

G.R. No. 199082 – JOSE MIGUEL T. ARROYO, *petitioner*, versus DEPARTMENT OF JUSTICE; COMMISSION ON ELECTIONS; HON. LEILA DE LIMA, in her capacity as Secretary of the Department of Justice; HON. SIXTO BRILLANTES, Jr., in his capacity as Chairperson of the Commission on Elections; and The JOINT DOJ-COMELEC PRELIMINARY INVESTIGATION COMMITTEE and FACT-FINDING TEAM, *respondents*.

G.R. No. 199085 – BENJAMIN S. ABALOS, SR., *petitioner*, versus HON. LEILA DE LIMA, in her capacity as Secretary of Justice; HON. SIXTO S. BRILLANTES, JR., in his capacity as COMELEC Chairperson; RENE V. SARMIENTO, LUCENITO N. TAGLE, ARMANDO V. VELASCO, ELIAS R. YUSOPH, CHRISTIAN ROBERT S. LIM and AUGUSTO C. LAGMAN, in their capacity as COMELEC Commissioners; and CLARO A. ARELLANO, GEORGE C. DEE, JACINTO G. ANG, ROMEO B. FORTES and MICHAEL D. VILLARET, in their capacity as Chairperson and Members, respectively, of the JOINT DOJ-COMELEC PRELIMINARY INVESTIGATION COMMITTEE ON THE 2004 AND 2007 ELECTION FRAUD, *respondents*.

G.R. No. 199118 – GLORIA MACAPAGAL-ARROYO, *petitioner*, versus COMMISSION ON ELECTIONS, represented by Chairperson Sixto S. Brillantes, Jr., DEPARTMENT OF JUSTICE, represented by Secretary Leila M. de Lima, JOINT DOJ-COMELEC PRELIMINARY INVESTIGATION COMMITTEE, SEN. AQUILINO M. PIMENTEL III and DOJ-COMELEC FACT-FINDING TEAM, *respondents*.

Promulgated:

SEPTEMBER 18, 2012

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DISSENTING AND CONCURRING OPINION

The Boiling Frog

Place a frog in boiling water, and
it will jump out to save itself;
But place it in cold water
and slowly apply heat,
and the frog will boil to death.¹

¹ 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/10.2139/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 attempts to take rights away outright, but not if the rights are eroded slowly."

BRION, J.:

I open this Dissenting and Concurring Opinion with the tale of the metaphorical “boiling frog” to warn the Court and the readers about the deeper implications of this case – *a case that involves a major breach of the Philippine Constitution where the frog stands for the independence of the Commission on Elections (COMELEC)*.

As one American article on the metaphor puts it,² “[I]f people become acclimated to some policy or state of affairs over a sufficient period of time, they come to accept the policy or state of affairs as normal. . . The Boiling Frog Syndrome explains how the American public has come to accept breaches of Constitutional government that would have provoked armed resistance a hundred years ago. The public has grown accustomed to these breaches, and to the federal government conducting myriad activities that are nowhere authorized by the Constitution and accepts them as normal.”³

In the Philippine setting, the various Philippine Constitutions have expressly guaranteed independence to the Judiciary, to the Office of the Ombudsman, and to the Constitutional Commissions, one of which is the COMELEC. The independence is mainly against the intrusion of the

² See Steven Yates, *The Boiling Frog Syndrome*, August 11, 2001, available online at <http://www.lewrockwell.com/yates/yates38.html> (last visited September 17, 2012).

³ The cited article further explains: But there are other ways of changing one kind of socioeconomic system to a fundamentally different kind of system that minimize or localize abrupt, destabilizing change. Gramscian “revolutionaries” have learned this lesson well – although they do not speak the vocabulary of systems theory, of course. They have learned to get what they want *by pursuing their goals gradually, one step at a time, through infiltrating and modifying existing institutions and other systems rather than overthrowing them and trying to create new ones from scratch*. Clearly, a central-government initiative calling for abolishing the U.S. Constitution would have provoked an armed upheaval at any time in U.S. history, and it is at least possible that anything this abrupt still would. U.S. citizens, that is, would jump out immediately if thrown into that pot of boiling water. But if the haters of Constitutional government proceed in small increments, they eventually gut the Constitution almost unnoticed – particularly if they carry out their initiatives in multiple components of U.S. society (so-called public schools, the banking system, the major news media, the legal system, etc.). Moreover, Gramscians have found that the road to centralization is much easier if “paved with good intentions,” expressed in pseudo-moral language and portrayed as a source of stability to come. Myriad small disruptions in the lives of individuals and local communities can be rationalized as the price to be paid for the utopia just over the horizon. “You can’t make an omelet,” so the saying goes, “without breaking a few eggs.” *So systems accommodate and incorporate these small steps, absorbing the disruptions as best they can and not allowing them to threaten the system’s overall stability. But when a system absorbs these small steps instead of repelling them, it incorporates them into its basic functioning and its transformation to a different kind of system with entirely different arrangements between its components has begun*. Or in terms of the Boiling Frog Syndrome, the frog is in the pot, and the temperature of the water has begun, very slowly, to rise. *Ibid.* (emphasis supplied)

Executive,⁴ the government department that implements the laws passed by the Legislature and that administered and controlled the conduct of elections in the past.⁵ The Judiciary has so far fully and zealously guarded the role of these institutions and their independence in the constitutional scheme, but the nation cannot rest on this record and must ever be vigilant.

*While gross and patent violations of the guarantee of independence will not sit well with, and will not be accepted by, the people, particularly in this age of information and awareness, ways other than the gross and the patent, exist to subvert the constitutional guarantee of independence. The way is through **small, gradual and incremental changes – boiling the frog** – that people will not notice, but which, over time, will slowly and surely result in the subjugation of the independent institutions that the framers of the Constitution established to ensure balance and stability in a democratic state where the separation of powers among the three branches of government, and checks and balances, are the dominant rules.*

This is what the present case is all about – a subtle change that people will hardly notice except upon close and critical study, and until they look around them for other subtle changes in other areas of governance, all of them put into place with the best professed intentions but tending to subvert the structures that the framers of the Constitution very carefully and thoughtfully established. Unless utmost vigilance is observed and subtle subverting changes are immediately resisted, the people may never fully know how their cherished democratic institutions will come to naught; through slow and gradual weakening, these democratic institutions – like the frog – will end up dead. Sadly, this process of gradualism is what the Court allows in the present case.

⁴ As the discussion of the leading cases, discussed below, will show.

⁵ Under the Department of the Interior, the executive department that administered elections before the COMELEC, which was first established in 1940, *infra* note 6.

It is in this context that I filed this Dissent from the majority's conclusion that COMELEC Resolution No. 9266 and Joint Order No. 001-2011 are valid and constitutional, although I ultimately concur with the majority's resulting conclusion, based on non-constitutional grounds, that the petitions should be dismissed. I maintain that these assailed issuances are fatally defective and should be struck down for violating the constitutionally guaranteed independence of *COMELEC*.

In its rulings, the majority held that the petitioners failed to establish any constitutional or legal impediment to the creation of the Joint Department of Justice (DOJ)-COMELEC Preliminary Investigation Committee (*Joint Committee*) and the Fact-Finding Team. It likewise held that the petitioners' issues relating to equal protection, due process, separation of powers, requirement of publication, and bias on the part of COMELEC Chairman Sixto Brillantes are unmeritorious.⁶ The

⁶ The *ponencia* holds that:

- a. Joint Order No. 001-2011 does not violate the equal protection clause of the Constitution because not all respondents were linked to former President Gloria Arroyo Macapagal (GMA);
- b. The due process clause is not infringed on the basis of prejudgment of the case since the petitioners failed to prove that the Joint Panel showed bias and partiality against them; neither was it shown that DOJ Secretary Leila De Lima actually intervened in the preliminary investigation and that the perceived prejudgment by COMELEC Chairman Sixto Brillantes, Jr. cannot be attributed to the COMELEC which acts as a collegial body;
- c. Joint Order No. 001-2011 does not violate the principle of separation of powers since it did not create new offices - the Joint Committee and the Fact-Finding Team perform functions that they already perform under the law;
- d. The COMELEC cannot be considered to have abdicated its independence from the executive branch of government by acting jointly with the DOJ; COMELEC validly issued Resolution No. 9266 as a means to fulfill its duty of investigating and prosecuting election offenses; the role of the DOJ in the conduct of preliminary investigation of election offenses has long been recognized by the COMELEC and is pursuant to Republic Act No. (RA) 9369 which vested the COMELEC and the DOJ the concurrent jurisdiction to conduct preliminary investigation of all election offenses;
- e. The Joint Committee's Rules of Procedure are infirm for failure to comply with the publication requirement; thus, the Rules of Criminal Procedure and the COMELEC Rules of Procedure govern;
- f. The petitioners were given the opportunity to be heard. They were furnished copies of the complaint, affidavits, and other supporting documents submitted to the Joint Committee, and were required to submit their counter-affidavit and countervailing evidence; thus, there is no reason to nullify the proceedings undertaken by the Joint Committee and the COMELEC;
- g. As to petitioners Jose Miguel Arroyo and Benjamin Abalos, Sr., the pendency of the cases before the Court does not automatically suspend the proceedings before the Joint Committee, nor excuse them from their failure to file the required counter-affidavits; and
- h. With respect to the issue of the credibility of COMELEC Chairman Brillantes, who had a previous professional relationship with complainant Aquilino Pimentel III and Fernando Poe (GMA's rival, for presidency in 2004) and of other Commissioners, their positions should be respected since they had the objective of ensuring that the credibility of the COMELEC would not be seriously affected, *ponencia*, pp. 52-53.

fountainhead of all these issues, however, is the validity of the creation of, and the exercise of their defined functions by, the DOJ-COMELEC committees; the issues the majority ruled upon all spring from the validity of this creation. On this point, I completely disagree with the majority and its ruling that the COMELEC did not abdicate its functions and independence in its joint efforts with the DOJ.

I submit that in the Resolutions creating the committees and providing for the exercise of their power to conduct fact-finding and preliminary investigation in the present case, the COMELEC unlawfully ceded its decisional independence by sharing it with the DOJ – an agency under the supervision, control and influence of the President of the Philippines.

The discussions below fully explain the reasons for my conclusion.

I. The Independence of the COMELEC

a. *Historical Roots*

The establishment of the COMELEC traces its roots to an amendment of the 1935 Constitution in 1940, prompted by dissatisfaction with the manner elections were conducted then in the country.⁷ Prior to this development, the supervision of elections was previously undertaken by the Department of Interior, pursuant to Section 2, Commonwealth Act No. 357 of the First National Assembly. The proposal to amend the Constitution was subsequently embodied in Resolution No. 73, Article III of the Second National Assembly, adopted on April 11, 1940, and was later approved on December 2, 1940 as Article X of the 1935 Constitution:⁸

⁷ Bartolome C. Fernandez, Jr., *On the Power of the Commission on Elections To Annul Illegal Registration of Voters*, Philippine Law Journal 428, <http://law.upd.edu.ph/plj/images/files/PLJ%20volume%2026/PLJ%20volume%2026%20number%204%20-06%20Bartolome%20C.%20Fernandez%20%20On%20the%20Power%20of%20the%20Commission%20on%20Elections%20to%20Annul%20Illegal%20Registration%20of%20Voters.pdf>, last visited January 15, 2012.

⁸ *Ibid.*

The administrative control of elections now exercised by the Secretary of Interior is what is sought to be transferred to the Commission on Elections by the proposed constitutional amendment now under discussion. The courts and the existing Electoral Commission (electoral tribunal) retain their original powers over contested elections.⁹

This development was described as “a landmark event in Philippine political history”¹⁰ that put in place a “novel electoral device designed to have the entire charge of the electoral process of the nation.”¹¹ A legal commentator noted:

The proposition was to entrust the conduct of our elections to an independent entity whose sole work is to administer and enforce the laws on elections, protect the purity of the ballot and safeguard the free exercise of the right of suffrage. The Commission on Elections was really existing before 1940 as a creation of a statute passed by the National Assembly; **but it necessitated a constitutional amendment to place it outside the influence of political parties and the control of the legislative, executive and judicial departments of the government. It was intended to be an independent administrative tribunal, co-equal with other departments of the government in respect to the powers vested in it.**¹² [emphasis and underscoring supplied]

Nine years later, the COMELEC’s independence was tested in *Nacionalista Party v. Bautista*,¹³ where the Court dealt with the question of whether the designation, by then President Elpidio Quirino, of Solicitor General Felix Angelo Bautista as Acting Member of the COMELEC — pending the appointment of a permanent member to fill the vacancy caused by the retirement of Commissioner Francisco Enage — was unlawful and unconstitutional. The Court ruled that the designation was repugnant to the Constitution which guarantees the independence of the COMELEC, and said:

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**

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 429.

¹² *Id.* at 428-429.

¹³ 85 Phil. 101 (1949).

Constitution wanted it to be independent from the other departments of the Government. xxx

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.¹⁴ [emphasis ours]

Thus, as early as 1949, this Court has started to guard with zeal the COMELEC's independence, never losing sight of the crucial reality that its *"independence [is] the principal justification for its creation."*¹⁵ The people's protectionist policy towards the COMELEC has likewise never since wavered and, in fact, has *prevailed even after two amendments of our Constitution in 1973 and 1987* – an enduring policy highlighted by then Associate Justice Reynato Puno in his concurring opinion in *Atty. Macalintal v. COMELEC*:¹⁶

¹⁴ *Id.* at 106-109.

¹⁵ Emmanuel Flores, The Commission on Elections and the Right to seek a public office, citing Jose P. Laurel, *Observations of the Philippine Constitutional Amendments* (June 13, 1940), published in *The Commercial and Industrial Manual of the Philippines*, 1940-1941, pp. 93-96.

¹⁶ 453 Phil. 586.

The Commission on Elections (COMELEC) is a constitutional body **exclusively** charged with the enforcement and administration of “all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall,” and is invested with the power to decide all questions affecting elections save those involving the right to vote.

Given its important role in preserving the sanctity of the right of suffrage, the COMELEC was **purposely constituted** as a body **separate** from the executive, legislative, and judicial branches of government. **Originally**, the power to enforce our election laws was vested with the President and exercised through the Department of the Interior. According to Dean Sinco, however, the **view ultimately emerged** that an **independent body** could better protect the right of suffrage of our people. Hence, the enforcement of our election laws, while an executive power, was transferred to the COMELEC.

The **shift to a modified parliamentary system** with the adoption of the 1973 Constitution **did not alter the character of COMELEC as an independent body**. Indeed, a “definite tendency to **enhance and invigorate** the role of the Commission on Elections as the independent constitutional body charged with the safeguarding of free, peaceful and honest elections” has been observed. The 1973 Constitution **broadened** the power of the COMELEC by making it the **sole judge** of all election contests relating to the election, returns and qualifications of members of the national legislature and elective provincial and city officials. Thus, the COMELEC was given **judicial power** aside from its traditional administrative and executive functions.

The trend towards strengthening the COMELEC continued with the 1987 Constitution. Today, the COMELEC enforces and administers all laws and **regulations** relative to the conduct of elections, plebiscites, initiatives, referenda and recalls. Election contests involving regional, provincial and city elective officials are under its exclusive original jurisdiction while all contests involving elective municipal and *barangay* officials are under its appellate jurisdiction.¹⁷ (citations omitted)

At present, the 1987 Constitution (as has been the case since the amendment of the 1935 Constitution) now provides that the COMELEC, like all other Constitutional Commissions, shall be independent. It provides that:

Section 1. The Constitutional Commissions, which shall be **independent**, are the Civil Service Commission, the Commission on Elections, and the Commission on Audit. [emphasis ours]

The unbending doctrine laid down by the Court in *Nationalista Party* was reiterated in *Brillantes, Jr. v. Yorac*,¹⁸ a 1990 case where *no less than*

¹⁷ *Id.* at 765-767.

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

the present respondent COMELEC Chairman Brillantes challenged then President Corazon C. Aquino's designation of Associate Commissioner Haydee Yorac as Acting Chairman of the COMELEC, in place of Chairman Hilario Davide.

In ruling that the Constitutional Commissions, labeled as "independent" under the Constitution, are not under the control of the President even if they discharge functions that are executive in nature, the Court again vigorously denied "Presidential interference" in these constitutional bodies and held:

Article IX-A, Section 1, of the Constitution expressly describes all the Constitutional Commissions as "independent." Although essentially executive in nature, they are not under the control of the President of the Philippines in the discharge of their respective functions. Each of these Commissions conducts its own proceedings under the applicable laws and its own rules and in the exercise of its own discretion. Its decisions, orders and rulings are subject only to review on *certiorari* by this Court as provided by the Constitution in Article IX-A, Section 7.

The choice of a temporary chairman in the absence of the regular chairman comes under that discretion. That discretion cannot be exercised for it, even with its consent, by the President of the Philippines.

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The lack of a statutory rule covering the situation at bar is no justification for the President of the Philippines to fill the void by extending the temporary designation in favor of the respondent. This is still a government of laws and not of men. The problem allegedly sought to be corrected, if it existed at all, did not call for presidential action. The situation could have been handled by the members of the Commission on Elections themselves without the participation of the President, however well-meaning.

X X X

The Court has not the slightest doubt that the President of the Philippines was moved only by the best of motives when she issued the challenged designation. But while conceding her goodwill, we cannot sustain her act because it conflicts with the Constitution. Hence, even as this Court revoked the designation in the Bautista case, so too must it annul the designation in the case at bar.¹⁹

¹⁹

Id. at 360-361.

In 2003, *Atty. Macalintal v. Commission on Elections*²⁰ provided yet another opportunity for the Court to demonstrate how it ardently guards the independence of the COMELEC against unwarranted intrusions.

This time, the stakes were higher as Mme. Justice Austria-Martinez, writing for the majority, remarked: “Under xxx [the] situation, the Court is left with no option but to withdraw xxx its usual reticence in declaring a provision of law unconstitutional.”²¹ The Court ruled that Congress, a co-equal branch of government, had no power to review the rules promulgated by the COMELEC for the implementation of Republic Act (RA) No. 9189 or *The Overseas Absentee Voting Act* of 2003, since it “trample[s] upon the constitutional mandate of independence of the COMELEC.”²² Thus, the Court invalidated Section 25(2) of RA No. 9189 and held:

The ambit of legislative power under Article VI of the Constitution is circumscribed by other constitutional provisions. One such provision is Section 1 of Article IX-A of the 1987 Constitution ordaining that constitutional commissions such as the COMELEC shall be “independent.”

Interpreting Section 1, Article X of the 1935 Constitution providing that there shall be an *independent* COMELEC, the Court has held that “[w]hatever 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.” In an earlier case, the Court elucidated:

The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. *It should be allowed considerable latitude in devising means and methods that will [e]nsure the accomplishment of the great objective for which it was created – free, orderly and honest elections.* We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere. Politics is a practical matter, and political questions must be dealt with realistically – not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with

²⁰ *Supra* note 16.

²¹ *Id.* at 660.

²² *Ibid.*

political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions. (*italics supplied*)

The Court has no general powers of supervision over COMELEC which is an independent body “except those specifically granted by the Constitution,” that is, to review its decisions, orders and rulings. In the same vein, it is not correct to hold that because of its recognized extensive legislative power to enact election laws, Congress may intrude into the independence of the COMELEC by exercising supervisory powers over its rule-making authority.

By virtue of Section 19 of R.A. No. 9189, Congress has empowered the COMELEC to “issue the necessary rules and regulations to effectively implement the provisions of this Act within sixty days from the effectivity of this Act.” This provision of law follows the usual procedure in drafting rules and regulations to implement a law – the legislature grants an administrative agency the authority to craft the rules and regulations implementing the law it has enacted, in recognition of the administrative expertise of that agency in its particular field of operation. Once a law is enacted and approved, the legislative function is deemed accomplished and complete. **The legislative function may spring back to Congress relative to the same law only if that body deems it proper to review, amend and revise the law, but certainly not to approve, review, revise and amend the IRR of the COMELEC.**

By vesting itself with the powers to approve, review, amend, and revise the IRR for *The Overseas Absentee Voting Act of 2003*, Congress went beyond the scope of its constitutional authority. Congress trampled upon the constitutional mandate of independence of the COMELEC. Under such a situation, the Court is left with no option but to withdraw from its usual reticence in declaring a provision of law unconstitutional.

The second sentence of the first paragraph of Section 19 stating that “[t]he Implementing Rules and Regulations shall be submitted to the Joint Congressional Oversight Committee created by virtue of this Act for prior approval,” and the second sentence of the second paragraph of Section 25 stating that “[i]t shall review, revise, amend and approve the Implementing Rules and Regulations promulgated by the Commission,” whereby Congress, in both provisions, arrogates unto itself a function not specifically vested by the Constitution, should be stricken out of the subject statute for constitutional infirmity. Both provisions brazenly violate the mandate on the independence of the COMELEC.

Similarly, the phrase, “subject to the approval of the Congressional Oversight Committee” in the first sentence of Section 17.1 which empowers the Commission to authorize voting by mail in not more than three countries for the May, 2004 elections; and the phrase, “only upon review and approval of the Joint Congressional Oversight Committee” found in the second paragraph of the same section are unconstitutional as they require review and approval of voting by mail in any country after the 2004 elections. Congress may not confer upon itself the authority to approve or disapprove the countries wherein voting by mail shall be allowed, as determined by the COMELEC pursuant to the conditions provided for in Section 17.1 of R.A. No. 9189. Otherwise, Congress

would overstep the bounds of its constitutional mandate and intrude into the independence of the COMELEC.²³ [citations omitted, emphases ours]

Thus, from the perspective of history, any ruling from this Court – as the *ponencia* now makes — allowing the COMELEC to share its decisional independence with the Executive would be **a first as well as a major retrogressive jurisprudential development.** *It is a turning back of the jurisprudential clock that started ticking in favor of the COMELEC’s independence in 1940 or 72 years ago.*

b. The COMELEC’s Power to Investigate and Prosecute Election Offenses

At the core of the present controversy is the COMELEC’s exercise of its power to investigate and prosecute election offenses under Section 2, Article IX (C) of the 1987 Constitution. It states that the COMELEC shall exercise the following power and function:

(6) File, upon a verified complaint, or on its own initiative, petitions in court for inclusion or exclusion of voters; **investigate and, where appropriate, prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offences and malpractices.** [emphasis supplied]

In *Barangay Association for National Advancement and Transparency (BANAT) Party-List v. Commission on Elections*,²⁴ the Court traced the legislative history of the COMELEC’s power to investigate and prosecute election offenses, and concluded that the grant of such power was not exclusive:

Section 2(6), Article IX-C of the Constitution vests in the COMELEC the power to “investigate and, **where appropriate**, prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offenses, and malpractices.” **This was an important innovation introduced by the Constitution because this provision was not in the 1935 or 1973 Constitutions. The phrase “[w]here appropriate” leaves to the legislature the power to determine the kind of election offenses that the COMELEC shall prosecute**

²³ *Id.* at 658-661.

²⁴ G.R. No. 177508, August 7, 2009, 595 SCRA 477.

exclusively or concurrently with other prosecuting arms of the government.

The grant of the “exclusive power” to the COMELEC can be found in Section 265 of BP 881 [Omnibus Election Code], which provides:

Sec. 265. *Prosecution.* - The Commission shall, through its duly authorized legal officers, have the exclusive power to conduct preliminary investigation of all election offenses punishable under this Code, and to prosecute the same. The Commission may avail of the assistance of other prosecuting arms of the government: *Provided, however,* That in the event that the Commission fails to act on any complaint within four months from his filing, the complainant may file the complaint with the office of the fiscal or with the Ministry of Justice for proper investigation and prosecution, if warranted. (Emphasis supplied)

This was also an innovation introduced by BP 881. **The history of election laws shows that prior to BP 881, no such “exclusive power” was ever bestowed on the COMELEC.**

We also note that while Section 265 of BP 881 vests in the COMELEC the “exclusive power” to conduct preliminary investigations and prosecute election offenses, **it likewise authorizes the COMELEC to avail itself of the assistance of other prosecuting arms of the government.** In the 1993 COMELEC Rules of Procedure, the authority of the COMELEC was subsequently qualified and explained. The 1993 COMELEC Rules of Procedure provides:

Rule 34 - Prosecution of Election Offenses

Sec. 1. Authority of the Commission to Prosecute Election Offenses. - The Commission shall have the exclusive power to conduct preliminary investigation of all election offenses punishable under the election laws and to prosecute the same, except as may otherwise be provided by law.²⁵ (citations omitted, emphases ours)

As outlined in that case, Section 265 of Batas Pambansa Blg. 881 (*BP 881*) of the Omnibus Election Code granted the COMELEC the exclusive power to conduct preliminary investigations and prosecute election offenses. Looking then at the practical limitations arising from such broad grant of power, Congress also empowered the COMELEC to avail of the assistance of the prosecuting arms of the government.

²⁵

Id. at 493-496.

Under the 1993 COMELEC Rules of Procedure, the Chief State Prosecutor, all Provincial and City Fiscals, and/or their respective assistants were given continuing authority, *as deputies of the COMELEC*, to conduct preliminary investigation of complaints involving election offenses under election laws that may be filed directly with them, or that may be indorsed to them by the COMELEC or its duly authorized representatives and to prosecute the same.²⁶

Under the same Rules, the Chief State Prosecutor, Provincial Fiscal or City Fiscal were authorized to receive complaints for election offenses and after which the investigation may be delegated to any of their assistants.²⁷ After the investigation, the investigating officer shall issue either a recommendation to dismiss the complaint or a resolution to file the case in the proper courts; this recommendation, however, was subject to the approval by the Chief State Prosecutor, Provincial or City Fiscal, and who shall also likewise approve the information prepared and immediately cause its filing with the proper court.²⁸ The Rule also provide that resolution of the Chief State Prosecutor or the Provincial or City Fiscal, could be appealed with the COMELEC within ten (10) days from receipt of the resolution, provided that the same *does not divest the COMELEC of its power to motu proprio review, revise, modify or reverse* the resolution of the Chief State Prosecutor and/or provincial/city prosecutors.²⁹

In the recent case of *Diño v. Olivarez*,³⁰ the Court had the occasion to expound on the nature and consequences of the delegated authority of the Chief State Prosecutor, Provincial or City Fiscal and their assistants to conduct preliminary investigations and to prosecute election offenses, as follows:

²⁶ Section 2, Rule 34 of the COMELEC Rules of Procedure.

²⁷ Section 4(b), Rule 34 of the COMELEC Rules of Procedure.

²⁸ Section 9(c), Rule 34 of the COMELEC Rules of Procedure.

²⁹ Section 10, Rule 34 of the COMELEC Rules of Procedure.

³⁰ G.R. No. 170447, December 4, 2009, 607 SCRA 251.

From the foregoing, it is clear that the Chief State Prosecutor, all Provincial and City Fiscals, and/or their respective assistants have been given continuing authority, as deputies of the Commission, to conduct a preliminary investigation of complaints involving election offenses under the election laws and to prosecute the same. Such authority may be revoked or withdrawn anytime by the COMELEC, either expressly or impliedly, when in its judgment such revocation or withdrawal is necessary to protect the integrity of the process to promote the common good, or where it believes that successful prosecution of the case can be done by the COMELEC. **Moreover, being mere deputies or agents of the COMELEC, provincial or city prosecutors deputized by the Comelec are expected to act in accord with and not contrary to or in derogation of its resolutions, directives or orders of the Comelec 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, must proceed within the lawful scope of their delegated authority.**³¹ [citations omitted, emphasis ours]

In 2007, Congress enacted RA No. 9369, amending BP 881, among others, on the authority to preliminarily investigate and prosecute.

Section 43 of RA No. 9369, amending Section 265 of BP 881, provides:

SEC. 43. Section 265 of Batas Pambansa Blg. 881 is hereby amended to read as follow[s]:

"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 prosecute the same." [emphases and underscoring ours]

In 2009, the petitioner and the COMELEC in *BANAT v. Commission on Election*³² questioned the constitutionality of Section 43 of RA No. 9369. They argued that the Constitution vests in the COMELEC the exclusive power to investigate and prosecute cases of violations of election laws. They also alleged that Section 43 of RA No. 9369 is unconstitutional because it gives the other prosecuting arms of the government concurrent power with the COMELEC to investigate and prosecute election offenses.

In ruling that Section 2, Article IX (C) of the Constitution did **not** give the COMELEC the exclusive power to investigate and prosecute cases of

³¹ *Id.* at 262-263.

³² *Supra* note 24.

violations of election laws and, consequently, that Section 43 of RA No. 9369 is constitutional, the Court held:

We do not agree with petitioner and the COMELEC that the Constitution gave the COMELEC the “exclusive power” to investigate and prosecute cases of violations of election laws.

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It is clear that the grant of the “exclusive power” to investigate and prosecute election offenses to the COMELEC was not by virtue of the Constitution but by BP 881, a legislative enactment. If the intention of the framers of the Constitution were to give the COMELEC the “exclusive power” to investigate and prosecute election offenses, the framers would have expressly so stated in the Constitution. They did not.

In *People v. Basilla*, we acknowledged that without the assistance of provincial and city fiscals and their assistants and staff members, and of the state prosecutors of the Department of Justice, the prompt and fair investigation and prosecution of election offenses committed before or in the course of nationwide elections would simply not be possible. In *COMELEC v. Español*, we also stated that enfeebled by lack of funds and the magnitude of its workload, the COMELEC did not have a sufficient number of legal officers to conduct such investigation and to prosecute such cases. The prompt investigation, prosecution, and disposition of election offenses constitute an indispensable part of the task of securing free, orderly, honest, peaceful, and credible elections. Thus, given the plenary power of the legislature to amend or repeal laws, if Congress passes a law amending Section 265 of BP 881, such law does not violate the Constitution.³³ [citations omitted; italics supplied]

Thus, as the law now stands, the COMELEC has concurrent jurisdiction with other prosecuting arms of the government, such as the DOJ, to conduct preliminary investigation of all election offenses punishable under the Omnibus Election Code, and to prosecute these offenses.

c. The COMELEC and the Supreme Court

Separately from the COMELEC’s power to investigate and prosecute election offenses (but still pursuant to its terms) is the recognition by the Court that the COMELEC exercises considerable latitude and the widest discretion in adopting its chosen means and methods of discharging its tasks, particularly in its broad power “to enforce and administer all laws and

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Id. at 493-497.

regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall.”³⁴ In the recent case of *Bedol v. Commission on Elections*,³⁵ the Court characterized the COMELEC’s power to conduct investigations and prosecute elections offenses as “adjunct to its constitutional duty to enforce and administer all election laws.”³⁶ For this reason, the Court concluded that the aforementioned power “should be construed broadly,”³⁷ i.e., “to give the COMELEC all the necessary and incidental powers for it to achieve the objective of holding free, orderly, honest, peaceful, and credible elections.”³⁸

In this regard, I agree with the majority that the COMELEC must be given considerable latitude in the fulfillment of its duty of ensuring the prompt investigation and prosecution of election offenses. I duly acknowledge that the COMELEC exercises considerable latitude and the widest discretion in adopting its chosen means and methods of discharging its tasks, particularly its broad power “to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall.”³⁹ An expansive view of the powers of the COMELEC has already been emphasized by the Court as early as 1941 (under the 1935 Constitution) in *Sumulong, President of the Pagkakaisa ng Bayan v. Commission on Elections*,⁴⁰ where the Court held:

The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. **It should be allowed considerable latitude in devising means and methods that will [e]nsure the accomplishment of the great objective for which it was created – free, orderly and honest elections. We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not**

³⁴ See Dissenting Opinion of Justice Arturo D. Brion in *Roque, Jr. v. Commission on Elections*, G.R. No. 188456, September 10, 2009, 599 SCRA 69, 299, citing CONSTITUTION, Article IX (C), Section 2(1).

³⁵ G.R. No. 179830, December 3, 2009, 606 SCRA 554.

³⁶ *Id.* at 569.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ See Dissenting Opinion, *supra* note 32 at 299.

⁴⁰ 73 Phil. 288 (1941).

interfere. Politics is a practical matter, and political questions must be dealt with realistically – not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions.⁴¹ [emphasis ours]

To place this view in constitutional perspective, the independence granted to the COMELEC is as broad as that granted to the Office of the Ombudsman, another constitutional entity engaged in the investigation and prosecution of offenses, this time with respect to those committed by public officers and employees in the performance of their duties. We have uniformly held that this Court shall fully respect the Office of the Ombudsman's independence in the performance of its functions, save only where it commits grave abuse of discretion;⁴² in this eventuality it becomes the duty of this Court to intervene pursuant to Section 1, Article VIII of the Constitution.

As it has been with the Ombudsman, so should independence in investigative and prosecutory functions be with the COMELEC and its authority to investigate and prosecute election offenses. ***In the same manner, the broad discretion granted has its limits.*** Lest it be forgotten, in addition to its power to guard against grave abuse of discretion mentioned above, this Court, as the last resort tasked to guard the Constitution and our laws through interpretation and adjudication of justiciable controversies, possesses oversight powers to ensure conformity with the Constitution – the ultimate instrument that safeguards and regulates our electoral processes and policies and which underlies all these laws and the COMELEC's regulations.⁴³

⁴¹ *Id.* at 294-295.

⁴² *Quiambao v. Desierto*, 482 Phil. 154 (2004); *Espinosa v. Office of the Ombudsman*, 397 Phil. 829 (2000) and *Office of the Ombudsman v. Civil Service Commission*, G.R. No. 162215, July 30, 2007, 528 SCRA 537.

⁴³ See Dissenting Opinion, *supra* note 32.

In other words, while the Court acknowledges that the COMELEC “reigns supreme” in determining the means and methods by which it acts in the investigation and prosecution of election offenses, it cannot abdicate its duty to intervene when the COMELEC acts outside the contemplation of the Constitution and of the law,⁴⁴ such as when it sheds off its independence — contrary to the Constitution — by sharing its decision-making with the DOJ.

In the context of the present case, this constitutional safeguard gives rise to the question: Did the COMELEC gravely abuse its discretion in issuing COMELEC Resolution No. 9266 and Joint Order No. 001-2011? My answer is a resounding yes.

II. COMELEC Resolution No. 9266 and Joint Order No. 001-2011 Examined

COMELEC Resolution No. 9266 is merely a preparatory resolution reflecting the COMELEC *en banc*’s approval of the creation of a committee with the DOJ to conduct preliminary investigation on the alleged election offenses and anomalies committed during the 2004 and 2007 elections.⁴⁵

Joint Order No. 001-2011, on the other hand, creates two committees or teams to investigate and conduct preliminary investigation on the 2004 and 2007 National Elections Electoral Fraud and Manipulation case – the **Fact-Finding Team** and the **Joint DOJ-COMELEC Preliminary Investigation Committee (Joint Committee)**.⁴⁶

Under Section 5 of the Joint Order, the Fact-Finding Team shall **be chaired by an Assistant Secretary of the DOJ**, and shall have six members: two (2) from the National Bureau of Investigation (NBI); two (2) from the DOJ and two (2) from the COMELEC. *Thus, effectively, the COMELEC has ceded primacy in fact-finding functions to the Executive,*

⁴⁴ *Id.* at 300-301.

⁴⁵ *Rollo* (G.R. No. 199118), p. 47.

⁴⁶ Annex A, Petition of Petitioner Arroyo in G.R. No. 199082.

given the composition of this team as the NBI is an executive investigation agency under the DOJ.

Under Section 4 of the Joint Order, the Fact-Finding Team is tasked to:

- 1) Gather and document reports, intelligence information and investigative leads from official as well as unofficial sources and informants;
- 2) Conduct interviews, record testimonies, take affidavits of witnesses and collate material and relevant documentary evidence, such as, but not limited to, election documents used in the 2004 and 2007 national elections. For security reasons, or to protect the identities of informants, the Fact-Finding Team may conduct interviews, or document testimonies discreetly;
- 3) Assess and evaluate affidavits already executed and other documentary evidence submitted or may be submitted to the Fact-Finding Team and/or the Committee;
- 4) Identify the offenders, their offenses and the manner of their commission, individually or in conspiracy, and the provisions of election and general criminal laws violated, establish evidence for individual criminal and administrative liability and prosecution, and prepare the necessary documentation such as complaints and charge sheets for the initiation of preliminary investigation proceedings against said individuals to be conducted by the Committee;
- 5) **Regularly submit to the Committee, the Secretary of Justice and the Chairman of the COMELEC periodic reports and recommendations, supported by real, testimonial and documentary evidence, which may then serve as the Committee's basis for immediately commencing appropriate preliminary investigation proceedings,** as provided for under Section 6 of this Joint Order; and [emphases supplied]
- 6) Upon the termination of its investigation, make a full and final report to the Committee, the Secretary of Justice, and the Chairman of the COMELEC.⁴⁷

The **Fact-Finding Team** shall be under the **supervision of the Secretary of the DOJ and the Chairman of the COMELEC** or, in the latter's absence, a Senior Commissioner of the COMELEC. Under the Joint Order, the Fact-Finding Team shall have a Secretariat to provide it with

⁴⁷*Ibid.*

legal, technical and administrative assistance. **The Fact-Finding Team shall also have an office to be provided by either the DOJ or the COMELEC.**⁴⁸

Section 1 of the Joint Order provides that the Joint 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 was designated as Chairperson, to be assisted by the following members:⁴⁹

- 1) Provincial Prosecutor George C. Dee, DOJ
- 2) City Prosecutor Jacinto G. Ang, DOJ
- 3) Director IV Ferdinand T. Rafanan, COMELEC
- 4) Atty. Michael D. Villaret, COMELEC

Section 2 of the Joint Order sets the mandate of the Joint Committee which is to “conduct the necessary preliminary investigation on the basis of the evidence gathered and the charges recommended by the Fact-Finding Team.” Resolutions finding probable cause for election offenses, defined and penalized under BP 881 and other election laws, shall be approved by the COMELEC in accordance with the COMELEC Rules of Procedure.⁵⁰

The procedure by which the resolutions finding probable cause is to be reviewed and/or approved by the COMELEC is clearly set forth in Sections 3, 4 and 5 of the Rules of Procedure on the Conduct of Preliminary Investigation on the Alleged Election Fraud in the 2004 and 2007 Elections. Sections 3, 4 and 5 of the Rules state:

Section 3. *Resolution of the Committee.* – If the Committee finds cause to hold respondent for trial, it shall prepare the resolution and information. The Committee shall certify under oath in the information that it, or as shown by the record, has personally examined the complainant and the witnesses, that there is reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof, that the accused was informed of the complaint and of the evidence submitted against him; and that he was given the opportunity to

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

submit controverting evidence. Otherwise, the Committee shall recommend the dismissal of the complaint.

Section 4. *Approval of the Resolution.* – **Resolutions of the Committee relating to election offenses, defined and penalized under the Omnibus Election Code, and other election laws shall be approved by the COMELEC** in accordance with the Comelec Rules of Procedure.

For other offenses, or those not covered by the Omnibus Election Code and other election laws, resolutions of the Committee shall be approved by the Prosecutor General except in cases cognizable by the Sandiganbayan, where the same shall be approved by the Ombudsman.

Section 5. *Motion for Reconsideration.* – Motions for Reconsideration on resolutions of the Committee involving violations of [the] Omnibus Election Code and other election laws shall be resolved by the COMELEC in accordance with its Rules.

For other cases not covered by the Omnibus Election Code, the Motion for Reconsideration shall be resolved by the Committee in accordance with the Rules of Criminal Procedure.⁵¹ (emphasis ours)

Finally, Section 9 of the Joint Order provides for the budget and financial support for the operation of the Joint Committee and the Fact-Finding Team which shall be sourced from funds of the DOJ and the COMELEC, as may be requested from the Office of the President.⁵²

a. The Unconstitutional Distortion of the Existing Legal Framework

Section 2, Article IX (C) of the Constitution specifically vests in the COMELEC the plenary power to “investigate and, where appropriate, prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offenses and malpractices.” **To discharge its duty effectively, the Constitution endowed the COMELEC with special features which elevate it above other investigative and prosecutorial agencies of the government.**

First and foremost, **it extended independence to the COMELEC and insulated it from intrusion by outside influences, political pressures**

⁵¹ Annex C, Petition of Petitioner Arroyo in G.R. No. 199082.

⁵² Annex A, Petition of Petitioner Arroyo in G.R. No. 199082.

and partisan politics. In *Atty. Macalintal v. COMELEC*,⁵³ already cited above, then Associate Justice Puno enumerated these safeguards to protect the independence of the COMELEC, viz.:

Several safeguards have been put in place to protect the independence of the COMELEC from unwarranted encroachment by the other branches of government. While the President appoints the Commissioners with the concurrence of the Commission on Appointments, **the Commissioners are not accountable to the President in the discharge of their functions.** They have a fixed tenure and are removable only by impeachment. To ensure that not all Commissioners are appointed by the same President at any one time, a staggered system of appointment was devised. Thus, of the Commissioners first appointed, three shall hold office for seven years, three for five years, and the last three for three years. Reappointment and temporary designation or appointment is prohibited. In case of vacancy, the appointee shall only serve the unexpired term of the predecessor. The COMELEC is likewise granted the power to promulgate its own rules of procedure, and to appoint its own officials and employees in accordance with Civil Service laws.

The COMELEC exercises quasi-judicial powers but it is not part of the judiciary. This Court has no general power of supervision over the Commission on Elections except those specifically granted by the Constitution. As such, the Rules of Court are not applicable to the Commission on Elections. **In addition, the decisions of the COMELEC are reviewable only by petition for *certiorari* on grounds of grave abuse of discretion[.]**⁵⁴ [emphasis ours, citations omitted]

Under the Constitution, the Executive is tasked with the enforcement of the laws that the Legislature shall pass. In the administration of justice, the Executive has the authority to investigate and prosecute crimes through the DOJ, constituted in accordance with the Administrative Code.⁵⁵ Under our current laws, the DOJ has general jurisdiction to conduct preliminary investigation of cases involving violations of the Revised Penal Code.⁵⁶

⁵³ *Supra* note 16.

⁵⁴ *Id.* at 767-768.

⁵⁵ See Separate Opinion of Justice Arturo D. Brion in *Biraogo v. Philippine Truth Commission of 2010*, G.R. Nos. 192935 & 193036, December 7, 2010, 637 SCRA 78, 330-331.

⁵⁶ The DOJ's power to conduct preliminary investigation is based on Section 5 (2) of RA 10071, which states:

(2) Conduct the preliminary investigation and prosecution of criminal cases involving national security, those for which task forces have been created and criminal cases whose venues are transferred to avoid miscarriage of justice, all when so directed by the Secretary of Justice as public interest may require[.]

and Section 3 (2), Chapter 1, Title III, Book IV of the Administrative Code, which states:

Sec. 3. *Powers and Functions.* – To accomplish its mandate, the Department shall have the following powers and functions:

With respect to the power to conduct preliminary investigation and to prosecute election offenses, Congress has mandated under Section 42 of RA No. 9369 that the COMELEC shall have the power **concurrent** with the other prosecuting arms of the government, to conduct preliminary investigation of all election offenses punishable under the Omnibus Election Code, and to prosecute these offenses. **Concurrent jurisdiction has been defined as “equal jurisdiction to deal with the same subject matter.”**⁵⁷

Thus, under the present legal framework, the COMELEC and the DOJ, and its prosecuting arms, have equal jurisdiction to conduct preliminary investigation and prosecute election offenses. Effectively, this means that the DOJ and its prosecuting arms can already conduct preliminary investigations and prosecute election offenses not merely as deputies, but independently of the COMELEC.

This concurrent jurisdiction mandated under Section 42 of RA No. 9369 must, however, be read together with and cannot be divorced from the provisions of the Constitution guaranteeing the COMELEC’s independence as a Constitutional Commission, in particular, Sections 1, 2, 3 4, 5 and 6 of Article IX (A) of the 1987 Constitution. This constitutional guaranty of independence cannot be taken lightly as it goes into the very purpose for which the COMELEC was established as an independent Constitutional Commission.

To briefly recall and reiterate statutory and jurisprudential history, the COMELEC was deliberately constituted as a separate and independent body from the other branches of government in order to ensure the integrity of our electoral processes; it occupies a distinct place in our scheme of government as the constitutional body charged with the administration of our election laws. **For this reason, the Constitution and our laws unselfishly granted**

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(2) Investigate the commission of crimes, prosecute offenders and administer the probation and correction system.

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Dept. of Justice v. Hon. Liwag, 491 Phil. 270, 285 (2005).

it powers and independence in the exercise of its powers and the discharge of its responsibilities.⁵⁸

The independence of the COMELEC is a core constitutional principle that is shared and is closely similar to the judicial independence that the Judiciary enjoys because they are both expressly and textually guaranteed by our Constitution. **Judicial independence** has been characterized as “a concept that expresses the ideal state of the judicial branch of government; it encompasses the idea that individual judges and the judicial branch as a whole should work free of ideological influence.”⁵⁹

The general concept of “judicial independence” can be “broken down into two distinct concepts: **decisional independence** and **institutional, or branch, independence.**” **Decisional independence** “refers to a judge’s ability to render decisions free from political or popular influence based solely on the individual facts and applicable law.” On the other hand, institutional independence “describes the separation of the judicial branch from the executive and legislative branches of government.”⁶⁰ **“Decisional independence is the *sine qua non* of judicial independence.”**⁶¹

In the exercise of the COMELEC’s power to investigate and prosecute election offenses, the “independence” that the Constitution guarantees the COMELEC should be understood in the context of the same “decisional independence” that the Judiciary enjoys since both bodies ascertain facts and apply the laws to these facts as part of their mandated duties.

In concrete terms, the **“decisional independence” that the COMELEC should ideally have in the exercise of its power to investigate and prosecute election offenses, requires the capacity to**

⁵⁸ *Atty. Macalintal v. Comelec*, *supra* note 16, at 770-771.

⁵⁹ Joseph M. Hood, *Judicial Independence*, 23 J. Nat’l Ass’n Admin. L. Judges 137, 138 (2003) citing American Judicature Society, What is Judicial Independence? (Nov. 27, 2002), at http://www.ajs.org/cji/cji_whatjsi.asp (last visited Apr. 14, 2003).

⁶⁰ *Id.*

⁶¹ Gordon Bermant, *Federal Judges And The Judicial Branch: Their Independence And Accountability*, 46 Mercer L. Rev. 835, 836 (1995).

exercise these 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 xxx [the] case.”⁶² And even if the power to investigate and prosecute election offences, upon determination of the existence of probable cause, are executive and not judicial functions, the rationale behind the constitutional independence of the Judiciary and the COMELEC is geared towards the same objective of de-politicization of these institutions which are and should remain as non-political spheres of government.

Tested under these considerations, the result cannot but be the unavoidable conclusion that what exists under **Joint Order No. 001-2011 and the Rules of Procedure** on the Conduct of Preliminary Investigation on the Alleged Election Fraud in the 2004 and 2007 National Elections **is not a scheme whereby the COMELEC exercises its power to conduct preliminary investigation and to prosecute elections offenses independently of other branches of government but a *shared responsibility* between the COMELEC and the Executive Branch through the DOJ.**

This is the incremental change at issue in the present case, whose adoption weakens the independence of the COMELEC, opening it to further incremental changes on the basis of the ruling in this case. Under the *ponencia*’s ruling allowing a shared responsibility, the independence of the COMELEC ends up a **boiled frog**; we effectively go back to the country’s situation before 1940 – with elections subject to intrusion by the Executive.

Significantly, the Solicitor General admitted during the oral arguments that the reports and or recommendations of the Fact-Finding

⁶² Stephen H. Legomsky, *Deportation And The War On Independence*, 91 Cornell L. Rev. 369, 386 (2006).

Team and Joint Committee were a shared responsibility between the DOJ and the COMELEC members, *viz.*:

JUSTICE BRION: With that agreement perhaps we have laid down the basis for the constitutional hierarchy in this case. So that here we recognize that the Bill of Rights is very important, the due process clause is very important as against the police power of the State, particularly in criminal prosecutions. Okay. Let me go now to a very, very small point. The investigating team that was created by the COMELEC-DOJ resolution, can you tell me how it operates?

SOLGEN CADIZ: Your Honor, there are two (2) bodies created, collaborative effort most of them. One is the fact-finding team and the other one is the preliminary investigation committee.

JUSTICE BRION: In the fact-finding team, what is the composition?

SOLGEN CADIZ: DOJ, COMELEC and NBI.

JUSTICE BRION: Two (2) members each?

SOLGEN CADIZ: That is my recollection also, your Honor.

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JUSTICE BRION: So effectively the DOJ has four (4) representatives in that investigating team, right?

SOLGEN CADIZ: If that is the perspective, Your Honor, but the NBI of course, has a vastly different function from the prosecutors of the DOJ.

JUSTICE BRION: Who has supervision over this investigation team?

SOLGEN CADIZ: Your Honor, it is a collaborative effort. There is no one head of this panel. Likewise, as regards the preliminary investigation team which was collaborative effort.

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JUSTICE BRION: What do the rules say? My question is as simple as that. Who has supervision over the investigating team?

SOLGEN CADIZ: The Preliminary Investigation Committee, Your Honor, the Fact-Finding Team.

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SOLGEN CADIZ: **Your Honor, it's here. Both the Secretary of Justice and the COMELEC Chairman as I previously stated.**

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JUSTICE BRION: And I heard from you before that the decision here was unanimous among the members. They have no problem.

SOLGEN CADIZ: In fact, Your Honor, the resolution of the COMELEC en banc says that it gave great weight to the assent of the two COMELEC representatives in the preliminary investigation team.

JUSTICE BRION: Of the preliminary investigation, we are not there yet. We are only in the fact-finding team.

SOLGEN CADIZ: There was no dissension, Your Honor.

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JUSTICE BRION: They were unanimous. They agreed, they consulted with one another and they agreed as their decision on what to send to their superiors, right?

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SOLGEN CADIZ: There was a report to the preliminary investigation committee...

JUSTICE BRION: So the report was unanimous?

SOLGEN CADIZ: Yes, Your Honor.

JUSTICE BRION: So this was a shared report?

JUSTICE BRION: **Okay. A shared understanding between the COMELEC and the DOJ.**

SOLGEN CADIZ: But maintaining their own identities, your Honor.

JUSTICE BRION: Now, let's go to the preliminary investigation team. What was the membership?

SOLGEN CADIZ: Three (3) from DOJ and two (2) from COMELEC.

JUSTICE BRION: **Three (3) from DOJ and two (2) from COMELEC. They also came out with their recommendations, right?**

SOLGEN CADIZ: **Yes, Your Honor.**

JUSTICE BRION: **Were they also unanimous?**

SOLGEN CADIZ: **Yes, Your Honor.**

JUSTICE BRION: **So again this was a shared decision between the DOJ members and the COMELEC members, right?**

SOLGEN CADIZ: **Yes, your Honor.**

JUSTICE BRION: **Okay. Thank you very much for that admission...**⁶³ [emphasis supplied]

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TSN (December 8, 2011), pp. 230-237.

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*.

To illustrate, Justice Presbitero J. Velasco raised during the oral arguments the prejudicial effects (to the COMELEC's decisional independence) of the joint supervision by the DOJ and the COMELEC over the composite Fact-Finding Team and the Preliminary Investigation Committee, viz.:

JUSTICE VELASCO: Counsel, would you agree that it was actually DOJ and COMELEC that initially acted as complainant in this case?

ATTY. DULAY: No, Your Honor, that is not our understanding, Your Honor.

JUSTICE VELASCO: What precipitated the creation of the Preliminary Investigating Committee and the fact-finding team under Joint Order No. 001-2011?

ATTY. DULAY: Well, if you were to take it, Your Honor, based on their Joint Circular, it would be due to the recent discovery of new evidence and the surfacing of new witnesses, Your Honor.

JUSTICE VELASCO: Correct. So *motu proprio*, they initiated the investigation into possible breach of election laws because of this new evidence discovered and the surfacing of new witnesses, is that correct?

ATTY. DULAY: Yes, Your Honor.

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JUSTICE VELASCO: Okay. So initially DOJ and COMELEC were the complainants in this election matter. **Now, the fact finding committee under Section 4 of Joint Order 001-2011 is under the supervision of the Secretary of Justice and COMELEC Chairman, correct?**

ATTY. DULAY: Yes, Your Honor.

JUSTICE VELASCO: **What does it mean, what does it mean if these two heads of two powerful branches of government have supervision over the activities of the fact-finding team? What can it do?**

ATTY. DULAY: Well, Your Honor our contention is that the merger of the powers of the ... an independent constitutional commission and an executive department, the executive branch, Your Honor, is a violation of the principle of separation of powers, Your Honor. Because while the law may provide that each body or entity the COMELEC or the DOJ have concurrent jurisdiction over election offenses, this does not mean that this can be exercised jointly, Your Honor. And what we are really objecting, Your Honor, is the fact that when they join, it is now a... it constitutes a violation of that principle of separation of powers, Your Honor.

JUSTICE VELASCO: Okay, as two branches or one department and a constitutional body supervising the fact finding, so under the Joint Order 001-2011 **it can give instructions to the fact-finding team as to how to go about in performing its functions under Section 4 of said joint order, is that correct?**

ATTY. DULAY: **Yes, Your Honor.**

JUSTICE VELASCO: **So they can issue instruction and orders to the fact-finding team in gathering reports, conducting interviews,**

assessing affidavits and the other functions of the fact-finding team, okay?

ATTY. DULAY: Yes, Your Honor.

JUSTICE VELASCO: And Preliminary Investigation Committee is composed of representatives from the same, DOJ and COMELEC also, correct?

ATTY. DULAY: Yes, Your Honor.

JUSTICE VELASCO: **Now the reports of the fact finding team are submitted also to the Secretary of Justice and Chairman of COMELEC, is that correct?**

ATTY. DULAY: Yes, under the order, Your Honor.

JUSTICE VELASCO: Okay. So in short the investigation, the investigator actually is also the complainant in this electoral matter? What's your view on that?

ATTY. DULAY: Yes, Your Honor, and the judge also, Your Honor, because the same body. That's why our contention, **Your Honor, is that the fact-finding team and the Preliminary Investigation Committee, is one and the same creature, Your Honor.** They are both created by... jointly by the COMELEC and the DOJ.

JUSTICE VELASCO: And the resolutions of the Preliminary Investigation Committee will have to be submitted first to whom?

ATTY. DULAY: If it is an election offense, Your Honor, to the COMELEC, if it is a non-election offense to the Department of Justice, Your Honor.

JUSTICE VELASCO: **So the resolution of the criminal complaint will have to be done by one of the agencies over which has supervision and control over two members of the Preliminary Investigation Committee, is that correct?**

ATTY. DULAY: Yes, Your Honor. If, your Honor please, **the supervision of the Secretary of Justice and the COMELEC Chairman refers to the fact-finding team as well as to the Preliminary Investigation Committee which are composed... it's a composite team, really, Your Honor, as far as the fact finding team, there's the DOJ, there's the NBI, they are the two representatives from the COMELEC.** So if we were to take the line that they would be under the supervision of one of the other heads, **then it would be a head of an executive department supervising the work of a representative from an independent constitutional commission and vice versa, Your Honor.** So there is in that sense a diminution, Your Honor, of the power and authority of the COMELEC which it should have in the first place exercised solely or singularly in the same way that the DOJ under its concurrent jurisdiction could have exercised separately, Your Honor.⁶⁴ [emphasis supplied]

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TSN (November 29, 2011), pp. 80-84.

Given that the membership of the composite Fact-Finding Team and Preliminary Investigation Committee is **numerically tilted in favor of the DOJ**, plus the fact that **a member of the DOJ exercises supervision over the representatives of the COMELEC**, it cannot be discounted that the latter runs the *risk* of being pressured into bending their analyses of the evidence to reach results (a finding of probable cause, in this case) more pleasing or tailor-fitted to the outcomes desired by their DOJ supervisors who belong to the majority. In this situation, the COMELEC's independent consideration of the facts, evidence and applicable law with respect to the complaints for electoral sabotage filed against the respondents cannot but be severely compromised. The following exchanges during the oral arguments are also very instructive:

ASSOCIATE JUSTICE ABAD: Now here, the Election Code grants the COMELEC and the other prosecution arms of the government concurrent authority to conduct preliminary investigation of election offenses, is that correct?

SOLICITOR GENERAL CADIZ: Yes, Your Honor.

ASSOCIATE JUSTICE ABAD: But your theory is that, given their concurrent authority they can conduct preliminary investigation of election offenses.

SOLICITOR GENERAL CADIZ: That was COMELEC and DOJ decided in this particular matter, Your Honor.

xxx

ASSOCIATE JUSTICE ABAD: No, I'm asking you if you adopt that position or not, that they concurrently conduct a joint investigation, concurrent?

SOLICITOR GENERAL CADIZ: Yes, Your Honor.

ASSOCIATE JUSTICE ABAD: Alright. Now, the prosecution arm of the government are under the Secretary of Justice, do you agree?

SOLICITOR GENERAL CADIZ: Yes, Your Honor.

ASSOCIATE JUSTICE ABAD: And the Secretary of Justice is the alter ego of the President, do you agree?

SOLICITOR GENERAL CADIZ: I think that is true.

ASSOCIATE JUSTICE ABAD: The President is essentially a politician belonging to a political party, will you agree?

SOLICITOR GENERAL CADIZ: He is the President of the people, Your Honor.

ASSOCIATE JUSTICE ABAD: Oh yes.

xxx

ASSOCIATE JUSTICE ABAD: As a matter of fact, he is also the titular President of the Liberal Party, is that correct?

SOLICITOR GENERAL CADIZ: Yes, but he is the President of a hundred million Filipinos.

xxx

ASSOCIATE JUSTICE ABAD: Has the COMELEC which is an independent constitutional body any business doing work assigned to it by law hand-in-hand with an agency under the direct control of a politician?

SOLICITOR GENERAL CADIZ: I think that's a wrong premise, Your Honor.

ASSOCIATE JUSTICE ABAD: Explain to me. Where is the error in my premise?

xxx

SOLICITOR GENERAL CADIZ: Thank you very much, Your Honor. Thank you very much, thank you, Your Honor. COMELEC and DOJ they decided to have a Fact-Finding Team and the Preliminary Investigating Committee. The Fact-Finding Team is composed of COMELEC personnel, DOJ personnel, and NBI personnel. The Preliminary Investigating Committee is composed to COMELEC people and DOJ personnel. Your Honor, they have, the Fact-Finding Team, made a report, submitted it both to COMELEC, to the Secretary of Justice, and to the Preliminary Investigating Committee. The Preliminary Investigating Committee had a unanimous finding and they made a report to the COMELEC *En Banc*. It is the COMELEC *En Banc*, Your Honor, which had the final say on the findings of Preliminary Investigating Committee. So, I think, Your Honor, the premise is wrong, that the independent of the COMELEC has been compromised in this particular matter because, in fact, the COMELEC *En Banc*, Your Honor did not adopt *in toto* the findings of the Preliminary Investigating Committee. And You Honor, there is a dimension here that not only election offenses are being investigated but also common crimes under the Revised Penal Code. So, in the collaboration between DOJ and the COMELEC, what was sought to be made, or what was sought to be achieved was efficiency, and what was sought to be avoided was redundancy, Your Honor. And again, if I may reiterate, Your Honor please, to your question about compromising the independence of the COMELEC, I respectfully beg to disagree with that premise, Your Honor, because at the end of the day it was the COMELEC *En Banc* who decided to file an Information or to have a Resolution asking the Law Department to file an

information against the three (3) accused in this case Gloria Macapagal-Arroyo, Lintang Bedol, and former Governor Zaldy Ampatuan, Sr.

ASSOCIATE JUSTICE ABAD: **Acting on the findings of a Committee dominated by representatives of the DOJ, is that correct?**

SOLICITOR GENERAL CADIZ: **There was a unanimity, Your Honor.**

ASSOCIATE JUSTICE ABAD: **Yes, yes. Well, the Committee dominated**

SOLICITOR GENERAL CADIZ: **I think the numbers are.....**

ASSOCIATE JUSTICE ABAD: 3-2.

SOLICITOR GENERAL CADIZ: 3-2?

ASSOCIATE JUSTICE ABAD: Yes.

SOLICITOR GENERAL CADIZ: There was no dissention, there was a unanimity in finding and at the end of the day there were only recommendatory to the COMELEC *En Banc*.

ASSOCIATE JUSTICE ABAD: **Well, that is true but the COMELEC did not make an investigation. It was not the one that denied the respondents the right to ask for time to file counter-affidavit. These rulings were made by that Committee dominated by representatives of the DOJ.** Anyway, you just answered it, although not exactly to my satisfaction but you answered it. Do you know if under the Election Code, tell me if I'm exceeded my time already, do you know if under the Election Code, the COMELEC must directly conduct the preliminary investigation of election offenses? Does it have to conduct directly by itself preliminary investigation of election offenses, the COMELEC?

SOLICITOR GENERAL CADIZ: The Law Department can do that, Your Honor.

ASSOCIATE JUSTICE ABAD: Well, so I will read to you Section 43 of Republic Act 9369, it says that, and I quote, **"That the COMELEC shall, through it's duly authorized legal officers, have the power concurrent with the other prosecuting arms of the government, to conduct preliminary investigation of all election offenses."** Now, since the law specifically provides that the COMELEC is to exercise its power to conduct preliminary investigation through its legal officers, by what authority did the COMELEC delegate that power to a joint committee dominated by strangers to its organization?

SOLICITOR GENERAL CADIZ: Your Honor, the power of the COMELEC to investigate and prosecute election related offenses is not exclusive. It is concurrent with prosecuting arms of the government, that is the Department of Justice. In other words, Your Honor, the Department of Justice under the amended law has the power to investigate and prosecute election related offenses

likewise, so there was no undue delegation as premises in your question, Your Honor, but this is a concurrent jurisdiction with the DOJ.

ASSOCIATE JUSTICE ABAD: So, that's what made the COMELEC disregard what the law says, "shall" which is, as you say, you know in law "shall" means a command, "Shall, through its duly authorized legal officers, have the power to conduct preliminary investigation of all election offenses." At any rate, I think, you've have answered.

SOLICITOR GENERAL CADIZ: It is not exclusive, Your Honor.

ASSOCIATE JUSTICE ABAD: You've given your answer.

SOLICITOR GENERAL CADIZ: It is not exclusive, Your Honor, the law states its power.

ASSOCIATE JUSTICE ABAD: **No, the method is exclusive.** The power to investigate is not exclusive, if the law expressly says "through its fully authorized legal officers" precisely because this is in **consonance with the policy laid down by the Constitution that the COMELEC shall enjoy autonomy, independent of any branch of government. It should not be working with the political branch of the government to conduct its investigation. It should try to maintain its independence.** At any rate, I understand that...Can I continue Chief? ⁶⁵[emphasis supplied]

Considering the terms of the COMELEC-DOJ resolutions and exchanges and admissions from no less than the Solicitor General, *the resulting arrangement – involving as it does a joint or shared responsibility between the DOJ and the COMELEC – cannot but be an arrangement that the Constitution and the law cannot allow, however practical the arrangement may be from the standpoint of efficiency.* To put it bluntly, 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 a qualification to the above views, I acknowledge — as the Court did in *People v. Hon. Basilla*⁶⁶ — that "the prompt and fair investigation and prosecution of election offenses committed before or in the course of nationwide elections would simply not be possible without the assistance of

⁶⁵ TSN (December 8, 2011), pp. 86-99.

⁶⁶ 258-A Phil. 656 (1989).

provincial and city fiscals and their assistants and staff members, and of the state prosecutors of the [DOJ].”⁶⁷ That the practice of *delegation of authority by the COMELEC*, otherwise known as *deputation*, has long been upheld by this Court is not without significance, as *it is the only means by which its constitutionally guaranteed independence can remain unfettered*.

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),⁶⁸ 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.”⁶⁹

⁶⁷ *Id.* at 663.

⁶⁸ *Dept. of Justice v. Hon. Liwag*, *supra* note 57, at 285,

⁶⁹ *Diño v. Olivarez*, *supra* note 30 at 262-263.

III. The Consequences of Unconstitutionality

In the usual course, the unconstitutionality of the process undertaken in conducting the preliminary investigation would result in its nullity and the absence of the necessary preliminary investigation that a criminal information requires. Three important considerations taken together, however, frustrate the petitioners' bid to achieve this result so that the petitions ultimately have to be dismissed.

First, separate from the COMELEC's decisional independence, it also has the attribute of *institutional independence*, rendered necessary by its key role in safeguarding our electoral processes; the Constitution's general grant of independence entitles it not only to the discretion to act as its own wisdom may dictate, but **the independence to act on its own separately and without interference from the other branches of the government.**

Thus, these other branches of government, including the Judiciary, cannot interfere with COMELEC decisions made in the performance of its duties, save only if the COMELEC abuses the exercise of its discretion⁷⁰ — a very high threshold of review from the Court's point of view. **Any such review must start from the premise that the COMELEC is an independent body whose official actions carry the presumption of legality, and any doubt on whether the COMELEC acted within its constitutionally allowable sphere should be resolved in its favor.**

In the context of the present case, the petitioners' allegations and evidence on the infirmity of the COMELEC's determination of probable cause should clearly be established; where the petitioners' case does not rise above the level of doubt — as in this case — the petition should fail.

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CONSTITUTION, Article VIII, Section 1, par. 2.

Second and taking off from where the first above consideration ended, Section 2 of Joint Order No. 001-2011 grants the COMELEC **the final say** in determining whether probable cause exists. Section 2 reads:

Section 2. Mandate. – The Committee shall conduct the necessary preliminary investigation on the basis of the evidence gathered and the charges recommended by the Fact-Finding Team create and referred to in Section 4 hereof. Resolutions finding probable cause for election offenses, defined and penalized under the Omnibus Election Code and other election laws shall be approved by the COMELEC in accordance with the COMELEC Rules of Procedure. For other offenses, or those not covered by the Omnibus Election Code and other election laws, the corresponding criminal information may be filed directly with the appropriate courts.

While the fact-finding and the preliminary investigation stages, as envisioned in the various COMELEC-DOJ instruments, may have resulted in a constitutionally impermissible arrangement between the COMELEC and the DOJ, Section 2 of Joint Order No. 001-2011 shows that it is the COMELEC that must still solely act and its actions can be constitutionally valid *if made in a process that is free from any attendant participation by the Executive*.

From the petitioners' perspective, while the disputed resolutions involved a fact-finding and a preliminary investigation phases that are constitutionally objectionable, ***the petitioners still have to show that indeed the COMELEC had left the matter of determining probable cause ultimately to the Fact-Finding Team and the Joint Committee***. It is on this point that the petitioners' case is sadly deficient. In contrast with this deficiency, the records show that the COMELEC did indeed meet, *on its own*, to determine probable cause based on the evidence *presented by its own representatives*.

Third, since the corresponding informations have already been filed in court, *claims of absence of, or irregularity in, the preliminary investigation are matters which appropriately pertain to the lower court in the exercise of*

*its jurisdiction.*⁷¹ After the lower court has effectively assumed jurisdiction, what is left for this Court to act upon is solely the issue of the constitutionality of the creation and operation of the Fact-Finding Team and the Joint Committee for being violative of the COMELEC's independence. Other constitutional issues (equal protection, due process, and separation of powers) simply arose as incidents of the shared COMELEC-DOJ efforts, and need not be discussed after the determination of the unconstitutionality of the shared COMELEC-DOJ arrangements for violation of the COMELEC's independence.

In sum, while the DOJ-COMELEC arrangements compromised the COMELEC's independence, the filing of the informations in court, upon the ***COMELEC's own determination of probable cause***, effectively **limited** not only the prosecution's discretion (for example, on whether to proceed or not), but also **the Court's jurisdiction** to pass upon the *entire* plaint of the petitioners. *Crespo v. Judge Mogul*⁷² teaches us that –

The filing of a complaint or information in Court initiates a criminal action. **The Court thereby acquires jurisdiction over the case**, which is the authority to hear and determine the case. x x x.

x x x x

The rule therefore in this jurisdiction is that once a complaint or information is filed in Court any disposition of the case as its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court. Although the fiscal retains the direction and control of the prosecution of criminal cases even while the case is already in Court he cannot impose his opinion on the trial court. The Court is the best and sole judge on what to do with the case before it. **The determination of the case is within its exclusive jurisdiction** and competence. [emphases ours, citations omitted]

To reiterate, except for the resolution of the issue of the constitutionality of creating a Joint Committee and a Fact-Finding Team and of the incidental issues bearing on this constitutional interpretation – *matters which only this*

⁷¹ *Doromal v. Sandiganbayan*, 258 Phil. 146 (1989).

⁷² 235 Phil. 465, 474-476, cited in *Galvez v. Court of Appeals*, G.R. No. 114046, October 24, 1994, 237 SCRA 685, 699, and *Velasquez v. Undersecretary of Justice*, G.R. No. 88442, February 15, 1990, 182 SCRA 388, 391.

*Court may authoritatively determine*⁷³ – this Court should now refrain from making any pronouncement relative to the disposition of the criminal cases now before the lower court.

Based on these considerations — particularly, on the lack of a factual showing that the COMELEC did not determine the existence of probable cause by itself and relied solely on its unconstitutional arrangements with the DOJ — ***I support the dismissal of the petitions save for the ruling that the shared COMELEC-DOJ investigatory and prosecutory arrangements, as envisioned in the disputed resolutions, are unconstitutional.***

Lest this opinion be misconstrued and for greater emphasis, while I ultimately sustain the COMELEC's finding of probable cause based on the collective considerations stated above, the constitutionally objectionable arrangement of a shared responsibility between the COMELEC and the DOJ was not necessarily saved by the existence of Section 2 of Joint Order No. 001-2011. I sustain the COMELEC's finding of probable cause under the unique facts and developments in this case, based on the institutional independence the COMELEC is entitled to; the lack of proof that the COMELEC did not act independently; and the adduced fact that the COMELEC did indeed meet to consider the findings presented to it by its representatives. I make this conclusion without prejudice to proof of other facts that, although bearing on the COMELEC's independence but are not here decided, may yet be submitted by the petitioners before the trial court if they are appropriate for that court's consideration on the issues properly raised.

For greater certainty for the COMELEC in its future actions in enforcing and administering election-related laws, let me advise that what I highlighted regarding the nature and breadth of the constitutionally

⁷³*Civil Service Commission v. Department of Budget and Management*, 502 Phil. 372 (2005).

guaranteed independence of the COMELEC should always be seriously considered as guiding lights.

For the Court *en banc*'s consideration.


ARTURO D. BRION
Associate Justice