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## The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?

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# The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?

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## **Abstract**

This Note argues that the establishment of the Commonwealth government fails to fulfill the requirements of a free associated territory as detailed in United Nations General Assembly Resolutions 742 (“Resolution 742”) and 1541 (“Resolution 1541”) because the Puerto Rico Constitution remains subject to the Territorial Clause of the U.S. Constitution. The Territorial Clause gives the U.S. Congress plenary authority to govern territories of the United States. Part I of this Note introduces the factual and legal background of Puerto Rico’s hybrid legal status. Part II describes the different interpretations regarding the validity of Puerto Rico’s status in international law. Part III argues that the present status of Puerto Rico requires that the U.S. Congress enact legislation that allows a binding plebiscite to define the status of Puerto Rico in a manner consistent with U.N. General Assembly Resolutions 742 and 1541. Finally, this Note concludes that the U.S. Congress should act to prevent the continuation of a system of government where unequal treatment of U.S. citizens in Puerto Rico is allowed under the U.S. Congress’ plenary power to administer territories.

# THE STATUS OF PUERTO RICO REVISITED: DOES THE CURRENT U.S.-PUERTO RICO RELATIONSHIP UPHOLD INTERNATIONAL LAW?

## INTRODUCTION

On November 14, 1993, residents of Puerto Rico voted in a plebiscite to choose Puerto Rico's future relationship with the United States.<sup>1</sup> The plebiscite permitted Puerto Ricans to select among statehood, independence, or commonwealth status.<sup>2</sup> The plebiscite, however, was non-binding.<sup>3</sup> As a result of the

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1. Larry Rohter, *Puerto Rico Votes to Retain Status as Commonwealth*, N.Y. TIMES, Nov. 15, 1993, at A1 [hereinafter Rohter, *P.R. Votes*]; Maria T. Padilla, *Sifting for facts on plebiscite*, SAN JUAN STAR, Nov. 12, 1993, at 31; *Salsa with Fries*, ECONOMIST, Nov. 13-19, 1993, at 28; Rafael Matos, *Commonwealth a winner with 48.4% of vote*, SAN JUAN STAR, Nov. 15, 1993, at 3.

The term "residents" as opposed to "people" of Puerto Rico will be used in this Note. Several commentators argue that the status of Puerto Rico should be determined by all Puerto Ricans, regardless of their place of residence. See Manuel del Valle & José Luis Morín, *Unravelling Puerto Rico's Colonial Status: The Puerto Rican Plebiscite*, 1 INT'L REV. CONTEMP. L. 126 (1990) (arguing for full participation in plebiscite by all Puerto Rican people "wherever they are found in their diaspora"); Juan M. García Passalacqua, Institute for Puerto Rican Policy *The 1993 Plebiscite in Puerto Rico: The Story, The Results and Their Implications*, 23-24 (1993) (maintaining that participation by Puerto Rican community in New York for 1993 plebiscite inextricably intertwined Puerto Rican New York residents in Puerto Rico's political future) [hereinafter *The 1993 Plebiscite*].

Despite the arguments put forth by these commentators, the focus of this Note is the legal-political status of Puerto Rico and the residents thereof who are directly affected by this status. This choice of terminology follows the current U.S. Supreme Court treatment of Puerto Rico, as stated in *Harris v. Rosario*, 446 U.S. 651 (1980) (reaffirming U.S. Congress' power to treat residents of Puerto Rico differently than residents of U.S. states). The Court in *Harris v. Rosario* maintained that it is residence in Puerto Rico which affects a Puerto Rican's legal rights under the U.S. Constitution. *Id.* Furthermore, while there were movements to allow stateside residents to vote in the plebiscite in New York, New Jersey, Illinois, Florida, Massachusetts, Connecticut, Pennsylvania and Delaware, the extremely low turnout in New York discouraged stateside voting in states other than New York. Passalacqua, *supra*, at 23-24. In effect, the only significant voting took place in Puerto Rico. See Rohter, *P.R. Votes*, *supra*, at A1 (discussing vote in Puerto Rico); Padilla, *supra*, at 31 (discussing vote in Puerto Rico); Matos, *supra*, at 3 (discussing vote in Puerto Rico).

2. Rohter, *P.R. Votes*, *supra* note 1, at A1; Matos, *supra* note 1, at 1; *Salsa with Fries*, *supra* note 1, at 28; Padilla, *supra* note 1, at 32-34.

3. Padilla, *supra* note 1, at 32; Matos, *supra* note 1, at 4. A "plebiscite" is a "vote of the people expressing their choice for or against a proposed law or enactment, submitted to them, and which, if adopted, will work a change in the constitution, or which is beyond the powers of the regular legislative body." BLACK'S LAW DICTIONARY 1153 (6th ed. 1990). See DANIEL PATRICK MOYNIHAN, PANDAEMONIUM 103 (1993) (discussing historical perspective of plebiscite). Self-executing legislation is "[a]nything (e.g., a document or legislation) which is effective immediately without the need of intervening

non-binding nature of the plebiscite, the two and one-half million Puerto Ricans residing in the continental United States and three and one-half million Puerto Ricans residing on the island must secure U.S. congressional legislation to enable Puerto Rico to enact its chosen status.<sup>4</sup>

Puerto Rico's present status is a direct result of U.S. political control of the island over the past century.<sup>5</sup> After the Spanish-American War,<sup>6</sup> Spain ceded Puerto Rico to the United States in the Treaty of Paris.<sup>7</sup> A series of U.S. Supreme Court cases, the *Insular Cases*, established Puerto Rico as an "unincorporated territory"<sup>8</sup> subject to the absolute will of the U.S. Congress.<sup>9</sup> In

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court action, ancillary legislation, or other type of implementing action." BLACK'S LAW DICTIONARY 1360 (6th ed. 1990). See *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829) (discussing "self-executing" with respect to treaties). In contrast to a plebiscite which is self-executing, the "plebiscite" held on November 14 was non-binding because the chosen option would not automatically go into effect without further congressional action. Padilla, *supra* note 1, at 32.

4. Padilla, *supra* note 1, at 31; see Beth Donovan, *Islanders May Soon Decide Age Old Status Question*, 47 CONG. Q. WKLY. REP. 1759 (1989) [hereinafter Donovan, *Age Old Status Question*] (discussing previous efforts to bring issue of Puerto Rico's status before U.S. Congress).

5. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. IX, 30 Stat. 1754, 1759 (discussing transfer of Puerto Rico to United States); CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK 358 (1992) (listing Puerto Rico as dependent area).

6. JOHN A. GARRATY & PETER GAY, THE COLUMBIA HISTORY OF THE WORLD 932-38 (1972); R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD SINCE 1815, 618-20 (6th ed. 1983); JAMES T. PATTERSON, AMERICA IN THE TWENTIETH CENTURY: A HISTORY 93-94 (3rd ed. 1989). The Spanish-American War was declared against Spain in 1898. GARRATY & GAY 932-38; PALMER & COLTON, 618-20; PATTERSON 93-94. The causes included the desire to protect American investments of \$50,000,000 in Cuba, the public protest in the United States against the Spanish cruelties imposed upon Cuba, the sinking of the U.S. battleship *Maine* in Havana Harbor, and the pro-war publications of the "Jingo Press" in the United States. GARRATY & GAY 932-38; PALMER & COLTON, 618-20; PATTERSON 93-94. The United States easily won the war and acquired Puerto Rico. GARRATY & GAY 932-38. Thus the war was popularly received. *Id.* Nevertheless, there was a group of anti-imperialists who attacked it as an imperialist war. PATTERSON 93-94. The war was ended by the Treaty of Paris of December 10, 1898. GARRATY & GAY 932-38; PALMER & COLTON, 618-20; PATTERSON 93-94.

7. Treaty of Paris, *supra* note 5, art. II, 30 Stat. at 1755.

8. *Downes v. Bidwell*, 182 U.S. 244 (1901). The *Insular Cases*, a series of cases decided in 1901, define the standard for determining the status of a territory of the United States. *Downes*, 182 U.S. at 244; *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Huus v. New York & Puerto Rico Steamship Co.*, 182 U.S. 392 (1901) [hereinafter *Insular Cases*]. In *Downes* the Supreme Court established the doctrine of territorial incorporation. 182 U.S. at 339-41. Pursuant to this doctrine, areas under the sovereignty of the United States that are not states fall into two categories: incorporated and unincorporated. *Id.* Incorporated territories are

1950, Congress gave Puerto Rico the opportunity to hold a plebiscite<sup>10</sup> to adopt a Puerto Rican Constitution.<sup>11</sup> Puerto Rico's adoption of this Constitution<sup>12</sup> by referendum created a "compact" governing the relationship between the United States and Puerto Rico.<sup>13</sup> Thus, Puerto Rico's acceptance of the Puerto Rico Constitution by referendum was an act of self-determination, giving democratic validity to the association between Puerto Rico and the United States.<sup>14</sup>

Presently, the United States classifies Puerto Rico as a Com-

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destined to become states and are subject to the full application of the U.S. Constitution. *Id.* Unincorporated territories are not intended for statehood and are only subject to fundamental parts of the U.S. Constitution. *Id.* 268, 339-41. See *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990) (stating that only fundamental constitutional rights apply in unincorporated territories); *Balzac v. Porto Rico*, 258 U.S. 298, 304, 312-13 (1922) (stating that jury trial for criminal and civil cases do not apply to unincorporated territory).

9. *Downes*, 182 U.S. at 268. As determined by the Court in *Downes*, Congress has plenary power to rule over territories through the Territorial Clause of the U.S. Constitution. *Id.* Article IV of the U.S. Constitution states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV, § 3, cl. 2.

10. See *supra* note 3 (discussing nature of plebiscite).

11. RAYMOND CARR, PUERTO RICO: A COLONIAL EXPERIMENT 76 (1984).

12. PUERTO RICO CONST. The U.S. Congress approved the Puerto Rico Constitution on July 25, 1952. Pub. L. No. 447 of July 3, 1952, ch. 567, 66 Stat. 327 (1952) (codified as amended at 48 U.S.C. §§ 731-916 (1988 & Supp. III 1991)).

13. CARR, *supra* note 11, at 77-78. The "compact" is an ambiguous term used to describe the U.S.-Puerto Rico relationship. *Id.* The U.S. Supreme Court discussed the compact as follows:

It may be that the Commonwealth of Puerto Rico—"El Estado Libre Asociado de Puerto Rico" in the Spanish version—organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in Pub. L. 600, and by them accepted, is a State. . . . [However,] Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word . . . . It is a political entity created by the act and with consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.

*Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (quoting *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953)). Some commentators, however, view the U.S.-Puerto Rico relationship as a congressionally-dictated relationship. José A. Cabranes, Puerto Rico and the Constitution, Address Before the Judicial Conference of the First Circuit (Sept. 1986), *reprinted in* 110 F.R.D. 475, 481 (1985) [hereinafter Cabranes, First Circuit Address].

14. Letter from Héctor Rivera Cruz to Linda G. Morra (Jan. 14, 1991), *in* U.S. GENERAL ACCOUNTING OFFICE, U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION 82-84 (1991) [hereinafter Rivera Cruz Letter]; CARR,

monwealth, which Puerto Ricans have translated to "Estado Libre Asociado" ("ELA").<sup>15</sup> Both the statehood and the independence parties<sup>16</sup> assail the validity of this legal-political status.<sup>17</sup> Some view the establishment of the ELA as a valid exercise in self-determination<sup>18</sup> enabling Puerto Ricans to create a "free associated territory,"<sup>19</sup> a status recognized by the United Nations

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*supra* note 11, at 77; Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying To Gain Dignity and Maintain Culture*, 17 REV. JUR. U.I.P.R. 1, 20-22, (1982).

15. U.S. GENERAL ACCOUNTING OFFICE, U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION 53 (1991) [hereinafter US GAO REPORT]; Jon M. Van Dyke, *The Evolving Legal Relationships Between The United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 450-51 (1992); MARTINDALE HUBBELL UNITED STATES LAW DIGEST PR 1 (1993). The ELA/Commonwealth is described in Martindale Hubbell Law Digest as follows:

[The] Commonwealth of Puerto Rico is populated substantially by U.S. citizens, uses U.S. currency, U.S. mail, has U.S. Customs, and in general has the appearance of a State of the Union, with a Governor and a legislature elected by popular suffrage, a system of Commonwealth courts and other paraphernalia familiar in respective States. However, Puerto Rico is not a State and its inhabitants cannot vote in national elections and are not represented in Congress, except by a Resident Commissioner with a voice in House of Representatives but no vote. . . . Bona fide residents of Puerto Rico for an entire taxable year are exempted from U.S. income tax for such year on income derived from sources within Puerto Rico, but are not otherwise exempted from U.S. income tax.

*Id.* The ELA literally translates to "free associated state." CARR, *supra* note 11, at 3-4.

16. *Proposed Legislation to Authorize a Political Status Referendum in Puerto Rico Oversight Hearing Before the Subcommittee on Insular and International Affairs of the Committee on Interior and Insular Affairs House of Representatives*, 101st Cong., 2d Sess. pt. II, 16, 100 (1990) [hereinafter *Proposed Legislation*]. There are three main political parties in Puerto Rico. While the Partido Nuevo Progresista ("PNP") wants statehood, the Partido Independentista Puertorriqueño ("PIP") desires independence and the Partido Popular Democrático ("PPD") seeks an *enhanced* Commonwealth status. Donovan, *Age Old Status Question*, *supra* note 4, at 1759. Although the type of change desired varies according to political party affiliation, all three political parties call for change. *Id.*

17. UNITED NATIONS GENERAL ASSEMBLY, SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION OF THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES: VERBATIM RECORD OF THE 1390TH MEETING SPECIAL COMMITTEE DECISION OF 15TH AUGUST 1990 CONCERNING PUERTO RICO CONTINUED, U.N. DOC. A/AC.109/PV 1390 at 9-10 (1991) [hereinafter U.N. DOC. A/AC.109/PV 1390] (Rosello statement discussing colonial status); SURENDRA BHANA, *THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS QUESTION, 1936-1968* 130-32 (1975) (discussing *estadistas*' [statehood party's] and *independentistas*' [independence party's] opposition to the compact); *see supra* note 16 (discussing three main political parties and their platforms).

18. CARR, *supra* note 11, at 77; *see* Rivera Cruz Letter, *supra* note 14, at 82-84 (discussing validity of compact governing P.R.-U.S. relationship and Puerto Rico's new governmental structure); *see Proposed Legislation*, *supra* note 16, pt. II, at 16-19 (statement of Resident Commissioner Jaime Fuster) (discussing validity of Commonwealth status).

19. Arthur J. Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association*:

Decolonizing Committee.<sup>20</sup> Other commentators contend that the present Commonwealth merely camouflages Puerto Rico's colonial status.<sup>21</sup> These disparate interpretations regarding Puerto Rico's status underscores the need to address this issue.<sup>22</sup>

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*The Negotiations for the Future Political Status of Micronesia*, 7 BROOKLYN J. INT'L. L. 179, 182 (1981). A Free Associated Territory:

differs from [an independent one] in that one of the parties to the bilateral agreement willingly binds itself, by its own constitutional process . . . to cede to the other a fundamental sovereign authority and responsibility for the conduct of its own affairs. Specifically, this distinction is exemplified by the reservation to the United States of plenary defense authority . . . Free Association is distinguished from integration into a metropolitan power by the retention by the freely associated government of the power to assert itself domestically and internationally without reference to the legal authority of another state.

*Id.*

20. G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25, U.N. Doc. A/2630 (1953). In 1961, the Assembly established the Special Committee to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples. UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, BASIC FACTS ABOUT THE UNITED NATIONS 163 (1989).

21. CARR, *supra* note 11, at 81; Cabranes, First Circuit Address, *supra* note 13, at 481; José A. Cabranes, *Puerto Rico Out of the Colonial Closet*, 33 FOREIGN POL'Y 66-91 (1978) [hereinafter Cabranes, *Colonial Closet*]; Van Dyke, *supra* note 15, at 514-15 (discussing Puerto Rico's lack of representation in U.S. Congress and equating status to classical colonial situation); Guillermo Moscoso, *Quo vadis, ELA?*, SAN JUAN STAR, Dec. 12, 1992, at 35 [hereinafter Moscoso, *Quo Vadis*]; U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 46 (statement of Zaida Hernández Torres) (discussing P.R.'s colonial status and failure of bilateral pact).

22. See *Pallid Promises to Puerto Rico*, N.Y. TIMES, Nov. 6, 1990, at A22 (discussing U.S. policy of decolonization and criticising U.S. actions). The need to resolve the issue of Puerto Rico's status is evident in light of the United States' policy of decolonization and the criticism waged against the United States for failing to resolve Puerto Rico's status. *Id.* ALVIN Z. RUBINSTEIN & GEORGE GINSBURGS, SOVIET & AMERICAN POLICIES IN THE UNITED NATIONS: A TWENTY-FIVE YEAR PERSPECTIVE 84-90 (1971). The U.S. policy of decolonization is demonstrated by the U.S. actions in the United Nations.

In 1945 both the Soviet Union and the United States had regarded decolonization not only as inevitable, but also as desirable, and both favored the U.N.'s involvement in the process. In the twenty-five years that followed, they continued to share these broad general assumptions, and as the record has demonstrated, their policies generally were based on them.

*Id.*; see *Pallid Promises to Puerto Rico*, *supra*, at A22 (discussing U.S. policy of decolonization and criticising U.S. actions). Furthermore, this issue is pressing insofar as Puerto Rico's Commonwealth status has been used as a precedent for other U.S. territories. See, e.g., INTERNATIONAL LAW 435-40 (Barry E. Carter & Philip R. Trimble eds., 1991). Arguably, the commonwealth status has also been used in determining the status of the Northern Mariana Islands. *Id.*; Leibowitz, *supra* note 14, at 1; see also Guillermo Moscoso, *Facts on the Pacific island republics*, SAN JUAN STAR, Nov. 6, 1991, at 16 [hereinafter Moscoso, *Pacific Islands*] (discussing government of Pacific Island republics); Moscoso, *Quo Vadis*, *supra* note 21, at 35 (discussing attacks on United States for Puerto Rico's colonial status).

This Note argues that the establishment of the Commonwealth government fails to fulfill the requirements of a free associated territory as detailed in United Nations General Assembly Resolutions 742 ("Resolution 742") and 1541 ("Resolution 1541")<sup>23</sup> because the Puerto Rico Constitution remains subject to the Territorial Clause of the U.S. Constitution.<sup>24</sup> The Territorial Clause gives the U.S. Congress plenary authority to govern territories of the United States.<sup>25</sup> Part I of this Note introduces the factual and legal background of Puerto Rico's hybrid legal status. Part II describes the different interpretations regarding the validity of Puerto Rico's status in international law. Part III argues that the present status of Puerto Rico requires that the U.S. Congress enact legislation that allows a binding plebiscite to define the status of Puerto Rico in a manner consistent with U.N. General Assembly Resolutions 742 and 1541.<sup>26</sup> Finally, this Note concludes that the U.S. Congress should act to prevent the continuation of a system of government where unequal treatment of U.S. citizens in Puerto Rico is allowed under the U.S. Congress' plenary power to administer territories.

### I. THE LEGAL AND FACTUAL FRAMEWORK FOR PUERTO RICO'S HYBRID LEGAL STATUS

The actions of the United States between 1898 and 1952 shaped Puerto Rico's current political status.<sup>27</sup> In the United States, the *Insular Cases*<sup>28</sup> of 1901 set the U.S. Constitutional

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23. See G.A. Res. 648, U.N. GAOR, 7th Sess., Supp. No. 20 at 33, U.N. Doc. A/2361 (1952); G.A. Res. 742, U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/2630 (1953); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960). These General Assembly resolutions, which act as persuasive authority, set forth guidelines for a free associated territory. BASIC FACTS ABOUT UNITED NATIONS, *supra* note 20, at 4.

24. *Downes v. Bidwell*, 182 U.S. 244 (1901); U.S. GAO REPORT, *supra* note 15, at 29; Rafael Pérez-Bachs, Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico, Remarks Before the Judicial Conference of the First Circuit, *reprinted in* 110 F.R.D. 485, 486 (1986). See *supra* note 9 and accompanying text (discussing Territorial Clause).

25. *Downes*, 182 U.S. at 268. U.N. Doc.A/AC.109/PV 1390, *supra* note 17, at 52-75; Pérez-Bachs, *supra* note 24, at 486. See *supra* note 9 and accompanying text (discussing Territorial Clause).

26. G.A. Res. 742, *supra* note 23; G.A. Res. 1541, *supra* note 23.

27. See Treaty of Paris, *supra* note 5, art. II, 30 Stat. at 1755 (discussing transfer of Puerto Rico to United States); THE WORLD FACT BOOK, *supra* note 5, at 358 (listing Puerto Rico as dependent area of United States).

28. See *supra* note 8 (discussing Insular Cases).

framework for the treatment of U.S. territories.<sup>29</sup> Following the *Insular Cases*, a series of U.S. congressional acts modified Puerto Rico's internal government and relationship with the United States.<sup>30</sup> These congressional statutes gradually increased Puerto Rico's local autonomy.<sup>31</sup> Congress' statutory treatment culminated in the adoption of a Puerto Rican Constitution and the establishment of the ELA.<sup>32</sup> In 1953, the United Nations qualified Puerto Rico as a self-governing territory in accordance with General Assembly Resolution 748.<sup>33</sup> In addition, several other General Assembly resolutions contain detailed provisions that establish how a territory becomes self-governing.<sup>34</sup> Puerto Ricans have subsequently revisited the issue of Puerto Rico's status in 1967, 1989, and 1993.<sup>35</sup>

#### A. *Puerto Rico and the Constitutional Framework for Treatment of U.S. Territories*

In 1898, Spain ceded Puerto Rico to the United States in the Treaty of Paris<sup>36</sup> to compensate the United States for ex-

29. Van Dyke, *supra* note 15, at 449-50.

30. The Foraker Act of Apr. 12, 1900, ch. 191, 31 Stat. 77 (1900), *amended by* ch. 145, 39 Stat. 951 (1917); Jones Act of Mar. 2, 1917, ch. 145, 39 Stat. 951 (1917), *amended in part by* ch. 490, 61 Stat. 770 (1947), and *amended in part by* ch. 446, 64 Stat. 319 (1950); Puerto Rico Elective Governor Act, ch. 490, 61 Stat. 770 (1947); Puerto Rico Federal Relations Act, ch. 446, 64 Stat. 319 (1950) [hereinafter Public Law 600], *as amended by* 48 U.S.C. §§ 731-916; Public Law No. 447 of July 3, 1952, ch. 567, 66 Stat. 327 (1952) (codified as amended at 48 U.S.C. §§ 731-916 (1988 & Supp. III 1991)).

31. *See supra* note 30 (discussing legislative history of U.S.-Puerto Rico relations).

32. *See supra* note 15 and accompanying text (discussing Commonwealth/ELA government).

33. G.A. Res. 748, *supra* note 20, ¶ 5. The U.N. General Assembly maintained that: in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-governemnt attained by the Puerto Rican people as that of an autonomous political entity.

*Id.*

34. G.A. Res. 648, *supra* note 23, Annex; G.A. Res. 742, *supra* note 23, Annex; G.A. Res. 1541, *supra* note 23, Annex.

35. JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 129-30, 199 (1985) (discussing 1967 plebiscite results); Van Dyke, *supra*, note 15, at 447; Donovan, *Age Old Status Question*, *supra* note 4, at 1759 (discussing 1989-91 efforts to secure self-executing bill to implement chosen status options); Padilla, *supra* note 1 (discussing 1993 plebiscite on Puerto Rico's status).

36. Treaty of Paris, *supra* note 5, art. II, 30 Stat. at 1755; U.S. GAO REPORT, *supra* note 15, at 43. Other territories that came under the United States power include:

penses incurred during the Spanish-American War.<sup>37</sup> The Treaty of Paris provided that the U.S. Congress would determine the civil rights and political status of the native inhabitants of Puerto Rico.<sup>38</sup> Pursuant to the treaty, Congress passed the Foraker Act in 1900.<sup>39</sup> The Foraker Act terminated the military administration in Puerto Rico, temporarily provided revenues, and established an interim civil government.<sup>40</sup> The Foraker Act, however, neither incorporated Puerto Rico nor granted Puerto Ricans the political and civil rights possessed by citizens of the United States.<sup>41</sup>

### 1. The Insular Cases

In the *Insular Cases*,<sup>42</sup> a series of cases decided by the U.S. Supreme Court in 1901, the Court addressed the territorial status of Puerto Rico.<sup>43</sup> The Court determined that Article IV, section 3, clause 2 of the U.S. Constitution,<sup>44</sup> commonly referred to as the Territorial Clause, grants the U.S. Congress plenary authority over territories of the United States.<sup>45</sup> Furthermore, the *Insular Cases*<sup>46</sup> distinguished between incorporated and unincorporated territories,<sup>47</sup> defining the standard for determining the

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Cuba, Guam, and the Phillipines. Treaty of Paris, *supra* note 5, arts. II-III, 30 Stat. at 1755.

37. CARR, *supra* note 11, at 22; TORRUELLA, *supra* note 35, at 17.

38. Treaty of Paris, *supra* note 5, art. IX, 30 Stat. at 1759.

39. The Foraker Act, 31 Stat. at 77.

40. The Foraker Act, 31 Stat. at 79-86.

41. TORRUELLA, *supra* note 35, at 36. For example, residents of Puerto Rico were not given U.S. citizenship or the right to vote for representatives to the U.S. government. *Id.* at 36-39.

42. *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Huus v. New York & Puerto Rico Steamship Co.*, 182 U.S. 392 (1901); *Pepke v. United States*, 183 U.S. 176 (1901).

43. *Downes*, 182 U.S. at 247; Del Valle, *Puerto Rico Before the United States Supreme Court*, 19 REV. JUR. U.I.P.R. 13, 29-30 (1984).

44. U.S. CONST. art. IV, § 3; see *supra* note 9 and accompanying text (discussing Territorial Clause).

45. *Downes*, 182 U.S. at 267-68. The Court stated that "the power of Congress over the territories of the United States is general and plenary." *Id.*

46. See *supra* note 8 and accompanying text (discussing *Insular Cases* that set standard for determining status of U.S. territories: *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Huus v. New York & Puerto Rico Steamship Co.*, 182 U.S. 392 (1901)).

47. See *supra* note 8 and accompanying text (discussing doctrine of territorial incorporation).

status of a territory of the United States.<sup>48</sup>

In *DeLima v. Bidwell*,<sup>49</sup> an action to recover duties paid on goods imported from Puerto Rico into New York, the U.S. customs collector contended that Puerto Rico was a foreign country within the meaning of the tariff laws.<sup>50</sup> U.S. Supreme Court Justice Henry Billings Brown reasoned that treaties made under the authority of the United States are the supreme law of the land under Article VI,<sup>51</sup> and that the U.S. possesses the power to acquire territory either by conquest or by treaty.<sup>52</sup> Relying on the *Dred Scott* case,<sup>53</sup> Justice Brown stated that the right to acquire territory included the right to govern and dispose of it.<sup>54</sup> Once acquired by treaty, the territory belonged to the United States and was subject to the disposition of the U.S. Congress.<sup>55</sup> Accordingly, ratification of the Treaty of Paris made Puerto Rico a territory of the United States subject to the disposition of the U.S. Congress.<sup>56</sup>

In *Downes v. Bidwell*,<sup>57</sup> the U.S. Supreme Court established the doctrine of territorial incorporation.<sup>58</sup> Pursuant to this doctrine, areas under the sovereignty of the United States that were not states fell into two categories, incorporated and unincorporated territories.<sup>59</sup> Incorporated territories included those terri-

48. *Downes*, 182 U.S. at 339; Van Dyke, *supra* note 15, at 459-60.

49. 182 U.S. 1 (1901).

50. *Id.* at 1-2.

51. *Id.* at 194. Article VI of the U.S. Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land . . ." U.S. CONST. art. VI, § 2.

52. *De Lima v. Bidwell*, 182 U.S. 1, 195 (1901).

53. *Dred Scott v. Sanford*, 60 U.S. 393, 395 (1857). In *Dred Scott*, the U.S. Supreme Court held that Scott, a slave, was neither a citizen of Missouri nor a citizen of the United States and had no constitutional rights to sue in Federal Courts. *Id.* The Court also maintained that the U.S. Congress may legislate over territories within the scope of its constitutional powers. *Id.*

54. *De Lima*, 182 U.S. at 196.

55. *Id.* at 197.

56. *Id.* at 196-197.

57. 182 U.S. 244 (1901).

58. *Id.* at 339.

59. *Id.* The Court explained the doctrine of territorial incorporation as follows:

[t]he treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand when it has expressed in the treaty the conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law of

tories that would become states and thus were subject to the full application of the U.S. Constitution.<sup>60</sup> Unincorporated territories, by contrast, were those territories that were not intended for statehood and were only subject to fundamental parts of the U.S. Constitution.<sup>61</sup>

In *Downes*,<sup>62</sup> the Supreme Court addressed the applicability of the U.S. Constitution to territories of the United States. The Court reasoned that under the Territorial Clause of the U.S. Constitution, the U.S. Congress had plenary authority over U.S. territories.<sup>63</sup> The U.S. Congress' authority arose from, and was incidental to, the U.S. right to acquire territory and make all needful rules respecting territory belonging to the United States.<sup>64</sup> The Court maintained that the U.S. Constitution applied to territories only when Congress explicitly provided.<sup>65</sup> The Court stated, however, that fundamental limitations in favor of personal rights always applied to the territories by inference and the general spirit of the Constitution.<sup>66</sup> Citing constitu-

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the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.

*Id.*

60. *Downes*, 182 U.S. at 339.

61. *Id.*

62. *Id.* at 244.

63. *Downes*, 182 U.S. at 268. The court stated:

The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other other property belonging to the United States.

*Id.*; see Van Dyke, *supra* note 15, at 453-59 (discussing Supreme Court's interpretation of U.S. Congress' plenary authority over territories).

64. *Downes*, 182 U.S. at 268.

65. *Id.*

66. *Id.* The Court stated:

Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

*Id.*; see *U.S. v. Verdugo-Urguidez*, 494 U.S. 259, 268-69 (1990) (stating that only "funda-

tional silence, common practice, and congressional limits in dealings with territories, the majority rejected the notion that the Constitution attached to these territories as soon as they were acquired.<sup>67</sup> The Court concluded that Puerto Rico was a territory belonging to the United States,<sup>68</sup> and that Article I, section 8, clause 1 of the U.S. Constitution, requiring uniform duties throughout the United States, was not a fundamental provision and did not apply to Puerto Rico.<sup>69</sup>

Justice Edward Douglass White's concurrence in *Downes* has emerged as the prevalent rule of the *Insular Cases*.<sup>70</sup> Justice White maintained that, in the case of territories, the Constitution was always operative.<sup>71</sup> The question with respect to territories was whether a particular constitutional provision applied.<sup>72</sup> In the case of Puerto Rico, the Treaty of Paris failed to provide for incorporation.<sup>73</sup> Instead, the Treaty of Paris explicitly deferred the determination of the status of the territories to the

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mental" constitutional rights apply in unincorporated territories); *Dorr v. U.S.*, 195 U.S. 138, 149 (1904) (stating that U.S. Constitution does not, without legislation of its own force, carry such right to territory); *Van Dyke*, *supra* note 15, at 459-68 (discussing nature of fundamental rights).

67. *Downes*, 182 U.S. at 286. The Court stated:

The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there [is] nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. In short, there is absolute silence upon the subject. The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department.

*Id.*

68. *Id.* at 287.

69. *Id.* at 278-80.

70. *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922); TORRUELLA, *supra* note 35, at 53.

71. *Downes*, 182 U.S. at 292 (White, J., concurring). The White concurrence stated that "[i]n the case of territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." *Id.*

72. *Id.*

73. *Id.* at 340. Justice White stated: "It is to me obvious that the above quoted provisions of the treaty do not stipulate for incorporation, but, on the contrary, expressly provide that the civil rights and political status of the native inhabitants of the territories hereby ceded shall be determined by Congress." *Id.*; see *Treaty of Paris*, *supra* note 5, 30 Stat. at 1759 (failing to provide for incorporation of Puerto Rico).

U.S. Congress.<sup>74</sup> Therefore, although Puerto Rico was an unincorporated territory, the U.S. Constitution did apply.<sup>75</sup> Accordingly, Puerto Rico was not a separate country in an international sense as it was subject to the sovereignty of, and owned by, the United States.<sup>76</sup> Puerto Rico was, however, foreign to the United States in the domestic sense, because it had not been incorporated into the United States, but was merely a possession.<sup>77</sup> Justice White relied heavily on the explicit terms of the Treaty of Paris to distinguish territories acquired under the Treaty of Paris from other territories that had received explicit promises for eventual statehood.<sup>78</sup>

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74. *Downes*, 182 U.S. at 340 (White, J., concurring); Treaty of Paris, *supra* note 5, 30 Stat. at 1759.

75. *Downes*, 182 U.S. at 292 (White, J., concurring).

76. *Id.* at 341. Justice White stated:

Since it has been decided that incorporation flows from a treaty which provides for that result, when its provisions have been expressly or impliedly approved by Congress, it must follow that the same effect flows from a treaty which expressly stipulates to the contrary, even although [sic] the condition to that end has been approved by Congress. That is to say, the argument is this: Because a provision for incorporation when ratified incorporates, therefore a provision against incorporation must also produce the very consequence which it expressly provides against.

The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

*Id.* at 341-42.

77. *Id.*

78. *Id.* at 341; Treaty of Paris, *supra* note 5, art. I, 30 Stat. at 1755. A cursory survey of other territories that came under United States power at this time, specifically Cuba, Guam, the Philippines, and Hawaii, reveals divergent political paths. See Treaty of Paris, *supra* note 5, arts. I-III, 30 Stat. at 1755-56 (providing for U.S. control of Cuba, Guam and Phillipines); Newlands Resolution, No. 55, 30 Stat. 750 (1898) (bringing Hawaii under power of United States); U.S. GAO REPORT, *supra* note 15, at 49 (discussing Guam's current political status); Act of Independence, No. 24, 48 Stat. 1682 (1934) (providing independence for Cuba); Act of July 4, 1946, ch. 84, 48 Stat. 456 (1946) (providing for independent Republic of Phillipines); Hawaii Statehood Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) (providing statehood for Hawaii). Article 1 of the Treaty of Paris provided that "Spain relinquishe[d] all claim of sovereignty over the title to Cuba" and names the United States as the occupying power. Treaty of Paris, *supra* note 5, art. I, 30 Stat. at 1755. After a short period of military governments in Cuba under the United States trusteeship, a civil government was established. GARRATY & GAY, *supra* note 6, at 937. Through the Platt Amendment, which Cuba had to add to its Constitution before the United States would recognize its independence, the United States was allowed to interfere with the governing affairs of Cuba. The Platt Amendment, 33 Stat. 2248 (1903). In 1934, the United States abrogated the Platt Amendment, effectively

In *Balzac v. Porto Rico*,<sup>79</sup> decided twenty-one years after the *Insular Cases*, the U.S. Supreme Court unanimously adopted the incorporation doctrine.<sup>80</sup> *Balzac* involved the existence of a constitutional right to a jury trial in Puerto Rico.<sup>81</sup> The Court held that U.S. legislation regarding Puerto Rico did not incorporate Puerto Rico into the United States.<sup>82</sup> In passing the Jones Act,<sup>83</sup> which established a system of local government in Puerto Rico,

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making Cuba politically independent. Act of Independence, No. 24, 48 Stat. 1682 (1934).

Article II of the Treaty of Paris provided for the cession of both Guam and Puerto Rico to the United States. Treaty of Paris, *supra* note 5, art. II, 30 Stat. at 1755. Guam, like Puerto Rico, became an unincorporated U.S. territory. The Organic Act of Guam, ch. 512, 64 Stat. 384 (1950). The U.S. Congress passed the Organic Act of Guam, which granted Guamanians U.S. citizenship, established a bill of rights and a three-branch government, vested executive authority in a Presidentially-appointed governor, and defined the island as an unincorporated territory. *Id.* In 1968, the Organic Act was amended to provide for popular election of a governor. Guam Elective Governor Act, Pub. L. No. 90-497, 82 Stat. 842 (1968). In 1972 Guam was granted the right to elect a non-voting delegate to the U.S. House of Representatives. Act of Apr. 10, 1972, Pub. L. No. 92-271, 86 Stat. 118 (1972).

Article III of the Treaty of Paris provided for the cession of the Philippine Islands to the United States for the sum of U.S.\$20 million. Treaty of Paris, *supra* note 5, art. III, 30 Stat. at 1755-56. In 1902, the U.S. Congress provided for a temporary government in the Philippines. Administration of Philippine Government Act, ch. 1369, 32 Stat. 691 (1902). *Id.* By 1902, the Supreme Court deemed the Philippines an unincorporated territory. *Pepke v. United States*, 183 U.S. 176 (1901). In 1916, the Jones Act clarified the U.S. intention to grant independence to the Philippines. Philippine Autonomy Act, ch. 416, 39 Stat. 545 (1916). The Tydings-McDuffie Act of 1934 set the date of independence at 1946 following a transition period under a commonwealth government. Tydings-McDuffie Act, ch. 11, 47 Stat. 761 (1933), *amended by* Philippine Independence Act, ch. 84, 48 Stat. 456. The independent Republic of the Philippines was inaugurated on July 4, 1946. Philippine Independence Act, ch. 84, 48 Stat. 456 (1946).

Another territory that came under U.S. dominion during the Spanish-American War was Hawaii. Newlands Resolution, No. 55, 30 Stat. 750 (1898). The Newlands Resolution provided for annexation of the territory of Hawaii "as part of the territory of the United States." *Id.* Thus, the Newlands Resolution deemed Hawaii, unlike Puerto Rico, an incorporated territory providing for its eventual attainment of statehood. *See* Act of Apr. 3, 1900, ch. 339, 31 Stat. 141 (1900) (providing for incorporated status); TORRUELLA, *supra* note 35, at 66-68. In 1947 the House of Representatives passed legislation approving statehood for Hawaii, yet the Senate rejected the House bill. Statehood was eventually granted to Hawaii on March 18, 1959, effective Aug. 21, 1959, two months after statehood was granted to Alaska. Hawaii Statehood Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959).

79. 258 U.S. 298 (1922).

80. *See supra* notes 57-61 and accompanying text (discussing incorporation doctrine).

81. 258 U.S. at 300.

82. *Id.* at 313. The Court stated: "On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress

and in granting Puerto Ricans U.S. citizenship, the U.S. Congress did not incorporate Puerto Rico.<sup>84</sup> The Court stated that to incorporate Puerto Rico Congress must do so explicitly, rather than merely inferring it.<sup>85</sup> The Court reasoned that none of the U.S. Congress' acts had explicitly incorporated Puerto Rico into the United States.<sup>86</sup> The Court concluded that the right to trial by jury<sup>87</sup> did not apply to territories not incorporated in the United States and, therefore, did not apply to Puerto Rico without explicit congressional action.<sup>88</sup>

## 2. Statutory Treatment of Puerto Rico Prior to 1950

The U.S. Congress passed the Foraker Act in 1900 in order to establish a system of local government in Puerto Rico.<sup>89</sup> Although the Foraker Act did not incorporate Puerto Rico nor grant Puerto Ricans U.S. citizenship,<sup>90</sup> it did grant Puerto Ricans entitlement to U.S. protection.<sup>91</sup> The Foraker Act also established a system of local government consisting of a governor,<sup>92</sup> an executive council (the upper house of the Puerto Rico Congress),<sup>93</sup> justices of the Supreme Court of Puerto Rico,<sup>94</sup> and the judge for the newly created United States District Court, all of whom were appointed by the U.S. President.<sup>95</sup> Puerto Ricans elected members of the lower house, known as the House of Del-

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to incorporate Porto Rico into the United States with the consequences which would follow." *Id.*

83. 54 CONG. REC. 4810, ch. 145, 39 Stat. 951 (1917). The Jones Act, passed by the U.S. Congress in 1917, provided Puerto Rico with a new governmental framework and its residents with U.S. citizenship. 54 CONG. REC. 1324-29, 2162-64, 2221-23, 2248-65, 3005-11, 3069-74, 3467-79, 3666-67 (1917).

84. *Bakac*, 258 U.S. at 305.

85. *Id.* at 306. "Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by plain declaration, and would not have left it to mere inference." *Id.*

86. 258 U.S. at 313.

87. See U.S. CONST. amend. VII. The Seventh amendment to the U.S. Constitution provides: "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." *Id.*

88. *Bakac*, 258 U.S. at 304-05.

89. The Foraker Act, 31 Stat. at 77; *Bakac*, 258 U.S. at 305-06.

90. The Foraker Act, 31 Stat. at 79; *Bakac*, 258 U.S. at 305-06.

91. 31 Stat. at 79.

92. *Id.* at 81.

93. *Id.* at 79-81.

94. *Id.* 84-85.

95. *Id.* at 82-84; TORRUELLA, *supra* note 35, at 39 n.164.

egates.<sup>96</sup> Any legislation had to pass both chambers and the governor's veto.<sup>97</sup> Thus, the Foraker Act established a framework that precluded any legislation contrary to American interests.<sup>98</sup>

During the next fifty years the U.S. Congress gradually enhanced Puerto Rico's local autonomy.<sup>99</sup> The U.S. Congress paved the way for a more permanent union between Puerto Rico and the United States with the passage of the Jones Act of 1917.<sup>100</sup> The Jones Act granted Puerto Ricans U.S. citizenship, unless the Puerto Rican resident specifically rejected such citizenship.<sup>101</sup> The Jones Act also altered the structure of the civil government by authorizing a popularly-elected bicameral legislature.<sup>102</sup> The U.S. President, however, continued to appoint the governor, the attorney general, and the justices of the Supreme Court of Puerto Rico.<sup>103</sup> The Jones Act also provided that the statutory laws of the United States had the same force and effect in Puerto Rico as in the United States, with the exception of the internal revenue laws and other laws the U.S. Congress deemed inapplicable.<sup>104</sup> Furthermore, the Jones Act included a bill of rights similar to that contained in the U.S. Constitution.<sup>105</sup>

Thirty years later, the U.S. Congress passed the Puerto Rico

96. The Foraker Act, 31 Stat. at 82-83.

97. *Id.* at 81, 83.

98. *See id.* at 83 (discussing U.S. Congress' power to annul laws); CARR, *supra* note 11, at 36-37 (maintaining that Foraker Act precluded Puerto Rico legislation contrary to U.S. interests).

99. *See, e.g.*, CARR, *supra* note 11, at 147-82 (discussing increasing self-government to Puerto Rico culminating in adoption of Puerto Rico Constitution); *United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir. 1993) (discussing Puerto Rico's increasingly independent authority over local affairs in years leading up to 1950).

100. The Jones Act, 39 Stat. at 951. TORRUELLA, *supra* note 35, at 85-87. During the period 1900 to 1917, twenty-one bills were presented for the purpose of granting Puerto Ricans citizenship. TORRUELLA, *supra* note 35, at 85. During this period Puerto Rico had nearly one million inhabitants and increasing business and trade interests with the United States. *Id.* at 86. Furthermore, the Republic of Panama became a protectorate of the United States and the Panama Canal was constructed thereby enhancing Puerto Rico's strategic importance to the United States. *Id.* at 86-87.

101. The Jones Act, 39 Stat. at 953.

102. *Id.* at 958-59.

103. *Id.* at 955-56, 965.

104. *Id.* at 954; *see* 48 U.S.C. § 734 (1988). Today 48 U.S.C. § 734 still describes the applicability of federal statutes to the Commonwealth of Puerto Rico as whatever is "not locally inapplicable." *Id.* This has been criticized as a "blank check" for the federal government to have the ultimate determination regarding which federal laws apply in Puerto Rico. Pérez-Bachs, *supra* note 24, at 487-88.

105. The Jones Act, 39 Stat. at 951.

Elective Governor Act (the "PREGA"),<sup>106</sup> which permitted the local election of a governor.<sup>107</sup> At the same time, the PREGA provided for a federal coordinator to oversee and report to the U.S. President on government affairs.<sup>108</sup> The PREGA also enabled the U.S. President to exempt Puerto Rico from any federal law not expressly applied to Puerto Rico.<sup>109</sup> Furthermore, under the PREGA, the U.S. Congress could revoke the grant of authority to self-govern in local matters.<sup>110</sup> The PREGA neither provided Puerto Ricans a voting representative in the U.S. Congress nor granted them the right to vote in federal elections.<sup>111</sup>

### 3. Adoption of Public Laws 600 and 447: The Establishment of the ELA

Between 1950 and 1952, the U.S. Congress significantly modified the status of Puerto Rico.<sup>112</sup> By enacting Public Law No. 600 ("Public Law 600") on July 3, 1950,<sup>113</sup> the U.S. Congress established the process by which residents of Puerto Rico could organize a government under a locally designed constitution.<sup>114</sup> Puerto Ricans ratified Public Law 600 by a plebiscite in Puerto Rico on June 4, 1951.<sup>115</sup> Thereafter, a constituent assembly met in Puerto Rico and drafted a constitution.<sup>116</sup> The Puerto Rico electorate subsequently approved the Constitution on March 3, 1952.<sup>117</sup> On July 25, 1952, via Public Law No. 447 ("Public Law 447"), the U.S. Congress approved the Puerto Rican Constitution, with alterations.<sup>118</sup>

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106. Puerto Rico Elective Governor Act, 61 Stat. at 770.

107. *Id.* at 770-71.

108. *Id.* at 772.

109. *Id.* at 772.

110. BHANA, *supra* note 17, at 107.

111. U.S. GAO REPORT, *supra* note 15, at 44. Puerto Rico has a non-voting representative in the U.S. House of Representatives. *Id.*

112. Pub. L. No. 600, 64 Stat. 319 (1950) [hereinafter Public Law 600]; Pub. L. No. 447, 66 Stat. 327 (1952) [hereinafter Public Law 447]. Luis Muñoz-Marín, a leading Puerto Rican politician, campaigned for a "Pueblo Asociado de Puerto Rico" ("Associated People of Puerto Rico") that would allow Puerto Rico complete internal autonomy. TORRUELLA, *supra* note 35, at 144.

113. Public Law 600, 64 Stat. at 319.

114. *Id.*

115. TORRUELLA, *supra* note 35, at 153.

116. *Id.*

117. *Id.*

118. Public Law 447, 66 Stat. at 327. After the Constitution was approved in Puerto Rico, the U.S. Congress unilaterally deleted sections 5 and 20 of the Puerto Rico Consti-

The preamble to Public Law 600 fully recognized the principle of government by consent by stating that Public Law 600 was adopted "in the nature of a compact."<sup>119</sup> Accordingly, the United States and the United Nations regarded Puerto Rico's acceptance of Public Law 600 by plebiscite as an act of self-determination that gave democratic validity to Puerto Rico's association with the United States.<sup>120</sup> The United States contended that Public Law 600 terminated direct U.S. administration of local affairs in Puerto Rico and granted Puerto Rico full control over local executive, legislative, and judicial matters.<sup>121</sup>

#### 4. Puerto Rico Revisits the Status Issue

Although Puerto Rico's status, as established in Public Laws 600 and 447, remains unchanged, Puerto Ricans have revisited the status issue on several occasions.<sup>122</sup> On July 23, 1967, Puerto Ricans held a non-binding plebiscite on Puerto Rico's status.<sup>123</sup> The Puerto Rico electorate voted 60.5% in favor of a "perfected" commonwealth, 38.9% in favor of statehood, and 0.6% in favor of independence.<sup>124</sup> The independence movement and the official statehood party, however, opposed the plebiscite and abstained from voting.<sup>125</sup> Despite the lack of participation by the statehood and independence movements, 66% of the registered voters cast their ballots in the plebiscite.<sup>126</sup>

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tution's Bill of Rights. TORRUELLA, *supra* note 35, at 154. Section 5 of the proposed Puerto Rico Constitution provided for free public education, while Section 20 provided for certain human rights, including public elementary and secondary education and disability protection. *Id.* n.573; *see* Leibowitz, *supra* note 14, at 25-26 (discussing changes to Puerto Rico Constitution).

119. Public Law 600, 64 Stat. at 319.

120. CARR, *supra* note 11, at 77; G.A. Res. 748, *supra* note 20, at 25.

121. U.S. GAO REPORT, *supra* note 15, at 44. The U.S. government maintains that Puerto Rico's adoption of the 1952 Constitution "ended direct U.S. administration of local affairs in Puerto Rico and granted full local executive, legislative, and judicial authority to Puerto Rico." *Id.*

122. TORRUELLA, *supra* note 35, at 129-30; Van Dyke, *supra* note 15, at 447; Leibowitz, *supra* note 14, at 30-31; Donovan, *Age Old Status Question*, *supra* note 4, at 1759 (discussing 1989-91 congressional hearings on Puerto Rico's status); Padilla, *supra* note 1, at 31 (discussing 1993 plebiscite on Puerto Rico's status).

123. TORRUELLA, *supra* note 35, at 129-30, 199; Leibowitz, *supra* note 14, at 31.

124. TORRUELLA, *supra* note 35, at 129-30, 199. In the 1967 plebiscite 425,079 votes favored commonwealth, while 273,315 votes favored statehood. *Id.* at 129-30; Leibowitz, *supra* note 14, at 31 n.119; *Puerto Rico Vote Strongly Favors A Commonwealth*, N.Y. TIMES, July 24, 1967, at A1.

125. TORRUELLA, *supra* note 35, at 129-30; Leibowitz, *supra* note 14, at 31 n.119.

126. TORRUELLA, *supra* note 35, at 129-30. Judge Torruella notes that the indepen-

Between 1989 and 1991, the three main political parties, the Partido Popular Democratico ("PDP"), the Partido Nuevo Progressista ("PNP"), and the Partido Independentista Puertorriqueño ("PIP"),<sup>127</sup> joined together to seek congressional approval for a plebiscite.<sup>128</sup> Each of the party leaders agreed to offer voters all three options: statehood, independence, and enhanced commonwealth status.<sup>129</sup> The goal was to draft a self-executing bill that would fully and finally commit the U.S. government to specific plans for implementation of each option.<sup>130</sup> Although the bill enabling this plebiscite in the summer of 1991 passed in the U.S. House of Representatives on October 10, 1990,<sup>131</sup> the U.S. Senate voted against the bill on February 27, 1991.<sup>132</sup>

Most recently, on November 14, 1993, Puerto Ricans voted in a non-binding plebiscite<sup>133</sup> to choose among statehood, independence, and enhanced commonwealth status options.<sup>134</sup>

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dence movement was losing strength and that the then official statehood party, PER, no longer represented the statehood movement. *Id.* After the 1967 plebiscite there emerged a new statehood party, the PNP. *Id.*

127. See *supra* note 16 and accompanying text (discussing main political parties in Puerto Rico). The PNP desires statehood, the PIP seeks independence, and the PPD seeks an enhanced commonwealth status. Donovan, *Age Old Status Question*, *supra* note 4, at 1759.

128. Donovan, *Age Old Status Question*, *supra* note 4, at 1759.

129. *Id.* For a detailed description of the proposals for each status option, see Beth Donovan, *Senate Committee Gives Its OK To Puerto Rican Plebiscite*, 47 CONG. Q. WKLY. REP. 2152 (1989) [hereinafter Donovan, *Senate Gives OK*]; Van Dyke, *supra* note 15, at 499-501 (discussing provisions for enhanced commonwealth proposal).

130. Donovan, *Senate Gives OK*, *supra* note 129, at 2152.

131. Kitty Dumas, *House Passes Puerto Rico Bill; Johnston Stalls It In Senate*, 48 CONG. Q. WKLY. REP. 3413 (1990) [hereinafter Dumas, *House Passes PR Bill*]. House bill H.R. 4765 did not call for a binding plebiscite, but instead would have set up an expedited procedure for the U.S. Congress to follow up on the results of the plebiscite. *Id.* By contrast, the companion Senate bill, S. 712, would have been self-executing, putting into effect immediately the status option chosen in the plebiscite. *Id.*

132. Kitty Dumas, *Referendum Bill Appears Dead After Energy Panel Vote*, 49 CONG. Q. WKLY. REP. 538 (1991) [hereinafter Dumas, *Referendum Bill Appears Dead*].

133. Padilla, *supra* note 1, at 31 (discussing fact that Nov. 14 plebiscite was not really plebiscite); see *supra* note 3 (discussing nature of plebiscite).

134. STATE ELECTIONS COMMISSION, THESE ARE THE POLITICAL STATUS DEFINITIONS ACCORDING TO THE PARTIES THAT PROMOTE THEM (San Juan, Puerto Rico 1993). The PPD has defined enhanced commonwealth as follows:

A vote for the Commonwealth is a mandate in favor of:

- Guaranteeing our progress and security as well as that of our children within a status of full political dignity, based on a permanent union between Puerto Rico and the United States, embodied in a bilateral pact that cannot be altered except by mutual agreement.

The Commonwealth guarantees:

Although non-binding, the purpose of this vote was to build upon the momentum of the 1989-91 failed U.S.-Puerto Rico negotiations for a binding plebiscite and to maintain pressure on the U.S. Congress to revisit the status issue.<sup>135</sup> The commonwealth option received 48.6% of the votes, statehood received 46.3% of the votes, and independence 4.4% of the votes.<sup>136</sup> Despite the fact that the commonwealth option received a 2% margin over statehood, none of the options garnered a clear majority.

In response to the 1993 plebiscite, U.S. President Bill Clinton directed the establishment of an Inter-Agency Working Group on Puerto Rico.<sup>137</sup> This Inter-Agency Working Group will coordinate the development and review of policy, acting as a liaison between the White House and the senior officials of the relevant departments and agencies.<sup>138</sup> The main purpose of the Working Group is to study the 1993 plebiscite proposals.<sup>139</sup>

#### B. *The United Nations on Territories and Puerto Rico*

The U.N. Charter<sup>140</sup> seeks to establish a world order modeled on the federal structure of the United States and to ensure the collective security of its members and the rule of law for all humankind.<sup>141</sup> Article 1 of the U.N. Charter states that

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- Irrevocable U.S. citizenship;
  - Common market, common currency and common defense with the United States;
  - Fiscal Autonomy for Puerto Rico;
  - Puerto Rican Olympic Committee and our own international sports representation;
  - Full development of our cultural identity under Commonwealth we are Puerto Rican first [sic].

*Id.* (emphasis added). Padilla, *supra* note 1, at 33; Larry Rohter, *3 Ex-Presidents Join the Debate on Puerto Rico*, N.Y. TIMES, Nov. 13, 1993, at 8 [hereinafter Rohter, *Three Ex-Presidents*]; Rohter, *Puerto Rico Votes*, *supra* note 1, at A1.

135. Padilla, *supra* note 1, at 31.

136. Ivonne García, *Final status plebiscite results released*, SAN JUAN STAR, Dec. 10, 1993, at 12.

137. Letter from Marcia L. Hale, Assistant to the President and Director of Intergovernmental Affairs, The White House, to Honorable Ron de Lugo, Chairman, Subcommittee on Insular and International Affairs, U.S. House of Representatives I (March 9, 1994) (on file with the Subcommittee on Insular and International Affairs, Washington, D.C.) [hereinafter Letter from Marcia Hale to Ron de Lugo].

138. *Id.*

139. *Id.*

140. U.N. CHARTER art. 1. The U.N. Charter established the United Nations. *Id.*

141. INTERNATIONAL LAW, *supra* note 22, at 435-40 (quoting Thomas M. Franck,

the purpose of the United Nations includes the development of amicable relations among nations based on the principles of equal rights and self-determination.<sup>142</sup> To this end, Article 73 provides that members of the United Nations that assume responsibility for the administration of non-self-governing territories accept the obligation to transmit regularly to the Secretary-General statistical and other information relating to economic, social, and educational conditions in these territories.<sup>143</sup> Article 73(b) provides that a Member nation accepts the obligation to develop self-government in territories, to take due account of the political aspirations of the peoples in the territories, and to assist them in the progressive development of their free political institutions.<sup>144</sup>

To guide the process of preparing a territory to attain self-government, the General Assembly issued a series of resolutions.<sup>145</sup> Resolution 648 listed several factors to take into account in determining whether a territory is self-governing, including the manifestation of the freely expressed will of the people.<sup>146</sup> Resolution 648 also laid out three alternative paths to self-government: independence, "other separate systems of self-government," and free association.<sup>147</sup> One year later, in 1953, Resolution 742 further clarified the list of factors to determine whether a territory has reached a full measure of self-govern-

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*Soviet Initiatives: U.S. Responses-New Opportunities for Reviving the United Nations Systems*, 83 AM. J. INTL. L. 531, 532 (1989)). "The Charter was touted by the Truman administration as the new global Magna Carta, which would establish a world order modeled on the federal structure of the United States and thus ensure collective security and the rule of law for all mankind." *Id.*

142. U.N. CHARTER art. 1.

143. U.N. CHARTER art. 73.

144. U.N. CHARTER art. 73(b).

145. G.A. Res. 648, *supra* note 23, at 33; G.A. Res. 742, *supra* note 23 at 21; G.A. Res. 1541, *supra* note 23, at 29. Article 85 of the U.N. Charter provides that any alteration or amendment to a trusteeship agreement is to be exercised by the General Assembly. U.N. CHARTER art. 85. The General Assembly is one of the six principal organs of the United Nations. BASIC FACTS ABOUT THE UNITED NATIONS, *supra* note 20, at 4. The General Assembly is divided into seven main committees that submit draft resolutions to the plenary meetings where voting occurs by simple majority. *Id.* at 5. The decisions of the General Assembly "have no legally binding force for Governments," but rather "carry the weight of world opinion on major international issues, as well as the moral authority of the world community." *Id.* at 7.

146. G.A. Res. 648, *supra* note 23, ¶ 7(c), at 34.

147. G.A. Res. 648, *supra* note 23, Annex pts. I-II, at 34. These alternatives were later developed in Resolutions 742 and 1541. G.A. Res. 742, *supra* note 23, at 21; G.A. Res. 1541, *supra*, note 23, at 29.

ment.<sup>148</sup> Building upon the three forms of self-government listed in Resolution 648,<sup>149</sup> Resolution 742 provided that territories could also achieve self-government by association with another State or group of States if done freely and on the basis of absolute equality.<sup>150</sup>

Resolution 742 also considered the constitutional framework of the central authority with regard to the territory associated by treaty or bilateral agreement.<sup>151</sup> These include: (i) whether constitutional guarantees extend equally to the associated territory; (ii) whether there are powers that are constitutionally reserved to the territory or to the central authority; and (iii) whether there is a provision for the equal participation of the territory in any changes in the constitutional system of the State.<sup>152</sup> Resolution 742 further noted that citizenship should be provided without discrimination on the same basis as other inhabitants of the central authority.<sup>153</sup> Finally, Resolution 742 stated that the territory should be free to modify its associated status through the expression of the associated will of the people by democratic means.<sup>154</sup>

### 1. Resolution 1541

In 1960, the United Nations General Assembly, through Resolution 1514,<sup>155</sup> created a Decolonization Committee that provided Members with a forum in which to raise a territory's "colonial" status.<sup>156</sup> Within one month of its creation, the Committee issued Resolution 1541,<sup>157</sup> which established principles to determine whether a member country has an obligation to transmit information under Article 73(e) of the Charter.<sup>158</sup>

Principles I, II, and III of Resolution 1541 establish that Ar-

148. G.A. Res. 742, *supra* note 23, Annex pts. I-III, at 22.

149. *See supra* notes 146-47 and accompanying text (discussing G.A. Res 648, which introduced three alternative forms of self-government).

150. G.A. Res. 742, *supra* note 23, ¶ 6, at 22.

151. *Id.* Annex, pt. III(6), at 23.

152. *Id.*

153. *Id.*

154. *Id.*

155. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

156. G.A. Res. 742, *supra* note 23, Annex, pt. III(A)(2), at 22.

157. G.A. Res. 1541, *supra* note 23, at 29.

158. *Id.*; U.N. CHARTER art. 73(e).

ticle 73(e) of the U.N. Charter applies to all territories that have not yet attained a full measure of self-government.<sup>159</sup> These principles also impose upon the administering country an obligation to transmit certain information to the Secretary-General.<sup>160</sup> Principle IV of Resolution 1541 states that there is a *prima facie* obligation to transmit information regarding a territory that is geographically separate and ethnically or culturally distinct from the country administering it.<sup>161</sup>

Once such a *prima facie* case of geographical and ethnic or cultural distinctness of a territory exists, Principle V of Resolution 1541 provides for consideration of other elements.<sup>162</sup> These elements include administrative, political, juridical, and economic considerations.<sup>163</sup> If these elements demonstrate that the territory is in a position of subordination to the country administering it, there is a *prima facie* presumption that there is an obligation to transmit information.<sup>164</sup>

Principle VI of Resolution 1541 provides that free association with another state is one method by which a territory may achieve full self-government.<sup>165</sup> Principle VII sets out the minimum terms and conditions for free association of a territory with an independent State.<sup>166</sup> These conditions include the free association established as a result of free and voluntary choice.<sup>167</sup> This choice may be expressed through informed and democratic processes that respect the individuality and cultural characteristics of the territory and its inhabitants.<sup>168</sup> Such a democratic process enables the people of a territory to retain the freedom to

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159. G.A. Res. 1541, *supra* note 23, Annex, prin. I-III, at 29. "Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a 'full measure of self-government'. As soon as a territory and its people attain a full measure of self-government, the obligation ceases." *Id.*

160. *Id.* U.N. Charter Article 73(e) requires transmission of information regarding social, economic and educational conditions of territories. U.N. CHARTER art. 73(e).

161. G.A. Res. 1541, *supra* note 23, Annex, prin. V, at 29.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* Annex, prin. VI, at 29. Principle VI also sets out independence and integration with another state as valid methods to satisfy the self-government requirement. *Id.*

166. *Id.* Annex, prin. VII, at 29-30.

167. *Id.*

168. *Id.*

modify the status of that territory through the expression of their will.<sup>169</sup> Furthermore, Principle VII provides that the associated territory should have the right to determine its internal Constitution without outside interference.<sup>170</sup> Thus, the territory's population should democratically choose free association status.<sup>171</sup> The territory should have the right to determine its own Constitution without interference by the independent State with which it is associated.<sup>172</sup>

## 2. Resolution 748

The United States complied with the above U.N. guidelines until the General Assembly issued Resolution 748 on November 27, 1953.<sup>173</sup> Resolution 748 provided for the cessation of transmission of information on Puerto Rico under Article 73(e).<sup>174</sup> The General Assembly premised this Resolution on two factors.<sup>175</sup> These included the consummation of a free political association<sup>176</sup> between Puerto Rico and the United States, as manifested in the establishment of the Commonwealth government, and the entry into force of the Puerto Rican Constitution.<sup>177</sup> Specifically, Resolution 748 recognized the respect the United States gave to Puerto Rico's individual cultural characteristics, the adoption of a new status through free and democratic expression, and the creation of an autonomous political entity.<sup>178</sup>

## II. *THE DISCREPANCY IN EVALUATING PUERTO RICO'S CURRENT POLITICAL STATUS*

In analyzing Puerto Rico's status, this Note focuses on Pub-

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. G.A. Res. 748, *supra* note 20. Resolution 748 states that "as a result of the entry into force on 25 July 1952 of the Constitution of Puerto Rico . . . the Government of the United States of America would cease to transmit information under Article 73(e) of the Charter." *Id.* pmbl., at 26.

174. *Id.* The United States started filing reports with respect to Puerto Rico in June of 1947. TORRUELLA, *supra* note 35, at 160.

175. G.A. Res. 748, *supra* note 20, pmbl. at 25-26.

176. *See* G.A. Res. 742, *supra* note 23, Annex, pt. III (discussing free association status).

177. *Id.*; *see supra* notes 112-21 and accompanying text (discussing adoption of Public Laws 600 and 447).

178. G.A. Res. 748, *supra* note 20, ¶ 5, at 26.

lic Laws 600 and 447<sup>179</sup> and their effects on Puerto Rico's status. This Note also examines the requirements of a self-governing territory under Resolutions 742<sup>180</sup> and 1541<sup>181</sup> to determine whether the status of Puerto Rico complies as a self-governing territory. Some commentators argue that Puerto Rico and the United States entered into a bilateral compact, thereby complying with the free associated status as prescribed in Resolution 1541.<sup>182</sup> Other commentators, however, feel that Puerto Rico's current Commonwealth status does not comply with international law because no compact was formed during the period between 1950-52.<sup>183</sup> Alternatively, some commentators argue that if the United States and Puerto Rico formed a compact, it was not upheld.<sup>184</sup>

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179. See *supra* notes 112-21 and accompanying text (discussing adoption of Public Laws 600 and 447).

180. G.A. Res. 742, *supra* note 23, at 21.

181. G.A. Res. 1541, *supra* note 23, at 29. David M. Helfeld, How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?, Address Before the Judicial Conference of the First Circuit (Sept. 1986), in 110 F.R.D. 452, 463-465 (1985) [hereinafter Helfeld, First Circuit Address]. Several commentators support the validity of the compact. See *Proposed Legislation*, *supra* note 16, pt. II, at 16-19 (statement of Resident Commissioner Jaime Fuster) (discussing validity of Commonwealth status); Rivera Cruz Letter, *supra* note 14, at 82-84. Other commentators do not support the validity of the compact. See TORRUELLA, *supra* note 35, at 158-59; Guillermo Moscoso, *Puerto Rico still an unincorporated territory*, SAN JUAN STAR, Mar. 2, 1993, at 32 [hereinafter Moscoso, *PR Still Unincorporated*]; MOSCOSO, *Quo vadis*, *supra* note 21, at 35; Guillermo Moscoso, *P.R.'s ambivalent status*, SAN JUAN STAR, Dec. 5, 1992, at 34 [hereinafter Moscoso, *PR's Ambivalent Status*]; U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 46 (statement of Zaida Hernández Torres) (discussing Puerto Rico's colonial status and failure of bilateral pact).

182. Helfeld, First Circuit Address, *supra* note 181, at 463-65; Rivera Cruz Letter, *supra* note 14, at 82-84; see *Proposed Legislation*, *supra* note 16, pt. II, at 16-19 (statement of Resident Commissioner Jaime Fuster) (discussing validity of Commonwealth status).

183. TORRUELLA, *supra* note 35 at 158-59; Moscoso, *Puerto Rico still unincorporated*, *supra* note 181, at 32; Moscoso, *Quo vadis*, *supra* note 21, at 35; Moscoso, *P.R.'s Ambivalent Status*, *supra* note 181, at 34; U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 46 (statement of Zaida Hernández Torres) (discussing Puerto Rico's colonial status and failure of bilateral pact).

184. Helfeld, First Circuit Address, *supra* note 181, at 463-65 (citing García Muñiz, *Puerto Rico and the United States: The United Nations Role — 1953-1975*, 53 REV. JUR. U.P.R. 1 (1984); Rivera Lugo, *Puerto Rico Ante La ONU (1976-1983): Autodeterminación y Transferencia de Poderes*, 53 REV. JUR. U.P.R. 267 (1984)); Van Dyke, *supra* note 15, at 452, 479-80, 513 (discussing unilateral changes to compact).

A. *The Current Status of Puerto Rico Complies With Free Associated Status As Prescribed by Resolution 1541 and Adheres to the Bilateral Compact*

Those who view Puerto Rico as a self-governing territory hold that a bilateral compact culminated from the adoption of Public Law 447,<sup>185</sup> the Puerto Rico Federal Relations Act,<sup>186</sup> and the Constitution<sup>187</sup> of the Commonwealth of Puerto Rico.<sup>188</sup> These commentators argue that the adoption of a new system of government for Puerto Rico between 1950 and 1952 required the approval of both the United States and Puerto Rico.<sup>189</sup> Accordingly, the United States and Puerto Rico mutually consented to adopt the new government.<sup>190</sup>

After the U.S. Congress approved Public Law 600,<sup>191</sup> which provided a loose framework for the adoption of the Puerto Rico Constitution, a referendum in Puerto Rico approved the contents of Public Law 600.<sup>192</sup> Thereafter, the elected delegates to the constitutional convention in Puerto Rico approved the Constitution and submitted it to a referendum of the electorate.<sup>193</sup> On March 3, 1952, the electorate of Puerto Rico overwhelmingly approved the Constitution.<sup>194</sup> On April 22, 1952, U.S. President Harry S. Truman declared that the Puerto Rico Constitution

185. Public Law 447, 66 Stat. 327; *see supra* notes 112-21 and accompanying text (discussing adoption of Public Laws 600 and 447).

186. Public Law 600, 64 Stat. at 319. Section 4 of Public Law 600 provided that the Puerto Rico Constitution should govern local matters, while the amended part of the Organic Act (The Foraker Act which later was amended and became the Jones Act) concerning Puerto Rico-United States relations would continue in force as the "Puerto Rico Federal Relations Act." BHANA, *supra* note 17, at 132; TORRUELLA, *supra* note 35, at 146; *see supra* notes 112-21 and accompanying text (discussing adoption of Pub. L. No. 600); *supra* note 30 (discussing legislative history of Organic Act of Puerto Rico).

187. *See supra* note 12 (discussing Puerto Rico Constitution and U.S. legislation adopting Puerto Rico Constitution).

188. Helfeld, First Circuit Address, *supra* note 181, at 463-65; Rivera Cruz Letter, *supra* note 14, at 82-84; *see* Leibowitz, *supra* note 14, at 30-31 (discussing official Commonwealth position that scope of compact includes Puerto Rico Constitution and Federal Relations Act).

189. Helfeld, First Circuit Address, *supra* note 181, at 463-65; Rivera Cruz Letter, *supra* note 14, at 82-84.

190. Helfeld, First Circuit Address, *supra* note 181, at 463-65.

191. *See supra* notes 112-21 and accompanying text (discussing adoption of Public Law 600).

192. TORRUELLA, *supra* note 35, at 153.

193. *Id.*

194. The electorate of Puerto Rico approved the Constitution by 373,544 votes in favor and 82,877 votes against. TORRUELLA, *supra* note 35, at 153.

complied with both the terms of Public Law 600 and the U.S. Constitution, and submitted it to the U.S. Congress for final approval.<sup>195</sup> President Truman hailed the new relationship, based on the referendum in Puerto Rico that favored Public Law 600, the drafting of the Puerto Rico Constitution, and its subsequent approval by the U.S. Congress with minor changes, as a relationship based on mutual consent and esteem.<sup>196</sup>

Shortly after the establishment of the Estado Libre Asociado,<sup>197</sup> the U.S. Court of Appeals for the First Circuit<sup>198</sup> echoed the importance of this bilateral process in *Figueroa v. Puerto Rico*.<sup>199</sup> The First Circuit stated that Public Law 600 offered the people of Puerto Rico a compact that permitted them to organize a government pursuant to a constitution of their own adoption.<sup>200</sup> The court noted that the compact stood as an expression of the will of the people of Puerto Rico.<sup>201</sup> According to the First Circuit, the nature of the compact presumed mutual consent.<sup>202</sup>

Commentators who agree that Puerto Rico's status complies with Resolutions 742 and 1541<sup>203</sup> also cite the language of Public Law 600 as evidence of mutual consent.<sup>204</sup> Public Law 600 states that the Act is adopted "in the nature of a compact" between the people of Puerto Rico and the U.S. Congress.<sup>205</sup> Notably, Mr. Mason Sears, a U.S. delegate to the United Nations, endorsed the compact theory in his presentation of the U.S. position before the U.N. General Assembly's Committee on Information from Non-Self Governing Territories on August 27, 1953.<sup>206</sup> Mr.

195. *Id.*

196. *Id.*

197. See *supra* notes 112-121 and accompanying text (discussing establishment of ELA).

198. See The Jones Act, 39 Stat. at 966. The courts of Puerto Rico became subject to the U.S. Court of Appeals for the First Circuit in 1917. *Id.*; JOSÉ TRIAS MONGE, *EL CHOQUE DE DOS CULTURAS JURÍDICAS EN PUERTO RICO* 113 (1991).

199. 232 F.2d 615 (1st Cir. 1956).

200. *Id.* at 617; *Proposed Legislation*, *supra* note 16, at 16 (statement of Mr. Jaime Fuster, former Resident Commissioner) (quoting *Figueroa*, 232 F.2d at 615).

201. *Figueroa*, 232 F.2d at 617.

202. *Id.*; G.A. Res. 1541, *supra* note 23, Annex, princ. VII, at 29. Principle VII of G.A. Res. 1541 declares that "free association should be the result of a free and voluntary choice by the peoples of the territory . . . ." *Id.*

203. G.A. Res. 742, *supra* note 23; G.A. Res. 1541, *supra* note 23.

204. Helfeld, First Circuit Address, *supra* note 181, at 463.

205. *Id.*

206. Mason Sears, U.S. Delegate to the United Nations, Speech before the General

Sears maintained that the new constitution was adopted "in the nature of a compact."<sup>207</sup> As a result, the compact represented a stronger arrangement between the two parties because the compact could not be denounced by one side alone.<sup>208</sup> The provisions of the Federal Relations Act<sup>209</sup> became provisions of a compact, bilateral in nature, the terms of which could be changed only by common consent.<sup>210</sup> Accordingly, Public Law 600 enabled Puerto Rico to govern local affairs and to enact a constitution that conformed with both the U.S. Constitution and Public Law 600 so as to form a "compact."<sup>211</sup> Thus, commentators maintain that the compact binds both Puerto Rico and the United States, and can be modified only through the bilateral consent of the parties.<sup>212</sup>

The commentators arguing that Puerto Rico's status complies with U.N. requirements note that the U.N. passed General Assembly Resolution 748,<sup>213</sup> which relieves the United States of reporting requirements based on Puerto Rico's new self-governing status.<sup>214</sup> Resolution 748 recognizes that the compact invests the people of the Commonwealth of Puerto Rico with attributes of sovereignty and identifies the status of self-government attained as that of an autonomous political entity.<sup>215</sup>

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Assembly's Committee on Information from Non-Self Governing Territories (Aug. 27, 1953), *reprinted in* TORRUELLA, *supra* note 35, at 162-163; Leibowitz, *supra* note 14, at 22. Mason Sears echoed the compact language by stating:

A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and Puerto Rican people. A compact, as you know, is far stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.

TORRUELLA, *supra* note 35, at 162-63; *see Proposed Legislation*, *supra* note 16, pt. II at 18 (statement of Mr. Jaime Fuster) (quoting Frances Bolton's statement as part of U.S. delegation to United Nations in 1953).

207. TORRUELLA, *supra* note 35, at 162-63; Leibowitz, *supra* note 14, at 22.

208. TORRUELLA, *supra* note 35, at 162-63.

209. *See supra* notes 112-21 and accompanying text (discussing establishment of ELA); *supra* note 186 (discussing Federal Relations Act).

210. Helfeld, First Circuit Address, *supra* note 181, at 464.

211. Pub. L. No. 600, 64 Stat. at 319; 98 CONG. REC. 6183, 7924 (1952); Leibowitz, *supra* note 14, at 26-27.

212. 98 CONG. REC. 6183, 7924 (1952); Leibowitz, *supra* note 14, at 26-28.

213. *Proposed Legislation*, *supra* note 16, at 32-33 (statement of Mr. Jaime Benítez, former Resident Commissioner) (quoting G.A. Res. 748, *supra* note 20, ¶¶ 2-5, at 26); *see supra* note 174 and accompanying text (discussing Resolution 748).

214. G.A. Res 748, *supra* note 20, ¶ 5, at 26.

215. *Proposed Legislation*, *supra* note 16, at 32-33 (statement of Mr. Jaime Benítez,

A change in Puerto Rico's status would require both a consensus in Puerto Rico and a consensus in the U.S. Congress.<sup>216</sup> As a result, supporters of the compact and the validity of the Commonwealth status attribute the failure of the United States to modify Puerto Rico's status to a lack of consensus in Puerto Rico, as well as to the U.S. Congress' failure to agree to a change.<sup>217</sup> Furthermore, the commentators continue to uphold the validity of relations between Puerto Rico and the United States, notwithstanding the fact that all efforts to improve or change Commonwealth status since 1952 have failed.<sup>218</sup> These commentators maintain that in order to send a clear message to the U.S. Congress that the majority of the people stand behind one status option, Puerto Rico should vote by a margin greater than fifty percent to bring about any status change.<sup>219</sup>

#### B. Federal Case Law Supporting the Validity of the Compact Theory

Federal case law provides additional reinforcement for the validity of Puerto Rico's current status.<sup>220</sup> Following the adoption of Public Law 600 and the Puerto Rico Constitution,<sup>221</sup> several cases decided by the U.S. Supreme Court and the U.S. Court of Appeals for the First Circuit suggest that Puerto Rico has autonomy in local matters analogous to that of U.S. states.<sup>222</sup>

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former Resident Commissioner) (quoting GA Resolution 748, *supra* note 20, ¶¶ 2-5, at 26).

216. Helfeld, First Circuit Address, *supra* note 181, at 473. Dr. David M. Helfeld, former Dean of the University of Puerto Rico's Law School and constitutional scholar, noted: "For there to be substantial and meaningful change [in Puerto Rico's status] depends on two conditions: achieving a modicum of consensus in Puerto Rico and converting that consensus into a bilateral agreement with Congress and the President." *Id.*; see Leibowitz, *supra* note 14, at 65; Moscoso, *PR Still Unincorporated*, *supra* note 181, at 32.

217. Helfeld, First Circuit Address, *supra* note 181, at 473; Leibowitz, *supra* note 14, at 65.

218. Helfeld, First Circuit Address, *supra* note 181, at 473.

219. *Id.*; see Carlos Romero Barceló, *Island's 'colonial' status remains a topic of debate*, SAN JUAN STAR, Jan. 9, 1994, at V1 (discussing need to vote for one status option by margin greater than 50%).

220. *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 672-74 (1974); *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *United States v. Quiñones*, 758 F.2d 40 (1st Cir. 1985); Helfeld, First Circuit Address, *supra* note 181, at 464-65.

221. See *supra* notes 112-121 and accompanying text (discussing Public Laws 600 and 447).

222. *Calero-Toledo*, 416 U.S. at 672-74 (discussing Puerto Rico's autonomy in local matters analogous to that of states); *Examining Board*, 426 U.S. at 572 (allowing court to

Thus, commentators cite federal case law acknowledging Puerto Rico's autonomy in local matters and unique status in validating Puerto Rico's current status.<sup>223</sup>

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>224</sup> the U.S. Supreme Court strongly suggested that Puerto Rico has a degree of autonomy in local matters analogous to that of states.<sup>225</sup> The Court, in reviewing the constitutionality of a statute of the Commonwealth of Puerto Rico, recognized Puerto Rico as a state for the purposes of bringing a direct appeal from the decision of the three-judge court convened in Puerto Rico pursuant to the Three-Judge Court Act.<sup>226</sup> The Three-Judge Court Act required three judges to sit in suits to enjoin enforcement of a state statute on constitutional grounds.<sup>227</sup> The Supreme Court held that Puerto Rico was a state for the purpose of the Three-Judge Court Act because the Commonwealth achieved a degree of authority over its internal affairs and acted as a sovereign over matters not controlled by the U.S. Constitution.<sup>228</sup> The Court also maintained that federal due process applied to Puerto Rican legislation, but did not specify whether such a right existed pursuant to the Fifth or Fourteenth Amendments.<sup>229</sup>

The commentators who support the validity of the compact

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hear challenge to Puerto Rico statute pursuant to Act addressing deprivation under color of state law); *Quiñones*, 758 F.2d at 42 (maintaining that Puerto Rico was no longer territory subject to plenary power of U.S. Congress).

223. See, e.g., Leibowitz, *supra* note 14, at 1, 30-34; Rivera Cruz Letter, *supra* note 14, at 82-85;

224. *Calero*, 416 U.S. at 672-74.

225. *Id.* at 672. The Court stated:

Puerto Rico has thus not become a State in the federal union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word. . . . It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.

*Id.*

226. 28 U.S.C. § 2281 (repealed 1976). In *Calero*, the issue was whether appellate jurisdiction existed to hear a direct appeal from a decision of the three judge court convened in the District of Puerto Rico to determine the constitutionality of a statute of the Commonwealth of Puerto Rico. 416 U.S. 663; TORRUELLA, *supra* note 35, at 178. Section 2281 provided "that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality should not be granted unless the application has been heard and determined by a three-judge district court." 28 U.S.C. § 2281 (repealed 1976).

227. 28 U.S.C. § 2281 (repealed 1976).

228. *Calero-Toledo*, 416 U.S. at 672-74.

229. *Id.* at 668-69.

also cite the U.S. Supreme Court decision in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*.<sup>230</sup> In *Examining Board*, two alien civil engineers challenged a Puerto Rican statute, which required one to attain U.S. citizenship before obtaining a license to practice engineering in Puerto Rico,<sup>231</sup> pursuant to the Civil Rights Act.<sup>232</sup> The Court determined that the U.S. District Court for the District of Puerto Rico<sup>233</sup> possessed jurisdiction pursuant to 28 U.S.C. § 1343(3).<sup>234</sup> Section 1343(3) permitted the district court to entertain a suit that addressed deprivation under color of state law.<sup>235</sup> The *Examining Board* Court concluded that the U.S. District Court for the District of Puerto Rico had jurisdiction under 28 U.S.C. § 1343(3) to hear the suit.<sup>236</sup> The Court maintained that Puerto Rico was neither a state nor a territory, but instead, a commonwealth.<sup>237</sup> The Court thus acknowledged both the existence of the compact and the validity of the commonwealth status.<sup>238</sup>

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230. 426 U.S. 572 (1976).

231. *Id.* at 577.

232. 42 U.S.C. § 1983 (1988).

233. Act of June 26, 1946, ch. 646, 62 Stat. 889 (1946); Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (1966) and Act of June 2, 1970, Pub. L. No. 91-272, 84 Stat. 294 (1970). At the time of this action the current U.S. District Court for the District of Puerto Rico was a territorial court; later legislation changed this status and granted life tenure to the judges, which made their tenure identical to other U.S. district judges. Act of June 26, 1946, ch. 646, 62 Stat. 889 (1946); Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (1966). In 1970, the U.S. Congress provided additional U.S. district judges throughout the United States, including Puerto Rico. Act of June 2, 1970, Pub. L. No. 91-272, 84 Stat. 298 (1970).

234. *Examining Board*, 426 U.S. at 575. The Supreme Court stated the issue as "whether Puerto Rico is a 'State,' for purposes of § 1343(3), insofar as that statute speaks of deprivation 'under color of any State law.'" *Id.* Title 28 U.S.C. § 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by a person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens of all persons within the jurisdiction of the United States.

28 U.S.C. § 1343 (1988).

235. 426 U.S. at 597; see *Polk County v. Dodson*, 454 U.S. 312, 317 (1981). The U.S. Supreme Court held that "a person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Polk*, 454 U.S. at 317.

236. *Examining Board*, 426 U.S. at 597.

237. *Id.* at 593-94.

238. *Id.*; see *Proposed Legislation*, *supra*, note 16, pt. II, at 16-19 (statement of Resident Commissioner Jaime Fuster) (maintaining that in 1952 compact became effective,

In *United States v. Quiñones*,<sup>239</sup> the U.S. Court of Appeals for the First Circuit discussed Puerto Rico's status in terms favorable to Commonwealth supporters.<sup>240</sup> The First Circuit maintained that in 1952, Puerto Rico ceased to be a territory, subject to U.S. Congress' plenary authority, through the territorial clause of the U.S. Constitution.<sup>241</sup> Furthermore, the First Circuit stated that the authority exercised by the U.S. government came from the compact itself, and that this compact could not be amended unilaterally.<sup>242</sup> Consequently, commentators reason that Puerto Rico's status is not that of a local autonomy subject to the Territorial Clause of the U.S. Constitution, but that of a self-governing entity that has delegated powers to the federal government as specified in the compact.<sup>243</sup>

C. *Puerto Rico's Current Status Does Not Uphold International Law and Fails to Adhere to the "Bilateral Compact"*

A growing number of commentators who view Puerto Rico as a colonial territory argue that the establishment of the Commonwealth government and the adoption of the Puerto Rico Constitution<sup>244</sup> failed to alter the model for the U.S.-Puerto Rico relationship created in the *Insular Cases*.<sup>245</sup> Arguments that as-

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and Puerto Rico assumed Commonwealth status); see also U.S. GAO REPORT, *supra* note 15, at 83.

239. 758 F.2d 40 (1st Cir. 1985).

240. *Id.*

241. *Id.* at 42. See *supra* note 9 and accompanying text (discussing Territorial Clause).

242. *Quiñones*, 758 F.2d at 42. The court stated:

In 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.

*Id.*

243. *Id.*; see *Proposed Legislation*, *supra*, note 16, pt. II, at 16-19 (statement of Resident Commissioner Jaime Fuster) (discussing validity of Commonwealth status and compact).

244. PUERTO RICO CONST. The U.S. Congress approved the Puerto Rico Constitution on July 25, 1952. Public Law 447, 66 Stat. at 327.

245. Cabranes, First Circuit Address, *supra* note 13, at 481. "The key point about Puerto Rico's place in the American Constitutional System is that no word other than 'colonialism' adequately describes the relationship between a powerful metropolitan state and an impoverished overseas dependency disenfranchised from the formal law-

sail the validity of Puerto Rico's current status fall into two categories. First, some legal scholars assert that Puerto Rico and the United States have not formed a compact.<sup>246</sup> Second, others believe that even if a compact was formed, it has not been upheld.<sup>247</sup>

### 1. Some Commentators Do Not Believe That a Compact Was Formed in the Years 1950-52

#### a. Legislative History of Public Law 600

Commentators note that the legislative history accompanying the adoption of Public Law 600 demonstrates that the U.S. Congress did not intend to abdicate its authority under the Territorial Clause or to alter significantly Puerto Rico's status.<sup>248</sup> House Report 2275, which accompanied Public Law 600, explains that the effect of Public Law 600 was to alter matters of purely local concern.<sup>249</sup> House Report 2275 emphasized that Puerto Rico's fundamental political, social, and economic relationship to the United States would not change.<sup>250</sup>

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making processes that shape its people's daily lives." *Id.* at 480; see TORRUELLA, *supra* note 35, at 267-68 (discussing continuing validity of *Insular Cases*); *Insular Cases*, *supra* note 8 (discussing U.S. Supreme Court cases that determined status of U.S. territories).

246. See TORRUELLA *supra* note 35, at 146-53, 193 (doubting existence of compact); U.N. Doc. A/AC.109/PV.1390, *supra* note 17, at 46-52 (statement of Zaida Hernández Torres) (discussing P.R.'s colonial status and attacking bilateral pact); Moscoso, *PR still unincorporated*, *supra* note 181, at 32 (arguing Puerto Rico is still unincorporated territory); Moscoso, *Quo vadis*, *supra* note 21, at 35 (questioning validity of compact); Guillermo Moscoso, *PR in the United Nations*, SAN JUAN STAR, Aug. 14, 1991, at 12 [hereinafter Moscoso, *PR in U.N.*] (discussing Puerto Rico's continuing colonial status).

247. *United States v. Valentine*, 288 F. Supp. 957, 981, n.24 (P.R. Dec. 1968) (limiting scope of compact to certain essential provisions); Helfeld, *First Circuit Address*, *supra* note 181, at 465 n.65; Van Dyke, *supra* note 15, at 452, 470-80 (discussing unilateral changes to compact).

248. H.R. REP. NO. 2275, 81st Cong., 2d Sess., (1950), reprinted in 1950 U.S.C.C.S. 2681 [hereinafter H.R. REP. NO. 2275]; Leibowitz, *supra* note 14, at 23-31; Stein, *Notes on the History of Puerto Rico's Commonwealth Status*, 30 REV. JUR. U.P.R. 33 (1961); Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U.P.R. 255 (1952) [hereinafter Helfeld, *Congressional Intent*] (discussing unchanged U.S. Congressional power after adopting Public Law 600).

249. H.R. REP. NO. 2275, *supra* note 248, at 2681-84.

250. *Id.* at 2682-83.

It is important that the nature and general scope of S. 3336 be made absolutely clear. The bill under consideration *would not change Puerto Rico's fundamental political, social, and economic relationship to the United States*. Those sections of the Organic Act of Puerto Rico pertaining to the political, social, and economic relationship of the United States and Puerto Rico concerning such

These authors maintain that the U.S. Congress did not believe that the bill accompanying Public Law 600 changed the essential nature of Puerto Rico's subordinate status.<sup>251</sup> For example, Delegate Bartlett of Alaska, in supporting the bill, stated that there was no need to fear passage of the bill because the U.S. Congress retained all of its powers under the U.S. Constitution and the Territorial Clause.<sup>252</sup> Therefore, Delegate Bartlett believed that only Congress would ultimately determine the changes, if any at all, to the status of the island.<sup>253</sup> Although authors refer to the ambiguity of the language of Public Law 600, "in the nature of a compact,"<sup>254</sup> commentators also maintain that a review of the legislative history leading up to the adoption of Public Law 600 clarifies any ambiguity in the language of Public Law 600.<sup>255</sup>

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matters as the applicability of United States laws, customs, internal revenue, Federal judicial jurisdiction in Puerto Rico, Puerto Rican representation by a Resident Commissioner, etc. would remain in force and effect, and upon enactment of S. 3336 would be referred to as the Puerto Rican Federal Relations Act.

*Id.* at 2682-83 (emphasis added); see TORRUELLA, *supra* note 35, at 150-153; BHANA, *supra* note 17, at 126.

251. TORRUELLA, *supra* note 35, at 147; BHANA, *supra* note 15, at 126; Guillermo Moscoso, *The time has come*, SAN JUAN STAR, May 9, 1990, at 24 [hereinafter Moscoso, *Time has Come*].

252. 96 CONG. REC. 9594, 9595 (1950). Delegate Bartlett specifically stated that: [n]o one need have any apprehension about a grant of undue powers under this Act to the people of Puerto Rico. Congress retains all essential powers set forth under our constitutional system, and it will be Congress and Congress alone which ultimately will determine the changes, if any, in the political status of the island.

*Id.*

253. *Id.*

254. See *supra* notes 112-21 and accompanying text (discussing adoption of Public Law 600).

255. TORRUELLA, *supra* note 35, at 147-48. The ambiguity regarding the type of relationship created by Public Law 600 stems from the vague language of the Act: "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 system of their own adoption . . ." Public Law 600, 64 Stat. at 319. The language proposed by Muñoz-Marín's legal advisors was "to organize their democratic government in accordance with a *Constitution* of their own adoption which will recognize and incorporate the principles of local self government within the Federal Union and will be *in the nature of a compact* between themselves and the Government of the United States." TORRUELLA, *supra* note 35, at 147; CARR, *supra* note 11, at 77-78; see *supra* notes 112-21 and accompanying text (discussing Public Law 600).

b. Public Law 600 Satisfied Demands For Democracy and Self-Determination

In order to support the view that Public Law 600 effected only cosmetic change, commentators argue that the changes were merely a symbol of democracy to pacify the demands for self-determination in the early 1950's.<sup>256</sup> The language of House Report 2275 regarding Senate Bill 3336 supports this theory.<sup>257</sup> House Report 2275 explicitly states that the bill would have great value as a symbol of freedom at a time when anti-American propaganda accused the United States of engaging in colonialism and imperialism.<sup>258</sup> The U.S. Congress benefitted by permitting a Constitution that did not significantly alter the relationship, yet represented a step toward "decolonization" to the international community.<sup>259</sup>

c. The Manner in Which the Puerto Rico Constitution Was Adopted Asserts Congress' Continuing Control Through the Territorial Clause

Commentators add that the manner in which the U.S. Congress and Puerto Rico adopted the Puerto Rico Constitution also reaffirms Congress' continuing control over Puerto Rico through the Territorial Clause.<sup>260</sup> The current Governor of Puerto Rico, Mr. Pedro Rosselló, argues that the failure to allow Puerto Rico to adopt a Constitution free from outside control

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256. CARR, *supra* note 11, at 72-73. Puerto Rico could capitalize on the then current political climate to demand democracy. *Id.* First, World War II, fought in the name of democracy, had just ended; second, Puerto Rico was gaining in strategic importance to the United States and President Truman was acting in the spirit of the United Nations Charter. *Id.*

257. H.R. REP. NO. 2275, *supra* note 248, at 2689; Leibowitz, *supra* note 14, at 23-31; Helfeld, *Congressional Intent*, *supra* note 248, at 307, 314.

258. H.R. REP. NO. 2275, *supra* note 248, at 2689. "In view of the importance of 'colonialism' and 'imperialism' in anti-American propaganda, the Department of State feels that S. 3336 would have a great value as a *symbol* of the basic freedom enjoyed by Puerto Rico, within the larger framework of the United States of America." *Id.* at 2689 (emphasis added).

259. CARR, *supra* note 11, at 75. "There is no question that the Executive branch's concern with the status of Puerto Rico was exacerbated by commitments before the United Nations and the Atlantic Charter." TORRUELLA, *supra* note 35, at 141.

260. MOSCOSO, *PR still unincorporated*, *supra* note 181, at 32; MOSCOSO, *Quo vadis*, *supra* note 21, at 35; MOSCOSO, *PR in U.N.*, *supra* note 246, at 12 (discussing Puerto Rico's continuing colonial status).

does not accord with Resolution 1541.<sup>261</sup> According to Mr. Rosselló, the U.S. Congress' continuing control is apparent from the inception of the Commonwealth government.<sup>262</sup> The electorate of Puerto Rico approved the Puerto Rico Constitution on March 3, 1952.<sup>263</sup> After approval in Puerto Rico,<sup>264</sup> however, the U.S. Congress unilaterally deleted Sections 5 and 20 of the Bill of Rights of the Puerto Rico Constitution.<sup>265</sup> Neither the people nor the Congress of Puerto Rico approved these subsequent changes.<sup>266</sup> Governor Rosselló maintains that this unilateral assertion of the U.S. Congress' authority affecting the content of the Puerto Rico Constitution violates Principle VII(b) of Resolution 1541.<sup>267</sup> Despite the provisions of Resolution 1541 that expressly provide that a territory has a right to determine its constitution free of outside interference, Puerto Rico did not have the opportunity to determine its internal constitution without outside interference.<sup>268</sup>

Commentators who maintain that the Puerto Rico Constitution was not adopted free from outside interference refer to a proposed amendment to the Puerto Rico Constitution initiated by Senator J. Bennett Johnston<sup>269</sup> that provided for future

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261. See G.A. Res. 1541, *supra* note 23, princ. VII(b), at 29-30 (stating that associated territory should be free to adopt constitution without outside control).

262. *Id.*; U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 6. (statement of Pedro Rosselló, Chairman of the Partido Nuevo Progressista).

263. TORRUELLA, *supra* note 35, at 153.

264. See *supra* notes 112-21 and accompanying text (discussing approval of Puerto Rico Constitution).

265. TORRUELLA, *supra* note 35, at 154 n.573. Section 5 of the proposed constitution of Puerto Rico provided for free public education, while Section 20 provided for certain human rights, including public elementary and secondary education and disability protection. *Id.*

266. U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 6 (statement of Pedro Rosselló, current Governor of Puerto Rico).

267. *Id.* at 8.

268. G.A. Res. 1541, *supra* note 23, princ. VII., at 29-30. Principle VII(b) of Resolution 1541 provides: "The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people." *Id.*

269. Kitty Dumas, *Practice Makes Puerto Rico A Force Heard in Congress*, 48 CONG. Q. WKLY. REP. 4074 (1990) [hereinafter Dumas, *Practice Makes PR a Force*]. Sen. J. Bennett Johnston [D-LA] is the chairman of the Energy and Natural Resources Committee and has been described as "the Senate's standard-bearer on the Puerto Rican status issue" for his long-term involvement in this issue. *Id.* at 4076.

amendments to the Puerto Rico Constitution.<sup>270</sup> The Johnston amendment proposed that the Puerto Rico Constitution could not be amended without the consent of the U.S. Congress.<sup>271</sup> Former Governor Luis Muñoz-Marín<sup>272</sup> expressed discontent with Senator Johnston's proposal.<sup>273</sup> Thereafter, Mr. Muñoz-Marín agreed to a compromise whereby the Puerto Rico Constitution could not be changed in a manner incompatible with Public Law 600, the Federal Relations Act, dispositions of the U.S. Constitution applicable to Puerto Rico, or Public Law 447.<sup>274</sup> Thus, despite the compromise, the U.S. Congress maintained its authority by providing that any future changes conform with the Territorial Clause authority.<sup>275</sup> As the *Insular Cases* established, the U.S. Congress' authority pursuant to the Territorial Clause is plenary.<sup>276</sup>

d. "In the Nature of a Compact": Ambiguous Language in Public Law 600 that Accommodated Irreconcilable Differences

Those who believe that a compact was not formed maintain that the ambiguous phrase "in the nature of a compact"<sup>277</sup> at best accommodated irreconcilable interests.<sup>278</sup> As former Governor Muñoz-Marín could not use the term "contract," he resorted to the less defined "compact."<sup>279</sup> The U.S. Congress sought to pacify Mr. Muñoz-Marín's demands without giving up its author-

270. CARR, *supra* note 11, at 79; Helfeld, *Congressional Intent*, *supra* note 248, at 304-06.

271. CARR, *supra* note 11, at 79; Helfeld, *Congressional Intent*, *supra* note 248, at 304-06.

272. BHANA, *supra* note 17, at 93-108. Luis Muñoz-Marín was the proponent of the Commonwealth and the first locally elected Governor of Puerto Rico. Mr. Muñoz-Marín remained in office from 1948-1964. *Id.*

273. 98 CONG. REC. 6183, 7924 (1952); CARR, *supra* note 11, at 79-80; Leibowitz, *supra*, note 14, at 26-28.

274. 98 CONG. REC. 6183, 7924 (1952); CARR, *supra* note 11, at 79-80; Helfeld, *Congressional Intent*, *supra* note 248, at 304-06; Leibowitz, *supra* note 14, at 26-28.

275. Pérez-Bachs, *supra* note 24, at 485-87 (discussing lack of limitation on U.S. Congress' power through Territorial Clause).

276. CARR, *supra* note 11, at 79-80; Moscoso, *PR still unincorporated*, *supra* note 181, at 32; Pérez-Bachs, *supra* note 24, at 486; *see supra* note 63 and accompanying text (discussing U.S. Congress' plenary authority over territories).

277. *See supra* notes 112-21 and accompanying text (discussing the adoption of Public Law 600).

278. CARR, *supra* note 11, at 81-82.

279. *Id.*

ity over Puerto Rico, which resulted in the ambiguous term "in the nature of the compact."<sup>280</sup> Consequently, commentators maintain that the phrase "in the nature of a compact" is not clear, as it provides an ill-defined and questionable status.<sup>281</sup> These commentators hold that the legal ambiguities surrounding the nature of the Puerto Rico-United States relationship continue to affect and impede progress toward an ultimate solution to Puerto Rico's status.<sup>282</sup>

## 2. Some Authors Believe That Even if a Compact Was Formed, It Is Not Upheld

### a. Judicial Decisions Refute the Current Validity of the Compact and Affirm Congressional Dominance Through the Territorial Clause

Commentators who do not view Puerto Rico as a self-governing territory find support in federal judicial decisions.<sup>283</sup> Despite the decision in *United States v. Valentine*,<sup>284</sup> which stated that a compact governed the U.S.-Puerto Rico relationship, some scholars note that no federal judge has held the bilateral compact theory to be absolute.<sup>285</sup> For example, the District Court of Puerto Rico qualified the compact<sup>286</sup> as unilaterally irrevocable

280. TORRUELLA, *supra* note 35, at 155-56 (citing *Hearings before the Senate Committee on Interior and Insular Affairs on SJ Res. 151*, 82d Cong., 2d Sess. (1952)).

281. 109 CONG. REC. 20124, 88th Cong., 1st Sess., (1963) (statement of Representative Leo. W. O'Brien).

No one, in or out of Congress, or in or out of Puerto Rico, knows exactly what the Commonwealth of Puerto Rico is. I have been Chairman of the Subcommittee on Territorial and Insular Affairs for 9 years and I have spent many hours, here and in Puerto Rico, seeking an answer to these questions . . . . Some . . . insist that Puerto Rico is still, in fact, a colony, a possession . . . . Others argue that when we created the first and only commonwealth under the American flag we entered into an irrevocable compact from which there could be no withdrawal . . . .

*Id.*; TORRUELLA, *supra* note 35, at 56 (quoting statement of Senator Long).

282. TORRUELLA, *supra* note 35, at 263-65; Van Dyke, *supra* note 15, at 515-16.

283. *Harris v. Rosario*, 446 U.S. 651 (1980); *Califano v. Torres*, 435 U.S. 1 (1978); *Sea-Land Serv., Inc. v. Mun. of San Juan*, 505 F. Supp. 533 (P.R. Dec. 1980); *United States v. Valentine*, 288 F. Supp. 957, 981, n.24 (P.R. Dec. 1968); TORRUELLA, *supra* note 35, at 193; Helfeld, *supra* note 181, at 463-67 n.63-65.

284. 288 F. Supp. 957 (P.R. Dec. 1968).

285. Helfeld, First Circuit Address, *supra* note 181, at 464 n.57.

286. See *supra* notes 112-21 and accompanying text (discussing adoption of Public Laws 600 and 447 to form compact).

only with respect to certain essential provisions,<sup>287</sup> such as Puerto Rico's association with the United States and U.S. citizenship of its people.<sup>288</sup> Under *Valentine*, the lack of national political participation<sup>289</sup> is not a violation of the compact because such participation was voluntarily waived by the Puerto Rican people.<sup>290</sup> Commentators maintain that the compact theory, which according to the U.S. Congress and the Puerto Rico Commonwealth government consists of Public Law 600, Public Law 447, the Federal Relations Act, and the Puerto Rico Constitution, is kept intact only by limiting the scope of the compact.<sup>291</sup> Thus, all four of the components of the compact are not immune to unilateral change as originally contemplated.<sup>292</sup> Instead, to maintain the validity of the compact, the Federal Relations Act must be excluded from the components of the compact as originally contemplated.<sup>293</sup>

Although in some instances Puerto Rico is treated as an equal among U.S. states,<sup>294</sup> commentators assert that this treatment is inconsistent.<sup>295</sup> Commentators who question Puerto

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287. *United States v. Valentine*, 288 F. Supp. 957, 981 n.24 (P.R. Dec. 1968) (holding that exclusion from jury service in U.S. District Court for Puerto Rico of non-English speakers did not deprive Puerto Rican defendants of due process of law).

288. *Id.*

To say that the compact is irrevocable unilaterally is not to say that all of its detailed provisions are. It is only the essential provisions which cannot be revoked by one party acting alone: i.e., the provisions which establish Puerto Rico's status as a Commonwealth with plenary domestic authority, its association with the United States, the United States citizenship of its people, and such favorable concessions as its fiscal autonomy.

*Id.*

289. U.S. GAO REPORT, *supra* note 15, at 5, 7; Van Dyke, *supra* note 15, at 469-71 (discussing Puerto Rico's non-voting representative in U.S. Congress); see *Proposed Legislation*, *supra* note 16, pt. I, at 33 (statement of Luis A. Ferré) (discussing disparate voting rights).

290. *Valentine*, 288 F. Supp. at 981.

291. TORRUELLA, *supra* note 35, at 176 n.678; Helfeld, First Circuit Address, *supra* note 181, at 464-66; see *supra* note 188 and accompanying text (discussing official Commonwealth position regarding scope of compact).

292. TORRUELLA, *supra* note 35, at 176 n.678; Helfeld, First Circuit Address, *supra* note 181, at 464-66; see *supra* note 188 and accompanying text (discussing official Commonwealth position regarding scope of compact).

293. TORRUELLA, *supra* note 35, at 176 n.678; Helfeld, First Circuit Address, *supra* note 181, at 464-66; see *supra* note 188 and accompanying text (discussing official Commonwealth position regarding scope of compact).

294. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672-74 (1974).

295. See *id.* (treating Puerto Rico as equal among U.S. states). But see *Harris v. Rosario*, 446 U.S. 651 (1980) (reaffirming U.S. Congress power to treat Puerto Rican

Rico's self-governing status cite recent judicial decisions that reaffirm U.S. Congressional dominance over Puerto Rico through application of the Territorial Clause and do not rely on the compact theory. In *Califano v. Torres*,<sup>296</sup> for example, the U.S. Supreme Court held that the U.S. Congress may not constitutionally discriminate against the elderly, the blind, and the handicapped, who are entitled to receive benefits under the Supplementary Security Income program.<sup>297</sup> This protection from discrimination only applies, however, if a recipient lives in the fifty states or the District of Columbia.<sup>298</sup> The U.S. Congress may therefore discriminate if the recipient lives in Puerto Rico.<sup>299</sup> Following the *Insular Cases*,<sup>300</sup> the *Califano* Court maintained that the U.S. Congress continued to have authority under the Territorial Clause of the Constitution, and pursuant to this power, could treat Puerto Rico differently than the states.<sup>301</sup>

Similarly, in *Harris v. Rosario*,<sup>302</sup> the U.S. Supreme Court reinforced the U.S. Congressional power to treat residents of Puerto Rico differently than residents of U.S. states by virtue of the Territorial Clause of the U.S. Constitution.<sup>303</sup> The program of

residents differently than residents of U.S. states through Territorial Clause). See generally TORRUELLA, *supra* note 35, at 109 (quoting Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 599 (1976)); Moscoso, *PR's Ambivalent Status*, *supra* note 181, at 34 (discussing inconsistent treatment of Puerto Rico's status).

296. 435 U.S. 1 (1978).

297. *Id.* at 2.

298. *Id.* The Court stated:

"The exclusion of Puerto Rico in the amended program is apparent in the definitional section. Section 1611(f) of the Act, as set forth in 42 U.S.C. § 1382c(f) (1970 ed., Supp. V), states that no individual is eligible for benefits during any month in which he or she is outside the United States. The Act defines "the United States" as "the 50 States and the District of Columbia." § 1614(e), as set forth in 42 U.S.C. § 1382c(e) (1970 ed., Supp. V).

*Id.*

299. 435 U.S. at 5.

300. See *supra* notes 42-78 and accompanying text (discussing *Insular Cases*).

301. See *Califano*, 435 U.S. at 3 n.4. The Court stated that: "the District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it. Puerto Rico has a relationship to the United States 'that has no parallel in our history.'" *Id.* (citing *Examining Board*, 426 U.S. at 596). To justify this discriminatory treatment the Court explained: "First, because of the unique tax status of Puerto Rico, its residents do not contribute to the public treasury. Second, the cost of including Puerto Rico would be extremely great — an estimated \$300 million per year. Third, inclusion in the SSI program might seriously disrupt the Puerto Rican economy." *Califano*, 435 U.S. at 5 n.7.

302. 446 U.S. 651 (1980).

303. *Id.*

Aid to Families with Dependent Children<sup>304</sup> discriminated against residents of Puerto Rico by providing them with less aid than that given to other U.S. citizens.<sup>305</sup> The Court stated that the U.S. Congress, in acting under the Territorial Clause of the U.S. Constitution, may make all needful rules and regulations respecting the territory, and may treat residents of Puerto Rico differently than residents of the fifty states so long as there is a rational basis for its actions.<sup>306</sup>

In *Sea-Land Services, Inc. v. Municipality of San Juan*,<sup>307</sup> the District Court for the District of Puerto Rico acknowledged that the U.S. Supreme Court had recently clarified the scope of the U.S. Congress' authority in Puerto Rico.<sup>308</sup> *Sea-Land Services* dealt with a challenge to the constitutionality of taxes imposed by coastal municipal authorities on an ocean transport company.<sup>309</sup> The court stated that regardless of the particular constitutional relationship between Puerto Rico and the United States, the Territorial Clause is still a source of congressional power over the island.<sup>310</sup> Accordingly, Puerto Rico was constrained by the prohibitory implications of the Commerce Clause.<sup>311</sup> The court noted that this was not because the Commerce Clause applies to Puerto Rico *ex proprio vigore*, but instead, because it is binding on the Commonwealth through the Territorial Clause.<sup>312</sup> Commentators maintain that these judicial decisions

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304. 42 U.S.C. §§ 601-19 (1988 and Supp. III 1991 and West Supp. 1993).

305. *Harris*, 446 U.S. at 651.

306. *Id.* The United States General Accounting Office also confirmed the applicability of the Territorial Clause. U.S. GAO REPORT, *supra* note 15, at 29.

307. 505 F. Supp. 533 (P.R. Dec. 1980).

308. *Id.* at 544. "The source of such congressional authority has been recently clarified by the Supreme Court of the United States in *Harris v. Santiago Rosario*, 446 U.S. 651 (1980) . . ." *Id.*

309. 505 F. Supp. at 533.

310. 505 F. Supp. at 544. "It is thus settled that, regardless of the nature of the particular relationship between Puerto Rico and the United States, the Territorial Clause is a source of congressional power over the island." *Id.*

311. *Id.* at 545. The Commerce Clause of the U.S. Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

312. 505 F. Supp. at 545. The court held that

in the absence of clear congressional acquiescence to the contrary, Puerto Rico is constrained by the prohibitory implications of the Commerce Clause as construed by the Supreme Court of the United States. This, however, does not mean that the Commerce Clause applies to Puerto Rico *ex proprio vigore*, but that its prohibitive effect is binding on the Commonwealth through the

highlight the general disparity prevalent in treatment between United States stateside citizens and United States citizens residing in Puerto Rico.<sup>313</sup>

Recently, in *United States v. Sánchez*,<sup>314</sup> the U.S. Court of Appeals for the Eleventh Circuit affirmed that Puerto Rico was subject to the Territorial Clause.<sup>315</sup> As a result, Puerto Rico was still constitutionally a territory, and not a separate sovereign for purposes of the Double Jeopardy clause.<sup>316</sup> In *Sánchez*, the defendants were indicted in the Southern District of Florida following their acquittal in the Superior Court of Puerto Rico.<sup>317</sup> The defendants had been charged with attempted murder in Puerto Rico and contended that to charge them with the transport of explosives with intent to injure or kill in Florida violated the Double Jeopardy clause of the Fifth Amendment.<sup>318</sup> In determining whether these successive prosecutions violated the Fifth Amendment, the court reasoned that prosecutions for the same unlawful act would not violate the Fifth Amendment when the prosecutions were brought under the laws of separate sovereigns.<sup>319</sup> States are separate sovereigns with respect to the fed-

Territorial Clause, Art. IV, s 3, cl. 2 as an implied corollary of congressional commerce powers thereunder.

*Id.* (footnotes omitted).

313. See e.g., TORRUELLA, *supra* note 35, at 268 (discussing disparate treatment of Puerto Rico); Helfeld, First Circuit Address *supra* note 181, at 454-56 (discussing dichotomy of fundamental versus non-fundamental rights, lack of uniformity in taxation and denial of right to trial by jury); U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 26-28 (statement of Kenneth McClintok Hernández) (discussing disparate voting rights of Puerto Ricans and Puerto Rico's colonial status); see also G.A. Res. 742, *supra* note 23, Annex, pt. 3, § (B)(3), at 22.

314. 992 F.2d 1143 (11th Cir. 1993).

315. *Id.* at 1151-52. The court stated that:

[w]ith each new organic act, first the Foraker Act in 1900, then the Jones Act in 1917, and then the Federal Relations Act in 1950 and later amendments, Congress has simply delegated more authority to Puerto Rico over local matters. But this has not changed in any way Puerto Rico's constitutional status as a territory, or the source of power over Puerto Rico. Congress continues to be the ultimate source of power pursuant to the Territory Clause of the Constitution.

*Id.* at 1152.

316. *Id.* at 1151-52. The court stated that "Puerto Rico is still constitutionally a territory, and not a separate sovereign." *Id.* The Double Jeopardy Clause of the 5th Amendment to the U.S. Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

317. *Sanchez*, 992 F.2d at 1145.

318. *Id.* at 1148; see *supra* note 316 (discussing Double Jeopardy Clause).

319. *Id.* at 1148. The court stated that "[w]hile the exact scope of this clause has

eral government because each state derives its power to prosecute from its own inherent sovereignty.<sup>320</sup> By contrast, prosecutions in territorial courts are not protected by the dual sovereignty doctrine.<sup>321</sup> The court concluded that the development of the Commonwealth of Puerto Rico did not give its judicial tribunals a source of punitive authority which is independent of the U.S. Congress.<sup>322</sup> The court further stressed that the tribunals' power does not derive from an inherent sovereign.<sup>323</sup> Accordingly, the court maintained that Puerto Rico was still a constitutional territory subject to the U.S. Congress' ultimate control, pursuant to the Territorial Clause.<sup>324</sup> The court also stated that, pursuant to its Territorial Clause authority, the U.S. Congress may unilaterally repeal the Puerto Rican Constitution

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resisted repeated efforts at definition, it is at least well established that successive prosecutions for the same unlawful act will not offend the Constitution when they are brought under the laws of separate sovereigns." *Id.*

320. *Id.* at 1149. The court stated that "states are separate sovereigns with respect to the federal government because each state's power to prosecute is derived from its own 'inherent sovereignty,' not from the federal government." *Id.*

321. *Id.* at 1150. The court held that:

The Shell Court clearly found the dual sovereignty doctrine inapplicable to prosecutions in the courts of United States territories. This view is supported by Article IV of the Constitution which mandates that "[t]he Congress shall have [P]ower to dispose of and make all needful [R]ules and Regulations respecting the [T]erritory or other [P]roperty belonging to the United States." U.S. CONST. art. IV, [§ 3 ¶ 2]. Punitive authority in a territory of the United States flows directly from this plenary power. Every exercise of authority in a territory which does not proceed under a direct Congressional enactment proceeds, at least, at the sufferance of the Congress, which may override disfavored rules or institutions at will. The United States Congress is the source of prosecutorial authority for both the courts of United States territories and the federal district courts. Therefore . . . prosecutions in territorial courts are not protected by the dual sovereignty doctrine from application of the Double Jeopardy Clause.

*Id.* (footnote omitted).

322. *Id.* at 1152-53. The court stated that "[t]he development of the Commonwealth of Puerto Rico has not given its judicial tribunals a source of punitive authority which is independent of the United States Congress and derived from an 'inherent sovereignty.'" *Id.* at 1152.

323. *Id.*

324. *Id.* at 1152-53; see *supra* note 9 and accompanying text (discussing Territorial Clause). The *Sánchez* court found, however, that the conduct for which the defendant was prosecuted in Puerto Rico differed from the conduct prosecuted in Florida. 992 F.2d. at 1158. Thus, the prosecution of two different unlawful acts did not violate the Double Jeopardy Clause and the appellant's conviction was affirmed. *Id.*

or the Puerto Rican Federal Relations Act<sup>325</sup> and replace them with any rules or regulations of its choice.<sup>326</sup>

b. Unilateral Congressional Changes to the Federal Relations Act Demonstrate That the Compact is Not Bilateral

Some authors maintain that unilateral congressional changes in the Federal Relations Act<sup>327</sup> also evidence the lack of a bilateral pact.<sup>328</sup> In 1966 and 1970, the U.S. Congress unilaterally changed the scope of the jurisdiction of the Federal District Court of Puerto Rico and the tenure of its judges.<sup>329</sup> In 1984, the U.S. Congress unilaterally provided that the United States would not return tax receipts in excess of U.S.\$10.50 per gallon on rum entering the United States.<sup>330</sup> Prior to 1984, the entire

325. See *supra* note 186 and accompanying text (discussing Federal Relations Act). The court stated that:

Congress may unilaterally repeal the Puerto Rican Constitution or the Puerto Rican Federal Relations Act and replace them with any rules or regulations of its choice. Despite passage of the Federal Relations Act and the Puerto Rican Constitution, Puerto Rican courts continue to derive their authority to punish from the United States Congress and prosecutions in Puerto Rican courts do not fall within the dual sovereignty exception to the Double Jeopardy Clause.

992 F.2d at 1153.

326. 992 F.2d at 1152-53. The *Sánchez* decision involves a clash between two federal appeals courts over the degree of autonomy possessed by the Commonwealth of Puerto Rico. See *United States v. Quiñonez*, 758 F.2d 40, 42 (1st Cir. 1985) (discussing Puerto Rico as autonomous political entity and upholding bilateral pact); *United States v. Sánchez*, 992 F.2d 1143, 1152-53 (11th Cir. 1993) (discussing Puerto Rico as territory subject to U.S. Congress' plenary power). The 1st Circuit has held that Puerto Rico ceased being a territory subject to the plenary powers of U.S. Congress upon adoption of the compact. *Quiñonez*, 758 F.2d at 40. The 11th Circuit, however, concluded that Puerto Rico was a territory subject to the plenary power of U.S. Congress. *Sánchez*, 992 F.2d at 1143. The Supreme Court refused to hear an appeal from the *Sánchez* decision, frustrating efforts to determine whether Puerto Rico should still be considered a territory. Robert Friedman, *Top court refuses to weigh Puerto Rico status*, *SAN JUAN STAR*, Feb. 23, 1994, at 6 [hereinafter Friedman, *Top Court*].

327. See *supra* note 186 and accompanying text (discussing Federal Relations Act).

328. Helfeld, First Circuit Address, *supra* note 181, at 463-68; TORRUELLA, *supra* note 35, at 193.

329. Act of June 2, 1970, Pub. L. No. 91-272, 84 Stat. 294 (1970); Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (1966). In 1970, the U.S. Congress eliminated additional diversity jurisdiction created under Section 41 of the Jones Act for the Federal District Court of Puerto Rico. Act of June 2, 1970, 84 Stat. at 298. In 1966, the U.S. Congress provided life tenure for judges of the Federal District Court for the District of Puerto Rico. Act of Sept. 12, 1966, 80 Stat. at 764; Leibowitz, *supra* note 14, at 30-31 (discussing unilateral U.S. Congressional changes to Federal Relations Act).

330. Deficit Reduction Act of 1984, H.R. 4170, 98th Cong. 2d Sess., 711-13, 1418-20 (1984). Prior to 1984, all receipts on the federal tax on rum, minus administrative costs, were returned to Puerto Rico. *Id.* Non-voting member of U.S. Congress Ron de

tax receipts on rum were returned to Puerto Rico under Section 9 of the Federal Relations Act.<sup>331</sup> Commentators reason that should a plaintiff challenge these amendments, claiming that the U.S. Congress violated the terms of the Federal Relations Act, the Supreme Court<sup>332</sup> would reject the suit.<sup>333</sup>

c. The U.S. Has Not Complied With Its Promises to Allow Puerto Rico to Change its Status

Some argue that the U.S. Congress' failure to follow through on its commitment before the United Nations in General Assembly Resolution 748 violates Resolution 1541.<sup>334</sup> In 1953, U.S. President Dwight D. Eisenhower, in a speech before the United Nations, recommended that the U.S. Congress grant Puerto Rico complete or absolute independence in accord with the wishes of the people of Puerto Rico.<sup>335</sup> Article 9 of Resolution 748 highlights the U.S. promise to permit a change in the status of Puerto Rico.<sup>336</sup> Resolution 748 provides that if either of the parties desires change to the terms of the association, due regard will be paid to either party's desires.<sup>337</sup> The U.S. reiter-

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Lugo acknowledged violation of a Commonwealth commitment to return all taxes collected. *Proposed Legislation*, *supra* note 16, pt. I, at 28 (statement of Ron de Lugo, Representative from U.S. Virgin Islands); Leibowitz, *supra* note 14, at 30-31 (discussing unilateral U.S. Congressional changes to Federal Relations Act).

331. Helfeld, First Circuit Address, *supra* note 181, at 466. Section 9 of the Federal Relations Act specifically provides that "taxes collected . . . on articles produced in Puerto Rico and transported to the United States . . . shall be covered into the Treasury of Puerto Rico." *Id.*

332. See *Harris v. Rosario*, 446 U.S. 651 (1980) (discussing U.S. Congress' power to treat residents of Puerto Rico differently than residents of states under Territorial Clause).

333. Helfeld, First Circuit Address, *supra* note 181, at 465-67.

334. See *Proposed Legislation*, *supra* note 16, pt. I, at 5 (statement of former Resident Commissioner Jaime Fuster) (discussing U.S. Congress' duty to allow Puerto Rico to change its status); *supra* note 23 and accompanying text (discussing G.A. Res. 1541); see *supra* note 20 and accompanying text (discussing G.A. Res. 748).

335. See *Proposed Legislation*, *supra* note 16, pt. I, at 5-6 (statement of former Resident Commissioner Jaime Fuster) (discussing U.S. Congress' duty to allow change to Puerto Rico's status citing President Eisenhower's speech before the U.N. in 1953). Mr. Fuster quoted former President Eisenhower as stating:

due regard will be paid to the will of both the Puerto Rican and American peoples . . . in the eventuality that either of the parties to the mutually agreed association may desire any change in the terms of this association.

*Id.* at 6.

336. G.A. Res. 748, *supra* note 20, art. IX, at 26.

337. *Id.*

ated Eisenhower's promise in a concurrent resolution prepared by the U.S. Senate and House of Representatives in 1979.<sup>338</sup> The U.S. Congress maintained its commitment to support Puerto Rico's wish to determine its own political future and change its relationship with the United States through open and democratic processes.<sup>339</sup> Authors contend that the U.S. Congress' failure thus far to grant a binding referendum on the status of the island fails to uphold Principle VII(a)(3) of Resolution 1541<sup>340</sup> because it prevents Puerto Rico from modifying its own status.<sup>341</sup>

d. Critics of the U.S. Congress are More Vocal in Light of U.S. Inaction With Regard to Puerto Rico

Recent commentators are more vocal in their disapproval of the U.S. Congress' failure to allow changes to Puerto Rico's status.<sup>342</sup> In November 1990,<sup>343</sup> a newspaper criticized the U.S. Congress for failing to execute its promise to allow a binding plebiscite.<sup>344</sup> The commentator emphasized the congressional hypocrisy regarding Puerto Rico, in light of the U.S. Congress' calls for self-determination in the Baltics and South Africa.<sup>345</sup>

338. S. Con. Res. 35, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S 11,371 (daily ed. Aug. 2, 1979).

339. *Id.*

340. G.A. Res. 1541, *supra* note 23, princ. VII(a)(3); *see supra* note 23 and accompanying text (discussing G.A. Res. 1541).

341. *See e.g.*, U.N. Doc. A/AC.109/PV. 1390, *supra* note 17, at 26-28 (statement of Kenneth McClintok Hernández) (discussing U.S. Congress' failure to allow Puerto Rico to alter its status); *Proposed Legislation*, *supra* note 16, pt. I, at 5 (statement of Jaime Fuster).

342. U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 34 (statement of Ambassador Diego Arria) (discussing United States treatment of Puerto Rico); *see* Van Dyke, *supra* note 15, at 515-16 (maintaining that inconsistent control by U.S. Congress cannot be allowed to exist indefinitely).

343. *Pallid Promises to Puerto Rico*, N.Y. TIMES, Nov. 6, 1990, at A22.

344. *Id.*

345. *Id.* A congressional decision on a Puerto Rican plebiscite is a serious matter, but no vote is possible unless Congress deals with it seriously. Two years of dithering produced two very different Senate and House plebiscite measures that were left in the lurch when Congress adjourned. These are the same lawmakers who can always find time to lecture the rest of the world on the need for self-determination in the Baltic republics or in South Africa. . . . Mainlanders have a duty to speak out for America's Caribbean stepchild. . . . Congress has a poor record of respecting the wishes of Puerto Ricans, [b]ut nothing can be done until Congress acts honorably and responsibly, in behalf of its voteless and voiceless wards.

*Id.*

Senator Daniel Patrick Moynihan [D-NY] echoed this condemnation of the U.S. Congress' failure to take action with regard to Puerto Rico.<sup>346</sup> Senator Moynihan condemned the Senate's block of the Puerto Rican plebiscite as a shameful act of consent by silence, denying a right which was previously held out to Puerto Ricans as inalienable.<sup>347</sup>

e. Disparate Voting Rights and Lack of Representation in the U.S. Congress Highlight the Need to Alter Puerto Rico's Status

Critics of Puerto Rico's status cite disparate voting rights and Puerto Rico's lack of representation in the U.S. Congress in order to further demonstrate the unequal treatment of Puerto Rican citizens compared with stateside United States citizens.<sup>348</sup> Residents of Puerto Rico may not vote in federal elections.<sup>349</sup> Although Puerto Rico residents participate in the nomination process for presidential elections, they do not vote in presidential elections.<sup>350</sup> Furthermore, Puerto Rico is allowed to elect only a Resident Commissioner to the House of Representatives for a four-year term.<sup>351</sup> Although allowed to vote in committee, the Resident Commissioner cannot vote when the full House votes.<sup>352</sup> Commentators argue that as long as the U.S. Congress has plenary authority to govern Puerto Rico, pursuant to the Territorial Clause, the Commissioner's inability to vote in U.S. federal elections amounts to governance without representa-

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346. U.N. Doc. A/AC.109/PV.1390, *supra* note 17, at 39 (Ambassador Diego Arria quoting Senator Moynihan [D-N.Y.]).

347. *Id.*

The decision of the Senate Committee to block the Puerto Rican plebiscite was the most shameful, negative exhibition I have seen in 15 years in the Senate . . . . To deny Puerto Rico that right [of self-determination] would be disastrous and would compromise the honor of the Congress. Silence gives Consent. Our silence would mean that we agree to the denial of a right which we have said for decades is inalienably possessed by the citizens of Puerto Rico.

*Id.*

348. U.S. GAO REPORT, *supra* note 15, at 5, 7; Helfeld, *The Constitutional and Legal Feasibility of the Presidential Vote for Puerto Rico*, prepared for the AdHoc Advisory Group on the Presidential Vote for Puerto Rico (1971); see *Proposed Legislation*, *supra* note 16, pt. I, at 33 (statement of Luis A. Ferré) (discussing disparate voting rights).

349. Dumas, *Practice Makes PR A Force*, *supra* note 269, at 4074.

350. U.S. GAO REPORT, *supra* note 15, at 7.

351. *Id.*

352. *Id.*

tion.<sup>353</sup>

### III. *THE U.S. CONGRESS SHOULD ENACT LEGISLATION ALLOWING PUERTO RICO TO HOLD A BINDING REFERENDUM TO MODIFY ITS STATUS*

At present, both the U.S. Congress and U.S. courts treat Puerto Rico's legal status inconsistently.<sup>354</sup> Furthermore, all of the leading political parties in Puerto Rico have called for a modification to the current Commonwealth status.<sup>355</sup> Because the Territorial Clause provides the U.S. Congress with plenary power over Puerto Rico,<sup>356</sup> Congress should modify Puerto Rico's current status by enacting legislation that would permit a binding plebiscite. Such a plebiscite would allow Puerto Rico to determine its status definitively through informed choice.<sup>357</sup>

#### A. *The Discrepancy in U.S. Congressional and Judicial Treatment of Puerto Rico*

The United States failed to observe its commitment to allow Puerto Rico to become a self-governing territory in accordance with Resolutions 742 and 1541.<sup>358</sup> Although the U.S. Congress provided for some degree of self-governance through Public Laws 600 and 447,<sup>359</sup> Congress failed to specify the parameters governing the relationship between the United States and Pu-

353. Helfeld, *supra* note 348; *Proposed Legislation*, *supra* note 16, pt. I, at 33 (statement of Luis A. Ferré; Van Dyke, *supra* note 15, at 469-71 (discussing governance without representation).

354. *See supra* note 330 and accompanying text (discussing Section 9 of Federal Relations Act and U.S. Congress' unilateral decision to keep all taxes on rum over U.S. \$10.50 per gallon); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 672-74 (1974) (treating Puerto Rico as state); *cf. Harris v. Rosario*, 446 U.S. 651 (1980) (reaffirming U.S. Congress power to treat Puerto Rico residents differently than those of States through Territorial Clause).

355. *See supra* note 16 and accompanying text (discussing political parties in Puerto Rico and their platforms).

356. *Harris v. Rosario*, 446 U.S. 651 (1980); *Califano v. Torres*, 435 U.S. 1 (1978).

357. G.A. Res. 1541, *supra* note 23, princ. VII, at 29-30 (discussing choice of status through informed and democratic processes).

358. *See supra* notes 112-21 and accompanying text (discussing adoption of Public Laws 600 and 447). The requirements of a free associated territory discussed in Resolution 742 were further clarified in Resolution 1541. G.A. Res 1541, *supra* note 23.

359. *See supra* notes 112-21 and accompanying text (discussing adoption of Public Laws 600 and 447).

erto Rico.<sup>360</sup> As a result, U.S. court interpretations and U.S. legislation are inconsistent in their treatment of the relationship between Puerto Rico and the United States.<sup>361</sup> In some instances, U.S. courts and the U.S. Congress treat the Commonwealth of Puerto Rico as a state. In others, they treat the Commonwealth as a territory.<sup>362</sup>

The people of Puerto Rico have clearly expressed a desire to change the status of the island.<sup>363</sup> The recent 1989-91 congressional hearings<sup>364</sup> and the 1993 plebiscite<sup>365</sup> evidence this call for change. Furthermore, all three of the major political parties have called for change.<sup>366</sup> The PNP wants statehood, the PIP seeks independence, and the PPD calls for an *enhanced* Commonwealth status.<sup>367</sup> In fact, the original intent of former Governor Muñoz-Marín, founder of the PPD,<sup>368</sup> was that Commonwealth status would be temporary.<sup>369</sup>

The U.S. Congress has denied all requests for change in Pu-

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360. See *supra* notes 277-82 and accompanying text (discussing ambiguous phrase "in the nature of a compact").

361. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672-74 (1974) (treating Puerto Rico as a State); cf. *Harris v. Rosario*, 446 U.S. 651 (1980) (reaffirming U.S. Congress' power to treat Puerto Rico residents differently than those of States through Territorial Clause); see also Moscoso, *PR's ambivalent status*, *supra* note 181, at 34 (discussing unsettled status of Puerto Rico).

362. See *Calero-Toledo*, 416 U.S. at 672-74 (treating Puerto Rico as a State); cf. *Harris*, 446 U.S. at 651 (maintaining U.S. Congress' power to treat residents of Puerto Rico differently than those of U.S. states); see also Moscoso, *PR's ambivalent status*, *supra* note 181; Leibowitz, *supra* note 14, at 12-13 (discussing unsettled status of Puerto Rico).

363. *Proposed Legislation*, *supra* note 16; Donovan, *Senate Gives OK*, *supra* note 129, at 2152. Thus, even the PPD, the party of Muñoz-Marín, which is responsible for the island's current Commonwealth status, is not satisfied with the constitutional arrangements presently in effect. Cabranes, *First Circuit Address*, *supra* note 13, at 482-83.

364. See *supra* notes 127-32 and accompanying text (discussing 1989-91 congressional hearings on status of Puerto Rico).

365. See *supra* notes 133-36 and accompanying text (discussing 1993 status plebiscite).

366. Donovan, *Senate Gives OK*, *supra* note 129; see *supra* note 16 (discussing three main political parties in Puerto Rico).

367. Donovan, *Senate Gives OK*, *supra* note 129.

368. See *supra* note 272 and accompanying text (discussing role of Muñoz-Marín in Puerto Rico politics).

369. TORRUELLA, *supra* note 35, at 144. In a speech on July 4, 1948 Muñoz-Marín emphasized that the Commonwealth status under consideration would be transitional until such time as economic conditions permitted either independence or statehood. *Id.*; see Guillermo Moscoso, *Destiny should not be overlooked*, *SAN JUAN STAR*, Apr. 8, 1991, at 16 [hereinafter Moscoso, *Destiny Should Not Be Overlooked*].

erto Rico's current political status.<sup>370</sup> In 1967, there was an overwhelming vote in Puerto Rico for enhanced commonwealth status, yet the U.S. Congress ignored Puerto Ricans' vote for change.<sup>371</sup> More recently, in the 1989-91 congressional hearings, proposals for a binding referendum failed.<sup>372</sup> Senate Bill 712 offered the people of Puerto Rico the opportunity to vote on the status of the island with actual knowledge of the provisions of each choice.<sup>373</sup> Furthermore, Senate Bill 712, a "self-executing" bill,<sup>374</sup> would have finally committed the U.S. government to specific plans for implementation of each option.<sup>375</sup> Although the House passed a bill, the Senate rejected it.<sup>376</sup> The U.S. Senate bill would have established detailed provisions for implementing the three status choices: statehood, independence, and enhanced commonwealth.<sup>377</sup>

Most recently, in the 1993 plebiscite, Puerto Ricans once again called for a change in their status.<sup>378</sup> However, this plebi-

370. U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 37-40 (statement of Mr. Diego Arria); *see* Cabranes, *supra* note 13, at 483-84.

371. *Proposed Legislation*, pt. I, *supra* note 16, at 22 (statement of Rafael Hernández Colon); *Puerto Rico Vote Strongly Favors A Commonwealth*, N.Y. TIMES, July 24, 1967, at 1. The vote was greater than 60% for enhanced commonwealth. *Id.* *See also*, Leibowitz, *supra*, note 14, at 30-31 n.119 (discussing '67 Plebiscite and vote for enhanced Commonwealth).

372. Dumas, *Referendum Bill Appears Dead*, *supra* note 132 at 538; Kitty Dumas, *Fading Support, Lack of Time May Hinder Status Bills*, 49 CONG. Q. WKLY. REP. 243 (1991) [hereinafter *Dumas, Fading Support, Lack of Time*]; Dumas, *Practice Makes Puerto Rico A Force*, *supra* note 269, at 4074; Dumas, *House Passes PR Bill*, *supra* note 131, at 3413; Kitty Dumas, *House Interior Approves Bill To Give Puerto Rico Choice*, 48 CONG. Q. WKLY. REP. 3009 (1990) [hereinafter *Dumas, House Interior Approves*]; Kitty Dumas, *Measure on Puerto Rico's Status Hits Snags in Both Chambers*, 48 CONG. Q. WKLY. REP. 2506 (1990) [hereinafter *Dumas, Measure on PR's Status*]; Beth Donovan, *Potential Cost of Statehood Far Exceeds Other Options*, 47 CONG. Q. WKLY. REP. 3452 (1989) [hereinafter *Donovan, Potential Cost of Statehood*]; Donovan, *Senate Committee Gives OK*, *supra* note 129, at 2152; Beth Donovan, *Puerto Rico Referendum OK'd Amid Charges of 'Slant'*, 47 CONG. Q. WKLY. REP. 2024 (1989) [hereinafter *Donovan, PR Referendum OK'd*]; Beth Donovan, *Senators Debate Cost to U.S. Of Puerto Rican Statehood*, 47 CONG. Q. WKLY. REP. 1955 (1989) [hereinafter *Donovan, Senate Debates Cost to US*]; Donovan, *Age Old Status Question*, *supra* note 4, at 1759.

373. Donovan, *Senate Debates Cost to US*, *supra* note 372, 1955; *see supra* note 127-32 and accompanying text (discussing 1989-91 failed congressional hearings to propose political status referendum).

374. *See supra* note 3 (discussing nature of self-executing legislation).

375. Donovan, *Age Old Status Question*, *supra* note 4, at 1759.

376. Dumas, *Referendum Bill Appears Dead*, *supra* note 132, at 538.

377. Donovan, *Age Old Status Question*, *supra* note 4, at 1759.

378. Padilla, *supra* note 1, at 31; Rohter, *3 Ex-Presidents*, *supra* note 134, at 8; Rohter, *P.R. Votes*, *supra* note 1, at A1.

scite was non-binding.<sup>379</sup> Despite the fact that none of the 1993 plebiscite options garnered a clear majority,<sup>380</sup> the plurality vote presents some important points for U.S. congressional action. First, the commonwealth option, which won by a 2% margin, called for modification to Puerto Rico's current commonwealth government.<sup>381</sup> The statehood option, which obtained 46% percent of the votes, also called for change to the current status.<sup>382</sup> Accordingly, a great majority of Puerto Ricans<sup>383</sup> reject the present status.<sup>384</sup> In addition, the majority of Puerto Ricans have opted for a status that calls for a permanent union with the United States either as a state or as an "enhanced" commonwealth.<sup>385</sup>

President Bill Clinton's response to the plebiscite results was to direct the formation of an Inter-Agency Working Group to study the 1993 plebiscite proposals and results.<sup>386</sup> Although President Clinton's administration is aware that the PPD<sup>387</sup> seeks to enhance the current commonwealth relationship between Puerto Rico and the United States, the President has not commented on the possibility of enhancement.<sup>388</sup> Despite calls from a majority of the people in Puerto Rico to change the current status,<sup>389</sup> the United States has thus far declined to enable change. This reluctance to modify the current U.S.-Puerto Rico

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379. Padilla, *supra* note 1, at 31 (discussing non-binding nature of plebiscite and fact that this was not really plebiscite); *see supra* note 3 and accompanying text (discussing nature of plebiscite); *supra* notes 133-36 and accompanying text (discussing 1993 plebiscite purpose and results).

380. Matos, *supra* note 1, at 3. The Commonwealth option received 48% of votes, the Statehood option 46%, and the Independence option 4%. *Id.*

381. Robert Friedman, *Clinton supports Puerto Rico plebiscite results*, SAN JUAN STAR, Nov. 16, 1993, at 4. Among the changes proposed were: restoration of 936 tax program cuts, extension of Supplemental Security Insurance, and protection of island agricultural products through federal tariffs. *Id.*

382. *See supra* note 136 and accompanying text (discussing results of Nov. 14 plebiscite).

383. Garcia, *Final plebiscite results*, *supra* note 136, at 12. Of the 2.3 million registered voters, 1.7 million ballots were cast. *Id.* Therefore, 73.5% voters participated. *Id.*

384. Juan M. Garcia Passalacqua, *Presenting plebiscite results to Congress*, SAN JUAN STAR, Jan. 21, 1994, at 33; Guillermo Moscoso, *Analyst way off mark*, SAN JUAN STAR, Dec. 11, 1993, at 33 [hereinafter Moscoso, *Analyst Way Off*].

385. Moscoso, *Analyst way off*, *supra* note 384, at 33.

386. Letter from Marcia Hale to Ron de Lugo, *supra* note 137, at 2.

387. *See supra* note 16 (discussing political parties in Puerto Rico).

388. Friedman, *Clinton supports P.R. plebiscite results*, *supra* note 381, at 4.

389. *See supra* notes 125-42 and accompanying text (discussing 1967 plebiscite, 1989-91 congressional hearings, and 1993 plebiscite).

relationship is contrary to Principle VII of Resolution 1541.<sup>390</sup>

Current U.S. treatment of Puerto Rico fails to comply with the non-reporting requirements of Resolution 748, as detailed in Resolutions 742 and 1541.<sup>391</sup> The plenary power granted to the U.S. Congress through the Territorial Clause<sup>392</sup> continues to allow discriminatory treatment of Puerto Rico, as evidenced by federal judicial decisions<sup>393</sup> and unilateral changes to the compact.<sup>394</sup> This unequal treatment does not comply with Resolution 742, which qualifies a territory as self-governing if it achieves this status on a basis of absolute equality with the citizens of the central authority.<sup>395</sup>

The U.S. Congress has insisted that all changes to the Puerto Rico Constitution conform with the U.S. Constitution, Public Laws 600 and 447,<sup>396</sup> and the Federal Relations Act.<sup>397</sup> This requirement has ensured the continuance of the U.S. Congress' plenary authority with respect to Puerto Rico by controlling all changes to the Puerto Rico Constitution.<sup>398</sup> This failure to allow Puerto Rico to change its status does not comply with Principle VII of Resolution 1541, which maintains that a territory should be free to modify its status.<sup>399</sup>

390. G.A. Res. 1541, *supra* note 23, princ. VII, at 29-30.

391. *See supra* notes 148-72 and accompanying text (discussing terms of Resolutions 742 and 1541).

392. *Harris v. Rosario*, 446 U.S. 651 (1980) (noting continued application of Territorial Clause); *Califano v. Torres*, 435 U.S. 1, 3 n.4 (1978) (noting continued application of Territorial Clause); U.S. GAO REPORT, *supra* note 15, at 29.

393. *Harris*, 446 U.S. at 651 (failing to extend AFDC program on equal basis to residents of Puerto Rico); *Califano*, 435 U.S. at 1 (failing to extend SSI benefits to Puerto Rico on an equal basis); *United States v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993) (stating that Congress, through Territorial Clause may treat Puerto Rico differently); *Sea-Land Serv., Inc. v. Mun. of San Juan*, 505 F. Supp. 533 (P.R. Dec. 1980) (maintaining that Commerce Clause is binding on Puerto Rico through Territorial Clause).

394. *See supra* notes 327-33 and accompanying text (discussing unilateral changes to Federal Relations Act).

395. *See* G.A. Res. 742, *supra* note 23, Annex, ¶¶ A(6), B(3), at 22 (maintaining that territories achieving self-government through free association must do so on basis of absolute equality).

396. *See supra* notes 112-21 and accompanying text (discussing enactment of Public Laws 600 and 447).

397. *CARR*, *supra* note 11, at 79-80.

398. *See supra* notes 207-12, 274-76 and accompanying text (discussing manner in which Puerto Rico Constitution can be changed).

399. G.A. Res. 1541, *supra* note 23, Annex, princ. VII, at 29-30 (maintaining that territories achieving self-government through free association should be free to modify their status).

### B. *Resolving the Discrepancy*

Both the U.S. Congress and the U.S. judiciary have failed to protect the rights of Puerto Rico residents under the "compact" governing the present status.<sup>400</sup> Continued disparate treatment of Puerto Rico creates a negative precedent<sup>401</sup> for further self-determination efforts. The U.S. treatment of Puerto Rico is particularly disturbing in light of U.S. foreign policy that encourages self-determination and seeks to eradicate colonialism.<sup>402</sup> The United States must remedy the situation in Puerto Rico to maintain the integrity of American democratic government and U.S. foreign policy. In the *Insular Cases*, the U.S. Supreme Court held that the doctrine of territorial incorporation provides the U.S. Congress with plenary authority to govern the U.S. insular areas.<sup>403</sup> Therefore, it is the U.S. Congress, and not the judiciary, that should provide the mechanism for the modification of Puerto Rico's status.

The U.S. Congress should enact legislation allowing for a binding plebiscite to allow residents of Puerto Rico to determine their status through informed choice.<sup>404</sup> The status choices should not be subject to the Territorial Clause or the plenary power of the U.S. Congress. The continued application of the Territorial Clause prevents Puerto Ricans from claiming all the constitutional guarantees offered by the U.S. Constitution<sup>405</sup> and allows the U.S. Congress to pass legislation that impacts Puerto Rico without the participation of members from Puerto Rico.<sup>406</sup> To comply with Principle VII of Resolution 1541, the U.S. Congress should put an end to Puerto Rico's quasi-colonial status and allow Puerto Ricans to choose freely their political status.<sup>407</sup>

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400. See *supra* notes 112-21 (discussing compact theory).

401. See *supra* note 22 and accompanying text (discussing Northern Mariana Islands).

402. U.N. Doc. A/AC.109/PV 1390, *supra* note 17, at 39 (statement of Mr. Diego Arria) (quoting statement of Senator Daniel Patrick Moynihan [D-N.Y.]).

403. See *supra* notes 41-78 and accompanying text (discussing *Insular Cases* and U.S. Congress' plenary power to govern territories under Territorial Clause); *supra* note 22 (discussing U.S. policy of decolonization).

404. G.A. Res. 1541, *supra* note 23, Annex, prin. VII, at 29-30 (discussing adoption of free association status through informed choice).

405. *Harris v. Rosario*, 446 U.S. 651 (1980); Del Valle, *supra* note 43, at 79-80.

406. See *supra* notes 348-53 and accompanying text (discussing Puerto Rico's inability to vote in federal elections and lack of a voting representative in U.S. Congress).

407. See G.A. Res. 1541, *supra* note 23, Annex, princ. VII, at 29-30.

The U.S. Congress should not subject residents of Puerto Rico to treatment different from that afforded to other U.S. citizens. General Assembly Resolution 742 calls for equal extension to the associated territory of constitutional guarantees of the central authority and citizenship on the same basis as other inhabitants of the central authority.<sup>408</sup> By treating residents of Puerto Rico differently from stateside U.S. citizens, Congress has failed to abide by the mandates of Resolution 742.<sup>409</sup>

The U.S. Congress should pass legislation that calls for a binding referendum with clearly delineated status choices. Without a commitment on the provisions of each option, Congress will once again unjustifiably ask Puerto Ricans to vote on a series of hypothetical options that result in a "bilateral compact" that is not clearly defined.<sup>410</sup> By contrast, a self-executing bill that narrowly defines descriptions of each status option will allow the people of Puerto Rico to modify their status in a manner that is not subject to later congressional amendment.<sup>411</sup>

Despite the lessons learned from the November 14, 1993 results, this plebiscite was not a valid method to determine the Puerto Rican people's choice regarding their future relationship with the United States. The ballots in the November plebiscite only consisted of representative geometric symbols.<sup>412</sup> This poll did not provide the electorate with full knowledge of their choices, as mandated by Resolution 1541, for a change in a territory's status.<sup>413</sup>

The binding plebiscite should list the three status options approved by Resolutions 742<sup>414</sup> and 1541<sup>415</sup> with a detailed description of the independence option, the statehood option, and the enhanced commonwealth/ELA option.<sup>416</sup> The U.S. Con-

408. G.A. Res. 742, *supra* note 23, Annex, pt. III, ¶ 6, at 23.

409. *Id.*

410. *See supra* notes 260-82 and accompanying text (discussing ambiguity of bilateral compact).

411. *See supra* note 260 and accompanying text (discussing unilateral changes to Puerto Rico Constitution).

412. *Salsa With Fries*, *supra* note 1, at 28-29.

413. *See* G.A. Res. 1541, *supra* note 23, Annex, princ. VII, at 29-30 (discussing Principle VII's mandate for voluntary and informed choice).

414. *See* G.A. Res. 742, *supra* note 23, Annex, at 22-23 (listing three status options).

415. *See* G.A. Res. 1541, *supra* note 23, Annex, at 29-30 (listing three status options).

416. *See supra* note 134 (discussing 1993 provisions for enhanced commonwealth status); Donovan, *Senate Gives OK*, *supra* note 129 (discussing 1990 provisions for en-

gress and the Puerto Rico Legislature should submit the details for each status option to discussion and revision prior to the referendum. In this manner the voters' will base their choice on actual knowledge, allowing for a truly bilateral process.

### C. *Difficulties in Implementing a Binding Plebiscite*

A binding plebiscite that narrowly defines each status option and removes Congress' plenary power under the Territorial Clause<sup>417</sup> is the most viable solution to the present non-compliance of the U.S.-Puerto Rico relationship with the mandates of Resolutions 742 and 1541.<sup>418</sup> Nevertheless, implementing these changes will present a number of difficulties. First, there is no voting representative in Congress to bring about this change.<sup>419</sup> Without a vote, Puerto Rico's Resident Commissioner in the U.S. Congress must rely on members of Congress from the fifty states of the U.S. to advocate Puerto Rico's cause.<sup>420</sup> Despite the hurdles presented by the lack of federal representation, Puerto Rico has been able to put its status on the political agenda in the past, as it did in the 1989-91 hearings. Puerto Rico has overcome its lack of representation by employing a number of powerful Washington law firms to lobby for its cause.<sup>421</sup> Residents of Puerto Rico, representing various interests, have also participated in hearings conducted by the United Nations to discuss the validity of the current status of Puerto Rico.<sup>422</sup> Thus, political lobbying coupled with pressure from the international community has

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hanced commonwealth). The PPD does not propose to continue the current ELA but instead calls for Enhanced ELA. *Id.* The 1990 Senate Committee Provisions for the enhanced ELA included: 1) governor appointment of a Senate liaison; 2) expedited congressional procedures to consider requests by the Puerto Rican Governor to waive U.S. law if there is no overriding interest; 3) request of waivers from federal rules and regulations that do not take into account local conditions; 4) gubernatorial consultations in federal appointments to Puerto Rico; 5) local authority over foreign airline landing rights; 6) independent foreign trade agreements; 7) authority to restrict imports. *Id.*

417. See *supra* note 9 (discussing Territorial Clause).

418. See *supra* notes 148-72 and accompanying text (discussing mandates of Resolutions 742 and 1541).

419. See *supra* notes 348-53 and accompanying text (discussing Puerto Rico's lack of representation in Congress).

420. See Romero Barceló, *supra* note 219, at VI-V2 (discussing frustration of being disenfranchised as Puerto Rico's sole representative in Congress).

421. Dumas, *Practice Makes Puerto Rico a Force*, *supra* note 372, at 4077-78 (discussing lobbying efforts and firms employed to carry this out).

422. U.N. Doc. A/AC.109/PV.1390, *supra* note 17.

been used in the past and may be relied upon again to persuade the U.S. Congress to revisit the issue of Puerto Rico's status.

Another factor that will inhibit implementation of a binding referendum is the formation of a definition for enhanced commonwealth that satisfies both the P.P.D. and the U.S. Congress.<sup>423</sup> Some commentators have suggested that the commonwealth option is untenable due to its cost to the United States.<sup>424</sup> Furthermore, the commonwealth option may not be as easily defined as the statehood option, as it would entail a modification to the current status and require a compromise by both the PPD and the U.S. Congress. However, the 1989-91 congressional hearings arrived at an agreement for the provisions of an enhanced commonwealth.<sup>425</sup> An agreement is therefore attainable, as it has been reached in the past, and the resulting provisions may serve as the basis for a future enhanced commonwealth definition.

An additional aspect confronting this binding referendum is the lack of consensus in Puerto Rico regarding the island's choice of status.<sup>426</sup> Despite this lack of consensus, Congress is capable of drafting a self-executing bill that details the provisions for each status option. A binding plebiscite with sufficiently defined status options will serve two purposes. First, a detailed description of each status option will enable the Puerto Rico electorate to make an informed and decisive choice from the options presented. Second, the process of negotiating the terms for each option will inform the Puerto Rico electorate and encourage electoral participation, because voters will be making a real, not a hypothetical, choice.

Despite the difficulties in implementing a binding referendum, it is certainly within the reach of the parties involved. Furthermore, the United States has an obligation to permit Puerto

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423. Romero Barceló, *supra* note 219, at VI-V2 (stating that commonwealth is not financially viable); Dumas, *Measure on Puerto Rico's Status*, *supra* note 372 (discussing provisions for tax credits and matching funds); *see supra* note 16 (discussing three main political parties).

424. Romero Barceló, *supra* note 219, at VI-VII (stating that commonwealth is not financially viable); Dumas, *Measure on PR's Status*, *supra* note 372 (discussing provisions for tax credits and matching funds).

425. *See supra* note 416 (discussing 1990 enhanced commonwealth provisions).

426. Helfeld, *First Circuit Address*, *supra* note 181, at 473 (discussing lack of consensus as an impediment to change); Romero Barceló, *supra* note 219, at VI (discussing fact that no party won a clear majority in 1993 plebiscite).

Rico to implement a status option that is satisfactory to both the residents of Puerto Rico and the U.S. government. President Clinton, in directing the organization of an Inter-Agency Working Group on Puerto Rico,<sup>427</sup> has acknowledged both the complexities involved in the U.S.-Puerto Rico relationship and the obligation of the United States to act on the results of the 1993 plebiscite. Although the creation of the Inter-Agency Working Group allows for a dialogue between political leaders in Puerto Rico and the U.S. Government, this is merely a preliminary step. The U.S. Congress must continue to work to solve the current problems in the U.S.-Puerto Rico relationship, instead of merely staving off further public criticism by having the U.S. President name a committee to discuss and rediscuss a longstanding problem.<sup>428</sup>

### CONCLUSION

The U.S. Congress should revisit Puerto Rico's current Commonwealth status. The "compact" theory that purports to govern the relationship between Puerto Rico and the United States has failed to define this relationship clearly. The inappropriate classification of Puerto Rico as a self-governing territory has its origin in a combination of unclear drafting and political and judicial misinterpretation. The system implemented by the "compact" fails to protect the rights of the people of Puerto Rico as U.S. citizens. In order to allow Puerto Rico to be self-governing in compliance with the United Nations General Assembly Resolutions 742 and 1541, the U.S. Congress should enact a self-executing bill that allows for a binding plebiscite to determine the island's status. In short, the United States should comply with international law and eradicate colonialism within its own borders in the same manner it expects other nations to comply with its calls for self-determination and decolonization.

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427. See *supra* notes 137-39 and accompanying text (discussing creation of Inter-Agency Working Group).

428. Robert Friedman, *PDP gets its wish in new committee*, SAN JUAN STAR, Mar. 13, 1994, at VI-V2.

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