in accordance with good faith;
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> 4. Whether the appointments of the petitioners and intervenors were irregularly made; and
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> 5. Whether EO 2 violated the Civil Service Rules on Appointment.[31]

Because the issues raised "will require the assessment of different factual circumstances attendant to each of the appointments made,"[32] the Court decided to refer the petitions to the Court of Appeals (*CA*) to "resolve all pending matters and applications, and to decide the issues as if these cases have been originally commenced"[33] with the CA.[34]

CA RULING

In four separate decisions, the CA upheld the constitutionality of E.O. No. 2, ruling that the E.O. is consistent with the rationale of Section 15, Article VII of preventing the outgoing President from abusing his appointment prerogative and allowing the incoming President to appoint the people who will execute his policies. To give meaning to this intent, the CA departed from the literal wording of the provision **by construing the term "appointment" as a process that includes the appointee's acceptance of the appointment**.

The CA likewise found no violation of the petitioners' right to due process since no one has a vested right to public office.[35] Although the CA upheld the constitutionality of E.O. No. 2 and the application of its provisions to the petitioners, it expressed dismay over the "sweeping and summary invalidation of all the appointments made by the former administration without regard to the circumstances"[36] attendant to each case.

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31 *Rollo* (G.R. No. 203372), p. 80.
32 Id.
33 Id.
34 CA-G.R. SP No. 123662.
35 CA Decision, pp. 18-19 (G.R. No. 203372); CA Decision, pp. 26-27 (G.R. No. 206290).
36 CA Decision, p. 19 (G.R. No. 203372) CA Decision, p. 27 (G.R. No. 206290).

Citing *Sales v. Carreon*,[37] the CA ruled that not all midnight appointments are invalid; the nature, character, and merits of each individual appointment must be taken into account.

The CA, however, doubted its authority to evaluate the petitioners' appointments (particularly their qualifications and merits) and referred the matter to the Office of the President to determine whether to uphold the petitioners' appointments.

The petitioners manifested their objections to the CA rulings through the present petitions.

THE PETITIONS

The petitioners raised identical arguments in their bid to nullify E.O. No. 2 and to uphold their respective appointments.[38] These arguments can be summarized as follows:

First, Section 15, Article VII only prohibits the President from "making" an appointment within the prohibited period.[39] According to Garafil, an appointment is already *complete* when the commission is signed by the President, sealed if necessary, and is ready for delivery.[40] Venturanza, Villanueva and Rosquita argue a step further by insisting that their appointments were perfected,[41] or became effective,[42] upon their issuance,[43] which they equate to the dates appearing on their respective appointment papers.[44] Since their appointments bear dates prior to the two-month ban, they claim that they are not midnight appointees.[45] Additionally, Tamondong asserts that since his appointment was only a continuation of his present position, his acceptance and assumption of office also coincided with the date of his appointment letter.[46]

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37 G.R. No. 160791, February 13, 2007, 515 SCRA 601, 603-604.

38 *Rollo* (G.R. No. 203372), p. 29; *rollo* (G.R. No. 206290), p. 68; *rollo* (G.R. No. 209138), p. 19.

39 *Rollo* (G.R. No. 203372), pp. 24 and 29; *rollo* (G.R. No. 209138), pp. 7-8.

40 Citing *In Re: Seniority Among the Four 94) Most Recent Appointments to the Position of Associate Justices of the Court of Appeals*, A.M. No. 10-4-22-SC, September 28, 2010, 631 SCRA 382, 387, citing *Valencia v. Peralta, Jr.,* 118 Phil. 691 (1963).

41 *Rollo* (G.R. No. 206290), pp. 59-60.

42 *Rollo* (G.R. No. 209138), pp. 10-11, 13.

43 Citing Rule IV, Section 1 of 1998 Revised Omnibus Rules on Appointment and Other Personnel Actions.

44 Petitioner Garafil particularly claims that "[o]n March 5, 2010, President Gloria Macapagal-Arroyo issued the appointment letter of the petitioner… the act being prohibited is the president or acting president's act of making appointments" (*Rollo* [G.R. No. 203372], p. 17). On the other hand, petitioner Venturanza claims that "an appointment is perfected upon its issuance by the appointing authority which in this case is on 23 February 2010" (*Rollo* [G.R. No. 206290], p. 60). Petitioners Villanueva and Rosquita claim that "Indeed, an appointment becomes complete when the last act required by law of the appointing power has been performed x x x In the [present] case, the 'last act' required of the appointing power – President Arroyo – was her *issuance* of the appointments." (*Rollo* [G.R. No. 209138], p. 11).

45 Citing the legal opinion of the CSC Policies Office; *rollo* (G.R. No. 209138), p. 13.

46 *Rollo* (G.R. No. 212030), p. 20.

The petitioners uniformly assert that the appointee's acts, even if made within the prohibited period, do not render a "completed" or "perfected" appointment invalid. These subsequent acts are only necessary to make the appointment effective; and the effectivity of an appointment is not material under the constitutional provision since these acts are already beyond the President's control.[47]

Garafil moreover questions the President's power to interpret Section 15, Article VII of the 1987 Constitution. She claims that the President has no power to interpret or clarify the meaning of the Constitution.[48]

Second, in making a referral to the Office of the President, the petitioners posit that the CA failed to discharge its duty to resolve the issues submitted under the Court's referral resolution.[49] The petitioners likewise argue that not all "midnight appointments" are invalid,[50] because they must be adjudged on the basis of the nature, character, and the merits of the appointment. Thus, the petitioners aver that notwithstanding their coverage under E.O. No. 2, proof that their appointments were made to buy votes, for partisan reasons, or in bad faith must first be adduced to nullify their appointments.[51]

Third, E.O. No. 2 violated the petitioners' right to security of tenure.[52]

THE COMMENT

The respondents, represented by the OSG, pray for the dismissal of the petitions.

The respondents dispute the presumption of regularity that the petitioners' appointments enjoy.[53] They claim that Garafil's and Venturanza's appointments, in particular, were irregularly made. Garafil's (including Villanueva's, Rosquita's, and Tamondong's) appointment and transmittal papers did not pass through the MRO in accordance with the

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47 *Rollo* (G.R. No. 203372), p. 21; *rollo* (G.R. No. 206290), pp. 60-62; *rollo* (G.R. No. 209138), pp. 11-12.

48 *Rollo* (G.R. No. 203372), pp. 33-35.

49 Id. at 25-26.

50 Citing *Sales v. Carreon*, G.R. No. 160791, February 13, 2007, 515 SCRA 601, 603-604.

51 *Rollo* (G.R. No. 203372), pp. 25-26; *rollo* (G.R. No. 206290), pp. 59-60, 62-63, 65-67.

52 Id. at 37-39 (G.R. No. 203372); id. at 67 (G.R. No. 206290).

53 The OSG alleged that the hologram numbers imprinted on the appointment papers of the other "midnight appointees" evince irregularity such that the hologram numbers of the appointment papers supposedly signed on the same date are not in series; that more than eight hundred (800) appointments were signed by GMA in March 2010 alone based on the Certification of the MRO (Respondents' Memorandum before the CA, *rollo*, p. 176) which translates to signing more than 80 appointments a day – which explains why most of the appointments did not pass through the MRO and shows the blitzkrieg fashion in the issuance of the March appointments as the ban drew near (*rollo*, [G.R. No. 203372]; *rollo* [G.R. No. 206290], p. 295).

usual procedures; Venturanza's papers, while coursed through the MRO, were released by the OES only after the appointment ban had set in.[54]

The respondents further believe that "appointment" under Section 15, Article VII should be construed as a "process" instead of simply an "act." In imposing a ban on appointments, the Constitution envisions a complete and effective appointment, which means that the appointee must have accepted the appointment (by taking the oath) and assumed office before the ban took effect.[55]

To the respondents, to construe the word "appointment" in Section 15, Article VII simply as an "act" of the President would defeat the purpose of the provision because the President can easily circumvent the prohibition by simply antedating the appointment.[56] Since the petitioners took their oath and assumed office when the constitutional ban on appointment had already set in, they are considered midnight appointees whose appointments are intrinsically invalid for having been made in violation of the constitutional prohibition.

Lastly, petitioners cannot claim any violation of their right to due process or to security of tenure simply because their appointments were invalid.[57]

ISSUE

The twin issues before us are whether the President has the power to issue E.O. No. 2 that defined the "midnight appointments" contemplated under Article VII, Section 15 of the 1987 Constitution; and if so, whether E.O. No. 2's definition of midnight appointment is constitutional.

A finding that E.O. No. 2's definition of midnight appointment is constitutional (thus rendering the petitioners' appointments invalid) would render any ruling on the petitioners' security of tenure argument completely unnecessary. An appointment in violation of the Constitution and/or the law is void and no right to security of tenure attaches.[58]

MY CONCURRING AND DISSENTING OPINION

I vote to **partially grant** the petitions.

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54 *Rollo* (G.R. No. 206290), p. 292.

55 Comment in G.R. No. 203372, p. 13; Comment in G.R. No. 206290, p. 16; Comment in G.R. No. 212030, pp. 11-13.

56 Id. (G.R. No. 203372); id. at 20-22 (G.R. No. 206290); id. at 11 (G.R. No. 212030).

57 Id. (G.R. No. 203372); id. at 26 (G.R. No. 206290), *rollo*, p. 400.

58 *Debulgado v. Civil Service Commission*, G.R. No. 111471, September 26, 1994, 237 SCRA 187, 199-200; and *Mathay, Jr. v. Court of Appeals*, 378 Phil. 473, 479 (1999).

Read together, the petitions ask the Court to grant the following reliefs: ***first***, the declaration of the unconstitutionality of E.O. No. 2 and the reversal of the assailed CA rulings; ***second***, the declaration of the validity of their respective appointments and their reinstatement to the positions they held prior to the issuance of E.O. No. 2; and, ***third*** (as prayed for by petitioners Villanueva and Rosquita) if the term of their appointments had already expired, the grant of back wages with interest.

I vote to only partially grant the petitions as I find that only **a part of E.O. No. 2** is **unconstitutional,** *i.e.*, **insofar as it unduly expands the scope of midnight appointments under Section 15, Article VII of the 1987 Constitution**.

I find the rest of the provisions of E.O. No. 2, particularly, Sections 1 (b) and (c) in relation to Section 2, to be valid; the presumption of constitutionality remains since the petitioners did not squarely question the constitutionality of these provisions before the Court. In fact, even if the issue had been raised, none of the petitioners showed that they have the legal standing to question their validity since the petitioners are admittedly appointees of the previous President and not mere appointees of a local chief executive. The constitutionality of these provisions would have to await its resolution in a proper case.

Despite the partial invalidity of E.O. No. 2, I also find that the petitioners' claims for the validity of their appointments are unmeritorious, measured under the terms of Section 15, Article VII of the Constitution and the valid portions of E.O. No. 2. Specifically, while I vote to **grant part of the first relief** the petitioners prayed for, **I vote to deny their second and third requested reliefs**.

A. Preliminary consideration

At the outset, I note that petitioners **Villanueva and Rosquita** did not appeal the CA's ruling under Rule 45 of the Rules of Court, but instead filed a petition for *certiorari* under Rule 65 of these Rules. **This procedural error warrants an outright dismissal of their petition**.

For the remedy of *certiorari* under Rule 65 to lie, an appeal or any plain, speedy, and adequate remedy should not be available to the aggrieved party. If appeal is available, *certiorari* will not prosper even if the cited ground is grave abuse of discretion.[59]

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[59] *Sps. Jesus Dycoco v. Court of Appeals*, G.R. No. 147257, July 31, 2013, 702 SCRA 566, 576.

In the present case, the remedy of appeal by *certiorari* under Rule 45 of the Rules of Court was clearly available to petitioners Villanueva and Rosquita since the CA decision was a final order that completely disposed of the proceeding before it.[60] The CA, in other words, fully complied with this Court's January 31, 2012 Resolution to "*resolve all* pending matters and applications, and to *decide the issues* as if these [present] cases have been originally commenced [in the CA]."[61]

Even if I were to consider the Rosquita/Villanueva petition to be a Rule 45 petition for review on *certiorari*, I would still maintain its denial because it was filed out of time. Under Section 2, Rule 45, the aggrieved party has a period of only fifteen (15) days from notice of the judgment or final order or resolution appealed from within which to appeal. Based on this rule, their petition should have been filed on October 2, 2013, not on October 7, 2013 or 5 calendars days after the period allowed for appeal.

Notably, not even a hint of explanation accompanied this tardy appeal.[62] I am thus forced to conclude that the petition was filed under Rule 65 with the intent to make it a **substitute for a Rule 45 appeal that had been lost** for lapse of the period to file an appeal. A special civil action for *certiorari* is a limited form of review and is a last remedy allowed under strict requirements that Rosquita/Villanueva failed to observe.[63] To reiterate, the Court cannot allow a petition for *certiorari* to prosper when a party could appeal the judgment, but instead used a petition for *certiorari* in lieu of his appeal.[64]

Moreover, read as a Rule 65 petition, Rosquita's and Villanueva's failure, without any valid explanation, to file a motion for reconsideration from the CA's ruling warrants the outright dismissal of their petition. The prior filing of a motion for reconsideration is an indispensable condition before a *certiorari* petition can be used.[65] This failure is an added lapse that contributes to my resolve to recognize the petition's deficiencies to the fullest.

Of course, it is within this Court's power to recognize, and the Court has in fact recognized exceptions to technical and procedural deficiencies based on the discretion given us by the Constitution under our constitutional

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60 A judgment or order is considered final if the order disposes of the action or proceeding completely, or terminates a particular stage of the same action; in such case, the remedy available to an aggrieved party is appeal (*Spouses Bergonia and Castillo v. Court of Appeals*, G.R. No. 189151, January 25, 2012, 604 SCRA 322, 326-327).

61 *Rollo* (G.R. No. 203372), p. 80.

62 According to the petitioners, they received a copy of the CA Decision on September 17, 2013 (*Rollo* [G.R. No. 209138], pp. 3-4). Thus, they have until October 2, 2013 within which to file the petition for review on *certiorari*.

63 *Dycoco v. CA*, G.R. No. 147257, July 31, 2013.

64 Id.

65 *Audi AG v. Mejia*, G.R. No. 167533, July 27, 2007, 528 SCRA 380, 383-384.

rule-making authority.[66] Under the proper conditions, the Court should permit the full and exhaustive ventilation of the parties' arguments and positions despite a petition's technical deficiencies.

This liberal policy, however, is an <u>exception</u> and has its limits. In those rare cases when the Court applied the exception, there always existed a clear need to prevent the commission of a grave injustice.[67] This critical element unfortunately is not genuinely reflected in Rosquita and Villanueva's respective petitions.

Rosquita and Villanueva must be reminded that the present case is no longer an original suit recognized under our January 31, 2012 Resolution, but an appeal from the CA's adverse ruling that was rendered after the parties were given full opportunity to be heard. Since we are dealing here with an appealed case, compliance with the required period for appeal is imperative.[68]

At any rate, even if we brush aside the procedural deficiencies, I see no legal and factual basis for its grant, particularly with respect to its pleas to invalidate their removal from office and to restore them to their previous positions. For an orderly presentation of our reasons, I defer my discussion on this point and first address Garafil's preliminary constitutional argument questioning the President's authority to issue E.O. No. 2.

B. The President has the power of constitutional interpretation

Garafil posits that the President has no power to interpret the Constitution, particularly Section 15, Article VII of the 1987 Constitution.

I find this position to be legally erroneous.

The Constitution, admittedly, does not contain an express definition of the executive power reposed in the Chief Executive;[69] it merely contains an enumeration of the powers the President can exercise. Broadly understood,[70] however, executive power is the power to enforce and administer the laws of

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66 CONSTITUTION, Article VIII, Section 5(5).

67 *Neypes v. Court of Appeals*, G.R. No. 141524 September 14, 2005, 469 SCRA 634, 642.

68 *Heirs of Teofilo Gaudiano v. Benemerito, et al*., G.R. No. 174247, February 21, 2007, 516 SCRA 418, 420.

69 Section 1, Article VII of the 1987 Constitution simply reads:
Section 1. The executive power shall be vested in the President of the Philippines.

70 Section 17, Article VII of the 1987 Constitution reads:
Section 17. The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.

the land;[71] it is the power to carry the laws into practical operation and to enforce their due observance.[72]

As the country's Chief Executive, the President represents the whole government; he carries the obligation to ensure the enforcement of all laws by the officials and employees of his department. This characterization of executive power is plainly evident from the presidential oath of office which states:

> I do solemnly swear [or affirm] that I will faithfully and conscientiously fulfill my duties as President [or Vice-President or Acting President] of the Philippines, **preserve and defend its Constitution, execute its laws**, do justice to every man, and consecrate myself to the service of the Nation. So help me God. [In case of affirmation, last sentence will be omitted.][73]

To fulfill the oath to **"**preserve and defend [the] Constitution, [and] execute its laws," the President, in particular, and the Executive branch, in general, necessarily must interpret the provisions of the Constitution or of the particular law they are enforcing.[74] This power of legal interpretation uniquely arises from the legal principle that *the grant of executive power to the President is a grant of all powers necessary for the exercise of the power expressly given.*[75]

The scope of the presidential/executive interpretative power, however broadly it may be interpreted, has to be read together with the principle of checks and balances. In other words, the executive's broad interpretative power does not signify that he possesses unfettered authority to exercise an independent power of legal interpretation. The scope of the President's power of executive interpretation is at its **broadest** *when exercised clearly within its own sphere of power* and **diminishes** *when it involves the power*

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71 In *Marcos v. Manglapus* (258 Phil. 491, 501-502 [1989]), the Court pointed out the inaccuracy of this generalization of executive power: "It would not be accurate, however, to state that "executive power" is the power to enforce the laws, for the President is head of state as well as head of government and whatever powers in here in such positions pertain to the office unless the Constitution itself withholds it. Furthermore, the Constitution itself provides that the execution of the laws is only one of the powers of the President. It also grants the President other powers that do not involve the execution of any provision of law, *e.g.*, his power over the country's foreign relations."

72 *Ople v. Torres*, 354 Phil. 948, 967 (1998).

73 CONSTITUTION, Article VII, Section 5.

74 See David Strauss, 15 Cardozo L. Rev. 113, October, 1993, Presidential Interpretation of the Constitution. For instance, in 1997, President Ramos issued an administrative order that provides, among others, for the withholding of an amount equivalent to 10% of the internal revenue allotment to local government units, pending the assessment and evaluation by the Development Budget Coordinating Committee of the emerging fiscal situation. Given the express provision of Section 6, Article X of the 1987 Constitution, mandating the automatic release of the internal revenue allotment to local government units, the President justified the issuance of the administrative order on the basis of the temporary nature of the withholding. While the Court did not agree with the President, this is a jurisprudential illustration of the President's power of executive interpretation (*Pimentel v. Aguirre*, G.R. No. 132988, July 19, 2000, 336 SCRA 208).

75 *Marcos v. Manglapus, supra* note 71. See also Section 1, Article VII of the Constitution which provides: "The executive power shall be vested in the President of the Philippines."

of the other branches of the government.[76] The degrees of presidential legal interpretation thus fluctuates from the very broad to the very narrow.

To place my discussion in proper context and in simpler terms, when the President interprets a constitutional provision that grants him full discretionary authority to act on a matter, the Court generally defers to the President's judgment on how the constitutional provision is to be interpreted and applied.[77] This is true in ordinary legal situations where a government agency in the executive, tasked to implement a particular law, is given the first opportunity to interpret and apply it even before a controversy as regards its implementation reaches the courts.

In fact, the Executive branch is constantly engaged in legal interpretation in performing its multifarious duties. In instances when the executive interpretation finally reaches the judiciary, the courts may adopt a deferential attitude towards the construction placed on the statute by the executive officials charged with its execution. This reality is what we now know as the ***doctrine of contemporaneous construction***.[78]

In other words, even in the Court's task of ***constitutional interpretation***, it does not simply disregard the doctrine of contemporaneous construction and the executive power that it supports, since *executive interpretation is a practical and inevitable premise in the execution of laws*.[79] This recognition is, of course, constantly subject to the Court's own power of judicial review to ensure that the executive's interpretation is consistent with the letter and spirit of the law and the Constitution.[80]

This understanding of the limits of executive interpretation is further qualified in a situation where the Court has already previously ruled on a particular legal issue affecting the implementation of laws. The Court's ruling is not only binding on the lower courts under the principle of *stare decisis*,[81] but on the two co-equal branches of government as well,[82] in

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[76] See Geofrey Miller, The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law.

[77] For instance, in *Integrated Bar of the Philippines v. Zamora* (392 Phil. 627 [2000]), we deferred to the President's "full discretionary power to determine the necessity of calling out the armed forces," by reason of the petitioner's failure to discharge the "heavy burden" of showing that the President's decision (necessarily interpreting the phrase "whenever it becomes necessary" under Section 18 of Article VII) is "totally bereft of factual basis." In this situation, the presidential power of executive interpretation is at its broadest.

[78] *Galarosa v. Valencia*, G.R. No. 109455, November 11, 1993, 227 SCRA 731, 746; and *Bagatsing v. Committee on Privatization, PNCC*, 316 Phil. 404, 429 (1995).

[79] See *Tañada v. Cuenco*, 103 Phil. 1051, 1075-1076 (1957).

[80] The courts may disregard contemporaneous construction where there is no ambiguity in the law, where the construction is clearly erroneous, where a strong reason exists to the contrary, and where the courts have previously given the statute a different interpretation. (Ruben E. Agpalo, Statutory Construction, 5th ed., 2003, p. 116.)

[81] The latin phrase *stare decisis et non quieta movere* means "stand by the thing and do not disturb the calm." See Justice Reynato Puno's Dissenting Opinion in *Lambino v. Commission on Elections* (G.R. Nos. 174153 and 174299, October 25, 2006, 505 SCRA 160).

keeping with the doctrine of separation of powers.[83] Judicial review and the interpretation of our laws are powers peculiarly vested by the Constitution in the courts, which powers, the two other branches must respect.[84]

Garafil misconstrued these legal parameters as well as the nature of executive interpretation when she took her positions in the present case. She should have recognized that the President's power of executive interpretation is even expressly recognized by law. The Administrative Code provides:

> **Chapter 2 - Ordinance Power**
>
> Section 2. Executive Orders. — Acts of the President providing for **rules of a general or permanent character in implementation or execution of constitutional or statutory** powers shall be promulgated in *executive orders*. (emphasis supplied)

As Section 15, Article VII of the Constitution has not been previously interpreted by the Court,[85] the present case affords us the chance to do so under the Court's **power and duty of judicial review** to determine the constitutionality of the Executive's interpretation of this provision.[86]

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82 Article 8 of the New Civil Code reads:
Art. 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.

83 In the words of *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is." *In Re: Resolution Granting Automatic Permanent Total Disability Benefits to Heirs and Judges Who Die in Actual Service*, cited by Atty. Garafil, falls within this category. In this case, the Court issued an earlier resolution construing the provisions of Republic Act No. 910. However, despite the Court's construction, the Department of Budget and Management (DBM) still continues to insist on its own interpretation of the law, prompting the Court to remind the DBM, *viz.*:

> We take this occasion to remind DBM that it is an agency under the executive branch of government. Hence, it is mandated to ensure that all laws, not the least of which is this Court's Resolution dated 30 September 2003 in A.M. 02-12-01-SC, are faithfully executed.
>
> In his letter of 19 July 2004 to the Chief Justice Undersecretary Relampagos speaks of DBM's "mandate to ensure that disbursements are made in accordance with law". It must be emphasized, however, that such a mandate does not include reviewing an issuance of this Court and substituting the same with DBM's own interpretation of the law. Anything of that sort is nothing less than a blatant usurpation of an exclusively judicial function and a clear disregard of the boundary lines delineated by the Constitution.

84 CONSTITUTION, Article VIII, Section 1.

85 See *Atty. Sana v. Career Executive Service Board*, G.R. No. 192926, November 15, 2011, 660 SCRA 130, 139.

86 Section 5, Article VIII, 1987 CONSTITUTION reads:
Section 5. The Supreme Court shall have the following powers:
x x x x
(2) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
(a) All cases in which the constitutionality or validity of x x x presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

C. Midnight appointments:

a. The case of Aytona v. Castillo and subsequent cases

Section 15, Article VII of the 1987 Constitution traces its jurisprudential roots from the 1962 case of *Aytona v. Castillo*.[87] As both parties rely on this case and for its proper understanding in the context of the present Constitution, a discussion of *Aytona* is in order.

On **December 13, 1961,** Congress proclaimed Diosdado Macapagal as the newly elected President of the Philippines. On **December 29, 1961**, outgoing President Carlos Garcia appointed Dominador Aytona as *ad interim* Governor of the Central Bank. On the same day, Aytona took his oath of office.

On December 30, 1961, President-elect Diosdado Macapagal assumed office. On the following day, he issued **Administrative Order (*A.O.*) No. 2** cancelling all *ad interim* appointments made by President Garcia after December 13, 1961. On January 1, 1962, President Macapagal appointed Andres Castillo as *ad interim* Governor of the Central Bank. Castillo assumed and qualified for his post immediately.

Because of A.O. No. 2, Aytona instituted a *quo warranto* proceeding against Castillo before this Court. He questioned the validity of the appointments made by outgoing President Garcia and raised the question of whether A.O. No. 2 was valid.

Even without the equivalent of the present Section 15, Article VII (of the 1987 Constitution) in the then 1935 Constitution, the Court refused to recognize the validity of Aytona's appointment. The Court regarded the issuance of 350 appointments in one night and the planned induction of almost all of them a few hours before the inauguration of the new President as an abuse by the outgoing President of his presidential prerogatives.

> **The filling of vacancies in important positions, if few, and so spaced to afford some assurance of deliberate action and careful consideration of the need for the appointment and the appointee's qualifications may undoubtedly be permitted**. But the issuance of 350 appointments in one night and planned induction of almost all of them a few hours before the inauguration of the new President may, with some reason, be regarded by the latter as an **abuse of Presidential prerogatives**, the steps taken being apparently a mere partisan effort to fill all vacant positions

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87 G.R. No. L-19313, January 19, 1962, 4 SCRA 6.

> irrespective of fitness and other conditions, and thereby deprive the new administration of an opportunity to make the corresponding appointments.
>
> x x x x
>
> Of course, the Court is aware of many precedents to the effect that once an appointment has been issued, it cannot be reconsidered, especially where the appointee has qualified. **But none of them refer to mass *ad interim* appointments (three-hundred and fifty), issued in the last hours of an outgoing Chief Executive**, in a setting similar to that outlined herein. On the other hand, the authorities admit of exceptional circumstances justifying revocation and if any circumstances justify revocation, those described herein should fit the exception.
>
> **Incidentally, it should be stated that the underlying reason for denying the power to revoke after the appointee has qualified is the latter's equitable rights. Yet it is doubtful if such equity might be successfully set up in the present situation, considering the rush conditional appointments, hurried maneuvers and other happenings detracting from that degree of good faith, morality and propriety which form the basic foundation of claims to equitable relief**. The appointees, it might be argued, wittingly or unwittingly cooperated with the stratagem to beat the deadline, whatever the resultant consequences to the dignity and efficiency of the public service. Needless to say, there are instances wherein not only strict legality, but also fairness, justice and righteousness should be taken into account.

In effect, the Court upheld the incoming President's order revoking the *en masse* appointments made by the outgoing President. The Court accomplished this, not on the basis of any express constitutional or statutory prohibition against those appointments, but because the outgoing President "abused" the presidential power of appointment. The presence of "abuse" was found based on the circumstances attendant to Aytona's appointment.

After the *Aytona* ruling, cases on "midnight" or "last minute" appointments were ruled to be valid or invalid depending on the attendant circumstances.

In *Rodriguez, Jr. v. Quirino*,[88] the Court nullified the appointment made after considering the following circumstances: the appointee was notified of his appointment only on December 30, 1961 (**after the new President had assumed office**) even though the appointment was made six months earlier; he took his oath of office days after the new President had recalled the "midnight" appointments issued by his predecessor; there was no urgency that justified the issuance of an *ad interim* appointment; and the oath of office that the appointee took was considered void. In contrast, the

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88 118 Phil. 1127 (1963).

Court upheld the appointments made in *Merrera v. Hon. Liwag*[89] and *Morales, Jr. v. Patriarca*.[90]

Gilera v. Fernandez[91] and *Quimsing v. Tajanglangit* [92] gave the Court the opportunity to clarify that the *Aytona* ruling and the subsequent cases "did not categorically declare [the revocation of the 'midnight appointments' as] valid" and that all appointments made by the outgoing President were ineffective. The Court stressed that its action, either upholding or nullifying the appointments made, was "more influenced by the ***doubtful character of the appointments*** themselves and not by the contention that the President had validly recalled them."[93]

The appointments in *Merrera*, *Morales* and *Tajanglangit*[94] were not considered "midnight" appointments although the appointees took their oath or assumed office near the end of the outgoing President's term (or within the period covered by the presidential issuance). In these cases, the Court considered several factors — the need to fill the vacancies, the qualifications of the appointees, and the date of the appointments — in determining whether the appointment was an abuse of the appointing power of the outgoing President and must thus be struck down in deference to the newly elected President.

In sum, before the 1987 Constitution when no *express* legal prohibition existed against appointments made by an outgoing President and out of respect for the separation of powers principle, the Court considered the validity of alleged "midnight" appointments on a ***case-to-case basis***.

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89 9 SCRA 204 (1963). In *Merrera*, the Court observed that the following facts argue against the application of the *Aytona* ruling to the appointment involved: the appointment was extended on November 6, 1961 (or weeks before the elections); the necessity to fill the vacancy existed; the appointee was qualified to the position, as shown by the favorable recommendation of the official concerned and; he entered upon the exercise of his official functions days before the "scramble" in *Malacanan* on December 29, 1961.

90 121 Phil. 742 (1965). In *Morales*, the Court considered the appointment made on November 6, 1961 (or weeks before the elections) as sufficient to indicate "deliberate and careful action" even though the appointment was released only on December 27, 1961 and the appointee assumed office only on December 28, 1961.

91 109 Phil. 494 (1964), citing its March 30, 1962 resolution in *Aytona v. Castillo.*

92 119 Phil. 729 (1964).

93 In *Quimsing v. Tajanglangit*, the Court said:

> In the various cases decided by this Court after the *Aytona v. Castillo* case, the matter of the validity of appointments made after December 13, 1961 by former Administrative Order No. 2 (which was never upheld by this Court) but, on the basis of the nature, character and merit of the individual appointments and the particular circumstances surrounding the same. In other words, this Court did not declare that all the *ad-interim* appointments made [were void] by the mere fact that the same were extended after [the date fixed by the presidential issuance] nor that they automatically come within the category of the "midnight" appointments, the validity of which were doubted and which gave rise to the ruling in the *Aytona* case[.]

94 In *Tajanglangit* the appointment was extended several days before the new President took his oath and assumed office.

b. The 1987 Constitution and the earlier laws on appointment ban after Aytona

While the midnight appointments contemplated in *Aytona* were, by nature, strictly last-minute appointments, or were made after an outgoing President had lost his bid for reelection, statutory law after *Aytona* expanded the concept of a midnight appointment by extending the period when appointments could not be made within the period prior to the elections.

Republic Act (*RA*) No. 6388,[95] as a rule, prohibited national and local appointing authorities "from appointing or hiring new employees" "during the period of forty-five days ***before*** a regular election and thirty days before a special election."[96] The statutory prohibition was reproduced in Section 178 (f) and (g) of Presidential Decree (*PD*) No. 1296.[97] Eventually, these prohibitions were substantially carried over into *Batas Pambansa Blg.* 881.[98] Thus, even prior to the 1987 Constitution, statutory law had already *generally prohibited* the appointment or hiring of a new employee **within specific time frames broader than the midnight appointment period understood in *Aytona*.**

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[95] The Election Code of 1971.

[96] See Sections 75 and 76 of RA 6388. "except upon prior authority" of the Commission on Elections (*COMELEC*) or, in case of urgent need with prior notice to the COMELEC.

[97] The 1978 Election Code. Except that: (i) the period covered by the prohibition on appointment or hiring of new employee was left to the determination of the COMELEC and (ii) the period of prohibition on the detail or transfer covers the election period (See Art. IX-C, Section 9 of the 1987 Constitution).

[98] The present Omnibus Election Code. Section 261 (g) and (h) of BP 881 considers the following as election offense:

> x x x x
>
> (g) Appointment of new employees, creation of new position, promotion, or giving salary increases. - During the period of forty-five days before a regular election and thirty days before a special election:
>
> (1) any head, official or appointing officer of a government office, agency or instrumentality, whether national or local, including government-owned or controlled corporations, who appoints or hires any new employee, whether provisional, temporary or casual, or creates and fills any new position, except upon prior authority of the Commission. The Commission shall not grant the authority sought unless, it is satisfied that the position to be filled is essential to the proper functioning of the office or agency concerned, and that the position shall not be filled in a manner that may influence the election.
>
> As an exception to the foregoing provisions, a new employee may be appointed in case of urgent need: Provided, however, That notice of the appointment shall be given to the Commission within three days from the date of the appointment. Any appointment or hiring in violation of this provision shall be null and void.
>
> (2) Any government official who promotes, x x x any government official or employee, including those in government-owned or controlled corporations.
>
> x x x x
>
> (h) Transfer of officers and employees in the civil service. - Any public official who makes or causes any transfer or detail whatever of any officer or employee in the civil service including public school teachers, within the election period except upon prior approval of the Commission.

This broader statutory law concept of midnight appointments was carried over into the **1987 Constitution** where the ban was a special one specifically directed **only against the outgoing President**. The prohibition covers appointments without any distinction on whether the appointee is a new hire or not, or whether the appointment would involve a transfer, a detail or other kinds of personnel movement.[99]

Section 15, Article VII of the Constitution also provides its own period of effectivity of two months prior to the coming Presidential elections all the way to the end of the outgoing President's term. While the prohibition contains an exception that is left for the outgoing President's determination, his power of appointment under the exception is very much curtailed; the permitted appointment is limited only to *temporary* appointments in the executive branch.

Thus, as worded, Section 15, Article VII (both its rule and exception) is a clear limitation on the appointing power of the outgoing President.[100]

c. The status of Presidential midnight appointments under the 1987 Constitution and the CA's defective treatment of midnight appointments

By providing for a specific provision especially applicable only to the outgoing President (a provision entirely absent in the 1935 Constitution when the *Aytona* ruling took place and in the 1973 Constitution) under terms uniquely directed at his office, the Constitution apparently sought to limit any judicial fact-finding determination of the validity of the appointment *in the manner done in Aytona*. **Had the intent been otherwise, there would have been no need to provide for a specific period for the operation of the ban**; **the framers of the Constitution would have left things as they had been.**

In other words, by the express terms of Section 15, Article VII, the Constitution fixed the period covered by the appointment ban precisely to avoid the necessity of making further inquiries on whether the appointments were made with "undue haste, hurried maneuvers, [or] for partisan reasons, [or otherwise] not in accordance with good faith" – issues that are largely factual in nature.

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[99] But see special provision for appointments in the Judiciary, as recognized in *De Castro v. Judicial and Bar Council*, G.R. No. 191002, March 27, 2010, 615 SCRA 702.

[100] See Justice Brion's Concurring and Dissenting Opinion in *Arturo de Castro v. Judicial and Bar Council*, G.R. No. 191002, April 20, 2010, 615 SCRA 788, 822.

The fixed period too inevitably established the presumption that "appointments" made outside this two-month period have been made in the regular discharge of duties and hence should enjoy the presumption of regularity or validity.[101] In this sense, the issue of –

> Whether the appointments of the petitioners and intervenors were made with undue haste, hurried maneuvers, for partisan reasons, and not in accordance with good faith,

in our January 31, 2012 Resolution largely becomes a non-issue. The CA's failure to resolve these matters is consequently not fatal.[102]

Thus, based on these considerations of presidential power and its limits, **I find it completely unnecessary for the CA to qualify its ruling upholding E.O. No. 2 by stating that "not all midnight appointments are invalid**." If appointments were indeed made within the prohibited period, then they suffer from an irremediable infirmity. On the other hand, if they were issued outside the prohibited period, then they fall outside the ambit of Section 15, Article VII.

Notably, **the CA used wrong considerations and cited inapplicable cases that led it to erroneously qualify its ruling**. The CA cited cases involving appointments **made *after* the elections by an outgoing local chief executive**, not by the President.

In particular, in the CA's cited *Nazareno v. City of Dumaguete*,[103] the Court upheld the Civil Service Commission's (*CSC*'s) issuance that generally prohibited outgoing *local chief executives* from exercising their appointing power unless certain requirements, evidencing regularity of the appointment, are observed.[104] In *Sales v. Carreon*,[105] the Court supported

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101 If at all, the factual circumstances surrounding the appointment may become material should the President make a last minute *en masse* "appointment" - as the term is understood under Section 15, Article VII – a day or two before the effectivity of the ban in a manner that unmistakably shows an abuse of presidential prerogative comparable or even worse than *Aytona*.

102 If at all, these factual circumstances may become material once an appointment is found to be *technically* valid. See footnote (preceding immediately).

103 G.R. No. 181559, October 2, 2009, 602 SCRA 580, 591-593.

104 CSC Resolution No. 010988 dated June 4, 2001, pertinently reads:

> NOW THEREFORE, the Commission, pursuant to its constitutional mandate as the control personnel agency of the government, hereby issues and adopts the following guidelines:
>
> x x x x
>
> 3. All appointments, whether original, transfer, reemployment, reappointment, promotion or demotion, except in cases of renewal and reinstatement, regardless of status, which are issued AFTER the elections, regardless of their dates of effectivity and/or date of receipt by the Commission, including its Regional or Field Offices, of said appointments or the Report of Personnel Actions (ROPA) as the case may be, shall be disapproved unless the following requisites concur relative to their issuance:

the CSC's nullification of the appointments made by the *outgoing local chief executive* because it was made in disregard of civil service laws and rules, not because of an express prohibition against appointment *per se*.

In reading these cited cases, it should be noted that their reference to the prohibition under Section 15, Article VII was tangential and pertained merely to the provision's underlying rationale. Thus, while noting that this provision applies only to presidential appointments,[106] the Court nevertheless cited the prohibition because of the rationale behind it, *i.e.*, to discourage losing candidates from issuing appointments merely for partisan purposes, as these losers thereby deprive the incoming administration of the opportunity to make their own appointments.[107]

The CSC–issued prohibition applicable to local chief executives is jurisprudentially significant since **the Constitution does not expressly prohibit an outgoing local chief executive from exercising its power to appoint or hire new employees *after* the elections** (in the manner that an outgoing President is prohibited under Section 15, Article VII). Thus, the validity of an appointment by a local chief executive in the cited cases was, in effect, determined by applying the CSC's regulations to the facts surrounding each contested appointment. This is the import of *Sales* and *Nazareno*. These cases, of course, are obviously inapplicable to the present case, given the existence of a clear constitutional prohibition applicable to an outgoing President.

In this light, I also do not see any need to refer anything to the Office of the President with respect to the nature, character, and merits of the petitioners' appointment. As previously stated, if an "appointment" is made within the prohibited period, it is illegal (as the CA itself found, although for the wrong reason as will be discussed later) for being contrary to the fundamental law. No amount of evaluation by the President can *validate* this kind of appointment.

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a) The appointment has gone through the regular screening by the Personnel Selection Board (PSB) before the prohibited period on the issuance of appointments as shown by the PSB report or minutes of its meeting;
b) That the appointee is qualified;
c) There is a need to fill up the vacancy immediately in order not to prejudice public service and/or endanger public safety;
d) That the appointment is not one of those mass appointments issued after the elections.

4. The term "mass appointments" refers to those issued in bulk or in large number after the elections by an outgoing local chief executive and there is no apparent need for their immediate issuance.

[105] This case *in turn* cited pre-1987-Constitution cases: *Quimsing v. Tajanglangit* (1964); *Davide v. Roces* (1975); *Aytona v. Castillo* (1962); *Rodriguez, Jr. v. Quirino* (1963).

[106] *De Rama v. Court of Appeals*, G.R. No. 131136, February 28, 2001, 353 SCRA 95, 102.

[107] *Quirog v. Governor Aumentado*, G.R. No. 163443, November 11, 2008, 570 SCRA 584, 595-596.

D. The meaning of appointment under Section 15, Article VII

a. Considerations under Section 15, Article VII

i. The Dichotomy of an Appointment – it is both an executive act and a process

Appointments by the President may be construed both in its broad and narrow senses. In its broad sense, an **appointment is a process** that must comply with the requirements set by law and by jurisprudence in order to be complete. Narrowly speaking, an **appointment is an executive act** that the President unequivocally exercises pursuant to his discretion.

This dichotomy arises because of the two participants in the appointing process — the appointing power (which, in this case, is the President), and the appointee. While the concurrence of the actions of these two participants is necessary in order for an appointment to be **fully effective**, it is also important to note that **the appointing power and the appointee act independently of each other.** An examination and understanding of this relationship is the key to the proper appreciation and interpretation of the "appointment" that Section 15, Article VII of the Constitution speaks of.

i. a. Appointment in its broad sense as a process

As a process, appointments made by the President[108] undergo three stages: ***first***, the making of the commission,[109] which includes the signing of the appointment papers by the President and its sealing if necessary; ***second***, the issuance of the commission and the release of the transmittal letter, if any; and ***third***, the appointee's receipt and acceptance of the appointment, which could either be express or implied.

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[108] Under Article V, Section 9 (h) of Presidential Decree No. 807, the Civil Service Commission does not have the power to approve appointments made by the President.

There may be a slight difference when the appointment requires confirmation. Under the Constitution, in cases requiring the confirmation of the Commission on Appointments and while Congress is in session, the President merely nominates and it is only after the Commission on Appointments has given its consent that the President appoints. This situation however can rarely happen because the prohibition in Section 15, Article VII happens only once every six years.

[109] According to *Valencia v. Peralta, Jr.* (*supra* note 40), a written memorial (the commission) to evidence one's appointment is necessary to render title to public office indubitable.

In this ***broad sense***, an appointment is **a process** that is *initiated by the acts of the President and culminates with the positive acts of the appointee*.[110]

This **broad interpretation of an appointment is necessary and appropriate in cases where there is no issue as to the validity of the first two stages of appointment**, *i.e.,* **the signing of the appointment papers, and the issuance of the commission**. The main question to be resolved in considering an appointment as a process, is whether or not there was a valid assumption of public office, based on the appointee's valid acceptance of the appointment through an oath or any positive act.

In *Javier v. Reyes,*[111] the Court upheld the appointment of petitioner Isidro Javier as Chief of Police of Malolos on the finding that no question existed on the regularity of his appointment by the then mayor of Malolos. Compared to his fellow claimant over the position, he was the one who accepted the appointment by taking an oath and subsequently discharging the functions of his office. Although this case does not concern a Presidential appointment, it shows **that in cases where there was already a valid act of appointment, the only remaining act to be done is for the appointee to exercise his part in the process so that the appointment will be effective**.

Consequently, an acceptance merely results from the valid exercise of the appointing authority of his power to appoint. It is an act of the appointee that lies outside the control of the appointing authority and totally depends on the appointee's discretion.

i. b. Appointment in its narrow sense - as an executive act

Appointment, as an executive act, is an ***exercise of power*** **or authority**. It is the *unequivocal* act of designating or selecting an individual to discharge and perform the duties and functions of an office or trust.[112] The appointment is deemed complete once the *last act* required of the appointing authority has been complied with and acceptance is thereafter made by the appointee in order to render it **fully effective**.[113]

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110 In *Borromeo v. Mariano* (1921), the Court said that even if the law does not "prevent a judge of first instance of one district from being appointed to be judge of another district," the acceptance of the new appointment by the appointee is required to carry the process of appointment out. The same principle was applied in *Lacson v. Romero*, G.R. No. L-3081, October 14, 1949. In *Javier v. Reyes* (1989) and *Garces v. Court of Appeals* (1996), the Court said that "acceptance x x x is indispensable to complete an appointment." In *Garces*, since the respondent did not accept his appointment to another station, then the petitioner cannot be validly appointed to the respondent's station which is not legally vacant.

111 G.R. No. 39451, February 20, 1989, 170 SCRA 360.

112 *Bermudez v. Executive Secretary*, G.R. No. 131429, August 4, 1999, 311 SCRA 735, 739, citing *Aparri v. Court of Appeals*, 212 Phil. 218, 222-223 (1984).

113 *Aparri v. Court of Appeals, supra* note 112.

In this ***narrow sense***, *appointment is simply an executive act*; ***that the full effectiveness of an appointment requires a positive act from the appointee is not a denial of the existence of the power and the full exercise of the act by the executive himself.***

Appointment as an executive act, as opposed to a process, is well-established under our laws and jurisprudence. This is referred to as the President's appointing power. Specifically, this executive power is embodied in the Constitution under Article VII, Sections 14, 15, and 16 and is vested on the President as provided under Section 1, Article VII.

A plain reading of the Constitution alone shows that the term *"appointment"* may pertain to the President's act of appointment as the President, **on his own**, has the power to appoint officials as authorized under the Constitution and the pertinent laws. **This presidential appointment power should be distinguished from the appointment process that requires the act of the appointee for its efficacy**. If these two concepts would be confused with one another, the result could be havoc and absurdities in our jurisprudence every time we resolve a case before us.

The President's power of appointment is *sui generis*. It is intrinsically an executive act because the filling of an office created by law is an implementation of that law.[114] The power to appoint is the exclusive prerogative of the President involving the exercise of his discretion;[115] the wide latitude given to the President to appoint is further demonstrated by the constitutional recognition that the President is granted the power to appoint even those officials ***whose appointments are not provided for by law***.[116]

In other words, where there are offices that have to be filled, but the law does not provide the process for filling them, the Constitution recognizes the power of the President to fill the office by appointment. **Any limitation on or qualification to the exercise of the President's appointment power should be strictly construed and must be clearly stated in order to be recognized.**

In *Osea v. Malaya*[117] and in other several cases,[118] the Court held that an appointment **may be defined** as the selection, by the authority vested with the power, of an individual who is to exercise the functions of a given office. The constitutionally mandated power of the President's appointing

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114 Bernas, the 1987 Constitution of the Republic of the Philippines, A Commentary, 2009 Ed., at p. 870.

115 *Concepcion v. Paredes*, G.R. No. L-17539 December 23, 1921.

116 Section 16, CONSTITUTION.

117 G.R. No. 139821, January 30, 2002.

118 *Sevilla v. Court of Appeals*, G.R. No. 88498 June 9, 1992, 210 SCRA 638, 642; and *Binamira v. Garrucho*, G.R. No. 92008 July 30, 1990, 188 SCRA 156, 158. See also *Flores v. Drilon*, G.R. No. 104732 June 22, 1993, 223 SCRA 570, 578.

power was statutorily recognized under Section 16, Chapter V, Book III, Title I of the Administrative Code. Book III of the Code pertains to the Office of the President, and Title I relates to the "**Powers of the President."** Chapter V, on the other hand, focuses on the President's ***"Power of Appointment"*** and its Section 16 provides:

> **Section 16.** *Power of Appointment.* - The President shall exercise the power to appoint such officials as provided for in the Constitution and laws.

Under these terms and structure, the term "appointment" apparently does not automatically equate to a process and pertain to the President's act or exercise of his power of appointment. Thus, when interpreting the word "appointment" in cases before the Court, we must consider which of the two should be applied considering the factual and legal settings of each case.

In the present case, I submit that what is applicable is not the concept of "appointment as a process" but the executive act or the President's power of appointment. The interpretation of "appointment" in Section 15, Article VII as an *executive act* rather than as a process finds support in the language of the provision itself. Section 15, Article VII reads:

> Section 15. Two months immediately before the next presidential elections and up to the end of his term, a **President or Acting President shall not make appointments**, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety. (emphasis supplied)

This express wording leads us away from an interpretation of the provision as a process that would involve the appointee and his or her acts within the scope of the appointment ban. For one, Section 15, Article VII of the 1987 Constitution is directed only against an outgoing President and against no other. By providing that the President shall not *make appointments* within the specified period, the Constitution could not have barred the President from doing things that are not within his power to accomplish as appointing authority, such as the acts required or expected of the appointee.

Note that the appointee who is at the receiving end of the appointment – if indeed the term "appointment" is meant as a process - is not even mentioned or even alluded to in Section 15, Article VII. Had the original intent of the framers been to include him, they would have simply "**prohibited an appointee from accepting a Presidential appointment commencing two months before the next Presidential Election**," which already presupposes a previous valid appointment by the President.

From this perspective, the objective of the provision is to **limit the President's appointing power alone,** by prohibiting him *from making appointments* within a certain period; the intent is not to curtail the entire appointment process. **As a limitation solely applicable *to the President's power of appointment***, appointment under this provision largely assumes the character of an ***executive act*** that does not concern the appointee at all.[119]

In their interpretation, the respondents insist that the acceptance and assumption of office by the appointee must also be accomplished before the ban sets in. They reason out that these acts are necessary for the completion and effectivity of an appointment; otherwise, "it would be useless to prohibit an incomplete and ineffective appointment."[120] Notably, the *ponencia* supports this interpretation.

With due respect, I believe that the *ponencia*'s and the respondents' interpretation merely highlights the word "appointment" in Section 15 but ignores the totality of the provision and the language it is couched in. There is simply nothing in the language of Section 15, Article VII that supports the respondents' plea for the Court to view "appointment" as a process. As will be discussed in detail below, even the supposed "uselessness" of prohibiting an "ineffective appointment" has no legal basis.

I especially note in examining and construing Section 15, Article VII that what the petitioners in the present case challenge is the very authority of an outgoing President to exercise his appointing power based on a specific constitutional provision that makes the date of the *making of appointment* the focal point of the prohibition. These unique factual and legal aspects of the case suffice to reject the respondents' reliance on cases whose factual and legal settings are completely at odds with the present case.[121]

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[119] Jurisprudence to the effect that oath of office is a qualifying requirement for a public office and that it is only when the public officer has satisfied the prerequisite of oath that his right to enter into the position becomes plenary and complete (*Lecaroz v. Sandiganbayan*, 364 Phil. 896, 904 [1999]; *Mendoza v. Laxina, Sr.*, 453 Phil. 1018, 1026-1027 [2003]; and *Chavez v. Ronidel*, G.R. No. 180941, June 11, 2009, 589 SCRA 104, 109) is immaterial in the interpretation of Section 15, Article VII because these cases concern the effects of taking or not taking an oath of office *on the appointee*. In *Chavez*, since the appointing power issued the appointment (February 23) before her successor took his oath (February 26) of office, then the appointment is valid even if the successor was "appointed" at an earlier date (February 19). In *Lecaroz*, the Court said that since the oath taken by the supposed successor in office was invalid (because the person who administered it has no power to do so), then the predecessor holdover officer continues to be the rightful occupant entitled to rights and privileges of the office. The necessity of taking an oath however (or of any of the acts of the appointee) is far removed from the purpose of the appointment ban.

[120] Comment.

[121] In *Appari v. Court of Appeals* (*supra* note 112), the Court said that when, at the instance of the President, the appointing power subsequently fixed the appointee's term, the Board merely acted in accordance with law which empowered the Board to "fix the [appointee's] term subject to the approval of the President." In *Bermudez v. Torres* (1999), the Court's definition of appointment was not that material since what is in issue is the lack of recommendation by the Justice Secretary to the President's appointment as required by law. In *Mitra v. Subido* (G.R. No. L-21691, September 15, 1967, 215 SCRA 131, 141-142), the Court affirmed petitioner's appointment after according presumption of regularity to the approval made by a subordinate of the Civil Service Commissioner. In so holding, the Court said: "Unless the appointment is an absolute nullity xxx the irregularity must be deemed cured by the probational and absolute

For the same reason, the petitioners, too, cannot simply rely on *In Re: Seniority Among the Four (4) Most Recent Appointments to the Position of Associate Justices of the Court of Appeals*,[122] in interpreting Section 15, Article VII of the 1987 Constitution.

In that cited case, the Court was tasked to resolve the correct basis in determining the seniority in the Court of Appeals of the newly appointed justices: whether it should be based on (i) the date the commission was signed by the President, *i.e.*, the date appearing on the face of the document or (ii) the order of appointments as contained in the transmittal letter to the Court.[123] In applying the first option, the Court simply applied the clear letter of the law[124] that seniority should be based on "the dates of their respective appointments."[125] In closing, the Court said:

> For purposes of completion of the appointment process, the appointment is complete when the commission is signed by the executive, and sealed if necessary, and is ready to be delivered or transmitted to the appointee. Thus, transmittal of the commission is an act which is done after the appointment has already been completed. It is not required to complete the appointment but only to facilitate the effectivity of the appointment by the appointee's receipt and acceptance thereof.
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> ***For purposes of appointments to the judiciary***, therefore, the date the commission has been signed by the President (which is the date appearing on the face of such document) is the date of the appointment. Such date will determine the seniority of the members of the Court of Appeals in connection with Section 3, Chapter I of BP 129, as amended by RA 8246. [Italics and emphasis supplied.]

The issue before us, however, is not as simple as the issue of seniority of the justices of the CA – a matter that is largely internal to its members. Far more important than this, the issue before us directly relates to **the constitutional limitation on the President's exercise of his appointing power**. The applicable law in *In Re: Seniority* is clearly worded on the

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appointment of the appointee and should be considered conclusive." In *Aquino v. Civil Service Commission* (G.R. No. 92403 April 22, 1992, 208 SCRA 243, 248-249), the Court sustained the CSC's action, revoking the *designation* of petitioner and in effect upholding that of respondent because respondent's "permanent appointment" which was approved by the CSC conferred on respondent security of tenure. The Court laid down the rule that "the moment the discretionary power of appointment has been exercised and the appointee assumed the duties and functions of the position, the said appointment cannot be revoked by the appointing authority [except "for cause"] [provided that] the first appointee should possess the minimum qualifications required by law." (See also, *Provincial Board of Cebu v. Hon. Presiding Judge of Cebu*, 253 Phil. 3 [1989]; *Atty. Corpuz v. Court of Appeals,* 348 Phil. 804 [1998]; and *Dimaandal v. Commission on Audit*, 353 Phil. 528 [1998]).

122 *Re: Seniority Among the Four (4) Most Recent Appointments to the Position of Associate Justices of the Court of Appeals*, *supra* note 40.

123 It is argued that since the final act in the appointing process is the transmittal of the appointment to the Supreme Court, then the second option should determine the issue of seniority. The Court rejected this argument.

124 An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and For Other Purposes [The Judiciary Reorganization Act of 1980], Batas Pambansa Blg. 129 (1980).

125 Id. at Section 3.

proper basis of seniority in the CA, *i.e.*, the date of appointment.[126] This is significantly very much unlike the Constitution's language that commands the President not to "make appointments."

Thus, the question should be: when do we consider the President to have already made an appointment or exercised his appointing power under Section 15, Article VII of the 1987 Constitution. Otherwise phrased, we ask: what stage in the *appointment process* must have been completed before the ban takes effect in order that an appointment may not be considered under the broad category of "midnight appointment" under Section 15, Article VII.

ii. Purpose of Section 15, Article VII; in relation with Section 4, Article VII

A factor I cannot disregard in our interpretative exercise is the presence of ***pragmatic considerations***[127] *underlying Section 15, Article VII of the 1987 Constitution that uniquely warrant a deeper and more critical understanding of the whole provision* – instead of only a word therein and of the purpose behind it.

These considerations militate not only against a literal interpretation of the phrase "shall not make appointments," as the CA appear to have shortsightedly ruled, but also **against an unduly expansive interpretation of the word "appointments" based on jurisprudential definitions that were decided under completely different sets of facts and law**.

Again, this latter broad-sense definition of appointment – in its largely administrative law concept – cannot be controlling in our interpretation of Section 15, Article VII. **For emphasis, Section 15, Article VII is unique in the factual situation it contemplates and in restricting the President's otherwise broad appointing power.**

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126 In fact, the wording of the applicable law in *In Re Seniority* (Section 3, Chapter I of Batas Pambansa Blg. 129, as amended) made it even further clear that the phrase "dates of their respective appointments" should mean exactly what it says by providing for a situation that "when the appointments of two or more of them shall bear the same date" then seniority shall be based "according to the order in which their appointments were issued by the President."

127 *Civil Liberties Union v. Executive Secretary* (G.R. No. 83896 February 22, 1991, 194 SCRA 320, 325) is instructive:

> A foolproof yardstick in constitutional construction is the intention underlying the provision under consideration. Thus, it has been held that the Court in construing a Constitution should bear in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied. A doubtful provision will be examined in the light of the history of the times, and the condition and circumstances under which the Constitution was framed. The object is to ascertain the reason which induced the framers of the Constitution to enact the particular provision and the purpose sought to be accomplished thereby, in order to construe the whole as to make the words consonant to that reason and calculated to effect that purpose

Under E.O. No. 2, any of the following is considered a "midnight appointment" even if the date of appointment is prior to the effectivity of the constitutional ban (March 11, 2010), where:

> 1. the appointee accepted, or took his oath, or assumed office at the time when the constitutional ban is already in effect;
> 2. the appointment will take effect or where the office involved will be vacant during the effectivity of the constitutional ban;
> 3. the appointment or promotion was made in violation of Section 261 of the Omnibus Election Code.

In *In Re Appointments dated March 30, 1998 of Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta as Judges of the Regional Trial Court of Branch 62, Bago City and of Branch 24, Cabanatuan City, respectively* (*In re Valenzuela*),[128] we ruled that Section 15, Article VII is directed against two types of appointments, *viz.*: (i) those made for buying votes and (ii) those made for partisan considerations.[129]

The first type obviously applies only before the elections; while the second type may apply whether the appointment was made before or after elections.[130] This observation is critical since under Section 4, Article VII of the 1987 Constitution,[131] the President is ineligible for any reelection.

Notably in *Aytona*, the Court cautioned the outgoing President not to exercise his prerogatives in a manner that would tie the hands of the incoming President through the appointment of individuals to key positions in the government. This pronouncement should not be lost to us in the present case because an outgoing President is ineligible for reelection under the 1987 Constitution. Under this situation, the objective of any prohibition against appointment, as in *Aytona*, is aimed at preventing the incumbent from adversely affecting his successor through partisan action. During an incumbent's last days in office, his sole mandate should be to ensure the orderly transfer of government administration to the next President.

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128 358 Phil. 901, 913-914 (1998).

129 Webster's Dictionary defines partisanship as "strong or sometimes blind and unreasoning adherence to a single cause or group: bias, one-sidedness, prejudice."

130 In *In re Valenzuela*, the Court ruled that the second type of prohibited appointment consist of the so-called "midnight" appointments," citing *Aytona*. *Aytona* and most cases (involving so-called midnight appointments) involved appointments made by executives who lost their bid in re-election.

131 Section 4, Article VII reads:

> Section 4. The President and the Vice-President shall be elected by direct vote of the people for a term of six years which shall begin at noon on the thirtieth day of June next following the day of the election and shall end at noon of the same date, six years thereafter. The President shall not be eligible for any re-election. No person who has succeeded as President and has served as such for more than four years shall be qualified for election to the same office at any time.

Thus, aside from the limitations on the president's appointing power under Section 15,[132] we need to add the constitutional disfavor that appointments made by the outgoing President carry when the elections are drawing near (and more so after the electorate has spoken), as this can be presumed to be for partisan considerations, or in furtherance or maintenance of political interest or influence, or as reward for partisan loyalties, or even for the purpose of shackling the hands of the new administration.

In elevating the *Aytona* ruling and its resulting prohibition against midnight appointments to the level of a constitutional provision, the thrust of Section 15, Article VII must be ***the broadening of the general rule against the exercise of the midnight appointing power*** and the ***narrowing of the exception in its favor***.[133] A constitutional provision specifically directed only against an outgoing President's exercise of his appointing power is also an express recognition of the unique and vast powers and responsibilities inherent in the Office of the President[134] that an outgoing President should most judiciously consider. Again, I quote *Aytona*:

> Of course, nobody will assert that President Garcia ceased to be such earlier than at noon of December 30, 1961. But it is common sense to believe that after the proclamation of the election of President Macapagal, his was no more than a "caretaker" administration. He was duty bound to prepare for the orderly transfer of authority the incoming President, and he should not do acts which he ought to know, would embarrass or obstruct the policies of his successor. The time for debate had passed; the electorate had spoken. It was not for him to use powers as incumbent President to continue the political warfare that had ended or to avail himself of presidential prerogatives to serve partisan purposes.

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132 That (i) is directed only against an outgoing president; (ii) provides its own timeframe; and (iii) makes no distinction on the kind of 'appointment' involved.

133 *In Re: Valenzuela* aptly stated:

> Section 15, Article VII has a broader scope than the Aytona ruling. It xxx contemplate[s] not only "midnight" appointments - those made obviously for partisan reasons as shown by their number and the time of their making - but also appointments presumed made for the purpose of influencing the outcome of the Presidential election.
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> On the other hand, the exception in the same Section 15 of Article VII - allowing appointments to be made during the period of the ban therein provided - is much narrower than that recognized in *Aytona*. The exception allows only the making of temporary appointments to executive positions when continued vacancies will prejudice public service or endanger public safety. Obviously, the article greatly restricts the appointing power of the President during the period of the ban.

134 The President is the country's Chief Executive and administrative head of the Executive Department (See *Ople v. Torres*, stating: "Administrative power is concerned with the work of applying policies and enforcing orders as determined by proper governmental organs. It enables the President to fix a uniform standard of administrative efficiency and check the official conduct of his agents. To this end, he can issue administrative orders, rules and regulations."). He is also the chief architect of the nation's foreign policy and as the country's sole representative with foreign nations (*Pimentel v. Office of the Executive Secretary*, G.R. No. 158088, July 6, 2005, 462 SCRA 628, 632; and *Bayan v. Zamora*, 396 Phil. 631, 663 [2000]). He is also the Commander-in-Chief of the country's armed forces. He is also the protector of the peace (See *Marcos v. Manglapus*, *supra* note 71, at 504-505.)

To be sure, the broad discretion given the appointing power may be limited by the Constitution[135] and by law.[136] Nonetheless, any limitation of the exercise of this broad power is generally strictly construed. Correspondingly, any undue expansion of a **textually evident limitation** under Section 15, Article VI, would[137] amount to judicial legislation.

iii. Nature of the power of appointment

Appointment is intrinsically an executive act; it is a *discretionary* power that must be exercised by the Chief Executive according to his best lights.[138] It involves a question of policy that only the appointing authority can decide. At the presidential level, his or her choice of an appointee involves a very highly political and administrative act of decision making that calls for considerations of wisdom, convenience, utility, and national interests; it is a power that the Constitution or the law has vested in him in his various roles.[139]

From the prism of Section 15, Article VII of the 1987 Constitution, I find it clear that the framers of the Constitution presumed the appointments made before the fixed two-month period preceding the elections to be generally characterized by good faith on the President's part. The good faith (or lack of it) of the President and his appointee, are matters that do not fall under the specific concern of Section 15, Article VII.

b. Combined reading of these considerations

In sum, I find the following basic considerations to be relevant in the resolution of the issues before us: ***first***, the definition of appointment in jurisprudence as an executive act (characterizing it as an "unequivocal act"

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135 With or without reference to the appointee. For instance, while the Constitution allows the President to make ad interim appointments, the Constitution nevertheless limits its effectivity "only until disapproved by the Commission on Appointments or until the next adjournment of the Congress" without reference to the appointee. With reference to the appointee, the President is prohibited from appointing his "spouse and relatives by consanguinity or affinity within the fourth civil degree" "as Members of the Constitutional Commissions, or the Office of the Ombudsman, or as Secretaries, Undersecretaries, chairmen or heads of bureaus or offices, including government-owned or controlled corporations and their subsidiaries.

Section 15, Article VII itself is a limitation of the appointing power of the President that does not make any reference to the appointee.

136 By prescribing the minimum qualifications for office.

137 *Sarmiento v. Mison,* 240 Phil. 514, 526 (1987).

138 *Pamantasan ng Lungsod ng Maynila v. Intermediate Appellate Court*, 224 Phil. 178, 187 (1985); and *Luego v. Civil Service Commission*, 227 Phil. 305, 307 (1986).

139 See *Espanol v. Civil Service Commission* G.R. No. 85479, March 3, 1992, 206 SCRA 716, 721, 723-724, citing *Abila v. Civil Service Commission, et al*., G.R. No. 92573, June 3, 1991, 198 SCRA 102, 106. From this power, too, flows the power to discipline or remove, as a rule (See *Larin v. Executive Secretary*, 345 Phil. 961 (1997).

of the appointing power and considering it "complete xxx once the last act required of the appointing authority has been complied with"), as opposed to the broad view of the term as a process that involves acts of the appointee; ***second***, the purpose of Section 15, in relation to Section 4 of Article VII of the Constitution, in the light of the *Aytona* ruling and; ***third***, the nature of the power of appointment and the considerations that underlie it.

Based on these considerations, I conclude that **for an appointment to be valid under Section 15, Article VII, the appointment papers must have already been signed, issued or released prior to the constitutional ban, addressed to the head of the office concerned or the appointee himself**. The appointee's acceptance through an oath, assumption of office or any positive act does not find any reference in Section 15, Article VII as this part of the appointment process is already outside the President's power of control and is wholly within the appointee's discretion. **The Constitution could not have envisioned a prohibition on the President that is already beyond the sphere of his executive powers.**

The *ponencia* disagrees with this view and asserts that an appointment will only be valid if all the elements for the completion of its total process are present.[140] It further avers that my argument (that acceptance even after the ban will not affect the appointment's validity as long as the designation and transmittal of the appointment papers were made before the ban sets in), will lead to glaring absurdities, *i.e.*, that in case of the appointee's non-acceptance, the position will be considered occupied and nobody else may be appointed to it; that an incumbent public official, appointed to another public office by the President, will automatically be deemed to occupy the new public office and to have resigned from his first office; and that, if the President is unhappy with an incumbent public official, the President can simply appoint him to another public office, thus remove him from his current post without due process.

I disagree with these contentions.

The act of issuing or releasing the appointment paper (together with the transmittal letter, if any) is the only reliable[141] and unequivocal[142] act that must be completed to show the intent of the appointing power to select the appointee. In other words, the President cannot be considered to have performed the "last act" required of him to complete the exercise of his

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[140] The *ponencia* holds that the following elements should always concur in the making of a valid appointment: (1) authority to appoint and evidence of the exercise of the authority; (2) transmittal of the appointment and evidence of the transmittal; (3) a vacant position at the time of the appointment; and (4) acceptance of the appointment by the appointee who possesses all the qualifications and none of the disqualifications, p. __.

[141] See *Valencia v. Peralta, Jr., supra* note 40, at 694-695.

[142] *Bermudez v. Executive Secretary*, 370 Phil. 769 (1999).

power of appointment if the signing of the appointment is not coupled with its issuance.

Along the same line of thought, because the appointing authority considers both the formal and informal qualifications of the prospective appointee[143] in exercising the power of appointment, the issuance of the appointment is the act that signifies the certainty of his choice. Prior to the issuance of an appointment, the President can choose to issue an appointment to another, or decide not to issue any appointment at all.

After the issuance and *before the appointment is accepted by the appointee*, the **appointment process** still lies within the President's control although the appointment can already be accepted by the appointee**. The President *finally* loses control over the appointment process when the appointee accepts it.** Prior to its acceptance, the President can still recall the appointment he issued and exercise his appointing power anew or completely desist from exercising it.

The appointment ban, however, limits the President's control over the appointment process. When the appointment ban sets in, the President can no longer exercise his appointment power, although the President may recall a previously unaccepted appointment, or revoke an unaccepted one. The President may likewise exercise his appointing power under the exception in Section 15, Article VII of the 1987 Constitution.

These conclusions draw strength from the reality that these acts are the only options that are left to the **sole President's discretion and full control**, and that are inherent and consistent with the President's prerogative as the appointing power.

The full extent of the presidential control over the appointment prior to its acceptance, however, does not and should not materially alter the fact of the issuance as the reckoning point under Section 15, Article VII. Any period prior to the appointee's acceptance is simply a period when the act of appointment, including its issuance, can be said to be complete although the appointment is not yet effective.

These conclusions are consistent with both the tenor and nature of Section 15, Article VII as a limitation against the President's exercise of his

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[143] Every particular job in an office calls for both formal and informal qualifications. Formal qualifications such as age, number of academic units in a certain course, seminars attended, and so forth, may be valuable but so are such intangibles as resourcefulness, team spirit, courtesy, initiative, loyalty, ambition, prospects for the future, and best interests of the service. Given the demands of a certain job; who can do it best should be left to the head of the office concerned provided the legal requirements for the office are satisfied (*Lapinid v. Civil Service Commission, et al.,* 274 Phil. 381, 386 [1991], citing *Gaspar v. Court of Appeals*, 268 Phil. 842 [1990]).

power to appoint. **Since the acts pertaining to the appointee himself are beyond the President's control, these same acts should not be covered by a provision that only essentially limits the executive power of appointment.** This too, is consistent, with the constitutional objective of preventing the outgoing president from tying the hands of the incoming president through a belated *exercise* of the appointing power.

Moreover, these conclusions will not lead to the glaring absurdities that the *ponencia* illustrates. Contrary to the *ponencia*'s arguments, we do not totally do away with or disregard the fact that **an appointment is also a process**. The Court should only make a clear and careful delineation that, for purposes of the prohibition against the President's midnight appointments under Section 15, Article VII, the interpretation should be limited to the notion of an appointment as an executive act or the President's exercise of his appointing power. The prohibition could not have included acts (such as the appointee's acceptance) that are outside the President's scope of executive powers.

In other words, what is applicable in the present case is the term "appointment" in the context of the President's appointing power, a concept which, as discussed above, is constitutionally, statutorily, and jurisprudentially acknowledged in our jurisdiction *vis-à-vis* appointment as a process. The focus in the present case is the limitation on the President's appointing power, an executive act, where the acts of third persons, such as the appointee, is not material in the resolution of the case.

Thus, an acceptance is still necessary in order for the appointee to validly assume his post and discharge the functions of his new office, and thus make the appointment effective. There can never be an instance where the appointment of an incumbent will automatically result in his resignation from his present post and his subsequent assumption of his new position; or where the President can simply remove an incumbent from his current office by appointing him to another one. I stress that acceptance through oath or any positive act is still indispensable before any assumption of office may occur.

Moreover, contrary to the *ponencia*'s assertion, the appointee's non-acceptance cannot in any way translate to a situation where the position will be considered occupied and nobody else may be appointed to it. As already discussed, before the appointee's acceptance of his appointment, the power of appointment still subsists and is within the President's control. Hence, the appointee's non-acceptance cannot hold the President hostage and prevent him from exercising his power to appoint someone else who is also eligible and qualified for the position.

In addition, such cumbersome interpretation would undermine the broad appointing power of the President and place it at the mercy of bureaucratic processes. It would practically reduce the President and the OES to a virtual housekeeper several months before the appointment ban, to monitor the acceptance of appointments and prevent any prejudice to public service.

i. Section 15 cannot be limited to the mechanical act of "making" the appointment

We cannot also distinguish, as the petitioners did,[144] between the mechanical acts of making an appointment paper, on one hand, and its issuance or release, on the other hand, without ignoring the basic principle of a single Executive. The issuance of an appointment paper and the release of the transmittal letter, if any, necessarily form part of the exercise of the appointing power. Without the issuance that subsequently follows the signing of the appointment papers, it cannot seriously be asserted that the President had indeed completely exercised his appointing authority. This conclusion remains valid even if the act of issuance is not personally accomplished by the President since the President, by necessity, must act through agents and cannot likewise be allowed to circumvent the prohibition against him by allowing officials under his control to do what he himself cannot do directly.[145]

Even Rule IV of the 1998 Revised Omnibus Rules on Appointment and Other Personnel Actions, which petitioners Venturanza, Villanueva and Rosquita ironically cited, provides that "an appointment **issued in accordance with pertinent laws** and rules shall take effect immediately, **upon its issuance** by the appointing authority." The term "laws" mentioned in the Rule necessarily includes the Constitution as the fundamental law. Thus, immediately after issuance, the appointee can already manifest his acceptance by qualifying for the position and assuming office; before them, it is the President who has the full and complete control, and loses this control only upon the appointee's acceptance.

i. a. The role of the MRO

In accomplishing this second stage of the appointment process, the appointment paper and transmittal letter, if any, may be coursed through the

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144 *Rollo* (G.R. No. 203372), p. 31; *rollo* (G.R. No. 206290), pp. 59 and 62.

145 Book IV, Chapter 7, Sec. 38(1) Administrative Code of 1987 reads:
Sec. 39. Secretary's Authority. - (1) The Secretary shall have supervision and control over the bureaus, offices, and agencies under him, subject to the following guidelines: (a) Initiative and freedom of action on the part of subordinate units shall be encouraged and promoted, rather than curtailed, and reasonable opportunity to act shall be afforded those units before control is exercised[.]

MRO. Prudence suggests this course of action not only for the appointee's convenience but for record-keeping purposes. The undisputed testimony of Director Dimaandal of the MRO on this score is as follows:

> Q: What is the effect if a document is released by an office or department within Malacañan without going through the MRO?
>
> A: If a document does not pass through the MRO contrary to established procedure, **the MRO cannot issue a certified true copy of the same** because as far as the MRO is concerned, it does not exist in our official records, hence, not an official document from the Malacañan. There **is no way of verifying the document's existence and authenticity** unless the document is on file with the MRO even if the person who claims to have in his possession a genuine document furnished to him personally by the President. As a matter of fact**,** it is only the MRO which is authorized to issue certified true copies of documents emanating from Malacañan being the official custodian and central repository of said documents. Not even the OES can issue a certified true copy of documents prepared by them (boldfacing supplied).
>
> Q: Why do you say that?
>
> A: Because the MRO is the so-called "gate-keeper" of the Malacañan Palace. All incoming and outgoing documents and correspondence must pass through the MRO. As the official custodian, the MRO is in charge of the official release of documents.
>
> x x x x
>
> Q: Assuming the MRO has already received the original appointment paper signed by the President together with the transmittal letter prepared by the OES, you said that the MRO is bound to transmit these documents immediately, that is, on the same day?
>
> A: Yes.

However, contrary to the respondents' claim,[146] **failure to course an appointment through the MRO for official release is not fatal**. Otherwise, an office[147] in the Executive department particularly within the Office of the President can make or break an appointment by its own inaction or even contrary to the instruction of the Chief Executive,[148] thereby

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146 Comment in G.R. No. 203372; Comment in G.R. No. 206290, pp. 292-294.

147 MRO Service Guide, p. 5, *rollo*, p. 526 (G.R. No. 206290).

148 As early as *Villena v. Secretary of Interior*, the Court had held:

> Familiarity with the essential background of the type of government established under our Constitution, in the light of certain well-known principles and practices that go with the system, should offer the necessary explanation. With reference to the Executive Department of the government, there is one purpose which is crystal-clear and is readily visible without the projection of judicial searchlight, and that is, the establishment of a single, not plural, Executive. The first section of Article VII of the Constitution, dealing with the Executive Department, begins with the enunciation of the principles that "The executive power shall be vested in a President of the Philippines." This means that the

emasculating the President's power of control and negating his power of appointment.

The president's power of control "of all the executive departments, bureaus, and offices" gives him the authority *to assume directly* the functions of the executive department, bureau and *office*, or interfere with the discretion of its officials and employees[149] from the Cabinet Secretary down to the lowliest clerk[150] or altogether ignore their recommendations.[151]

Thus, the President himself or his Executive Secretary may cause the issuance of the appointment paper and transmittal letter, if any, without need of forwarding it to the MRO *so long as the date of actual issuance or release of the appointment paper* (and transmittal letter, if any) *can otherwise be established by other means and be proven with reasonable certainty* in obeisance to the constitutional prohibition. Since this constitutional limitation on the President's appointing power is triggered only every six years, compliance with this evidentiary requirement to establish with reasonable certainty the timeliness of the issuance of appointment paper should not be difficult to comply with.

Under this situation, I agree with the *ponencia* that the President must not only sign the appointment paper but also intend that the appointment paper be issued.[152]

I disagree, however, with the *ponencia*'s position that "the release of the appointment paper through the MRO is an **unequivocal** act that signifies the President's intent of its release."[153] The release of the appointment paper through the MRO is not the only act that can signify the President's intent. The President may also cause the issuance of the appointment paper and transmittal letter, if any, without the need of forwarding it to the MRO *so long as the date of actual issuance or release of the appointment paper* (and transmittal letter, if any) *can otherwise be established by other means and be proven with reasonable certainty*.

> President of the Philippines is the Executive of the Government of the Philippines, and no other.

149 *Biraogo v. The Philippine Truth Commission of 2010*, G.R. No. 192935, December 7, 2010, 637 SCRA 78, 154.

150 *Rufino v. Enriga*, 528 Phil. 473 (2006). In *National Electrification Administration v. Commission on Audit*, 427 Phil. 464, 485 (2002), the Court said:

> Executive officials who are subordinate to the President should not trifle with the President's constitutional power of control over the executive branch. There is only one Chief Executive who directs and controls the entire executive branch all other executive officials must implement in good faith his directives and orders. This is necessary to provide order, efficiency and coherence in carrying out the plans, policies and programs of the executive branch.

151 *Bermudez v. Torres*, G.R. No. 131429, August 4, 1999, 311 SCRA 733.

152 *Ponencia*.

153 Id.

I also agree with the *ponencia* that the possession of the original appointment paper is not indispensable to authorize an appointee to assume office. I, however, disagree with its view that "in case of loss of the original appointment paper, the appointment **must** be evidenced by a certified true copy by the proper office, in this case the MRO."[154] In case of loss of the original appointment paper, the certification may not only be evidenced by a certified true copy from the MRO but can also be established by other means and be proven with reasonable certainty.

c. The extension of Section 15, Article VII to the acts of the appointee is completely unwarranted by the text and intent of the Constitution

In upholding E.O. No. 2 that the acts required of the appointee must also be accomplished before the ban, the CA opined that -

> this mandated period banned by the Constitution, no less, should enjoin not only the act of the President in making appointments, but all other acts that would give effect or allow the furtherance of the President's prohibited act of making appointment within the same prohibited period, if only to breathe life and give full effect to the spirit behind the Constitutional provision limiting the power of the President. This deduction proceeds from the settled rule that an appointment, in order to be effective, requires the acceptance of the appointee.
>
> x x x x
>
> In requiring that the acceptance of the appointment, i.e., the taking of an oath and the assumption of office, be also done prior to the ban, E.O. No. 2 merely implements in full force the Constitutional considerations of practicality and logic enshrined in the provision on midnight appointments. Since the appointment of the President only becomes effective upon the appointee's acceptance, it stands to reason that the entire process completing an appointment must be done prior to the Constitutionally set period.[155]
>
> What worth is it to prohibit the President from making an appointment that is not effective anyway? It would be useless to prohibit an incomplete and ineffective appointment. To rule otherwise is to make the intent of the Constitutional provision not only purely illusory, but would also open the floodgates to possible abuse. The outgoing President may x x x [simply] antedate [the] appointment papers to make it appear that they were legally signed prior to the ban[.]

The CA's reasoning, unfortunately, does not validate its conclusion. The CA upheld the extension of the scope of the prohibition to the acts of

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154 Id. at 16.

155 CA Decision in G.R. No. 203372, pp. 15-16; CA Decision in G.R. No. 206290, pp. 23-24.

the appointee on the reasoning that these acts "give effect or allow the furtherance of the President's prohibited act of making appointments within the same prohibited period." The CA ruling obviously failed to consider the situation where the making and issuance of the appointments were made *outside* of the prohibited period.

To be sure, limiting the term "appointment" to the mechanical act of *making* the appointment, *i.e.*, the date appearing on the appointment paper, will severely encroach on the constitutional prerogatives of the incoming president. An appointment whose validity stands solely on the date appearing on the appointment paper will practically leave the operation of the appointment ban at the sole determination of the outgoing President since he can simply antedate the appointment to avoid the prohibition. This situation would bring us back to the days of *Aytona* when the validity of the appointment would have no reference to specific time frames but would be resolved on a case-to-case basis, rendering practically useless the elevation and modification of the *Aytona* ruling into a constitutional provision.

With the date of actual issuance or release as the reckoning point under the Constitution, however, the feared "encroachment" on the prerogative of the incoming President loses ground: if the appointee rejects the appointment at a time when the ban has already set in, then the President's exercise of his appointing power simply failed to produce the desired outcome. If the appointee accepts the appointment (which was actually issued before the ban) during the ban, then the acceptance simply renders the *timely exercise* of the power of appointment ***efficacious***. The fact remains that before or after the ban sets in, the President remains to be the Chief Executive until his successor legally assumes the Presidency; and before the ban sets in, the Constitution allows him to exercise his power of appointment, subject only to constitutional limitations. **Regardless of the appointee's action, the prohibition is maintained since the third stage in the appointment process is no longer within the outgoing President's control. The evils sought to be addressed by Section 15 is kept intact by a *constitutionally timely exercise* of the appointing power**.[156]

The conclusion I reach is but in keeping with the common observation that presidential appointees do not necessarily accept their appointments right away since most (if not all) of these appointees have current professional affiliations or undertakings elsewhere, be it in the government or in the private sector, which they need to wind up before assuming their new positions. This is an obvious fact that the framers of the Constitution could not have ignored in crafting Section 15, Article VII.

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[156] The CA's ruling implies that a timely issued appointment has an expiration date that coincides with the date of the appointment ban, such that, if the appointee does not act on his appointment before its expiration, there is no longer any appointment that he can accept later on. This implication obviously finds no support both in the language and intent of Section 15, Article VII.

Consequently, assumption of office or taking of oath of office may take some time after their appointment papers have been issued. Including these acts within the phrase "make appointments" is a completely unwarranted expansion of the text and a clear departure from the intent of the Constitution. In this light, **E.O. No. 2 is unconstitutional to the extent that it unduly expanded the scope of prohibition in Section 15, Article VII.** [157]

While I maintain my view that subsequent acts of the appointee need not be made before the ban, none of the petitioners however have shown that their appointment papers (and transmittal letter) have been issued (and released) before the ban. The presumption of regularity of official acts cannot alter the fact that the dates appearing on the petitioners' appointment papers (March 5, 2010; February 23, 2010; March 3, 2010; March 5, 2010; and March 1, 2010) and transmittal letters (March 8, 2010 and March 9, 2010) only establish that the documents were made or signed on the date indicated, that is, before the ban. It does not establish the fact that it was *issued* and released on the date indicated.[158] While it would have been normal to indicate the date of issuance of appointment, had the appointments been coursed through the MRO, the absence of that date is something that cannot be the subject of this Court's speculations.[159]

In the case of Garafil, the MRO received her appointment and transmittal papers only on May 13, 2010. The transmittal letter that was turned over to the MRO was already stamped "released" by the OES *without showing when the OES actually issued and released the same*.

In the case of Venturanza, while his appointment papers were sent to the MRO, the MRO released the same only on March 12, 2013 which is *the same date the OES forwarded it to the MRO*.[160] In short, *when his appointment papers were officially issued, the appointment ban was already in effect*.

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157 However, while the appointee's acts may be made even after the appointment ban, the constitution presupposes that the appointment made will take effect or the office involved will be vacant prior to the effectivity of the constitutional ban. This is clearly deduced from E.O. No. 2 itself. E.O. No. 2 Section 1b reads:

> SECTION 1. Midnight Appointments Defined. – The following appointments shall be considered as midnight appointments:
>
> x x x x
>
> (b) Those made prior to March 11, 2010, but to take effect after said date or appointments to office that would be vacant only after March 11, 2010.

158 This is where the advisability of coursing the appointment through the MRO comes in.

159 In this regard, we cannot totally discount Director Dimaandal's testimony that the presidential appointments made in March 2010 alone reached more than 800 and that out of this number, only 133 were appointment papers were released through the MRO (Rollo, pp. 468-470, G.R. No. 206290) in explaining the absence of proof as to the date of actual issuance/release of the appointment papers of the petitioners.

160 *Rollo* (G.R. No. 206290), p. 466 (testimony of Director Dimaandal).

In the case of Villanueva and Rosquita, *nothing supports their claim that their appointment papers were actually issued on the date appearing on their respective appointment papers*.

Lastly, in the case of Tamondong, his appointment was not coursed through the MRO. His letter of appointment was only released to him on March 25, 2010, already 14 days beyond the March 11, 2010 reckoning period. Also, *it was only on May 6, 2010 that the MRO actually received his appointment papers*.

I am not unaware that the interpretation above of Section 15, Article VII does not totally foreclose any circumvention of the prohibition against midnight appointment since the President can still "fix" the date of the issuance of the appointment paper. That may be a possibility – a possibility with legal repercussions that the Court is wholly unprepared to indulge in for the moment, for it involves a presumption on factual issues that were never raised nor are even evident in the circumstances of the present case. Nonetheless, the possibility of abuse of power does not argue against its existence nor destroy, diminish, or remove the power; much less does this authorize the Court to depart from its constitutional role of interpreting a textually evident Constitutional provision according to its letter and the spirit that animates it.

In view of the foregoing, I vote that the Court RESOLVES to:

1. **DISMISS** the ***petition for certiorari*** in G.R. No. 209138 for technical deficiencies;

2. **PARTIALLY GRANT** the ***petition for review on certiorari*** by declaring the phrase *"including all appointments bearing dates prior to March 11, 2010 where the appointee has accepted, or taken his oath, or assumed public office on or after March 11, 2010"* in Section 1(a) of E.O. No. 2 **UNCONSTITUTIONAL** for unduly expanding the scope of the prohibition on appointments under Section 15, Article VII of the 1987 Constitution; and

3. **DENY** the ***petitions for review on certiorari*** insofar as they seek (i) to uphold the petitioners' respective appointments and (ii) their reinstatement to the positions they held immediately prior to the issuance of E.O. No. 2.

ARTURO D. BRION
Associate Justice