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:

JULY 23, 2013

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DISSENTING OPINION

BRION, *J.:*

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

In his Motion for Reconsideration (*Motion*), petitioner Jose Miguel T. Arroyo (*Arroyo*) argues that the creation of a Fact-Finding Team and a Joint Department of Justice (*DOJ*)-Commission on Elections (*COMELEC*) Committee violates the constitutionally guaranteed independence of the COMELEC, in particular, its decisional independence. Arroyo also urges the Court to reconsider its September 18, 2012 Decision and take judicial

cognizance of: (1) the alleged "rushed resolution of the electoral sabotage cases against co-petitioner Gloria Macapagal-Arroyo (*GMA*) by the Joint DOJ-COMELEC Committee, having been packed with members of the Executive Branch, as a product of what he claims was the COMELEC's lack of decisional independence"; and (2) "the subsequent grant of bail to GMA as an indication that the evidence of guilt was weak and that the filing of cases against her was done regardless of merit."[1]

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

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

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

The COMELEC's history undeniably shows that its independence was the principal justification for its creation. The people's dissatisfaction with the manner by which the elections were administered by the Executive Department under the then Department of Interior prompted the

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1 *Rollo* (G.R. No. 199082), p. 1384.
2 Ibid.

constitutional amendment of the 1935 Constitution in 1940. This constitutional amendment was deliberately undertaken to place the COMELEC ***outside the influence of political parties and the control of the other departments of government.*** This constitutional policy towards protection of the COMELEC's independence has never wavered and in fact, has prevailed even after two amendments of our Constitution in 1973 and 1987. The current 1987 Constitution now provides that the COMELEC, like all other Constitutional Commissions, shall be independent.

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

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

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

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3 85 Phil. 101 (1949).
4 G.R. No. 93867, December 18, 1990, 192 SCRA 358.
5 453 Phil. 586 (2003).
6 *Supra* note 3.

> independence of one designated in a temporary capacity to the Commission on Elections. **It would be more in keeping with the intent, purpose and aim of the framers of the Constitution to appoint a permanent Commissioner than to designate one to act temporarily. Moreover, the permanent office of the respondent may not, from the strict legal point of view, be incompatible with the temporary one to which he has been designated, tested by the nature and character of the functions he has to perform in both offices, but in a broad sense there is an incompatibility, because his duties and functions as Solicitor General require that all his time be devoted to their efficient performance.** Nothing short of that is required and expected of him.[7] (emphases ours)

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

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

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

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

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

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[7] Id. at 106-109.

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

intrusion by the other branches of government – in this case, the Executive Branch.

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

> To point out the obvious, the Fact-Finding Team, on the one hand, is composed of five members from the DOJ and two members from the COMELEC. This team is, in fact, **chaired by a DOJ Assistant Secretary**. Worse, the Fact-Finding Team is **under the supervision of the Secretary of DOJ and the Chairman of the COMELEC** or, in the latter's absence, a Senior Commissioner of the COMELEC.
>
> On the other hand, the Joint DOJ-COMELEC Preliminary Investigation Committee **is composed of three (3) officials coming from the DOJ and two (2) officials from the COMELEC**. **Prosecutor General Claro A. Arellano from the DOJ is also designated as Chairperson of the Committee.** Not to be forgotten also is that **budget and financial support** for the operation of the Committee and the Fact-Finding Team shall be sourced from funds of the DOJ and the COMELEC, as **may be requested from the Office of the President**. This, again, is a perfect example of an incremental change that the Executive can exploit.
>
> What appears to be the arrangement in this case is a novel one, whereby the COMELEC – supposedly an independent Constitutional body - has been ***fused*** with the prosecutorial arm of the Executive branch in order to conduct preliminary investigation and prosecute election offenses in the 2004 and 2007 National Elections. To my mind, ***this fusion or shared responsibility between the COMELEC and the DOJ completely negates the COMELEC's "decisional independence" so jealously guarded by the framers of our Constitution who intended it to be insulated from any form of political pressure***.[9] (emphases, italics and underscores supplied)

I reiterate, if only for emphasis, that what exists under Joint Order No. 001-2011 is not a scheme whereby the COMELEC exercises its power to conduct preliminary investigation and prosecute election offenses independently of other branches of government; what it provides is a *shared responsibility* between the COMELEC and the Executive Branch through the DOJ. The result cannot but be an arrangement that the Constitution and the law cannot allow, however practical from the standpoint of efficiency it might be. To stress the obvious, the joint or shared arrangement directly goes against the rationale that justifies the grant of independence to the

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

COMELEC — to insulate it, particularly its role in the country's electoral exercise, from political pressures and partisan politics.

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

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

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

> In other words, the only arrangement constitutionally possible, given the independence of the COMELEC and despite Section 42 of RA 9369, is ***for the DOJ to be a mere deputy or delegate of the COMELEC and not a co-equal partner in the investigation and prosecution of election offenses WHENEVER THE COMELEC ITSELF DIRECTLY ACTS.*** While the COMELEC and the DOJ have equal jurisdiction to

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

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

> investigate and prosecute election offenses (subject to the rule that the body or agency that first takes cognizance of the complaint shall exercise jurisdiction to the exclusion of the others), the COMELEC — whenever it directly acts in the fact-finding and preliminary investigation of elections offences — can still work with the DOJ and seek its assistance without violating its constitutionally guaranteed independence, ***but it can only do so as the principal in a principal-delegate relationship with the DOJ where the latter acts as the delegate.***
>
> This arrangement preserves the COMELEC's independence as "being mere deputies or agents of the COMELEC, provincial or city prosecutors deputized . . . are expected to act in accord with and not contrary to or in derogation of its resolutions, directives or orders xxx in relation to election cases that such prosecutors are deputized to investigate and prosecute. Being mere deputies, provincial and city prosecutors, acting on behalf of the COMELEC, [shall also] proceed within the lawful scope of their delegated authority."[12] (emphases, italics and underscore supplied)

COMELEC's approval under Section 2 of Joint Order No. 001-2011 of the resolutions of the Joint DOJ-COMELEC Committee finding probable cause does not save the said Order from the vice of unconstitutionality

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

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

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

is insulated from any intrusion of outside influences, political pressures and partisan politics.

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

> JUSTICE VELASCO: Section 6 of the Joint Order states… wait a minute. No, Section 2 rather of the Joint Order states that "the resolutions of the preliminary investigation committee shall be approved by COMELEC," correct?
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> ATTY. DULAY: Yes, Your Honor.
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> JUSTICE VELASCO: However, I noticed that in the COMELEC En Banc resolution dated November 18, 2011, the Comelec En Banc resolved the complaint only upon the recommendation of the COMELEC's own representatives in the committee, what can you say about this?
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> ATTY. DULAY: Well, Your Honor, this is precisely the point we would like to point out also that even the COMELEC itself is unsure of its legal footing in this case because instead of affirming the authority of the same body which they jointly created, they would now make it appear, Your Honor, that the resolution of the COMELEC En Banc was only based on the recommendation of the two members, of the two of the five members of the Preliminary Investigation Committee. And if I may point out, Your Honor, this was issued after there was already publicity regarding this case, Your Honor, and I supposed after they've already received our petition, Your Honor.
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> JUSTICE VELASCO: So COMELEC En Banc issued that resolution dated November 18, 2011, only on the basis of the recommendations of two members of the five men Preliminary Investigation Committee which is not even the majority in the Committee?
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> ATTY. DULAY: Well yes, Your Honor, precisely that is why we would, we are quite surprised that the COMELEC would seem to disown its own creation now when in fact the decision of the Preliminary Investigation Committee is not a decision made by two people alone. Under their own rules this was a decision made by five people, three from the DOJ, and two from the COMELEC. So I do not see, Your Honor, how they can divorce the findings of their own representatives on the same committee with only one report, Your Honor.

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

> JUSTICE VELASCO: Under the Constitution, which body or agency has the exclusive charge of the enforcement and administration of all laws relative to the conduct of election?
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> ATTY. DULAY: It would be the COMELEC, Your Honor, under the Constitution.
>
> JUSTICE VELASCO: It's only the COMELEC, right.
>
> ATTY. DULAY: Yes, Your Honor.[14]

Conclusion

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

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

ARTURO D. BRION
Associate Justice

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