

JOSE MIGUEL T. ARROYO, PETITIONER, VS. DEPARTMENT OF JUSTICE; COMMISSION ON ELECTIONS; HON. LEILA DE LIMA, IN HER CAPACITY AS SECRETARY OF THE DEPARTMENT OF JUSTICE; HON. SIXTO ...

G.R. No. 199082. July 23, 2013

Ponente: PERALTA, J.

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PERALTA, J.:

For resolution are the separate motions for reconsideration filed by movants Gloria Macapagal Arroyo (GMA)[1] in G.R. No. 199118 and Jose Miguel T. Arroyo (Mike Arroyo)[2] in G.R. No. 199082 praying that the Court take a second look at our September 18, 2012 Decision[3] dismissing their petitions and supplemental petitions against respondents Commission on Elections (Comelec), the Department of Justice (DOJ), Senator Aquilino M. Pimentel III (Senator Pimentel), Joint DOJ-Comelec Preliminary Investigation Committee (Joint Committee) and DOJ-Comelec Fact-Finding Team (Fact-Finding Team), et al.

For a better perspective, we briefly state the relevant factual and procedural antecedents as found by the Court in the assailed decision, to wit:

On August 15, 2011, the Comelec and the DOJ issued Joint Order No. 001-2011 creating and constituting a Joint Committee and Fact-Finding Team (referred to as Joint Panel) on the 2004 and 2007 National Elections electoral fraud and manipulation cases. The Joint Committee was mandated to conduct the necessary preliminary investigation on the basis of the evidence gathered and the charges recommended by the Fact-Finding Team. The Fact-Finding Team, on the other hand, was created for the purpose of gathering real, documentary, and testimonial evidence which can be utilized in the preliminary investigation to be conducted by the Joint Committee. Pursuant to Section 7[4] of the Joint Order, on August 23, 2011, the Joint Committee promulgated its Rules of Procedure.

In its Initial Report[5] dated October 20, 2011, the Fact-Finding Team concluded that manipulation of the results in the May 14, 2007 senatorial elections in the provinces of North and South Cotabato, and Maguindanao was indeed perpetrated.[6] The Fact-Finding Team recommended, among others, that petitioner Benjamin S. Abalos, Sr. (Abalos) be subjected to preliminary investigation for electoral sabotage for conspiring to manipulate the election results in North and South Cotabato; that GMA and Abalos be subjected to another preliminary investigation for manipulating the election results in Maguindanao;[7] and, that Mike Arroyo be subjected to further investigation.[8] The case was docketed as DOJ-Comelec Case No. 001-2011.

Meanwhile, on October 17, 2011, Senator Pimentel filed a Complaint-Affidavit[9] for Electoral Sabotage against petitioners and twelve others, and several John Does and Jane Does. The case was docketed as DOJ-Comelec Case No. 002-2011.

On October 24, 2011, the Joint Committee issued two subpoenas against petitioners in DOJ-Comelec Case Nos.

001-2011 and 002-2011.[10] On November 3, 2011, petitioners, through counsel, appeared before the Joint Committee[11] and respondents therein were ordered to submit their Counter-Affidavits by November 14, 2011.[12]

Thereafter, petitioners filed before the Court separate Petitions for Certiorari and Prohibition with Prayer for the Issuance of a Temporary Restraining Order (TRO) and/or Writ of Preliminary Injunction assailing the creation of the Joint Panel.[13] The petitions were eventually consolidated.

On November 14, 2011, Mike Arroyo filed a Motion to Defer Proceedings[14] before the Joint Committee, in view of the pendency of his petition before the Court. On the same day, GMA filed before the Joint Committee an Omnibus Motion Ad Cautelam[15] to require Senator Pimentel to furnish her with documents referred to in his complaint-affidavit and for the production of election documents as basis for the charge of electoral sabotage. GMA prayed that she be allowed to file her counter-affidavit within ten (10) days from receipt of the requested documents.[16] Petitioner Abalos, for his part, filed a Motion to Suspend Proceedings (Ex Abundante Ad Cautelam),[17] in view of the pendency of his petition brought before the Court.

In an Order[18] dated November 15, 2011, the Joint Committee denied the aforesaid motions of petitioners. GMA, subsequently, filed a motion for reconsideration.[19]

On November 16, 2011, the Joint Committee promulgated a Joint Resolution which was later indorsed to the Comelec.[20] On November 18, 2011, the Comelec en banc issued a Resolution[21] approving and adopting the Joint Resolution subject to modifications. The Comelec resolved, among others, that an information for electoral sabotage be filed against GMA and Abalos, while the charges against Mike Arroyo be dismissed for insufficiency of evidence.

On even date, pursuant to the above Resolution, the Comelec's Law Department filed with the Regional Trial Court (RTC), Pasay City, an Information against petitioner GMA, Governor Andal Ampatuan, Sr., and Atty. Lintang H. Bedol, for violation of Section 42(b)(3) of Republic Act (RA) No. 9369, amending Section 27 (b) of RA 6646, docketed as Criminal Case No. RPSY-11-04432-CR.[22] The case was raffled to Branch 112 and the corresponding Warrant of Arrest was issued which was served on GMA on the same day.[23]

On November 18, 2011, GMA filed with the RTC an Urgent Omnibus Motion Ad Cautelam[24] with leave to allow the Joint Committee to resolve the motion for reconsideration filed by GMA, to defer issuance of a warrant of arrest and a hold departure order, and to proceed to judicial determination of probable cause. She, likewise, filed with the Comelec a Motion to Vacate Ad Cautelam[25] praying that its Resolution be vacated for being null and void. The RTC, nonetheless, issued a Warrant for her arrest which was duly served. GMA was later arraigned and she entered a plea of "not guilty." She was, for some time, on hospital arrest but was able to obtain temporary liberty when her motion for bail was granted. At present, she is again on hospital arrest by virtue of a warrant issued in another criminal case.

On September 18, 2012, the Court rendered the assailed Decision, the dispositive portion of which reads:

WHEREFORE, premises considered, the petitions and supplemental petitions are DISMISSED. Comelec Resolution No. 9266 dated August 2, 2011, Joint Order No. 001-2011 dated August 15, 2011, and the Fact-Finding Team's Initial Report dated October 20, 2011, are declared VALID. However, the Rules of Procedure on the Conduct of Preliminary Investigation on the Alleged Election Fraud in the 2004 and 2007 National Elections is declared INEFFECTIVE for lack of publication.

In view of the constitutionality of the Joint Panel and the proceedings having been conducted in accordance with Rule 112 of the Rules on Criminal Procedure and Rule 34 of the Comelec Rules of Procedure, the conduct of the preliminary investigation is hereby declared VALID.

Let the proceedings in the Regional Trial Court of Pasay City, Branch 112, where the criminal cases for electoral sabotage against petitioners GMA and Abalos are pending, proceed with dispatch.

SO ORDERED.[26]

Hence, these motions for reconsideration.

Issues

Mike Arroyo reiterates his arguments on the independence of the Comelec as basis in nullifying the subject joint DOJ-Comelec resolutions. Echoing Justice Arturo Brion in his Dissenting and Concurring Opinion,[27] Mike Arroyo insists that the creation of the Joint Panel undermines the decisional independence of the Comelec.[28]

Mike Arroyo also maintains that the DOJ should conduct preliminary investigation only when deputized by the Comelec but not exercise concurrent jurisdiction.[29] Finally, as has been repeatedly pointed out in his earlier pleadings before the Court, Mike Arroyo claims that the proceedings involving the electoral sabotage case were rushed because of pressures from the executive branch of the government.[30]

For her part, GMA claims that in availing of the procedural remedies available, she merely exercised her earnest efforts to defend herself and should not have been deemed by the Court as acts which purportedly tend to demonstrate that she either waived or forfeited her right to submit her counter-affidavit and countervailing evidence.[31] Citing several cases decided by the Court, she likewise faults the Court in not upholding her right to ask for additional time within which to submit her counter-affidavit and countervailing evidence.[32] GMA highlights that the subject Comelec Resolution creating the Joint Panel is different from the previous Comelec resolutions requesting the DOJ Secretary to assign prosecutors to assist the Comelec, as the latter emphasize the role of the DOJ as deputized agency in the conduct of preliminary investigation. She maintains that it is the Comelec and not the Joint Committee that has the primary, if not exclusive, authority to conduct preliminary investigation of election cases.[33]

In their Consolidated Comment,[34] respondents defend the creation of the Joint Committee and argue that it does not undermine the independence of the Comelec as a constitutional body because it is still the Comelec that ultimately determines probable cause.[35] As to the conduct of the preliminary investigation, respondents maintain that no rights were violated as GMA was afforded the opportunity to defend herself, submit her counter-affidavit and other countervailing evidence.[36] They, thus, consider GMA's claim of availing of the remedial measures as "delaying tactics" employed to thwart the investigation of charges against her by the Joint Committee.[37]

The Court's Ruling

Clearly from the above discussion, movants raise issues that have been thoroughly explained by the Court in the assailed decision. The issues were all addressed and the explanation was exhaustive, thus, we find no reason to disturb the Court's conclusions.

At any rate, if only to address the motions of the movants herein and to put an end to the questions attached to the creation of the Joint Panel and, consequently, to the performance of their assigned tasks, we hereby reiterate our findings and conclusions made in the assailed decision.

This is not the first time that the Court is confronted with the issue of whether the Comelec has the exclusive power to investigate and prosecute cases of violations of election laws. In *Barangay Association for National Advancement and Transparency (BANAT) Party-List v. Commission on Elections*,[38] the constitutionality of Section 43[39] of RA 9369[40] had already been raised by petitioners therein and addressed by the Court. While recognizing the Comelec's exclusive power to investigate and prosecute cases under Batas Pambansa Bilang 881

or the Omnibus Election Code, the Court pointed out that the framers of the 1987 Constitution did not have such intention. This exclusivity is thus a legislative enactment that can very well be amended by Section 43 of RA 9369. Therefore, under the present law, the Comelec and other prosecuting arms of the government, such as the DOJ, now exercise concurrent jurisdiction in the investigation and prosecution of election offenses.

Indeed, as aptly pointed out by GMA, there is a discrepancy between Comelec Resolution No. 3467[41] dated January 12, 2001 and Joint Order No. 001-2011, dated August 15, 2011, creating and constituting a Joint Committee and Fact-Finding Team on the 2004 and 2007 National Elections electoral fraud and manipulation cases. However, GMA seemed to miss the date when these two resolutions were promulgated by the Comelec. It is noteworthy that Comelec Resolution No. 3467 was issued when Section 265 of the Omnibus Election Code was still effective, while Joint Order No. 001-2011 as well as Comelec Resolution Nos. 8733[42] and 9057[43] mentioned in the assailed decision but missed out by GMA in her motion, were issued during the effectivity of Section 43 of RA 9369, giving the Comelec and other prosecuting arms of the government the concurrent jurisdiction to investigate and prosecute election offenses. This amendment paved the way for the discrepancy. In Comelec Resolution No. 3467, the Comelec maintained the continuing deputation of prosecutors and the Comelec Law Department was tasked to supervise the investigatory and prosecutory functions of the task force pursuant to the mandate of the Omnibus Election Code. However, with the amendment, the Comelec likewise changed the tenor of the later resolutions to reflect the new mandate of the Comelec and other prosecuting arms of the government now exercising concurrent jurisdiction. Thus, the Comelec Law Department and the Office of the Chief State Prosecutor of the DOJ were tasked to jointly supervise the investigatory and prosecutory functions of the Comelec-DOJ Task Force. Considering, therefore, that the later resolutions, including Joint Order No. 001-2011, were issued pursuant to Section 43 of RA 9369 amending Section 265 of BP 881 which was declared “constitutional” in *Banat*, there is no reason for us to declare otherwise. To maintain the previous role of other prosecuting arms of the government as mere deputies despite the amendment would mean challenging Section 43 of RA 9369 anew which has already been settled in *Banat*.

To be sure, the creation of a Joint Committee is not repugnant to the concept of “concurrent jurisdiction” authorized by the amendatory law. As we explained in our September 18, 2012 Decision:

x x x The doctrine of concurrent jurisdiction means equal jurisdiction to deal with the same subject matter. Contrary to the contention of the petitioners, there is no prohibition on simultaneous exercise of power between two coordinate bodies. What is prohibited is the situation where one files a complaint against a respondent initially with one office (such as the Comelec) for preliminary investigation which was immediately acted upon by said office and the re-filing of substantially the same complaint with another office (such as the DOJ). The subsequent assumption of jurisdiction by the second office over the cases filed will not be allowed. Indeed, it is a settled rule that the body or agency that first takes cognizance of the complaint shall exercise jurisdiction to the exclusion of the others.

x x x x

None of these problems would likely arise in the present case. The Comelec and the DOJ themselves agreed that they would exercise their concurrent jurisdiction jointly. Although the preliminary investigation was conducted on the basis of two complaints – the initial report of the Fact-Finding Team and the complaint of Senator Pimentel – both complaints were filed with the Joint Committee. Consequently, the complaints were filed with and the preliminary investigation was conducted by only one investigative body. Thus, we find no reason to disallow the exercise of concurrent jurisdiction jointly by those given such authority. This is especially true in this case given the magnitude of the crimes allegedly committed by petitioners. The joint preliminary investigation also serves to maximize the resources and manpower of both the Comelec and the DOJ for the prompt disposition of the cases.[44]

Notwithstanding the grant of concurrent jurisdiction, the Comelec and the DOJ nevertheless included a provision in the assailed Joint Order whereby the resolutions of the Joint Committee finding probable cause for election offenses shall still be approved by the Comelec in accordance with the Comelec Rules of Procedure.[45] With more reason, therefore, that we cannot consider the creation of the Joint Committee as an abdication of the Comelec's independence enshrined in the 1987 Constitution.

Finally, we focus on the validity of the preliminary investigation conducted by the Joint Committee.

The procedure in conducting the preliminary investigation is governed by Rule 112 of the Revised Rules on Criminal Procedure and Rule 34 of the Comelec Rules of Procedure. Under both Rules,[46] the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense, within ten (10) days from receipt of the subpoena, with the complaint and supporting affidavits and documents.[47] Also in both Rules, respondent is given the right to examine evidence, but such right of examination is limited only to the documents or evidence submitted by complainants which she may not have been furnished and to copy them at her expense.[48]

As to the alleged denial of GMA's right to examine documents, we maintain that no right was violated in view of the limitation of such right as set forth above. We reiterate our explanation in the assailed decision, to wit:

While it is true that Senator Pimentel referred to certain election documents which served as bases in the allegations of significant findings specific to the protested municipalities involved, there were no annexes or attachments to the complaint filed. As stated in the Joint Committee's Order dated November 15, 2011 denying GMA's Omnibus Motion Ad Cautelam, Senator Pimentel was ordered to furnish petitioners with all the supporting evidence. However, Senator Pimentel manifested that he was adopting all the affidavits attached to the Fact-Finding Team's Initial Report. Therefore, when GMA was furnished with the documents attached to the Initial Report, she was already granted the right to examine as guaranteed by the Comelec Rules of Procedure and the Rules on Criminal Procedure. Those were the only documents submitted by the complainants to the Committee. If there are other documents that were referred to in Senator Pimentel's complaint but were not submitted to the Joint Committee, the latter considered those documents unnecessary at that point (without foreclosing the relevance of other evidence that may later be presented during the trial) as the evidence submitted before it were considered adequate to find probable cause against her. x x x[49]

Neither was GMA's right violated when her motion for extension of time within which to submit her counter-affidavit and countervailing evidence was consequently denied. The Rules use the term "shall" in requiring the respondent to submit counter-affidavit and other countervailing evidence within ten (10) days from receipt of the subpoena. It is settled that the use of the word "shall" which is a word of command, underscores the mandatory character of the rule.[50] As in any other rule, though, liberality in the application may be allowed provided that the party is able to present a compelling justification for the non-observance of the mandatory rules. In the 2008 Revised Manual for Prosecutors, investigating prosecutors allow or grant motions or requests for extension of time to submit counter-affidavits when the interest of justice demands that respondent be given reasonable time or sufficient opportunity to engage the services of counsel; examine voluminous records submitted in support of the complaint or undertake research on novel, complicated or technical questions or issues of law and facts of the case.[51]

In this case, GMA claimed that she could not submit her counter-affidavit within the prescribed period because she needed to examine documents mentioned in Senator Pimentel's complaint-affidavit. It appeared, however, that said documents were not submitted to the Joint Committee and the only supporting documents available were those attached to the Initial Report of the Fact-Finding Team. Admittedly, GMA was furnished those documents. Thus, at the time she asked for the extension of time within which to file her counter-affidavit, she very well knew

that the documents she was asking were not in the record of the case. Obviously, she was not furnished those documents because they were not submitted to the Joint Committee. Logically, she has no right to examine said documents. We cannot, therefore, fault the Joint Committee in consequently denying her motion for extension to file counter-affidavit as there was no compelling justification for the non-observance of the period she was earlier required to follow.

And as we held in the assailed decision:

There might have been overzealousness on the part of the Joint Committee in terminating the investigation, endorsing the Joint Resolution to the Comelec for approval, and in filing the information in court. However, speed in the conduct of proceedings by a judicial or quasi-judicial officer cannot per se be instantly attributed to an injudicious performance of functions. The orderly administration of justice remains the paramount consideration with particular regard to the peculiar circumstances of each case. To be sure, petitioners were given the opportunity to present countervailing evidence. Instead of complying with the Joint Committee's directive, several motions were filed but were denied by the Joint Committee. Consequently, petitioners' right to submit counter-affidavit and countervailing evidence was forfeited. Taking into account the constitutional right to speedy disposition of cases and following the procedures set forth in the Rules on Criminal Procedure and the Comelec Rules of Procedure, the Joint Committee finally reached its conclusion and referred the case to the Comelec. The latter, in turn, performed its task and filed the information in court. Indeed, petitioners were given the opportunity to be heard. They even actively participated in the proceedings and in fact filed several motions before the Joint Committee. Consistent with the constitutional mandate of speedy disposition of cases, unnecessary delays should be avoided. [52]

Finally, in our assailed decision, we already took judicial notice that not only did GMA enter a plea of "not guilty," she also filed a Motion for Bail and after due hearing, it was granted. Apparently, she benefited from the RTC Order giving her temporary liberty. In filing the motion before the RTC and actively participating therein, she has chosen to seek judicial remedy before the RTC where the electoral sabotage case is pending instead of the executive remedy of going back to the Joint Committee for the submission of her counter-affidavit and countervailing evidence. Besides, as thoroughly discussed in the assailed decision, the irregularity or even the absence of preliminary investigation does not impair the validity of the information filed against her.

WHEREFORE, premises considered, the Motions for Reconsideration are DENIED for lack of merit.

SO ORDERED.

Velasco, Jr., Bersamin, Del Castillo, Villarama, Jr., Perez, Reyes, and Perlas-Bernabe, JJ., concur.

Sereno, C.J., I reiterate my qualified concurring vote joining J. Carpio's opinion of Sept. 2012.

Carpio, J., I reiterate my separate concurring & dissenting opinion of Sept. 18, 2012.

Leonardo-De Castro, J., I concur in the result but join the dissenting opinion of J. Brion on the violation of the constitutionally guaranteed independence of COMELEC.

Brion, J., see dissenting opinion.

Abad, J., join the dissent of J.A.D. Brion.

Mendoza, J., I maintain my previous separate opinion.

Leonen, J., I concur in the result and join J. Carpio's separate concurring and dissenting opinion of Sept 18, 2012.

[1] Rollo (G.R. No. 199118), pp. 845-867.

[2] Rollo (G.R. No. 199082), pp. 1155-1174.

[3] Id. at 1188-1247.

[4] Section 7. Rules of Procedure. – Within forty-eight (48) hours from the issuance of this Joint Order, the Committee shall meet and craft its rules of procedure as may be complementary to the respective rules of DOJ and Comelec, and submit the same to the Secretary of Justice and the Comelec En Banc for approval within five (5) days from such initial meeting.

[5] Rollo (G.R. No. 199118), pp. 58-143.

[6] Id. at 124.

[7] Id. at 132-134.

[8] Id. at 137.

[9] Rollo (G.R. No. 199085), pp. 162-194.

[10] Rollo (G.R. No. 199118), p. 316.

[11] Id. at 17.

[12] Rollo (G.R. No. 199082), p. 21.

[13] Refers to the Joint Committee and Fact-Finding Team.

[14] Rollo (G.R. No. 199082), pp. 158-161.

[15] Rollo (G.R. No. 199118), pp. 250-259.

[16] Id. at 257.

[17] Rollo (G.R. No. 199085), pp. 302-306.

[18] Rollo (G.R. No. 199118), pp. 260-264.

[19] Id. at 224.

[20] Id. at 318.

[21] Id. at 265-273.

[22] Id. at 321.

[23] Id. at 226.

[24] Id. at 274-280.

[25] Id. at 439-451.

[26] Id. at 756-757. (Emphasis in the original)

[27] Rollo (G.R. No. 199082), pp. 1106-1146.

[28] Id. at 1161.

[29] Id. at 1162.

[30] Id. at 1163

[31] Rollo (G.R. No. 199118), pp. 850-854.

[32] Id. at 854-857.

[33] Id. at 860-862.

[34] Id. at 902-932.

[35] Id. at 906-911.

[36] Id. at 911-913.

[37] Id. at 913.

[38] G.R. No. 177508, August 7, 2009, 595 SCRA 477.

[39] Section 43. Section 265 of Batas Pambansa Blg. 881 is hereby amended to read as follows:

“SEC. 265. Prosecution. – The Commission shall, through its duly authorized legal officers, have the power, concurrent with the other prosecuting arms of the government, to conduct preliminary investigation of all election offenses punishable under this Code, and to prosecute the same.”

[40] An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, to Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pambansa Blg. 881, as Amended, Republic Act No. 7166 and Other Related Election Laws, Providing Funds Therefor and for Other Purposes." Approved on 23 January 2007.

[41] “In the Matter of Requesting the Honorable Secretary of Justice to Assign Prosecutors as Members of a Special Task Force to Assist the Commission in the Investigation and Prosecution of Election Offenses in the May 14, 2001 National and Local Elections and Reiterating the Continuing Deputation of Prosecutors under Rule 34 of the Comelec Rules of Procedure.”

[42] “In the Matter of Requesting the Honorable Secretary of Justice to Assign Prosecutors as Members of a Special Task Force Created by the Commission to Conduct the Investigation and Prosecution of Election Offenses in Connection with the May 10, 2010 National and Local Elections”

[43] “In the Matter of Requesting the Honorable Secretary of Justice to Assign Prosecutors as Members of a Special Task Force to Assist the Commission in the Investigation and Prosecution of Elections Offenses in Connection with the October 25, 2010 Barangay and Sangguniang Kabataan Elections”

[44] Rollo (G.R. No. 199118), pp. 734-736. (Citations omitted)

[45] Id. at 733.

[46] Section 3 (c), Rule 112 of the Revised Rules on Criminal Procedure provides:

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. x x x

* * *

Section 6 (a), Rule 34 of the Comelec Rules of Procedure, on the other hand, provides:

(a) If on the basis of the complaint, affidavits and the supporting evidence, the investigating officer finds no ground to continue with the inquiry, he shall recommend the dismissal of the complaint and shall follow the procedure prescribed in Section 8 (c) of this Rule. Otherwise, he shall issue a subpoena to the respondent, attaching thereto a copy of the complaint, affidavits and other supporting documents giving said respondent ten

(10) days from receipt within which to submit counter-affidavits and other supporting documents. The respondent shall have the right to examine all other evidence submitted by the complainant.

[47] Revised Rules of Criminal Procedure, Rule 112, Section 3 (c) and Comelec Rules of Procedure, Rule 34, Section 6 (a).

[48] Rollo (G.R. No. 199118), p. 746.

[49] Id. at 746-747. (Citations omitted)

[50] Tan v. Link, G.R. No. 172849, December 10, 2008, 573 SCRA 479, 490.

[51] 2008 Revised Manual for Prosecutors, p. 89.

[52] Rollo (G.R. No. 199118), pp. 750-751. (Citations omitted).

DISSENTING OPINION

BRION, J.:

I dissent from the majority's conclusion and vote to grant the petitioners' motions for reconsideration. The reasons for this position are explained below.

In his Motion for Reconsideration (Motion), petitioner Jose Miguel T. Arroyo (Arroyo) argues that the creation of a Fact-Finding Team and a Joint Department of Justice (DOJ)-Commission on Elections (COMELEC) Committee violates the constitutionally guaranteed independence of the COMELEC, in particular, its decisional independence. Arroyo also urges the Court to reconsider its September 18, 2012 Decision and take judicial cognizance of: (1) the alleged "rushed resolution of the electoral sabotage cases against co-petitioner Gloria Macapagal-Arroyo (GMA) by the Joint DOJ-COMELEC Committee, having been packed with members of the Executive Branch, as a product of what he claims was the COMELEC's lack of decisional independence"; and (2) "the subsequent grant of bail to GMA as an indication that the evidence of guilt was weak and that the filing of cases against her was done regardless of merit." [1]

For her part, petitioner GMA contends that it is the COMELEC and not the Joint DOJ-COMELEC Committee which has the primary, if not exclusive, authority to conduct preliminary investigation of election cases and that the creation of the Joint DOJ-COMELEC Committee constitutes an abdication by the COMELEC of its constitutional mandate. GMA also argues that she should not be deemed to have waived her right to file her counter-affidavit and submit evidence on her behalf before the Joint DOJ-COMELEC Committee. [2]

I submit this Dissent to point out and stress that the fundamental constitutional transgression the ponencia glossed over is a grave, deep and lasting one that can unsettle our elections and undo the constitutional balance that those who have come before us have worked assiduously to maintain for almost eight decades of constitutional history. The resulting prejudice to our electoral system is the effect of the ponencia's confirmation of the validity of COMELEC Resolution No. 9266 and Joint Order No. 001-2011 — the instruments that called for the creation of a Fact-Finding Team and a Joint DOJ-COMELEC Preliminary Investigation Committee to investigate and conduct preliminary investigation on the 2004 and 2007 National Elections Electoral Fraud and Manipulation case. I maintain that these instruments should be struck down as they violate the constitutionally guaranteed decisional independence of the COMELEC and allow the intrusion of the Executive Department into the administration of our elections.

The enduring constitutional and jurisprudential policy upholding the COMELEC's independence completely abhors any outside intrusion into its authority and functions

The COMELEC's history undeniably shows that its independence was the principal justification for its creation. The people's dissatisfaction with the manner by which the elections were administered by the Executive Department under the then Department of Interior prompted the constitutional amendment of the 1935 Constitution in 1940. This constitutional amendment was deliberately undertaken to place the COMELEC outside the influence of political parties and the control of the other departments of government. This constitutional policy towards protection of the COMELEC's independence has never wavered and in fact, has prevailed even after two amendments of our Constitution in 1973 and 1987. The current 1987 Constitution now provides that the COMELEC, like all other Constitutional Commissions, shall be independent.

Taking cue from the people's protectionist policy, the Court had very zealously guarded the COMELEC's independence against various forms of executive intrusion as exemplified in the cases of *Nacionalista Party v. Bautista*,^[3] *Brillantes, Jr. v. Yorac*,^[4] and *Atty. Macalintal v. Comelec*.^[5]

In *Nacionalista Party v. Bautista*,^[6] the Court invalidated President Quirino's designation of Solicitor General Bautista as Acting Member of the COMELEC because the designation was repugnant to the constitutionally guaranteed independence of the COMELEC, the Court pointedly stated:

Under the Constitution, the Commission on Elections is an independent body or institution (Article X of the Constitution), just as the General Auditing Office is an independent office (Article XI of the Constitution). Whatever may be the nature of the functions of the Commission on Elections, the fact is that the framers of the Constitution wanted it to be independent from the other departments of the Government. x x x

By the very nature of their functions, the members of the Commission on Elections must be independent. They must be made to feel that they are secured in the tenure of their office and entitled to fixed emoluments during their incumbency (economic security), so as to make them impartial in the performance of their functions – their powers and duties. They are not allowed to do certain things, such as to engage in the practice of a profession; to intervene, directly or indirectly, in the management or control of any private enterprise; or to be financially interested in any contract with the Government or any subdivision or instrumentality thereof (sec. 3, Article X, of the Constitution). These safeguards are all conducive or tend to create or bring about a condition or state of mind that will lead the members of the Commission to perform with impartiality their great and important task and functions. That independence and impartiality may be shaken and destroyed by a designation of a person or officer to act temporarily in the Commission on Elections. And, although Commonwealth Act No. 588 provides that such temporary designation "shall in no case continue beyond the date of the adjournment of the regular session of the National Assembly (Congress) following such designation," still such limit to the designation does not remove the cause for the impairment of the independence of one designated in a temporary capacity to the Commission on Elections. It would be more in keeping with the intent, purpose and aim of the framers of the Constitution to appoint a permanent Commissioner than to designate one to act temporarily. Moreover, the permanent office of the respondent may not, from the strict legal point of view, be incompatible with the temporary one to which he has been designated, tested by the nature and character of the functions he has to perform in both offices, but in a broad sense there is an incompatibility, because his duties and functions as Solicitor General require that all his time be devoted to their efficient performance. Nothing short of that is required and expected of him.^[7] (emphases ours)

This ruling and its tenor have been reiterated in all the subsequent cases involving COMELEC independence, except in the present case where the Court looked the other way and allowed the COMELEC to share its decisional independence with the DOJ, an agency under the supervision, control and influence of the President.

I submit that by doing this, the majority wrote away 78 years of history of COMELEC independence in favor of the Executive's intrusion into its authority and functions.

The shared DOJ-COMELEC investigatory
and prosecutory arrangement under COMELEC
Resolution No. 9266 and Joint Order
No. 001-2011 violates the constitutionally
guaranteed decisional independence of the COMELEC

A fundamental point of disagreement with the ponencia relates to the nature of the independence that the Constitution guarantees the COMELEC in the exercise of its power to investigate and prosecute election offenses.

In the present case, the "independence" that the Constitution guarantees the COMELEC should be understood in the context of its "decisional independence" or the COMELEC's "capacity to perform its investigative and prosecutory functions according to its own discretion and independent consideration of the facts, the evidence and the applicable law free from attempts by the legislative or executive branches or even the public to influence the outcome of the case." [8] This simply means that the COMELEC, in the exercise of its power to investigate and prosecute election offenses, must be protected from unwarranted encroachment or intrusion by the other branches of government – in this case, the Executive Branch.

My core objection relates to the novel method by which the COMELEC exercised its power to investigate and prosecute the election cases against the petitioners. Under the terms of Joint Order No. 001-2011, the COMELEC, as an independent constitutional body, was fused with the DOJ, the prosecutorial arm of the Executive Branch. I pointed this out in my previous Opinion, as follows:

To point out the obvious, the Fact-Finding Team, on the one hand, is composed of five members from the DOJ and two members from the COMELEC. This team is, in fact, chaired by a DOJ Assistant Secretary. Worse, the Fact-Finding Team is under the supervision of the Secretary of DOJ and the Chairman of the COMELEC or, in the latter's absence, a Senior Commissioner of the COMELEC.

On the other hand, the Joint DOJ-COMELEC Preliminary Investigation Committee is composed of three (3) officials coming from the DOJ and two (2) officials from the COMELEC. Prosecutor General Claro A. Arellano from the DOJ is also designated as Chairperson of the Committee. Not to be forgotten also is that budget and financial support for the operation of the Committee and the Fact-Finding Team shall be sourced from funds of the DOJ and the COMELEC, as may be requested from the Office of the President. This, again, is a perfect example of an incremental change that the Executive can exploit.

What appears to be the arrangement in this case is a novel one, whereby the COMELEC – supposedly an independent Constitutional body - has been fused with the prosecutorial arm of the Executive branch in order to conduct preliminary investigation and prosecute election offenses in the 2004 and 2007 National Elections. To my mind, this fusion or shared responsibility between the COMELEC and the DOJ completely negates the COMELEC's "decisional independence" so jealously guarded by the framers of our Constitution who intended it to be insulated from any form of political pressure. [9] (emphases, italics and underscores supplied)

I reiterate, if only for emphasis, that what exists under Joint Order No. 001-2011 is not a scheme whereby the COMELEC exercises its power to conduct preliminary investigation and prosecute election offenses independently of other branches of government; what it provides is a shared responsibility between the

COMELEC and the Executive Branch through the DOJ. The result cannot but be an arrangement that the Constitution and the law cannot allow, however practical from the standpoint of efficiency it might be. To stress the obvious, the joint or shared arrangement directly goes against the rationale that justifies the grant of independence to the COMELEC — to insulate it, particularly its role in the country's electoral exercise, from political pressures and partisan politics.

As I previously noted in my previous Opinion, this shared arrangement between the COMELEC and the DOJ amounts to an incremental change whose adoption weakens the independence of the COMELEC. By allowing shared responsibility, the independence of the COMELEC ends up like the proverbial boiled frog^[10] - slowly killed because it was lulled into complacency by the slow application of heat – in this case, apparently brought about by the political identities of those who stood charged. Unfortunately, the majority's ruling today will now be the latest case law on COMELEC independence. Unless a new occasion arises, we are – in the meanwhile – now effectively back to the country's situation before 1940 with elections subject to intrusion by the Executive.

Delegation of authority by the COMELEC to the DOJ, as its deputy in the investigation and prosecution of election offenses, is the only constitutionally permissible arrangement, given the independence of the COMELEC

I take exception to the ponencia's conclusion that the creation of the Joint DOJ-COMELEC Committee is not repugnant to the concurrent jurisdiction conferred to the COMELEC and other prosecutorial agencies of government (such as the DOJ) under Section 42 of Republic Act No. 9369. I reiterate the view that this concurrent jurisdiction between the COMELEC and the DOJ in the investigation and prosecution of election offenses is circumscribed by the Constitutional provisions guaranteeing the COMELEC's independence as a Constitutional Commission.^[11] To my mind, the only arrangement that can pass constitutional muster is the practice of delegation of authority by the COMELEC, otherwise known as deputation, which has long been upheld by the Court, viz.:

In other words, the only arrangement constitutionally possible, given the independence of the COMELEC and despite Section 42 of RA 9369, is for the DOJ to be a mere deputy or delegate of the COMELEC and not a co-equal partner in the investigation and prosecution of election offenses **WHENEVER THE COMELEC ITSELF DIRECTLY ACTS**. While the COMELEC and the DOJ have equal jurisdiction to investigate and prosecute election offenses (subject to the rule that the body or agency that first takes cognizance of the complaint shall exercise jurisdiction to the exclusion of the others), the COMELEC — whenever it directly acts in the fact-finding and preliminary investigation of elections offences — can still work with the DOJ and seek its assistance without violating its constitutionally guaranteed independence, but it can only do so as the principal in a principal-delegate relationship with the DOJ where the latter acts as the delegate.

This arrangement preserves the COMELEC's independence as "being mere deputies or agents of the COMELEC, provincial or city prosecutors deputized . . . are expected to act in accord with and not contrary to or in derogation of its resolutions, directives or orders xxx in relation to election cases that such prosecutors are deputized to investigate and prosecute. Being mere deputies, provincial and city prosecutors, acting on behalf of the COMELEC, [shall also] proceed within the lawful scope of their delegated authority."^[12] (emphases, italics and underscore supplied)

COMELEC's approval under Section 2 of Joint Order No. 001-2011 of the resolutions of the Joint DOJ-COMELEC Committee finding probable cause does

not save the said Order from the vice of unconstitutionality

I also cannot accept the ponencia's strained reasoning that the creation of the Joint Committee does not undermine the independence of the COMELEC because the determination of probable cause ultimately pertains to the COMELEC under Section 2 of Joint Order No. 001-2011. In my view, the constitutionally objectionable arrangement of a shared responsibility between the COMELEC and the DOJ is not saved by the existence of Section 2 of Joint Order No. 001-2011. In order for the COMELEC's action in the present case to be constitutionally valid, it must still be shown that the COMELEC's determination of probable cause was free from any attendant participation by the Executive.

In the present case, the COMELEC's determination of probable cause can hardly be considered to be free from executive intrusion as its independent consideration of the facts, evidence and the applicable law with respect to the complaints for electoral sabotage filed against the petitioners was severely compromised by the tainted proceedings before the Joint DOJ-COMELEC Committee discussed elsewhere in this Opinion. I stress that the COMELEC's decisional independence should be observed or required at every stage of the preliminary investigation. Any standard less than this is tantamount to the emasculation of the independence that the framers so painstakingly incorporated in our Constitution to ensure that the COMELEC is insulated from any intrusion of outside influences, political pressures and partisan politics.

The fact that the COMELEC's determination of probable cause has been compromised by the intrusion of the Executive through its DOJ representatives is further shown by the COMELEC en banc's November 18, 2011 Resolution finding probable cause for electoral sabotage against petitioner GMA. In the guise of maintaining its independence (by making it appear that it had exercised its discretion and made an independent judgment), the COMELEC en banc in its November 18, 2011 Resolution included a caveat that the adoption of the resolution was "upon the recommendation of the COMELEC's own representatives in the Committee." [13] On this point, the following oral argument exchanges are illuminating, viz.:

JUSTICE VELASCO: Section 6 of the Joint Order states... wait a minute. No, Section 2 rather of the Joint Order states that "the resolutions of the preliminary investigation committee shall be approved by COMELEC," correct?

ATTY. DULAY: Yes, Your Honor.

JUSTICE VELASCO: However, I noticed that in the COMELEC En Banc resolution dated November 18, 2011, the Comelec En Banc resolved the complaint only upon the recommendation of the COMELEC's own representatives in the committee, what can you say about this?

ATTY. DULAY: Well, Your Honor, this is precisely the point we would like to point out also that even the COMELEC itself is unsure of its legal footing in this case because instead of affirming the authority of the same body which they jointly created, they would now make it appear, Your Honor, that the resolution of the COMELEC En Banc was only based on the recommendation of the two members, of the two of the five members of the Preliminary Investigation Committee. And if I may point out, Your Honor, this was issued after there was already publicity regarding this case, Your Honor, and I supposed after they've already received our petition, Your Honor.

JUSTICE VELASCO: So COMELEC En Banc issued that resolution dated November 18, 2011, only on the basis of the recommendations of two members of the five men Preliminary Investigation Committee which is not even the majority in the Committee?

ATTY. DULAY: Well yes, Your Honor, precisely that is why we would, we are quite surprised that the

COMELEC would seem to disown its own creation now when in fact the decision of the Preliminary Investigation Committee is not a decision made by two people alone. Under their own rules this was a decision made by five people, three from the DOJ, and two from the COMELEC. So I do not see, Your Honor, how they can divorce the findings of their own representatives on the same committee with only one report, Your Honor.

JUSTICE VELASCO: Under the Constitution, which body or agency has the exclusive charge of the enforcement and administration of all laws relative to the conduct of election?

ATTY. DULAY: It would be the COMELEC, Your Honor, under the Constitution.

JUSTICE VELASCO: It's only the COMELEC, right.

ATTY. DULAY: Yes, Your Honor.[14]

Conclusion

To summarize, the COMELEC, not the Joint DOJ-COMELEC Committee, has the primary, if not exclusive, authority to conduct preliminary investigation of election cases, and the creation of the Joint DOJ-COMELEC Committee constitutes an unconstitutional abdication by the COMELEC of its constitutionally-granted independence. In arriving at this Dissent, I take into account, together with my above conclusion, the extent of injury that can be caused to our electoral system by opening the COMELEC to Executive intrusion, as well as the haste the petitioners pointed out.

I conclude, as a consequence of the defective determination of probable cause, that no basis exists to support the charge of electoral sabotage against the petitioners. I thus vote for the grant of the motions for reconsideration.

[1] Rollo (G.R. No. 199082), p. 1384.

[2] Ibid.

[3] 85 Phil. 101 (1949).

[4] G.R. No. 93867, December 18, 1990, 192 SCRA 358.

[5] 453 Phil. 586 (2003).

[6] Supra note 3.

[7] Id. at 106-109.

[8] Stephen H. Legomsky, *Deportation And The War On Independence*, 91 Cornell L. Rev. 369, 386 (2006).

[9] See J. Brion's Separate Concurring and Dissenting Opinion, *Arroyo v. Department of Justice*, G.R. Nos. 199082, 199085 and 199118, September 18, 2012, 681 SCRA 181, 289-290.

[10] See Eugene Volokh, *The Mechanisms of the Slippery Slope*, Harvard Law Review, Vol. 116, February 2003, available online at SSRN: <http://ssrn.com/abstract=343640> or <http://dx.doi.org/102139/ssrn.343640> (last visited September 17, 2012) Volokh notes: "Libertarians often tell of the parable of the frog. If a frog is dropped into hot water, it supposedly jumps out. If a frog is put into cold water that is then heated, the frog doesn't notice the gradual temperature change, and dies. Likewise, the theory goes, with liberty: People resists to take rights away outright, but if the rights are eroded slowly."

[11] CONSTITUTION, Article IX(A), Sections 1, 2, 3, 4, 5 and 6.

[12] Supra note 9, at 298-299.

[13] Rollo (G.R. No. 199082), p. 190.

[14] TSN, November 29, 2011, pp. 84-86.

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