

The United States is not violating not the individual civil rights, but rather the collective, democracy entitlements of Puerto Ricans.

### **Legitimacy Crisis and Socio-Economic Crisis**

Puerto Rico possesses a political status that offends fundamental fairness and that hinders it from developing its society or economy. It has to abide by laws enacted by a Congress in which it has no regular representation and executed by a President in whose election it does not participate. As a result, these branches of government ultimately rule the island, but they neither regard it as a main concern nor devise policies targeted to improve its lot socially or economically. Predictably, it has entered a seemingly permanent legitimacy and socio-economic crisis.

In their short- and long-term decision-making, U.S. authorities naturally seek to advance, primarily, the United States' interest, which may not coincide with that of Puerto Rico. Accordingly, much as they may financially aid the island overall, some of their specific decisions on crime control, welfare, and so forth might actually end up hurting it. For example, the Federal Bureau of Investigation might focus more on restraining criminal organizations in Miami than in San Juan, particularly if a number of them might otherwise shift their operations from the former to the latter location. Similarly, Congress might have excluded Puerto Rico's indigent single mothers from subsidies for their child expenses, or disabled and aged Social Security beneficiaries from supplemental payments,<sup>1</sup> in order to avoid overburdening U.S. taxpayers.

Sometimes the United States' legislation might undermine cardinal Puerto Rican values or principles. For instance, it has imposed common law institutions that run counter to the local civil law heritage. More importantly, statutes that provide for the death penalty or for wire-tapping without a court order clash with Puerto Rico's constitutional prohibition of these practices.

In fact, a few federal laws might have actually contributed to the recession currently in place. First, the elimination of tax exemptions for U.S. corporations' subsidiaries based on the island, as part of the broader battle against corporate welfare, might have triggered the initial slowdown.<sup>2</sup> Secondly, United States' lawmakers might have deprived Puerto Rico of key tools to deal with its devastating debt by denying it the right to declare bankruptcy.

More generally, certain federal enactments might be keeping the insular economy from competing with its counterparts elsewhere in the region, and, therefore, from attracting investment, from growing, and from reducing its massive unemployment in the first place. For example, the federal minimum wage, which has applied to Puerto Ricans since the 1970s, tends to push the local cost of production to first-world standards. So does the Merchant Marine (Jones) Act, which allows only vessels "wholly owned" by individuals, businesses or governmental entities from the United States to "engage in trade" in Puerto Rico, or anywhere else in U.S. territory.<sup>3</sup> Consequently, emergency measures proposed by the President for Congressional action to grant insular municipalities and governmental enterprises bankruptcy relief, "to extend the earned-income tax creditor," and to expand Medicaid might buy time,<sup>4</sup> but not address the underlying problem.

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<sup>1</sup> See *Califano v. Torres*, 435 U.S. 1 (1978).

<sup>2</sup> Lizette Álvarez, *A new exodus from Puerto Rico*, NTY (Feb. 10, 2014) ("Tax laws were once abundantly generous, which fueled the spread of factories that made textiles and pharmaceuticals, among other things. That came to a crash in 2006, after the 10-year phaseout of a subsidy that provided American firms operating in Puerto Rico with tax-free income.").

<sup>3</sup> 46 U.S.C. §§ 12102-12103.

<sup>4</sup> Mary Williams Walsh, Michael Corkery, Julie Hirschfeld Davis, *White House devises plan to help Puerto Rico*, NYT (Oct. 23, 2015) ("The legislation introduced so far would make bankruptcy relief available . . . to Puerto Rico's municipalities and its government enterprises") ("The administration is also proposing to extend the earned-income tax credit, a refundable credit for the working poor that is payable even to people who earn too little to owe income tax. It is not currently available in Puerto Rico.") ("Administration officials who detailed the proposal offered no . . . cost projection for the Medicaid expansion.").

Obviously, the Puerto Rican leadership bears itself considerable responsibility for the debt debacle, as well as for any inter-related societal ails.<sup>5</sup> Nonetheless, it does not hold the ultimate authority over the island and certainly cannot remove on its own the difficulties referred to earlier. Furthermore, no person has attained reelection to the insular governorship since 2001 and no party since 2005.<sup>6</sup> Hence, the financial and other troubles have persisted independently of the identity, affiliation, or competence of those who hold the reins of power.

In sum, the hegemony of the United States over Puerto Rico comes across both as illegitimate and as a potential source of profound dysfunctions. As such, it appears to have played a significant role in bringing the island to its current critical juncture. Of course, the overarching illegitimacy and dysfunctionality have been around since the U.S. invasion in 1898. Nonetheless, they receded somewhat with the initial move toward decolonization and self-governance of the 1950s, only to return, with a vengeance, in the midst of the current decade-long stagnation.

Ordinarily, one would expect federal presidents to take the lead on such a grave matter. Nonetheless, they never have, at least in recent history. Oddly enough, the national political party rules may partly explain the lack of initiative. In particular, they entitle Puerto Ricans to participate in presidential primaries. As a result, a candidate must first campaign in the island on her way to the White House. She must try to secure the support of local voters who choose to partake in U.S. politics and who probably identify either with the pro-statehood New Progressive Party or with the more conservative wing of the pro-Commonwealth Popular Democratic Party. Ultimately, she will tend to commit, generically, to honoring the will of the insular population and, implicitly, to avoiding any real change in the *status quo*.<sup>7</sup>

The Congress, for its part, never really confronts Puerto Rico's situation, as a whole, head on. It only deliberates and votes, first in committees and then in plenary session, on whether to include the island in particular laws or programs, like the former Aid to Families with Dependant. Since the 1950s, Federal lawmakers have built the relationship with Puerto Rico piecemeal with these discrete decisions. They have not approached it in the way that they would that with any foreign country, by assessing its importance and developing it into the future in a direct and focused manner.

Of course, the Senate and the House of Representatives have, respectively, a Committee on Energy and Natural Resources in charge of "Territorial Possessions" and a Committee on Natural Resources responsible for "Insular areas," both, as such, with jurisdiction over Puerto Rico.<sup>8</sup> Still, these committees just oversee the island as a territory and do not purport to rethink, let alone transform, its political status.

In all likelihood, neither these structural impediments to far-reaching action nor Puerto Rico's overall low ranking on the U.S. list of priorities can fully account for the standstill. In reality, the authorities on the mainland seem to have deliberately chosen the path of avoidance. After all, they have never organized a referendum on status since invading the island in 1898 and have not seriously addressed the issue since 1952.

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<sup>5</sup> See Editorial, *Save Puerto Rico from Ruin*, NYT (Oct. 27, 2015) ("There is no doubt that Puerto Rican leaders have mismanaged the island's finances and economy.")

<sup>6</sup> Lizette Álvarez, *Puerto Rico's Embattled Governor Says He Won't Run for 2nd Term*, NYT (Dec. 15, 2015) ("In rejecting a run for a second term, Mr. García Padilla, a member of the Popular Democratic Party, which supports continued commonwealth status, joins a line of governors from the two leading parties who have served only one term since the island sank into a decade-long recession. His two predecessors lost re-election after voters disapproved of their handling of the economic crisis, among other things.")

<sup>7</sup> Nick Corasaniti, *Race Pulls Candidates to an Increasingly Important Puerto Rico*, NYT (Sept. 5, 2015) (Hillary Clinton "did take the same position as Mr. Rubio on potential statehood, saying that should Puerto Ricans vote for it, she would stand with them."); Helene Cooper, *In Visit to Puerto Rico, Obama Offers (and Seeks Out) Support*, NYT (June 15, 2011) ("Mr. Obama began his four-hour trip [to Puerto Rico] with a quick speech in which he . . . professed his love and admiration for all things Puerto Rican and promised to support 'a clear decision' by the people of Puerto Rico on statehood, whatever it may be.")

<sup>8</sup> See Rule XXV(g)(1)(16), STANDING RULES OF THE SENATE 22 (Revised January 24, 2013) ("Standing Committees") ("Committee on Energy and Natural Resources") ("Territorial Possessions of the United States"); Rule X(1)(m)(9), RULES OF THE HOUSE OF REPRESENTATIVES 8 (One Hundred Fourteenth Congress) (January 6, 2015) ("Organization of Committees") ("Committee on Natural Resources") ("Insular areas of the United States generally").

The U.S. political establishment has at times attempted to justify its inaction by pointing to the lack of agreement among Puerto Ricans.<sup>9</sup> This rationalization misses the mark on three grounds. First, there actually is an overwhelming, almost unanimous, feeling in Puerto Rico that the United States ought to authorize a binding referendum.<sup>10</sup> Secondly, the federal government could itself contribute to the development of a substantive consensus by spelling out what options it would support, by putting them up for a vote, and by committing to honor the people's choice.<sup>11</sup> Finally, Puerto Ricans appear to agree on the essentials of the relations between the United States and Puerto Rico. In fact, all three main political parties posit maintaining robust economic, civic, and military ties with the United States and considerable control over most other matters, including national culture and language. They ultimately disagree only on whether the island should participate in this kind of relationship as a state of the Union, an associated entity, or a sovereign nation.

Perhaps U.S. authorities have been looking the other way because of their lack of appetite for Puerto Rican statehood. In particular, they may very well partake in the presently generalized perception of the island as a financial basket case. Of course, the leadership on the mainland may have other reasons for its reluctance, such as concern about costs, political or geographic consequences,<sup>12</sup> or the cultural and linguistic unity of the nation.

In any event, the United States obviously bears no obligation to admit Puerto Rico into the Union. It explicitly disclaimed any such commitments when it established the island's current status.<sup>13</sup> All the same, the federal government holds the reins of power.

Link between the Legitimacy and the Socio-Economic Crisis  
 Illegitimacy: Civil Rights v. Democracy  
 Perhaps Congress, in particular, has avoided

could solve the Puerto Rican problem in one of two relatively straightforward ways. On the one hand, U.S. authorities could fully admit the island into the Union and commit to developing it socio-economically over a long period of time, with both hefty financial investment and exemption from certain federal standards. On the other hand, they could devolve powers to Puerto Rico—whether as a commonwealth, an associated republic, or a sovereign nation—and financially support the rehabilitation of its society and economy.

Granted, the two chambers of Congress would probably have little appetite for the first solution and not only because it would problematically require them to embrace asymmetrical federalism. They would most likely reject it as they would statehood in general. Lawmakers may have racist reasons

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<sup>9</sup> Chris Mooney, *Treasure Island; Puerto Ricans Can't Vote For Congress Or The Presidency. But They Can Write Checks. A Case Study Of What Happens When Politics Is All Money And No Voters*, AM. PROSPECT, Sept. 25, 2000 at 51 (“In the end, the internecine struggles between Puerto Rico’s factions prevent a consensus on the most basic definitions of the island’s choices. And such lack of agreement on terms is a tried and true recipe for congressional inaction.”).

<sup>10</sup> See Author, Editorial, *Lott Should Get Out of the Way, Let Puerto Ricans Vote on Future*, SUN-SENTINEL (Fort Lauderdale), May 15, 1998, at A22 (“A recent poll shows 97 percent of Puerto Ricans want a chance to vote on their political status. On the mainland, 63 percent of American voters favor a referendum in Puerto Rico, a stunningly high figure.”).

<sup>11</sup> See, Mooney, *supra*, note 64. (arguing that Congress must provide Puerto Rican’s with a binding vote on the island’s status in order to allow Puerto Rican citizens to arrive at a consensus and allow them to “resolve their most basic question in the manner of a functioning democracy.”).

<sup>12</sup> “Puerto Rico statehood would require approval from Congress, where it would face a tough fight because the territory is considered to lean Democratic and it would have two senators and five representatives if it became a state. But it could be hard for Congress to block it if a strong majority of Puerto Ricans demonstrated support for joining the union.” Danica Coto, *Puerto Rico Statehooders See Opportunity As Woes Deepen*, Associated Press (August 24, 2015 Monday 5:13 AM GMT).

<sup>13</sup> See S. Rep. No. 1779, 81st Cong., 2d Sess. 3 (1950) (“Let me say that enactment of S. 3336 will in no way commit the Congress to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status.”); H.R. Rep. No. 2275, 81st Cong., 2d Sess. 3 (1950) (“This bill does not commit the Congress, either expressly or by implication, to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status.”) (Office of the Secretary (Oscar Chapman), Department of the Interior).

It appears to harbor serious misgivings about statehood and to fear that their externalization could attract accusations of insensitivity to discrimination. After all, Independently of the merits of such a charge, it might enjoy potential appeal among the ever-growing mainland electorate of Puerto Rican or, more generally, Latin American origin.

If U.S. elected officials had an open mind about welcoming the Puerto Rico to the Union, they probably would have offered Puerto Ricans the opportunity to vote on the issue at some point since the invasion of the island 118 years ago.

In light of the generalized perception of Puerto Rico as a basket case, economically speaking, this reluctance is not surprising. Congressmen are probably not excited about the.

### **Individual Civil Rights Claim and Collective Democracy Claim**

Someone might complain that Puerto Ricans do not enjoy the same political, economic, and social rights as their fellow U.S. citizens on the mainland. She might conclude that they therefore possess a second-class citizenship. This contention almost inevitably calls to mind that voiced by African Americans in their quest for equal respect, most effectively on the 1950s and 1960s. It purports to awaken a comparable sense of urgency and peremptoriness.

Undeniably, the population of Puerto Rico does not participate in the politics of the United States on a par with its counterpart up north. It does not vote for the President or send a regular delegation to Congress. Moreover, Puerto Ricans do not benefit from federal welfare, infrastructure, and other programs to the extent that U.S. residents do.

Of course, these two types of disparate treatment take place with the endorsement of, respectively, the United States Court of Appeals for the First Circuit and the Supreme Court. Nonetheless, they sound offensively discriminatory offhand.

Coincidentally, the overall exemption of Puerto Rico's citizens from federal income tax can hardly excuse this apparently crass discrimination. Most of them would owe the Internal Revenue Service nothing anyway because of their low earnings. Furthermore, those with taxable income probably pay more taxes than they would in any state. In any event, no kind of fiscal compensation could possibly justify the violation of someone's fundamental individual rights.

All the same, Puerto Ricans who might cry "foul" actually do not have much of a leg to stand on. In reality, the United States does not treat them any differently than it does anybody else who bears its citizenship. It simply considers the island to lie outside the Union and, therefore, does not offer any of its citizens who reside there the whole panoply of entitlements that it guarantees those who take up their residence on the mainland.

As a result, when a Minnesotan moves to the island, she can no longer exercise a considerable number of federal rights either. Conversely, a Puerto Rico citizen who settles in Minnesota automatically acquires all of these entitlements. The United States makes absolutely no distinction *vis-à-vis* these two persons.

Consistently, any U.S. citizen who relocates from the United States to a foreign country loses many of the federal rights she held in her previous domicile. She retains only those entitlements that Congress opts to preserve for her, such as the right to vote for candidates to federal office under the Uniformed and Overseas Citizens Absentee Voting Act.<sup>14</sup> For instance, U.S. citizens residing in France, somewhat like their counterparts in

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<sup>14</sup> States must "permit absent . . . overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 52 U.S.C. § 20302(a)(1). Coincidentally, the Second Circuit has held that the statute does not empower a U.S. citizen who relocates from the mainland to the island and that it does not infringe upon "his constitutional rights to vote and travel, and his rights under the Privileges and Immunities and Due Process Clauses." Romeu, 120.

Puerto Rico, do not enjoy numerous entitlements ordinarily entailed by citizenship. Naturally, they cannot themselves any more convincingly complain about the situation.<sup>15</sup>

Puerto Ricans might protest that, as opposed to mainlanders, they must leave their home to secure the totality of their rights. Still, the U.S. government might stand its ground and explain that they must do so merely because they do not live in the United States. It might add that U.S. citizens domiciled abroad face a similar predicament and should not take it personally either.

As a consequence, one should discard the civil rights claim as empty. One should recognize it as a mirage that looks all-powerful on first impression, but hopelessly weak upon deeper inspection. Federal authorities, for their part, may openly argue against anyone who tries to rally the electorate of Puerto Rican or Latin American origin on this basis. They need not fear the big bad wolf.

### The Democracy Claim

All the same, something does smell rotten in Puerto Rico. Something does feel terribly unfair. After all, Puerto Ricans do not live in democracy. As a group, they may not democratically shape the supreme law of their land. U.S. executive and legislative branches operate there as external forces.

Indeed, Puerto Rico can decry an infringement upon not civil rights, but rather elemental democratic principles. As a result, it can and should demand respect for its people's collective, not individual entitlements. In particular, Puerto Ricans can and should struggle to vindicate their right to self-determination, *i.e.*, to determine their own destiny by, at least, selecting the men and the women who execute and enact the highest legal norms in their society.

Obviously, the collectivity at stake does not exist as such. It derives its existence from that of its members, namely, the citizens of Puerto Rico. Moreover, collective entitlements ultimately benefit nobody but these very individuals.

Individual, collective, no mystique.

Collateral Related, but Independent Damage.

[Nonetheless, Puerto Ricans might want to articulate a disparate impact argument. Hence, they might say that while the challenged deprivation affects mainland citizens, it disproportionately impacts them. Of course, this kind of argumentation pertains only to certain statutes, not to constitutional equal protection claims, let alone to the context of Puerto Rico in which rational relations applies.

More importantly, this approach seems to rely on inverted or warped logic. It takes the encroachment upon a collective right and tries to convert it into an individual violation by isolating the effect on individuals.]

Sovereignty.

Obligations.

US model.

Colonialism

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<sup>15</sup> With respect to the right to vote in federal elections, the "situation [of a New Yorker who moves to Puerto Rico] is not materially different from that of a New York citizen, prior to the passage of the UOCAVA, who decided to leave New York to reside in France." *Romeu v. Cohen*, 22.