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## **Puerto Rico's Position within the United States System of Government**

JOSÉ JULIÁN ÁLVAREZ GONZÁLEZ\*

Good afternoon. It is a pleasure to be here with you at your convention. I will try to be as brief as possible, which is what every last speaker should do. By now, you must be really tired. Although I feel your pain, my topic, however, will not ease your pain. From some perspectives, it is one of the most metaphysical subjects human mind has devised. I will try to make it as straightforward as possible. That is what I tried to do in the description of my talk, which is printed on your program. I tried to synthesize what I would say, so that reasonable men and women could decide that the beach, the pool or the casino would be more worthwhile enterprises.

So for all of you unreasonable people who remain here, let me begin by reiterating what is printed on your program, in case you feel the sudden urge to leave.

Puerto Rico's relationship to the United States is quite similar to that of one of the fifty states, with a very important exception: the inhabitants of Puerto Rico do not vote in federal elections. They do not vote for President of the United States nor do they have representation in the House of Representatives or the Senate, except for a non-voting delegate to the House. However, federal legislation, executive regulations and presidential executive orders apply generally to Puerto Rico, unless the rule provides otherwise. The federal court system also functions in Puerto Rico, where a federal district court operates, and which is currently conducting a criminal proceeding

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against the sitting governor of Puerto Rico. Decisions of the Supreme Court of Puerto Rico are reviewable by the Supreme Court of the United States in the same cases where that court exercises jurisdiction over the highest courts of the fifty states. A democratic deficit, therefore, is evident in this relationship.

Now, let me tell you some facts about Puerto Rico: political, sociological and even psychological. Puerto Rico is the only jurisdiction under the US flag where the majority of its inhabitants speaks a different language and has a different culture to those of most US citizens. There is no other jurisdiction under the US flag where government business is not conducted in English or where English is not the *lingua franca* in the daily lives of the citizenship. US Census figures show that the mother tongue of 99% of Puerto Rico's inhabitants is Spanish and that no more than 25% of them can be considered truly bilingual. And, as Jack Nicholson would say, this is *almost* "as good as it gets."

As my colleague Efrén Rivera told you, since 1952, Puerto Rico is a Commonwealth of the United States. The translation into Spanish of that ambiguous term is "Free Associated State." But, Puerto Rico is in no sense the "free associated state" that United Nations resolutions recognize as one of three legitimate solutions to the problem of self-determination of peoples.

At present, and for some three decades, the Puerto Rican electorate is deadlocked concerning its future political status. Around 47.5 % of voters favor that Puerto Rico become a state of the Union; an identical percentage favors that it retain its present status, but with modifications. And, at the very most, 5 % of the electorate favor complete independence. Since this may influence my views, I hasten to add that I belong to that latter 5 %. Those figures are estimates. Their accuracy could be and has been the subject of endless acrimonious debates which only a Puerto Rican would begin to understand.

But I also must tell you that practically no one dares to say publicly in Puerto Rico that he or she favors the current status quo without any modifications. Statehooders, as well as independentistas, openly use the term colonialism to describe the present relationship with the US. And, if pressed, most believers in a modified Commonwealth status will also use the term "colony." Whether this is a sincere view is an entirely different matter. If tortured, I would argue that the overwhelming majority of Commonwealth supporters would accept the present status –unchanged– if they cannot

accomplish the unspecified improvements that they say they seek. The term “happy colonials” has sometimes been used to describe that sector.

Outside of Puerto Rico, the principal opponent of Puerto Rico’s admission as the 51st State of the United States of America is . . . the United States of America. As a matter of fact, many independentistas say, at least *sotto voce*, that we have a better chance of becoming an independent republic by the will of the US than by that of a majority of the Puerto Rican electorate. This makes for some very strange bedfellows. Puerto Rican supporters of statehood are, in general, very conservative on socioeconomic issues. Yet, their principal allies in US politics are the more liberal sectors, some of whom seem determined to atone for the original sin of colonialism by baptizing us in the cleansing waters of statehood. By contrast, independentistas are overwhelmingly of a more leftist persuasion, but their natural allies in the US political scene are the more staunchly conservative forces. For their part, supporters of Commonwealth status are today basically conservative, but will get into bed with any US politician, of any tendency, who might give them more federal money.

Lastly, a simple statement of fact: after more than 100 years of US presence in Puerto Rico, there is officially around 13% unemployment on the Island. More reliable unofficial figures put that number closer to 25%, if you factor in people who no longer are actively looking for work. In many families of the lower economic means, two generations have never worked. The third generation is now in school, or dropping out.

My colleague Efrén Rivera has given you an excellent review of the history of Puerto Rico’s relationship to the United States. I would like to touch on an aspect of that history. As professor Rivera told you, from 1901 to 1952 Puerto Rico was considered an unincorporated territory of the US. That basically meant two things:

1. that the US constitutional protections available to the inhabitants of Puerto Rico were those that the US Supreme Court considered to be “fundamental;” and
2. the political branches of the US government had almost complete freedom to do as they pleased with Puerto Rico. It was – and still is – for Congress to determine whether federal laws shall or shall not apply to Puerto Rico. Under the doctrine of territorial incorporation, Congress, in legislating for Puerto Rico, may treat it as a state, worse than a state, or better than a state.

Historically, Congress has adopted all three postures. For instance, Puerto Rico is treated as a state in a host of federal statutes dealing with such matters as currency, postal service, communications, immigration and many others. On the other hand, Congress generally has treated Puerto Rico much worse than a state in social welfare statutes. In such cases, outright exclusion or maximum ceilings on federal payments are the rule. Lastly, Congress always has excepted Puerto Rico from the bulk of federal internal revenue laws, especially the income tax laws, and has provided different, more favorable treatment to Puerto Rico than to the 50 states in many other fiscal matters. This has permitted Puerto Rico to maintain higher tax rates than any of the states and to induce foreign investment by offering complete or almost complete tax exemption. Advocates of the Commonwealth status have hailed this condition and called it Puerto Rico's fiscal autonomy. The crucial fact to remember, however, is that this so-called fiscal autonomy has nothing to do with Commonwealth status; it is an outgrowth of the *Insular Cases*, which predate Commonwealth status by more than fifty years.

Until 1952, again, Puerto Rico's status as an unincorporated territory, however ambiguous that term may be, was settled. With the advent of Commonwealth status, many of its supporters fervently hoped for a definitive judicial declaration, a "Rosetta stone. . . which would decipher Puerto Rico's Federal relationship." There were many questions whose answers it was ingenuously expected the federal courts would provide, among them, whether Puerto Rico ceased to be an unincorporated territory after 1952; whether Congress has the power and did make a binding compact, and if so, what are its actual contents and whether it is unilaterally revocable or alterable by Congress. The list of questions goes on and on.

The fact is that very few of those questions have been answered by the federal courts. The Supreme Court, in particular, has been cautiously silent on most of these issues. This fact should not surprise anyone. It is not reasonable, nor was it ever reasonable, to expect courts to provide legal answers to what essentially are political problems; the answers must come, if at all, from the political branches of the US government.

From 1952 up until 1970 the U.S. Supreme Court was absolutely silent on any issue concerning the political status of Puerto Rico. In 1970, it broke its silence on these matters. Since then, it has dealt with related issues on several additional occasions. Yet, the Court's opinions are characterized more for what they do **not** say, than for what they do say. True, the Court has stated several times that there is a compact, but it has shown no inclination to discuss its content or its practical consequences.

The Supreme Court's modern decisions on Puerto Rico can be divided into two groups. First, there are those decisions in which a litigant claimed a federal constitutional right against the local government of Puerto Rico. In these decisions the Supreme Court has followed a uniform principle: the government of Puerto Rico is limited by the US Constitution to the same extent as one of the states of the Union; whatever a state can do, so can Puerto Rico; whatever a state cannot do, Puerto Rico cannot do it either. Twice in this first group of cases the Court specifically has rejected Commonwealth claims to greater autonomy than states are accorded under principles of federalism. The wishful idea that the Commonwealth relationship recognizes greater powers in the Puerto Rican government than those which the states possess has not gained any converts on the US Supreme Court bench.

The second group of cases presents an even uglier picture for Commonwealth advocates. In these cases, Puerto Rican residents assailed the constitutionality of federal welfare laws that exclude Puerto Rico from its coverage or provide considerably less money to Puerto Rican residents than to their counterparts in the 50 States. In both cases it was claimed that Congress had violated equal protection of the laws. The Court rejected both challenges and referred specifically to Congress' powers under the territorial clause as legitimating what would undoubtedly be prohibited when dealing with residents of the 50 States. Thus, it seems that even though the Court has held that equal protection of the laws is a "fundamental" right applicable to Puerto Rico, it becomes less "fundamental" when it is asserted against federal actors. This, of course, illustrates that the *Insular Cases* are alive and well. The Court's purpose in 1901 – to grant the federal government the utmost freedom in its dealings with Puerto Rico – has lost none of its vigor.

Let me now briefly tell you about the powers of the federal government and those of the government of Puerto Rico. In a nutshell, the federal government legislates for Puerto Rico, without any form of specific consent from Puerto Rico's inhabitants, in all matters in which it can legislate for the states of the Union. Under modern US constitutional law, this means that Congress wields an enormous power over the daily lives of Puerto Ricans without any of the legitimating features of representative democracy. Moreover, State autonomy in the 21<sup>st</sup> century has practically no resemblance to what state autonomy meant in the 19<sup>th</sup> century. The relative powers of the states vis-à-vis the federal government are much less today than what they were a century ago. Let me give you a brief explanation of why this is so, particularly for those of you who are not students of the American system of government.

The US Constitution created a national government, but retained the distinct personality of each of the components of the federation –the States. As a consequence of this federal organization, governmental powers are fragmented on a vertical plane, between the central government and the States. This leads to the fact that over the same geographical territory two full systems of government operate simultaneously: the federal and that of the pertinent state. This complexity introduces elements of tension and friction between both sets of governments. The federal Constitution attempts to solve or reduce such frictions under an apparently simple, but quite misleading formula. It provides that in case of conflict, valid federal norms will prevail over any state norm. Of course, that means that determining when federal norms are valid is of utmost importance.

If we were to describe the system of sources of law in the US, it would resemble a pyramid, with the US Constitution at the very top, federal laws and treaties below it, federal rules and executive orders further below it and, at the base of the pyramid, State constitutional and other norms.

The federal Constitution contains a list of powers granted to the federal government. And then it announces that the States and the people of the States retain all powers not granted to the federal government. This is called the doctrine of enumerated powers. But, very early in its history, the US Supreme Court almost turned that doctrine on its head by holding that a federal norm is valid if it has *some* reasonable relation to one of the enumerated federal powers. That is a *very* lax standard which favors federal power. So much so, that at present it is almost exclusively for Congress to decide what the reach of its powers is.

Since the 1930's, the US Supreme Court has found just a handful of federal laws which exceeded federal powers. Thus, one of the most notable developments in US constitutionalism is the growth of federal power at the expense of those of the States. Nowadays, apart from individual rights guarantees, there is practically no juridical limit to the exercise of federal powers; the only limit is that which, from the perspective of the federal government itself, political realities may dictate. That is why to be a State in the 21st century means something quite different to what it meant in the 19th.

Some sectors of Puerto Rican society have long strived toward greater powers for the Island vis-à-vis the federal government. From a historic standpoint, that quest is clearly at odds with the developments in the US.

Thus, all federal executive agencies operate in Puerto Rico just as they operate in the fifty states. The federal judiciary also operates in Puerto Rico – in English – and hears the same types of cases it hears in the states. A federal judge in Puerto Rico could sentence a Puerto Rican to the death penalty under federal law, even though that inhuman punishment is prohibited by the Constitution of Puerto Rico. Finally, almost all federal legislation applies to Puerto Rico with the same restrictions that limit the states, but with a smaller outlay of federal moneys. This means, to cite but a few examples, that the minimum wage that must be paid all workers in Puerto Rico is set by the federal government, that control over the Puerto Rican environment is also federally regulated, that all control over immigration is in federal hands and that the U.S. military is a permanent and visible fixture in the Puerto Rican scene. The local government of Puerto Rico possesses essentially the same powers that the states possess over their inhabitants. Thus, Puerto Rico's government is composed of an executive branch, headed by an elected governor, of an elective legislative assembly and of a judiciary. And that government operates in Spanish.

The first Puerto Rican ever appointed to a Federal Court of Appeals, Judge Juan Torruella, published a book some years ago whose title is *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL*.<sup>1</sup> Of course, separate and unequal was the name of the Supreme Court doctrine which legitimated racial segregation for more than half a century, and Judge Torruella discusses how the disparate treatment of Puerto Rico does not comport with equal protection of the laws. I agree with most of what he has to say about that subject. My main difference with Judge Torruella is not legal, but political. As an advocate of statehood for Puerto Rico, Judge Torruella would prefer to see Puerto Rico inseparable from and equal to the states of the Union. As an advocate of independence, I would rather see Puerto Rico seated alongside the US as a separate and equal member of the nation-states of the world.

As for Commonwealth supporters, any serious attempt to obtain greater autonomy for Puerto Rico must face up to a federal law that has existed since 1900 and does not seem to be on the verge of extinction. It states: “The statutory laws of the United States not locally inapplicable, shall have the same force and effect in Puerto Rico as in the United States.”<sup>2</sup> In this roundabout way, which rightly has been termed “a grammarian’s nightmare,” Congress stated that it will decide for itself which federal laws

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<sup>1</sup> La Editorial Universidad de Puerto Rico (January 1985).

<sup>2</sup> 48 U.S.C. § 734.

apply to Puerto Rico, without Puerto Ricans having an effective say on the subject. Those who claim that the US and Puerto Rico entered into a compact in 1952, are forced to recognize that this statute is the backbone of such compact. Thus, in the best of cases, we have transferred the theological dogma of Papal infallibility, to the political realm. Congress legislates for us, without our having any say, because we contracted it and we contracted it, *perhaps*, because Congress knows best.

The solution to the colonial problem of *both* Puerto Rico and the United States will not come from the federal courts, nor should it. It is a political problem whose solution lies squarely in the hands of the federal political branches. All justifications for benign neglect have long disappeared by now.