Is the JBC a Constitutional Puppet and the Supreme Court its Constitutional Puppeteer?

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The Honorable Supreme Court, speaking through Justice Teresita Leonardo-De Castro, in the recent case of Aguinaldo v. Aquino[1] seems to suggest so. In this case the Judicial and Bar Council submitted a clustered or grouped shortlist of nominees to fill multiple vacancies in the Sandiganbayan. The vacancies were brought about by the enactment of Republic Act No. 10660, which increased the number of justices in the Sandiganbayan, thereby creating two more divisions in the court with three Justices each, resulting in six vacant positions. Pursuant to the said law the President needed to appoint six new Sandiganbayan justices. There were a total of ninety applicants who were interviewed for the said six vacancies[2]. After the JBC vetted the applicants, they came up with six shortlists of nominees for the said six vacancies. Hence, there were six separate shortlists for each of the six vacancies, each shortlist comprising about five to seven nominees.

The controversy arose when the President eventually appointed two nominees who belong to the same shortlist – the list for the 21st justice position[3]. The petitioners argued that the President can only appoint nominees within the shortlist given to him by the JBC to fill up a particular justice position. Their theory is that he cannot fill up a position by choosing someone from a shortlist other than that submitted to him by the JBC for that particular vacancy. They argue that to allow otherwise would defeat the very purpose of the JBC in separately submitting six shortlists. This is since the President can just pick anyone even those outside a particular shortlist submitted for a particular vacancy.

To cut the long story short, the Supreme Court struck down as unconstitutional the act of the JBC of "clustering" the nominees. Among others, the Court ruled there was no legal justification to "cluster". The requirements and qualifications, as well as the power, duties and responsibilities are the same for all the Sandiganbayan Associate Justices. If an individual is found to be qualified for one vacancy, then he/she is also qualified for all other vacancies. Thus, the President was within his powers when he disregarded the clustering.

The Decision didn't end there.

The contentious part is that the Court went further and pointed out that it is taking judicial notice of the new matters that are covered by the new rules of the JBC. It found objectionable some matters that have been introduced by Chief Justice Maria Lourdes Sereno which it found contrary to long standing practice. This includes the deletion of a provision in the old JBC rules as regards the power of the Court to require the JBC to submit to the former its recommendees for the Court's consideration, whenever the vacancy involves a seat in the Court itself. The Supreme Court Justices shall vote on who among the applicants to the

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[1] G.R. 224302, November 29, 2016

[2] "ANNOUNCEMENT" of public interview, Judicial and Bar Council, Sept. 11, 2015

[3] Our vey own Judge Wilhelmina B. Jorge-Wagan garnered the highest votes in the shortlist for the 21st Justice position.

Supreme Court are most deserving and the JBC should give "due weight and regard" to the recommendees of the Court. The Court declares:

> The same Revised JBC Rules deleted a significant part of JBC-009, the former JBC Rules, specifically, Rule 8, Section 1, which provided:
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> Sec. 1. Due weight and regard to the recommendees of the Supreme Court. - In every case involving an appointment to a seat in the Supreme Court, the Council shall give due weight and regard to the recommendees of the Supreme Court. For this purpose, the Council shall submit to the Court a list of candidates for any vacancy in the Court with an executive summary of its evaluation and assessment of each of them, together with all relevant records concerning the candidates from whom the Court may base the selection of its recommendees.
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> The deletion of this provision will likewise institutionalize the elimination by Chief Justice Sereno of the voting by the Supreme Court Justices on who among the applicants to the Supreme Court they believe are most deserving.

Background of the JBC

The JBC is an organ created in order to ensure that the members of our courts are indeed qualified to assume their roles as dispenser of justice. In addition, it aims to depoliticize the selection of the members of the bench[4]. Thus, appointees in the Judiciary need not be confirmed anymore by politicians in the powerful Commission on Appointments. Instead, the JBC will now have the task of weighing the candidates' qualifications and determine their fitness to assume judicial posts. This is to ensure that the post-Marcos judiciary shall be truly independent, with proven probity, integrity and competence.

In other words, the JBC is the gatekeeper of the judiciary. No less than the Constitution clothes this gatekeeper with the distinct privilege of recommending to the President those who it deems qualified to hold judicial positions. The President can only choose exclusively from a list of at least three nominees prepared by the JBC. He cannot appoint someone outside the list.[5]

Thus, the Constitution gives the JBC certain attributes that will help insure the successful performance of its Constitutional duty. For example, it has the implied power to promulgate its own rules of procedure[6]; it has members who are appointed from a wide spectrum of stakeholders: a representative from the academe, one from the legislature, one from the Integrated Bar, a retired Supreme Court justice, the Secretary of Justice, a representative of the private sector and the Chief Justice as ex officio Chairman[7].

The anomaly now is that the Supreme Court, based on a supposed settled practice, can influence the gatekeeper as to who to let in and who to refuse entry in the Highest Court. The JBC is required to give "due weight and regard"[8] to the Court's preferences relative to vacancies in the Court itself.

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[4] Chavez v. Judicial and Bar Council 691 Phil 173 (2012) as cited in the Concurring Opinion of J. Leonen in Aguinaldo v. Aquino G.R. 224302, November 29, 2016

[5] Constitution, Art. VIII sec. 9

[6] JBC No. 2016-01 "The Revised Rules of the Judicial and Bar Council"

[7] Constitution, Art.VIII sec.8(1)

[8] JBC -009 (former Judicial and Bar Council Rules)

Would this not defeat the very purpose of having a JBC? If the framers of the Constitution really believed that the best body to vet the applicants for the positions in the judiciary, specifically in the Supreme Court, are the incumbent justices of the Supreme Court themselves, then they could have simply made the entire Court sit as ex officio members of the JBC — but the Constitution by purposeful design, did not.

To illustrate, all of the incumbent Justices of the Supreme Court sit as members of the Presidential Electoral Tribunal[9]. The Constitution purposely and consciously created this body, manned by the justices themselves, to settle controversies relating to the election, returns and qualifications of the President and Vice-President. The idea is that the justices, free from political affiliations, are the best qualified people to adjudicate these cases. Thus, by purposeful design, only the Justices of the Supreme Court, sitting as members of the Presidential Electoral Tribunal, to the exclusion of all other tribunals, have the competence to take cognizance of cases related to the election, returns and qualifications of the President and Vice-President.

Hence, in the same vein, it can be safely concluded that when the Constitution gave the power to the JBC to recommend nominees to the judiciary, it deliberately excluded the Supreme Court justices from participating in the process of choosing qualified candidates. The Court does not have the power to compel the JBC to give "due weight and regard" to its own recommendees because the Constitution, by purposeful design, consciously excluded it.

The Supreme Court's Supreme Interest

In any case, whatever interest the Supreme Court has in the selection of applicants in the JBC, for the eventual consideration by the President, is already well represented in the said body by no less than the Chief Justice herself as the ex officio Chairman of the Council. The Chief Justice being the Primus inter pares.

Aside from this, the Constitution clearly recognizes the equal interest of other stakeholders in the appointment of the right people in the judiciary[10]. This is evident in the organization of the JBC. Each member of the council is entitled only to one vote. The interest of the academe is equal to the interest of the Supreme Court. The interest of the Integrated Bar is equal to the interest of the Supreme Court. The same thing with the retired justices, the legislature, as represented by a member of Congress, the Executive, as represented by the Justice Secretary and the private sector — all interests are of equal weight and value. The vote of the Chief Justice who represents the Court is just one, just like all others.

Thus, the Constitution through the simple structural organization of the JBC recognizes the fact that the Supreme Court does not have the lone supreme interest in bringing about a Judiciary that is independent and with proven probity, integrity and competence. It is shared by the Court with other stakeholders. So that if the Court is given more influence in choosing the recommendees as compared to the other members of the JBC, it defeats a fundamental principle behind the creation of the Council.

Checks and Balances

In theory, the Constitution spreads power evenly among the three great branches of government: the Executive, the Legislative and the Judiciary. The idea is that one branch

[9] Constitution Art. VIII sec.4 paragraph 7

[10] Concurring Opinion, J. Leonen, Aguinaldo v. Aquino, G.R. 224302, November 29, 2016

cannot wield more power as against the other branches. So that in our system of government there is a healthy degree of antagonism which serves as a check against the other branches of government in order to balance power.

For example, the Legislature checks the Executive and the Supreme Court, by wielding impeachment powers. The Constitution vests unto the House of Representatives the sole power to initiate impeachment proceedings[11] and the Senate, on the other hand is granted the sole authority to try and decide such impeachment cases[12].

On the other hand, the Judiciary checks the Executive and Legislature through its power to strike down an Executive or Legislative act which it deems repugnant to the Constitution[13]. An act of the President that is contrary to the Constitution is void. In the same way, an act of Congress in violation of the fundamental law grants no rights, imposes no obligations, it is as if it never existed.

As for the Executive, the President checks the Legislature by possessing the power to veto a bill, and such Presidential veto can only be overcome by a special majority vote of 2/3 of all members of Congress[14].

As to the Judiciary, the President may grant pardon, commutation or reprieves to convicted felons[15], thus, in effect, overruling a court interpretation of law.

These are just few examples of an intricate pattern of Checks and Balances in our government structure that is actually meant to strengthen our institutions. The checks prohibit any of the three great branches of government from becoming despots. By sheer Constitutional design any one branch cannot amass absolute power. This is so since there will always be another branch of government that can check their excesses.

Now, the Supreme Court by allowing itself to influence the JBC as to who to recommend for Presidential consideration, contributes to the erosion of Checks and Balances among the three great branches of government.

The power of the President to appoint members of the Judiciary, in general, and the members of the Supreme Court, in particular, is a form of Executive check against the Judiciary.

If the choice of recommendees that the JBC can present to the President is influenced by the Supreme Court, then this dilutes Presidential appointing powers. It results to the President becoming limited to a list, the preparation of which was made with the "advise" of the head of a co-equal branch of government, which the President ironically seeks to fill up.

In other words, the balance of power tilts in favor of the Supreme Court as against the President. As a result, Presidential check against the Supreme Court is impaired.

[11] Constitution Art.XI sec.3(1)

[12] Constitution Art.XI sec.3(6)

[13] Constitution Art.VIII sec.1

[14] Constitution Art. VII sec.27(1)

[15] Constitution Art.VII sec.19

Against the Architectural Design of our Government

The architecture of our Constitutional structure of government disallows an incumbent to choose or directly influence the choice of who will eventually succeed him in his position. For example in the Executive branch, the President cannot choose who will become the next president[16]. He can campaign for a particular chosen candidate but he cannot directly participate in the process of choosing the next President – except to vote –and he is entitled only to one vote, just like all other mortals. The weight of his vote is equal to the vote of an ordinary laborer, or government employee, or farmer in the countryside. He cannot use the awesome powers of the Presidency to put someone as his replacement no matter how he deems that candidate fit for the Presidency. It is simply not allowed.

In the Legislature, Senators also cannot choose who will succeed them after their terms expire[17], this is the same case with Representatives in the Lower House[18]. It is the people who shall decide. After all, sovereignty resides in the people and all government authority emanates from them[19].

Thus, the idea that an incumbent group of government officials, no matter how exalted their position is, can directly influence in the selection process of who shall be their successors is anathema to our governmental design. Democratic ideals dictate that, by nature, the incumbent cannot choose his own replacement, this power is always wielded by someone else.

Judicial Dictatorship, Simply Undemocratic

There was only a single instance in our recent history where a person chose himself to succeed himself. That was when the dictator-plunderer Ferdinand Marcos took his oath as President after the 1986 snap Presidential election. The people rejected him in the ballots[20] but he insisted that he won the Presidency. Hence, he took oath at around 12nn of February 25, 1986 in Malacañang, just about the same time Corazon Aquino took her oath of office as President.

Thus, it is not far-fetched to say that the power to decide and/or directly influence one's replacement is an attribute of dictatorship.

If the Supreme Court shall wield the power to choose its own members, then, it will act as a dictator.

If the two elected branches of government, the Executive and the Legislative, which have direct mandate from the people, cannot dictate or directly influence the choice of who shall succeed them, then with more reason for the unelected Supreme Court, which does not enjoy a direct mandate from the people, to also not be allowed to interfere in the choice of who shall become members of such august Court.

To allow them to do so would wreck havoc on our Constitutional framework of

[16] Constitution Art. VII sec. 4

[17] Constitution Art VI sec.2

[18] Constitution Art.VI sec.5

[19] Constitution, Art II sec. 1

[20] http://www.namfrel.com.ph/v2/news/enewsletter/Namfrel%20E-Newsletter%20Vol%201%20Issue%2061%20020711.pdf

government.

To allow the Court to influence the choice of recommendees of the JBC for the eventual consideration of the President, reflects the Court's treatment of public office, not as public trust, as the Constitution demands[21], but as a property that can be passed on to a chosen successor as in the case of monarchies.

It is simply undemocratic.

Judicial Restraint in the Exercise of "Supervision"

The power of "supervision" which the Constitution grants to the Supreme Court relative to the JBC should not be interpreted to mean that the Court can substitute its wisdom to that of the JBC, as far as recommending nominees is concerned[22].

In the first place the Constitution speaks of "supervision" not "control"[23]. The tenor of the phrase "Due weight and regard to the recommendees of the Supreme Court"[24] admits no other interpretation but an expression that the Court views itself as having superior judgement as against that of the JBC. So that the JBC ought to follow the Supreme Court's "recommendation" as to who may or may not make it to the shortlist.

The Court ought to refrain from unduly tightening its grip on the JBC. In the same way that the Court has exercised judicial restraint in dealing with other Constitutional bodies tasked to perform particular constitutional functions. Due deference should be accorded to the JBC. After all the Constitution says: "The Council shall have the principal function of recommending appointees to the Judiciary."[25] Thus, it is the Council that ought to recommend, not anybody else. Not even the Supreme Court. To allow this would be allowing indirectly what is prohibited directly.

Judge in Its Own Case

Furthermore, in case the Supreme Court submits a list of recommendees to the JBC, the latter "giving due weight and regard" to such list, adopted such recommendees and submitted them to the President for his consideration, and a nominee was eventually appointed by the President from that list, what will happen now if a party with locus standi would question the qualification of such appointee recommended by the Supreme Court?

Can an aggrieved party invoke the Court's power of judicial review to settle a controversy involving a questioned act which is attributable to the Court itself? In approving or furnishing a list of recommendees to the JBC the Court is anchoring its authority on its power of "supervision", thus in the event there exists grave abuse of discretion on the part of the Court in the exercise of this power of "supervision" there is a clear conflict of interest in the fact that the ultimate arbiter of law is the same Supreme Court whose act is being questioned.

The Court will then review its own act and determine for itself if it gravely abused its

[21] Constitution Art. XI sec.1

[22] Concurring Opinion, J. Leonen, Aguinaldo v. Aquino, G.R. 224302, November 29, 2016

[23] Constitution Art.VIII sec.8 (1)

[24] Contained in Rule 8 sec. 1 of the former JBC Rules, and deleted in the current Revised Rules of the JBC, the Supreme Court in Aguinaldo v. Aquino [G.R. 224302, November 29, 2016] found this deletion as objectionable.

[25] Constitution Art.VIII sec.8 (5)

discretion amounting to lack or excess of jurisdiction?

The Supreme Court will judge its own case.

The JBC's Independence is Judicial Independence

The "spirit that giveth life" to the JBC is the paramount desire of the sovereign Filipino people to give flesh and blood to the idea of a truly independent judiciary. Judicial independence is a theme that resonates all throughout the Constitution. For example the provision on fiscal autonomy of the judiciary[26]; the provision that guarantees security of tenure of the members of the Court[27]; and in relation to this, the provision against removal from office of a justice of the Supreme Court except through impeachment[28]; the provision against the enactment of a law depriving the Supreme Court of its jurisdiction[29] — all these Constitutional precepts are meant to safeguard and guarantee judicial independence.

Thus, it is actually in the interest of the Supreme Court to allow the JBC to perform its constitutional mandate without pressure from the said Court. This will be a precursor that will hopefully bring about a truly and perpetually independent judiciary.

A weak JBC will spawn a weak judiciary. A JBC that is influenced by outside pressure will bring about a judiciary that is also influenced by outside pressure. A JBC that lets itself be dictated as to how to do its job will result to a judiciary that will let itself be dictated as to how it should adjudicate cases.

In contrast, a robust and independent JBC will lead to a robust and independent judiciary.

The JBC was created in repudiation of political puppeteers. The Supreme Court ought to refrain from becoming one.

[26] Constitution Art. VIII sec.3

[27] Constitution Art. VIII sec.11, sec. 2

[28] Constitution Art.XI sec.2

[29] Constitution Art. VIII sec.2