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ESTADO LIBRE ASOCIADO: THE CONSTITUTIONALITY OF PUERTO RICO'S LEGAL STATUS

I. INTRODUCTION

Imagine the following scenario: In the interest of reducing the state's crime rate, California enacts a statute authorizing the state and local police forces to search and seize any person or property upon mere belief that such person or property is somehow connected with criminal activity. Neither a warrant nor probable cause is needed to conduct the search and seizure; any evidence thereby obtained becomes admissible at trial.

Now imagine that you are sitting at home, quietly enjoying a meal with your family. Suddenly, police agents burst through the door. They proceed to search your home as you and your loved ones helplessly watch. After rummaging through your personal belongings, they miraculously discover a vial containing a "foreign substance." You are arrested and the vial is seized to be used as evidence against you in your subsequent trial.

Prior to trial, your attorney files a motion to exclude all of the evidence seized in the raid on your home. Claiming that the California statute is repugnant to the Fourth Amendment of the United States Constitution, your attorney maintains that the evidence seized in the manner described was done so illegally.

But all thoughts of legal redress fade when you discover that the Fourth Amendment does not apply to citizens of California, despite the fact that they are American citizens. In fact, prior to trial, you discover you will be tried before a judge since you do not have a right to a trial by jury. As an American citizen, you feel a sense of indignation because you know that the Federal Constitution fully protects American citizens in the neighboring states and you query why your neighbors have any more of a right than you to receive such guarantees and protections by the federal government.

Obviously, for citizens of California, or of any other state for that matter, this scenario is virtually unimaginable. For these fortunate citizens, the rights and privileges of the United States Constitution are guaranteed. Yet not all American citizens are accorded these rights and privileges; for American citizens living in Puerto Rico, the threat of this scenario is a constant reminder

that the full constitutional protections and federal laws guaranteed to them on the mainland do not extend to them *ex proprio vigore* while on the island.¹

A. *Puerto Rico: Commonwealth or Colony?*

By applying the Constitution and federal laws on the basis of geography rather than of citizenship, Congress and the United States courts have created a group of second-class citizens within the territorial boundaries of the United States. One has to query why such an anomaly exists and what legal justifications permit unequal treatment of American citizens. The answer, as given by the courts, indicates that there exists a unique legal relationship between Puerto Rico and the United States.

Currently, Puerto Rico has an anomalous relationship with the United States. It is neither a state of the union nor a foreign country. Yet for purposes of various United States federal statutes it may be categorized as either a territory of the United States, a state, or even an independent sovereign.² Although the relationship between the United States and Puerto Rico deviates from the traditional metropoli-satellite³ relationship, politically it is quite clear that Puerto Rico is one of the few existing colonies in the world today.

Legally, Puerto Rico is defined as *Estado Libre Asociado* ("ELA") or Commonwealth.⁴ The creation of ELA coupled with the previous grant of United States citizenship was hailed as the final solution to the issue of status. Consistent with the desires of the liberals in Puerto Rico, the grant of United States citizenship was to provide Puerto Ricans with the coveted rights and constitutional guarantees accorded to North American citizens, while ELA was to end the last vestiges of colonialism and to fulfill Puerto Rico's right to self-determination.

1. The U.S. Supreme court applied the 4th Amendment to Puerto Rico for the first time in *Torres v. Puerto Rico*, 442 U.S. 465 (1979). Although such abuses are constitutionally prohibited today, this scenario nonetheless illustrates the unequal application of the Fourth Amendment prior to 1979. For a discussion on the application of the U.S. Constitution "abroad," see L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

2. See *Lummas Co. v. Commonwealth Oil Ref. Co.*, 195 F. Supp. 47 (S.D.N.Y. 1961) (treated as a "territory" for purposes of a diversity statute); *Mora v. Mejias*, 115 F. Supp. 610 (D.P.R. 1953) (treated as a "state" for purposes of the requirement of a three-judge court); *Downes v. Bidwell*, 182 U.S. 244 (1901) (treated as independent from the United States for purposes of Article I, Section 8 of the Constitution—that "All Duties, Imposts, and Excises shall be uniform throughout the U.S."). For a general discussion in the treatment of Puerto Rico see Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219 (1967).

3. "Metropoli-satellite" is the technical term used by such progressive writers as Franz Fanon denoting the classical colonial relationship.

4. The literal translation of *Estado Libre Asociado* is "Free Associated State."

An examination of the status of the United States' political showcase, however, reveals the hidden reality. Puerto Rico's present status has not ended colonial rule on the island but has legitimized it.⁵ Today, while Puerto Ricans continue to advocate the island's association with the United States, it is this very relationship that perpetually condemns them to the status of second-class citizens. In essence, after eighty-five years of North American occupation, the constitutional status of Puerto Rico and of its citizens remains unsettled. The establishment of the Commonwealth has done little to change Puerto Rico's fundamental relationship with the United States. Meanwhile the ELA continues to mask the colonial association with the United States that has existed since 1898.

The purpose of this paper is to examine the present legal and political relationship between Puerto Rico and the United States and to unveil the reality that exists behind ELA. In order to examine ELA, it is first necessary to understand the historical development of Puerto Rico's status.

II. HISTORICAL DEVELOPMENT OF PUERTO RICO'S STATUS

Prior to the 19th Century, Puerto Rico had been ruled as a territory of Spain. Under the Code of Spanish Laws of 1795, virtually unlimited authority was extended to the Governor to control all the economic and political affairs of the island.⁶ The decline of Spain as a world power and the continuous political upheaval of her colonies during the 19th Century, however, fostered major liberal concessions in Puerto Rico. These political reforms during the period mirrored the concerns of Puerto Rican liberal elites to secure greater self-government and economic control for the island.⁷

In 1812, Puerto Rico was declared a province of Spain, bestowing upon her people the full rights and benefits of Spanish citizenship, including representation in the Spanish Cortes. But in 1814, the restoration of Ferdinand III to power signaled the annulment of the Constitution of 1812 and of the liberal reforms in Puerto Rico. This grant and subsequent removal of liberal concessions was to reoccur in 1820 and again in 1870. It was not until 1897 that the Crown, realizing the possibility of losing the island, declared Puerto Rico a province of Spain and conceded to it a

5. For a discussion on how Puerto Rico's economic expansion has led islanders to tolerate this colonial relationship, see Cabranes, *Puerto Rico out of the Colonial Closet*, 33 FOREIGN POLICY 66 (1978).

6. *United States-Puerto Rico Commission on the Status of Puerto Rico*, STATUS OF PUERTO RICO 31 (1967).

7. E. BERBUSSE, THE UNITED STATES IN PUERTO RICO, 1898-1900, 71 (1966).

greater degree of self-government.⁸

The year of 1897 marked the highpoint of liberal reforms on the island. In 1897, the Spanish government issued the Autonomous Charter, making the Spanish Constitution of 1876 applicable to Puerto Rico.⁹ The Charter accorded Puerto Rico the right to full representation in the Spanish Cortes, the right to participate in negotiations between Spain and other countries which affected the commerce of the island, the right to approve or reject commercial treaties affecting Puerto Rico, and the right to authorize the insular government to frame tariffs and fix custom duties on both imports and exports.¹⁰

The political and economic freedoms briefly enjoyed by the Spanish citizen were thwarted a year later when American military forces invaded Puerto Rico during the Spanish-American War.¹¹ As a consequence, the Autonomous Charter was abolished and Puerto Rico lost its provincial status.

Puerto Rico was officially ceded to the United States on April 11, 1899, upon the approval of the Treaty of Paris.¹² Article II of the Treaty transferred complete sovereignty of Puerto Rico and all other islands within its jurisdiction (i.e., Culebra, Mona, and Vieques) to the United States. According to United States law, Puerto Rico then ceased being a "foreign country" and became an "unorganized territory" of the United States.¹³ The most significant aspect of the Treaty was Article IX, which provided that the "civil rights and political status of the native inhabitants [would] be determined by Congress."¹⁴ Essentially, this article gave the United States plenary powers over Puerto Rico, which became the foundation for establishing colonial rule on the island.

To Puerto Rican liberals and Spanish loyalists who applauded the Charter, the American invasion represented an interruption of a continuous struggle to obtain liberal reforms at a time when it seemed they had been successful.¹⁵ The legality of the Treaty of Paris was immediately challenged on the ground that since Puerto Rico was an independent sovereign, Spain did not have the authority to cede the island. Consequently, the cession

8. *Id.* at 3-38.

9. See the Autonomous Charter of 1897, in DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO (1964) [hereinafter cited as DOCUMENTS].

10. It is interesting to note that Article XIII of the Constitution provided the right to organize labor—something that was unheard of even in the United States until the 1930's. See Spanish Constitution of 1876 and the Autonomous Charter of 1897, in DOCUMENTS, *supra*.

11. See *The Olinde Rodriques*, 174 U.S. 510 (May 15, 1899).

12. Treaty of Paris, in DOCUMENTS *supra*.

13. See *Dooley v. United States*, 182 U.S. 222 (1901) and *Delima v. Bidwell*, 182 U.S. 1 (1901).

14. Treaty of Paris, in DOCUMENTS *supra* at 89.

15. *United States-Puerto Rico Commission*, *supra* at 33.

was inconsistent with the Charter of Autonomy and therefore illegal under international law.¹⁶ This argument, however, lacked substance since the Charter of Autonomy merely confirmed Spain's sovereignty over the island and did not diminish it. The Preamble to the Charter stated:

The power and authority of the King, who is the nation itself; the command of the naval and military forces; the administration of justice, diplomatic relations between the colony and the mother country; the power of pardon; the guarding and defense of the constitution—are intrusted to the Governor-General, as the representative of the King, and under the direction of the Council of ministers. Nothing of what is essential has been forgotten, and in no degree is the authority of the central power diminished or lessened.¹⁷

To many others, though, the invasion meant economic progress for Puerto Rico under the auspices of the United States. They believed that the liberal Constitution of the United States and American citizenship would offer them more economic freedoms and greater constitutional rights than the Autonomous Charter. However, Puerto Ricans soon realized that they were to share neither in the privileges of the United States Constitution nor in the benefits of the Autonomous Charter.¹⁸

A. *The Foraker Act: False Hope of Autonomy*

In 1900, in what appeared to be a grant of greater self-government, Congress passed the first organic act¹⁹ (more commonly known as the Foraker Act), ending two years of military rule in Puerto Rico.²⁰ The mandate called for the organization of a temporary civilian government composed of an eleven-member Executive Council appointed by the President of the United States. Five members of the Executive Council were to be of Puerto Rican origin. The Governor, also an appointed²¹ official, was afforded veto power over the legislature of Puerto Rico. Most important was the fact that Congress reserved the absolute power to void any law passed by the legislature of Puerto Rico.²² Pre-

16. This same argument was maintained by Pedro Albizu Campos and the Nationalist Party during the 1930's but their focus was only political. See M. DENIS, *PUERTO RICO: UNA INTERPRETACION HISTORICO-SOCIAL* at 59 (1969).

17. Charter of Autonomy, in *DOCUMENTS supra* at 24.

18. BERBUSSE, *THE UNITED STATES IN PUERTO RICO supra* at 66.

19. An organic act is an act of Congress conferring power of government upon a territory. 5 *BLACK'S LAW DICTIONARY* 990.

20. Foraker Act, in *DOCUMENTS supra* at 64-80.

21. The President appointed a governor of Puerto Rican origin. President Truman appointed Jesus Pinero, ending close to fifty years of rule by appointees from the mainland who neither spoke Spanish nor understood the Puerto Rican culture.

22. Foraker Act, in *DOCUMENTS supra* at 64-80.

sumably this meant that any law passed which was inconsistent with United States' interests would be vetoed.

In addition, the Foraker Act subjected Puerto Rico and its citizens to all laws which Congress deemed applicable to the land:

That the Statutory laws of the United States not locally inapplicable, except as hereinbefore and hereinafter otherwise provided shall have the same force and effect of Porto Rico [sic]²³ as in the United States except the internal revenue laws.²⁴

The provision applied federal statutory laws to Puerto Rico, unless conditions of the island necessitated the exclusion of any particular statute. This provision of the Foraker Act, however, was meant to apply to general statutes and was not meant to serve as the basis for arguing against the applicability of statutes that Congress specifically legislated for Puerto Rico.²⁵ Congress still possessed the power under the territorial clause of the United States Constitution to apply specific legislation to the island regardless of what the conditions necessitated.²⁶

For Puerto Rican liberals, this implied that they no longer had the power to execute laws concerning trade and commerce or to organize labor. The organic act eliminated the laws that protected the Puerto Rican coffee industry and imposed duties on the island's major crop.²⁷ Similarly, it contained a particular stipulation favoring the American sugar *latifundias*.²⁸ In short, the Foraker Act eradicated all the freedoms and liberties granted to the people under the Autonomous Charter and the Spanish Con-

23. This was the official misspelling of Puerto Rico which was corrected in 1932 by Congress. 47 STAT. 158 (1932).

24. Foraker Act, in DOCUMENTS *supra*. Note that this provision of the Foraker Act has been fully incorporated into Section 9 of the Puerto Rican Federal Relations Act and is still in force today. See Leibowitz, *supra* at 234-236, for a brief comparison of this provision with the one applied to the territory of New Mexico which stated that the federal laws as well as the Constitution would have the same force and effect as it did in the U.S. He notes, accordingly, that the Foraker Act consciously omitted the application of the U.S. Constitution *in toto* in Puerto Rico.

25. For a discussion on the phrase "not locally applicable" and its scope of application, see Leibowitz, *supra* at 234-239.

26. "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territories . . . belonging to the U.S. . . ." U.S. CONST. ART. IV, § 3, 4.2.

27. For a discussion on the economic effects of the Foraker Act and of the U.S. invasion of Puerto Rico, see *Puerto Rico-End of Autonomy*, 15 NACLA REPORT ON THE AMERICAS, (March-April, 1981).

28. "That on and after the passage of this Act the same tariffs, customs and duties shall be levied, collected and paid upon all articles imported into Puerto Rico from ports other than those of the U.S. which are required by law to be collected upon articles imported into U.S. from foreign countries: Provided that on all coffee in the bean or ground imported into Puerto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding." Foraker Act, in DOCUMENTS *supra* at 64.

stitution of 1876. It offered little advancement in self-government and was, as a consequence, denounced by Puerto Rican liberals.

B. *Downes v. Bidwell: Puerto Rico as Unincorporated Territory*

Constitutionally, there was no question that Congress reserved the power under the territorial clause of the Constitution to legislate laws for any United States Territory. But the passage of the Foraker Act did raise other serious legal questions concerning the treatment of Puerto Rico, its citizens and the applicability of the United States Constitution to Puerto Rico. In *Downes v. Bidwell*,²⁹ the Supreme Court dealt with the question of whether Puerto Rico was considered part of the United States for purposes of imposing tariffs. An answer in the affirmative meant that all duties, imposts and excises had to be uniform with those on the mainland pursuant to Article 1, Section 8 of the Constitution.³⁰

In its holding, the Court created the distinction between an incorporated territory—which through the expressed consent of Congress, was integrated into the federal union and was destined to become a state—and an unincorporated territory—whose future within the federal structure had not been established.³¹ Accordingly, the Court defined Puerto Rico as an unincorporated territory which “belongs to but is not part of the United States,” thus constitutionally permitting the imposition of unequal taxes vis-a-vis those imposed on the mainland.³² The Court reasoned

29. 182 U.S. 244 (1901) *supra* was one of the so-called Insular cases, all of which dealt with the issue of whether the Constitution followed the flag. Other cases were *Delima v. Bidwell*, 182 U.S. 244 (1901), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Note that the question of whether the Constitution applied to territories was contemplated before *Downes* in *Scott v. Stanford*, 19 How. 393 (U.S. 1856). Chief Justice Taney stated in the majority opinion that Congress is always subject to constitutional limitations and that the due process clause does not solely apply “to the states, but the words are general and extend to the whole territory over which the Constitution gives . . . power to legislate . . . It is a total absence of power elsewhere within the dominion of the territory, so far as these rights are concerned, on the same footing as citizens of the States and guards them as firmly and plainly against inroads which the general government might attempt.” As quoted in Harbrecht, *What are the Liberties of Citizens of Puerto Rico under the Constitution?* 38 GEO. L.J. 471, 473 (1950).

30. See note 1 *supra*.

31. Note that this was not a majority view. Only four Justices created this distinction of incorporated and unincorporated territories. The fifth Justice—Justice Brown—did not see the distinction, but concurred in the result, contending that no territory of the U.S. became part of the U.S. for constitutional purposes. See Harbrecht, 38 GEO. L.J. *supra* at 475.

32. See Harbrecht *id.* at 480, where the author argues that this decision departs from the *Dred Scott* case *supra* where the court ruled that Congress was denied the power “to establish inequalities . . . by creating privileges in one class of those citizens and by the disenfranchisement of other portions or classes.” Thus, he infers that the Court in *Downes supra* does not consider Puerto Ricans to be on the “same plane as citizens of a state.” See *supra* note 29.

that the cession of Puerto Rico by Spain through a treaty was not enough to incorporate the island into the union; Congress had to expressly or implicitly incorporate the island.³³

This was to have a significant effect on Puerto Rico and its citizens since the Court further held that the United States Constitution applied in full force only to incorporated territories³⁴ of the United States and, as such, the Constitution did not extend *ex proprio vigore* to Puerto Rico. Thus, Congress, when engaging in island legislation, was not subject to any of the restrictions that applied when legislating to the states.³⁵ The Court added that only the "fundamental" constitutional rights applied to the island. But what rights were deemed fundamental remained to be seen.³⁶

In sum, the Supreme Court in *Downes v. Bidwell* confirmed the power of Congress to select which constitutional rights and federal laws were applicable to Puerto Rico. Legally, the Foraker Act did little to change the basic relationship between the United States and Puerto Rico. Furthermore, it did not make Puerto Ricans citizens of the United States nor did it extend the United States Constitution to the island.³⁷

C. *The Jones Act: Another Blow to Autonomy*

In 1917, the United States Congress passed the second organic act known as the Jones Act, establishing the legal framework to organize a permanent government in Puerto Rico.³⁸ To *independentistas*, this suggested that Puerto Rico would never be free of foreign subjugation. The Jones Act, like its predecessor, limited Puerto Ricans' authority to rule sovereign in their own land.³⁹

The significance of the Jones Act stemmed from the fact that it imposed American citizenship on all Puerto Ricans. Those who refused to accept the Jones act "offer" were forced to renounce their "citizenship" in a court of law.⁴⁰ Such a rejection meant that they would have to leave the island or become "aliens in their own

33. *Downes v. Bidwell*, 182 U.S. 244 (1901).

34. Note that at this moment the United States had no incorporated territories.

35. 38 GEO. L.J. at 474.

36. *Dorr v. United States*, 195 U.S. 138, 149 (1904) (trial by jury not a right).

37. Segal, *The Unique Status of Puerto Rico in Relation to the Federal Government*, 8 MERCER L. REV. 360, 361. Note that at this juncture, Puerto Ricans were neither citizens of Spain nor of the U.S. They were merely a body politic known as the "People of Puerto Rico."

38. Jones Act, in DOCUMENTS *supra* at 81-112.

39. *Id.*

40. Those who wished to retain their political status had to declare so within six month from the time that the Act was to take effect. The declaration was: "I, —, being duly sworn, hereby declare my intention not to become a citizen of the U.S. as provided in the Act of Congress conferring U.S. citizenship upon citizens of Puerto Rico and certain natives permanently residing in said island." *Id.* at 85.

birthplace."⁴¹ It also meant that they would not be permitted to vote, nor to hold office. As a result, only 288 Puerto Ricans chose to decline the offer of United States citizenship.⁴²

D. *Citizenship Sans Statehood*

Many Puerto Ricans believe that the conferring of United States citizenship, which was indeed consistent with the wishes of the liberals of Puerto Rico, would accrue the full benefits afforded to mainland citizens. But constitutionally, the Jones Act did not alter the legal status of Puerto Rico, nor did it substantially increase the rights of the citizens. In 1922, the Supreme Court reaffirmed the holding in *Downes v. Bidwell* in, *Balzac v. Porto Rico* [sic]⁴³, another landmark case which reviewed the legal status of Puerto Rico after the passage of the Jones Act. The Court held that "incorporation is not assumed without the express declaration" of Congress and that the Congress, by enacting the Jones Act, did not intend to incorporate Puerto Rico into the union.⁴⁴

The Court further stated that the Constitution "contains grants of power and limitations which in the nature of things are not always and everywhere applicable."⁴⁵ In essence, the Court reasserted that the Constitution applied in Puerto Rico; but the debate was over which relevant provisions were in force.⁴⁶

Thus, for the first time, Congress extended United States citizenship to a territory that was not to become a state. Any by doing so, Congress created second-class citizens who were not fully protected by the federal laws and the Constitution of the United States. In addition, Puerto Ricans did not acquire the right to vote in United States elections unless they became residents of a mainland state. It thus became evidence that the extension of United States citizenship to Puerto Ricans was nothing more than a proclamation by Congress of the "permanence of Puerto Rico's political links with the United States."⁴⁷

1. Citizenship and Conscription

It has been alleged that one of the motives behind the imposed citizenship was to draft Puerto Ricans into the United

41. L. CRIPPS, *PUERTO RICO: THE CASE FOR INDEPENDENCE* 24 (1974).

42. Cabranes, *Citizenship and the American Empire*, 127 U. PENN. L. REV. 391, 483 (1978).

43. 258 U.S. 298 (1922).

44. *Id.*

45. *Id.* at 312.

46. *Id.* Note that the courts have held that the due process clause does apply to Puerto Rico, but they have refused to say whether it applies under the 5th or under the 14th Amendment. They have avoided making a political determination of Puerto Rico's status. See *Examining Board v. Flores de Otero*, 426 U.S. 572, 601 (1975).

47. Cabranes, *Citizenship, supra* at 406.

States military. José A. Cabranes in *Citizenship in the American Empire*, discredits this claim.⁴⁸ The language of the Spanish-American War Act of 1898 specified that United States nationals were eligible for military duty in the service of the United States and that Puerto Ricans had already been declared nationals under the Treaty of Paris.⁴⁹ He concludes:

The United States did not have to confer American citizenship on the people of Puerto Rico in order to be able to draft Puerto Rican men during World War I. These men would have been subjected to conscription in military service even if they had remained citizens of Puerto Rico.⁵⁰

The conscription of Puerto Ricans was not a legal question because the Jones Act served not to legalize, but to legitimize conscription. The act obligated thousands of nationals to serve in the United States armed forces and to fight in an alien war. The conscription of Puerto Rico's young men occurred during a time when Puerto Rico's outcry for greater political and economic autonomy was so strong that it could have provoked mass discontent on the island—a situation which would have threatened the authority of the United States and the stability of the island.⁵¹

2. Puerto Rico's First "Governor"

In 1947, Congress enacted the Elective Governor Act, which for the first time permitted Puerto Rico to elect its own governor.⁵² The Act mirrored the continued demands for the increase in self-government now manifested by the reformist *Partido Popular Democrático* (PPD).⁵³ Although it allowed for greater internal autonomy, the status of the island remained the same; Congress continued to maintain its veto power over the governor and legislature of Puerto Rico.⁵⁴

48. 127 U. PENN. L. REV. 391 (1978).

49. Article IX of the Treaty of Paris transferred the nationality of the people to the nationality of the territory—however it was to be defined. With it, the Treaty transferred the people's allegiance and their obligations. Under international law, this included taking up arms for the defense of the United States. See Ruiz Alicea v. United States, 180 F.2d 870 (1st Cir. 1950).

50. Cabranes, *supra* at 407.

51. For a good political argument on citizenship see M. DENIS, INTERPRETACION SUPRA and LEWIS, PUERTO RICO: FREEDOM AND POWER IN THE CARIBBEAN (1963).

52. Luis Muñoz Marín, who emerged as a popular leader advocating association with the U.S., was the first elected governor of Puerto Rico. He served as governor from 1948 until 1969.

53. For a good account on the PPD and party politics in Puerto Rico, see ANDERSON, PARTY POLITICS IN PUERTO RICO (1965) and PAGAN, HISTORIA DE LOS PARTIDOS POLITICOS PUERTORRIQUENOS (1883-1956) (1959).

54. Salvador Tio, Regional Director of the Legal Services Commission in New York, maintains that the ratification of the Elective Governor Act was conditioned upon the "readiness and availability" of 12,000 acres of land for the use of the U.S.

III. THE REALITY OF THE *ESTADO LIBRE ASOCIADO*⁵⁵

In 1950, as a response to the upsurge of *Nacionalista* violence on the island that had been escalating since the 1930's,⁵⁶ the continuous pressure of liberal autonomists for greater political and economic reforms,⁵⁷ and the increased demands on the United States by the United Nations to comply with its obligations pursuant to Article 73 of the U.N. Charter,⁵⁸ the United States Congress ratified Public Law 600.⁵⁹ Public Law 600 permitted Puerto Rico to organize a government—subject to Congressional limitations—pursuant to a Puerto Rican Constitution.⁶⁰

A constitutional convention was held between 1950 and 1952. The document was drafted, based upon the same principles as the American Constitution. It organized a Republican form of government, consisting of a legislative, judicial and executive branch—all of which were to remain ancillary to the people of Puerto Rico.⁶¹ The Constitution also included a Bill of Rights acknowledging full individual rights and freedoms for Puerto

Navy. See United States Congress, Committee on Armed Services, *Naval Training Activities on the Island of Vieques, Puerto Rico*, at 135-145 (1980).

55. The literature available criticizing the commonwealth status of Puerto Rico is very comprehensive. For a good analysis of ELA, see G. POLANCO, *LA FARSA DEL ESTADO LIBRE ASOCIADO* (1972).

56. In 1932, *Nacionalista* patriots stormed the capital of Puerto Rico to prevent the legislature from passing a vote that would make the flag of Puerto Rico the official emblem of the colony. In 1933, *Nacionalistas* exploded a bomb in the summer residence of Governor Robert H. Gore in an attempt to assassinate him. In 1935, they succeeded in assassinating the Chief of Police, Colonel Francis Riggs. In 1937, they attempted to assassinate federal court judge Robert A. Cooper. On October 30, 1950—in response to Pub. L. 600—the *Nacionalistas* launched a two-day national insurrection, attacking several towns. Five commandos attacked La Fortaleza, the governor's mansion. On November 1, 1950, two *Nacionalistas* attacked Blair House in Washington, D.C., the residence of President Truman, in an attempt to assassinate him. As a further note, four *Nacionalistas* attacked the U.S. House of Representatives in 1954, injuring five Congressmen. For a historical account of the *Nacionalista* Party, see ANDERSON, *supra*; CASTRO, *HISTORIA SINOPTICA DEL PARTIDO NACIONALISTA DE PUERTO RICO* (1974); and see A. CAMPOS, *LA CONCIENCIA NACIONAL PUERTORRIQUENA* (1972).

57. Since 1946, Luis Muñoz Marín and the *Partido Popular Democrático* (PPD) had been striving for a new relationship with the United States that would benefit the island both politically and economically. For an account of the PPD and platforms, circa 1950, see N. DAVILA, *CAMBIO Y DESARROLLO EN PUERTO RICO: LA TRANSFORMACION IDEOLOGICA DEL PARTIDO POPULAR DEMOCRATICO* (1980).

58. Article 73 defined Puerto Rico as a non-selfgoverning territory and required the U.S. to "transmit reports regularly to the Secretary General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of technical nature relating to economic, social, and educational conditions in the territories for which they are responsible. U.N. CHARTER, art. 73. For a history of Puerto Rico before the United Nations, see G. MAYORA and D. ARGUELLES, *PUERTO RICO Y LA ONU* (1978) and see also M. BRAS, *THE CASE OF PUERTO RICO AT THE U.N.* (1974).

59. Pub. L. 600, in *DOCUMENTS supra*.

60. Pub. L. 600, in *DOCUMENTS supra* at 155.

61. The structure of government was specifically mandated by the Act, *Id.*

Ricans.⁶²

Puerto Rico possessed little latitude in drafting its constitution since its force and effect was conditioned upon United States Congressional approval. In fact, Section 20 of the Bill of Rights, which provided for basic human rights and which gave Puerto Ricans the freedom to completely control their economy, was abrogated in a joint resolution by Congress before the document took effect.⁶³ Section 20 had recognized the right of every citizen to obtain work, the right to receive free education, the right to an adequate standard of living, and the right to protection against unemployment, sickness, old age, and disability.⁶⁴ These were fundamental human rights⁶⁵ closely linked to the "progressive development of the economy of the Commonwealth."⁶⁶

It is interesting to note that Section 20 was abrogated despite Article VII, Section 3 of the Commonwealth Constitution, which specifically prohibited the abolition of the Bill of Rights and, presumably, any portion thereof.⁶⁷ In addition, the new constitution was not to take effect until amended with the following provision:

Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, which applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600 Eighty-First Congress adopted in the nature of the compact.⁶⁸

Hence, in approving the Commonwealth Constitution, Congress annulled Section 20 making it "unconstitutional" to amend any clause incompatible with the resolution passed by Congress. Despite this, the new constitution was approved by the people of Puerto Rico in 1952 by a vote of 374,000 to 84,000 becoming the very foundation of Puerto Rico's present status as the *Estado Libre Asociado*.⁶⁹

The newly created status, adopted in the nature of a compact, was founded as an alternative to both independence and statehood. Supposedly, the new status offered the greatest degree of political and economic autonomy⁷⁰ within the American federal

62. Commonwealth Const., in DOCUMENTS, *supra* at 168-192.

63. Pub. L. 447, in DOCUMENTS *supra*.

64. Commonwealth Const., in DOCUMENTS *supra* at 173.

65. *Id.*

66. *Id.*

67. "No amendment of this Constitution shall alter the republican form of government established by it or abolish its bill of rights." COMMONWEALTH CONST. IN DOCUMENTS *supra* at 188.

68. Pub. L. 447, in DOCUMENTS *supra*.

69. *United States-Puerto Rico Comm.*, *supra* at 28.

70. "The single word 'commonwealth' as currently used, clearly defines the status of the body politic created under the terms of the compact existing between the people of Puerto Rico and the United States, i.e., that of a state which is free of

structure and provided the ideal model for rapid economic development and stability.⁷¹ To many, the new status became the coveted solution to the status issue and to the economic plight of Puerto Rico.

Accordingly, the United Nations removed Puerto Rico from its list of non-selfgoverning territories, convinced that the people had fulfilled their right to self-determination and that the new relationship had eradicated the vestiges of colonialism.⁷² This belief was also manifested by Puerto Rican liberals—proponents of the *Estado Libre Asociado*—in their final declaration of the Constitutional Convention. Resolution 23 declared:

Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of the compact, and we enter into an era of new developments in democratic civilization. Nothing can surpass in political dignity, the principle of mutual consent and of compacts freely agreed upon. The spirit of the People of Puerto Rico is free from great undertakings now and in the future. Having full political dignity, the Commonwealth of Puerto Rico may develop in other ways by modifications of the compact through mutual consent.⁷³

A. *Did ELA Alter the Legal Status of Puerto Rico?*

Proponents of ELA have argued that the adoption of the Commonwealth Constitution has, in fact, elevated Puerto Rico's status from that of the "unincorporated territory" dating from the Insular cases of 1901 to a mutually consented-to status that has yet to be defined in the annals of constitutional law.⁷⁴ They have maintained that, because its new relationship with the United States was founded in the "nature of a compact,"⁷⁵ Congress can no longer assert its plenary powers under the territorial clause;

superior authority in the management of its own local affairs but which is linked to the United States of America and hence is part of its political system in a manner compatible with its federal structure." See Resolution 22, in DOCUMENTS *supra* at 164.

71. The economic plan of development for Puerto Rico was known as "Operation Bootstrap." It was designed to offset the high levels of disease, malnutrition and unemployment on the island through industrialization. For a detailed discussion of Operation Bootstrap, see C. CUEVAS, *EL DESARROLLO ECONOMICO DE PUERTO RICO: 1940 A 1972* (1976). Also see GONZALEZ, *ECONOMIA POLITICA DE PUERTO RICO* (1971). For a political analysis of Operation Bootstrap see EPICA Task Force, *PUERTO RICO: A PEOPLE CHALLENGING COLONIALISM* (1970).

72. See MAYORA, *PUERTO RICO Y LA ONU supra*.

73. Resolution 23, in DOCUMENTS, *supra* at 166.

74. See KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* 112-122 (1982).

75. "Fully recognizing the principle of government by consent, this act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of its own." Pub. L. 600, in DOCUMENTS *supra*.

any power to legislate emanates from the compact itself and not the territorial clause.⁷⁶

It has become obvious that Public Law 600 was nothing more than an attempt by the United States to hide its colonial relationship with Puerto Rico. Although the Act produced a semblance of greater internal autonomy, it did not alter the basic relationship of Puerto Rico with the United States.⁷⁷ The Act incorporated the major provisions of the Foraker and Jones Acts in a condensed version known as the Puerto Rican Federal Relations Act, thus extending to the United States the very same control, but under the guise of a new relationship.⁷⁸ Despite the notions of "compact" and "mutuality," Congress, according to its interest,⁷⁹ could still apply its laws without the prior consent of the People of Puerto Rico.⁸⁰ The only significant right acquired under Public Law 600 was the right to draft a constitution which would still be subservient to the whims of Congress. Puerto Ricans are, thus, still excluded from participating in national elections and are treated unequally with respect to the application of federal programs, grants and the United States Constitution.⁸¹

That the people of Puerto Rico consented to this new association was of no real significance since the United States did not offer appealing alternatives. Puerto Rico could choose between remaining a colony as it had been since 1898 or accepting a new status that purported to give its people greater control in their affairs.⁸² The effect of choosing the latter has been to effectively perpetuate the myth that under ELA, Puerto Rico became selfgoverning. In reality, accepting ELA has been tantamount to accepting the implementation of institutionalized colonial rule.⁸³

1. *Califano v. Torres*: SSI Denied

The two most recent cases dealing with the question of the legal status of Puerto Rico are *Califano v. Torres*⁸⁴ and *Harris v. Rosario*.⁸⁵ These cases have become quite significant since they

76. See *Hodgson v. Union de Empleados de Supermercados Pueblo*, 317 F. Supp. 56 (1974).

77. *Nestle Products, Inc. v. U.S.*, 310 F. Supp. 792 (1970).

78. Pub. L. 600, in DOCUMENTS *supra*.

79. The Senate Reports which recommended Pub. L. 600 stated: "it is important that the nature and general scope of S.3336 be absolutely clear. The Bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States." KERR, THE INSULAR CASES *supra* at 112.

80. *Caribtow Corp. v. Occupation Safety and Health Review Commission*, 493 F.2d 1064, *cert. denied*, 419 U.S. 830 (1974).

81. See *Recent Decision*: *Harris v. Rosaria*, 12 CASE W. RES. J. INT'L L. 641, 645.

82. KERR, THE INSULAR CASES, *supra* at 112-122.

83. See M. DENIS, PUERTO RICO: MITO Y REALIDAD (1969).

84. 435 U.S. 1 (1978).

85. 446 U.S. 651 (1980).

ruled on the Commonwealth status of the island. The issue before the court in *Califano v. Torres*, was whether Congress, by excluding Puerto Rico from the Supplemental Security Income (SSI) program violated the right to travel of citizens living in the mainland.⁸⁶

The United States District Court for Puerto Rico, finding the fundamental right to travel at issue, applied strict scrutiny analysis but found no compelling interest on the part of the government to justify such an intrusion.⁸⁷ On appeal, however, the Supreme Court refused to extend the right to travel as had the District Court, asserting that such a reading of the right to travel would allow one who travels to Puerto Rico "superior benefits to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came."⁸⁸

Accordingly, the court applied rational basis scrutiny, stating that "so long as its judgments are rational and not indivious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket."⁸⁹ The court then found that the exclusion of Puerto Rico from the SSI program was rational since 1) Puerto Ricans did not pay federal taxes;⁹⁰ 2) the cost of extending the program to the island would be overly burdensome; and 3) the extension of the program would prove to be destructive to the island's economy.⁹¹

2. *Harris v. Rosario*: AFDC Denied

This same rational basis test was applied to the more recent case of *Harris v. Rosario*.⁹² The issue to be decided here was whether Congress could treat United States citizens residing in Puerto Rico differently from those residing in the states with respect to the Aid to Families with Dependent Children (AFDC) program.⁹³ Under this federal program, Puerto Rico would pay welfare recipients their benefits and, in turn, would be reimbursed for fifty percent of the costs of the program by the federal government.⁹⁴ The problem stemmed from the fact that Puerto Rico

86. While on the mainland, U.S. citizens would have the right to SSI benefits but would lose those benefits if he moved to Puerto Rico since the federal program did not extend to residents of the island.

87. 12 CASE W. RES. J. INT'L. L. 641, 648 (1980).

88. *Id.* at 650.

89. *Id.* at 642.

90. It must be noted that while Puerto Ricans do not pay federal taxes, they do pay social security taxes which, incidently funds both the SSI and AFDC (discussed *infra*) programs. See 12 CASE W. RES. J. INT'L. L. at 649.

91. 435 U.S. 1, 5 n.7.

92. 446 U.S. 651.

93. *Id.*

94. 6 N.C. J. INT'L. L. AND COM. REG. 127 (1980).

would be reimbursed at a fixed rate while states would be re-funded up to eighty-three percent of the costs of the program.⁹⁵ The contention was that this unequal reimbursement plan violated the equal protection clause of the United States Constitution in that it discriminated on the basis of residence.⁹⁶

The District Court for the District of Puerto Rico found that, although there was no fundamental right involved, the statute did violate the equal protection clause in that it discriminated against a "class" of United States citizens who resided in Puerto Rico. Accordingly, the court held that the reimbursement program did not pass the strict scrutiny test.⁹⁷ However, in a *per curiam* opinion, the Supreme Court reversed the District Court's opinion finding that no such violation existed. Rather than focusing on the unjustifiably unequal treatment of United States citizens as had the lower court, the Supreme Court ruled on the powers of Congress to legislate unequally to territories.⁹⁸ The court held that: 1) Article IV, Section 3, Clause 2 gave Congress plenary powers to legislate laws to all United States territories and 2) that as a territory of the United States, Puerto Rico could be treated unequally under federal programs as "long as there is a rational basis for its actions."⁹⁹ The court went on to find that a rational basis existed for this unequal treatment based on the same factors that were considered in *Califano v. Torres*.¹⁰⁰ Thus, Congress had the right to distribute less financial assistance to Puerto Rico than to other states.¹⁰¹

In summary, both *Califano v. Torres* and *Harris v. Rosario*, illustrate that, despite the contentions of the proponents of ELA, Puerto Rico is still defined by the courts as an unincorporated territory of the United States and is still subject to the territorial clause of the U.S. Constitution. Thus, as far as the Court is concerned, the establishment of ELA did little to change the fundamental political status of Puerto Rico.

95. *Id.*

96. 446 U.S. 651.

97. 12 CASE W. RES. J. INT'L. L. at 649.

98. *Id.* at 649.

99. 446 U.S. 651, 652.

100. 435 U.S. 1.

101. Perhaps the better view was that of Justice Marshall in his dissent. Justice Marshall questions the validity of the Insular cases, contending that residents of Puerto Rico are citizens of the United States and, as such, must be protected fully under the Constitution. He criticized the fact that the issue was disposed of summarily, stating that the question deserves much more consideration than that what was given. He also attacked the factors which the majority used to determine the rational basis for the statute, pointing out that it is not rational to deny greater economic benefits to an area of the country which needs it the most. 446 U.S. at 652-653.

IV. CONCLUSION

Cayetano Coll y Toste was correct when he viewed Puerto Ricans as political orphans at the mercy of Congress, for after thirty-one years under the *Estado Libre Asociado*, Puerto Rico remains a classical colony of the United States. Constitutionally, Puerto Rico's status has not changed. The Supreme Court has repeatedly upheld the decision in *Downes v. Bidwell* that Puerto Rico is still an unincorporated territory of the United States and that, in effect, its citizens could be treated unequally as long as they remain on the island.¹⁰²

Only Congress has the power to legally alter Puerto Rico's relationship based upon the Treaty of Paris and Article IV, Section 3, Clause 2 of the American Constitution. Without a doubt, if Puerto Ricans were to ask for independence or statehood, the ultimate decision would belong to the United States and not to the people of Puerto Rico. The fact that the present political status of Puerto Rico remains vague and undetermined after eighty-six years reflects the unwillingness of the United States to finally resolve Puerto Rico's fate, while the institutionalization of ELA has become the basis for evading the status issue.

Congress has the power to unilaterally decide the status of Puerto Rico that has made the status issue on the island a sterile one. In spite of this, opposition to ELA is continuously increasing, manifesting itself through the political parties on the island which support either independence or statehood. But for the moment, at least, the majority of Puerto Ricans seemingly adhere to the island's present political and legal status.

In the interim, it is important for the courts to vitiate this distinction between incorporated and unincorporated territories created in the Insular cases. By continuously relying on the Insular cases, the courts have set a dangerous precedent by giving Congress a *carte blanche* to treat American citizens unequally. As Justice Black declared in *Reid v. Covert*:

[N]either the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written constitution

102. Puerto Ricans do vote for a federal representative—the Resident Commissioner—but he has no vote in Congress. It is also interesting to note that although Puerto Ricans do not vote, they are still subject to the Selective Service Laws of the United States and are thus obligated to serve in the U.S. Military. See the Puerto Rican Federal Relations Act, in DOCUMENTS *supra*.

and undermine the basis of our government.¹⁰³

The unequal treatment of American citizens in Puerto Rico should not be based on such a tenuous and arbitrary distinction and on the insignificant fact that Congress has not used the word "incorporate" in any of the organic acts it enacted for Puerto Rico. Query what did the Foraker Act, the Jones Act and Public Law 600 do if not to make Puerto Rico a permanent part of the United States in a legal sense? Is this not "incorporation"? What real difference does it make whether a territory will eventually become a state or not? Is it not enough that Puerto Ricans were conferred American citizenship and, as such, are entitled to the full benefits and protections of the American Constitution? Does it not seem ludicrous to suggest that but for the mere fact that an American citizen lives in Puerto Rico, he or she cannot vote in Presidential elections, collect SSI, or be tried by a jury of his or her peers? It is time, now, for the courts to depart from this doctrine and treat Puerto Ricans with the same dignity and respect given other American citizens—at least until a permanent solution to Puerto Rico's status problem is found.

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103. 354 U.S. 1, 14 (1957) (plurality opinion). *See also* *Torres v. Puerto Rico*, 442 U.S. 465, 475 (1979).