EN BANC

G.R. No. 224302 ***(Hon. Philip A. Aguinaldo, Hon. Reynaldo A. Alhambra, Hon. Danilo S. Cruz, Hon. Benjamin T. Pozon, Hon. Salvador V. Timbang, Jr., and the Integrated Bar of the Philippines (IBP) vs. His Excellency President Benigno Simeon C. Aquino III, Hon. Executive Secretary Paquito N. Ochoa, Hon. Michael Frederick L. Musngi, Hon. Ma. Geraldine Faith A. Econg, Hon. Danilo S. Sandoval, Hon. Wilhelmina B. Jorge-Wagan, Hon. Rosana Fe Romero-Maglaya, Hon. Merianthe Pacita M. Zuraek, Hon. Elmo M. Almeda, and Hon. Victoria C. Fernandez-Bernardo)***

Promulgated:

February 21, 2017

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SEPARATE OPINION

VELASCO, JR., *J.*:

I agree that there is no compelling reason for Associate Justice Teresita J. Leonardo-de Castro (Justice Leonardo-de Castro) to inhibit in the case at bar. Justice Leonardo-de Castro explained at length the extent of her participation, or non-participation, in the closed door meetings of the JBC when she was still a consultant thereof. She is not privy to the decision of the JBC to approve the rule on the clustering of nominees, much less to its implementation.

I likewise concur with the majority that the Judicial and Bar Council (JBC) should be allowed to intervene in the present proceeding. The nullification of the JBC's act of clustering the nominees for the Sandiganbayan vacancies was a precondition before the Court could have upheld the validity of the subject appointments. In fact, this was where the Office of the Solicitor General (OSG) primarily anchored its defenses. I cannot, therefore, agree that "[t]he declaration of the Court that the clustering of nominees by the JBC for simultaneous vacancies in the collegiate court is unconstitutional was only **incidental** to its ruling."[1] On the contrary, it is, as it remains to be, the very core of the controversy. It thus behooved this Court to hear the counter-arguments of the JBC against the OSG's contention.

Beyond quibble then is that the JBC is clothed with legal interest to take part in this case. The Court's attempt at curbing the august body's practice is more than palpable in the language of the Decision. The *fallo* of the adverted ruling reads:

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[1] Draft Resolution, p. 17.

> **WHEREFORE**, premises considered, the Court **DISMISSES** the instant Petition for *Quo Warranto* and *Certiorari* and Prohibition for lack of merit. The Court **DECLARES** the clustering of nominees by the Judicial and Bar Council **UNCONSTITUTIONAL**, and the appointments of respondents Associate Justices Michael Frederick L. Musngi and Geraldine Faith A. Econg, together with the four other newly-appointed Associate Justices of the Sandiganbayan as **VALID**. The Court further **DENIES** the Motion for Intervention of the Judicial and Bar Council in the present Petition, but **ORDERS** the Clerk of Court *En Banc* to docket as a separate administrative matter the new rules and practices of the Judicial and Bar Council which the Court took cognizance of in the preceding discussion as ***Item No. 2***: the deletion or non-inclusion in JBC No. 2016-1, or the Revised Rules of the Judicial and Bar Council, of Rule 8, Section 1 of JBC-009; and ***Item No. 3***: the removal of incumbent Senior Associate Justices of the Supreme Court as consultants of the Judicial and Bar Council, referred to in pages 35-40 of this Decision. The Court finally **DIRECTS** the Judicial and Bar Council to file its comment on said Item Nos. 2 and 3 within thirty (30) days from notice.
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> **SO ORDERED.**

I am amenable to the afore-quoted decretal portion of the November 29, 2016 Decision but, regrettably, I cannot fully agree with the following statement made in the discussion therein:[2]

> **The ruling of the Court in this case shall similarly apply to the situation wherein there are closely successive vacancies in a collegiate court, to which the President shall make appointments on the same occasion, regardless of whether the JBC carried out combined or separate application process/es for the vacancies**. The President is not bound by the clustering of nominees by the JBC and may consider as one the separate shortlists of nominees concurrently submitted by the JBC. (emphasis added)

This sweeping statement automatically makes an issue on how future nominations and appointments are to be made. It is not a mere *pro hac vice* ruling on the particular appointments in issue herein, but precedent setting. Preferably, the Court ought to take up the issue on whether or not the clustering of nominees is valid for closely successive appointments when there is an actual justiciable controversy on the matter. However, the Court's power of supervision over the JBC,[3] to my mind, permits us to grab the bull by the horns and resolve the boundaries of the doctrine set herein to serve as a guide not only to the JBC but also to the incumbent President.

My misgivings on the above declaration stem from the fact that separate application processes would yield varying number of applicants and different persons applying. It would then be erroneous to treat as one group

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[2] November 29, 2016, p. 32

[3] Section 8. (1) A Judicial and Bar Council is hereby created under the supervision of the Supreme Court composed of the Chief Justice as *ex officio* Chairman, the Secretary of Justice, and a representative of the Congress as *ex officio* Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector. xxx

the applicants who vied for different posts. The shortlists for the posts vacated by Associate Justices Jose P. Perez (Justice Perez) and Arturo D. Brion (Justice Brion) would assist in illustrating this point:[4]

Shortlist for the position vacated by Associate Justice Jose P. Perez	Shortlist for the position vacated by Associate Justice D. Brion
Reyes, Jose Jr. C. – 7 votes	Carandang, Rosmari D. – 6 votes
Bruselas, Apolinario Jr. D. – 5 votes	Bruselas, Apolinario Jr. D. – 5 votes
Dimaampao, Japar B. – 5 votes	Reyes, Jose Jr. C. – 4 votes
Martires, Samuel R. – 5 votes	Dimaampao, Japar B. – 4 votes
Reyes, Andres Jr. B. – 4 votes	Lazaro-Javier, Amy C. – 4 votes
	Tijam, Noel G. – 4 votes
	Ventura-Jimeno, Rita Linda S. – 4 votes

If I may convey some possible permutations and a few observations:

First, the ruling of majority permits the commingling of shortlists and would automatically render Hon. Amy C. Lazaro-Javier, Associate Justice of the Court of Appeals, a nominee for the position vacated by Associate Justice Jose P. Perez even though she only applied for the post vacated by Associate Justice Arturo D. Brion. This is an anomaly since Hon. Lazaro-Javier only applied for the latter post.

Noteworthy is that the application process for the two vacancies was separate and distinct. The JBC announced on August 4, 2016 that it will be receiving applications and nominations for the post to be vacated by Justice Perez until September 20, 2016. In contrast, the call for applications and nominations for the post vacated by Justice Brion was published on August 18, 2016, with the deadline set on October 4, 2016.

From September 21, 2014 to October 4, 2016, the JBC was then only receiving applications nominations for the Supreme Court post vacated by Justice Brion. Had Hon. Lazaro-Javier filed her application/nomination during this period, then she could not, by any stretch of the imagination or legalese, be considered an applicant, let alone a nominee, for the post vacated by Justice Perez.

Second, the wording of the decision may likewise result in the appointment of one who did not get the necessary minimum number of votes. Sec. 2, Rule 8 of JBC No. 2016-01, otherwise known as the JBC Rules, provides:

RULE 8
VOTING REQUIREMENTS

xxx

[4] Motion for Reconsideration-in-Intervention, pp. 20-21.

> Sec. 2. Votes Required For Inclusion as Nominees. – For applicants to be considered for nomination, they should obtain the affirmative vote of at least four (4) Members of the Council.

In this case, Hon. Andres Reyes, Jr. applied for both vacant positions, but obtained the required number of votes and was included in the shortlist only for the post vacated by Justice Perez. There were 14 applicants/nominees for the said post as compared to the 17 for the post vacated by Justice Brion. Competition may have been tougher in the application process for Justice Brion's replacement, resulting in Hon. Reyes not reaching the voting threshold. Whatever the reason for his non-inclusion in the shortlist for Justice Brion's post may be, the fact remains that he could not be appointed for the same. He could only qualify as a nominee for the post vacated by Justice Perez.

Third, precisely because there were two application processes, the voting for the nominees was conducted separately. Thus, it was possible for applicants/nominees for both vacant positions to be voted upon twice by the same member of the JBC. The following example provided by the JBC is telling:[5]

Table 1. Filled-up Ballot of Member X (where maximum no. of choices is 8)

Applicants for Vacancy (vice J. Perez)		Applicants for Vacancy (vice J. Brion)	
A	1	A	
B		B	
C		C	
D	2	D	1
E		E	
F	3	F	2
G	4	G	3
H		H	
I	5	I	4
J		J	
K	6	K	5
L		L	
M	7	M	6
N	8	N	7
		O	
		P	
		Q	8

As couched, the November 29, 2016 Decision would affect the manner by which the JBC members cast their votes: Should they be entitled to only one ballot since the clustered shortlists are to be considered as one comprehensive shortlist? Should they set a guideline in determining the maximum number of choices according to the number of vacancies to be filled?

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[5] Motion for Reconsideration-in-Intervention, pp. 20-21

These are legitimate concerns that would arise should the Court sustain its Decision. These contingencies should have been clearly addressed before we refrained from limiting the application of the ruling *pro hac vice* and instead ruled that it may validly and similarly be invoked in situations "wherein there are closely successive vacancies in a collegiate court, xxx regardless of whether the JBC carried out combined or separate application process/es for the vacancies."[6]

As a final word, the Court is well aware that the treatment of the vacancies that resulted from the mandatory retirements of Justices Perez and Brion is capable of repetition to those from the retirements of Associate Justices Jose Catral Mendoza and Bienvenido L. Reyes on July 6, 2017 and August 13, 2017, respectively. We must then be prudent in resolving this collateral issue before the Court is hounded by controversies surrounding the legitimacy of the succeeding appointees to the Court.

The foregoing premises considered, I hereby register my vote to **PARTIALLY GRANT** the instant Motion for Reconsideration-in-Intervention. Although the unconstitutionality of the clustering is sustained, the application of the doctrine should be limited to simultaneous vacancies in collegiate courts, not to closely successive vacancies thereto.

PRESBITERO J. VELASCO, JR.
Associate Justice

[6] November 29, 2016 Decision.