

Technology Theme Issue and
Governance Review Proposal
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The Top 10 Myths About Puerto Rico Statehood

On May 25, the Congressional Research Service issued a CRS Report for Congress entitled "Political Status of Puerto Rico: Background, Options, and Issues in the 109th Congress."¹ This report provides a useful starting point for those interested in appreciating Puerto Rico's plight as an American colony.

Puerto Rico's status can only be resolved through the convergence of the will of eligible voters in Puerto Rico, the 540 members of Congress, and the President of the United States. Impediments to that convergence include misunderstandings, half-truths, and myths about what statehood would mean to Puerto Rico and to the rest of the United States. Most of those myths exist in the minds of those residing in Puerto Rico and some in the minds of the rest of the U.S. citizenry. If sunlight is the best disinfectant, then let's shed some light on this lore by exposing these fables to the glare of the law and logic.

Myth No. 1: Puerto Rico is a "Commonwealth."

"Commonwealth" is a word used in the name of Puerto Rico's local government, as it is in the name of four states and one other U.S. territory. The term does not indicate Puerto Rico's political status. Puerto Rico is a territory under the U.S. Constitution, which provides only for states, territories, possessions, and a seat of the federal government and gives the federal government power to govern U.S. territories when it comes to local as well as national government matters.² In the so-called insular cases, the Supreme Court determined that some territories are "incorporated" into the United States and some are not. Although the wisdom of these cases may be questioned,³ the result is that unincorporated territories may be treated differently from states. Puerto Rico is an unincorporated territory according to the Supreme Court, the U.S. Justice and State Departments, and Congress.

The Constitution does not refer to commonwealth status. Those who claim the so-called commonwealth status as something other than a territory desperately cling to the language of the 81st Congress that said that the federal law authorizing a local constitution for the territory allowed Puerto Rico a measure of self-governance and that the law had been "adopted in the nature of a compact." These claimants conveniently ignore the committee reports on the bill that were issued by the U.S. House of Representatives and Senate as well as the statements in the hearings on the bill made by the federal executive branch and the

governor and resident commissioner of Puerto Rico at the time — all of whom indicated that the legislation would not change the territory's fundamental status.

As stated on page 2 of the CRS report to Congress, "While the approval of the commonwealth constitution marked a historic change in the civil governments for the islands, neither it, nor the public laws approved by Congress in 1950 and 1952, revoked statutory provisions concerning the legal relationship of Puerto Rico to the United States. This relationship is based on the Territorial Clause of the U.S. Constitution." The U.S. Supreme Court has repeatedly stated that Congress has power over Puerto Rico under the Territorial Clause and that Congress can, indeed, "treat Puerto Rico differently from states as long as there is a rational basis for its action."⁴ What the *Harris v. Rosario* decision said was that, under this clause, Congress may accord Puerto Rico fewer benefits than states that come with federal programs.

Commonwealth Myth: You're busted.

Myth No. 2: Puerto Rico will lose its right to speak Spanish if it becomes a state.

The Tenth Amendment to the U.S. Constitution provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As any frustrated "English-only" zealot would have to admit, the Constitution does not contain any English-language requirement, and proposals to make English the official language of the United States have failed in Congress. The Tenth Amendment establishes that, if the power to establish an official language is not delegated to the federal government, then the right resides with the state.

Ironically, under the Territorial Clause, Congress has the power to make English the only language of the territory right now. As a state, Puerto Rico would have more power — not less power — to regulate its official language.

As the CRS report points out on page 20, this does not mean that Congress may not attach some language requirement to any statehood bill it may pass. There is precedent for such requirements in the admission of three states — Oklahoma, New Mexico, and Arizona. Once it becomes a state, however, it is hard to see how Puerto Rico would not be free to comply with the purported requirement — or, as provided by the Tenth Amendment, not comply.

Indeed, the U.S. Supreme Court has already stated

clearly that Congress may require conditions for a state's enabling act, but it may not require the continuation of such requirements once the territory becomes a state, because each state must be on an "equal footing" with the other states. In *Coyle v. Smith*,⁵ for example, the Court ruled that Congress' attempt to force the location of the new state's capital was impermissible once Oklahoma became a state. Justice Lurton, in the majority opinion, cited an earlier opinion stated by Justice Field: "Equality of constitutional right and power is the condition of all states of the Union, old and new."

Myth No. 3: Puerto Rico has a right to make international agreements that it would lose if it becomes a state.

Puerto Rico has no power to enter into international agreements that require national sovereignty. Puerto Rico currently exercises the power that states possess when it comes to international affairs: the ability to make international arrangements that do not make binding commitments, including agreements on matters such as trade promotion as well as educational and sports exchanges. On two occasions in recent history, Puerto Rico tried to enter into agreements that only its national government — the U.S. government — can undertake. Both times, when Puerto Rico attempted to act like a sovereign nation, its efforts were shot down by the U.S. government.

Under a "commonwealth" governor in the 1980s, Puerto Rico attempted to enter into a tax-sparing agreement with Japan. The secretary of state in the Reagan administration, George Shultz, quickly informed Puerto Rico that it had no jurisdiction to make such a treaty. From 2001 through 2003, Secretary of State Colin Powell and other officials from the U.S. State Department had to curb the international activities of another "commonwealth" governor several times, invoking a State Department memo issued in the 1990s that explicitly spelled out the limits of Puerto Rico's power to enter into international agreements as an unincorporated territory.

Because pushing this envelope is politically advantageous to the political party that supports the "commonwealth" myth, Puerto Rico can expect this scenario to play out again if this party remains in power. Indeed, the current "commonwealth" party governor insists that the President of the United States can empower the "commonwealth" to enter into international agreements that states cannot (those requiring national sovereignty), but federal officials have uniformly rejected the notion. To the extent that advocates of commonwealth status can create a mind-set in the island that Puerto Rico has some greater international power than a state does, they set up a straw man to confront the growth of statehood supporters by possibly getting people to actually believe that statehood would cause Puerto Rico to lose power that it never had. Bizarre? Welcome to politics in Puerto Rico.

Myth No. 4: Puerto Rico is a tax haven that will be lost through statehood.

Congress has already done away with § 936 of the Internal Revenue Code that made it attractive for U.S. companies to invest in Puerto Rico by eliminating federal income taxes on income that companies located in the states attributed to manufacturing in Puerto Rico. Congress deemed that the tax credit was tantamount to "corporate welfare" and was tired of companies abusing it by attributing to Puerto Rico income that was really a result of work performed in the states, where income would have been taxed, and determined that the credit was unfair to the states and to companies that were manufacturing their goods in the states.

Of course, that's the problem with Puerto Rico. Congress decides these issues without a single vote from a member of Congress representing Puerto Rico. Puerto Rico's population of nearly four million is larger than that of 24 states. That figure means that Puerto Rico would have six members in the U.S. House of Representatives along with its two senators.

Without political power, Puerto Rico lost its status as a "tax haven" under a federal law passed by Congress pursuant to its Territorial Clause power. As a state, Puerto Rico could flex its newfound congressional voting muscle and seek either new federal laws or the extension of existing federal laws (like those establishing enterprise zones) to benefit Puerto Rico.

Myth No. 5: Puerto Rico will lose its right to participate in events such as the Olympics or international beauty contests under statehood.

The Olympics and international beauty contests are activities that are regulated by nongovernmental corporations. Even though Puerto Rico has not won a single Olympic medal since an American first walked on the moon, participation in the games remains a great source of "national" pride in Puerto Rico, as does participation in the Miss Universe contest, where Puerto Rico's representatives have shined.

Examples abound for exceptions to the rule requiring an entrant to be a country in order to participate in the Olympics. Other U.S. territories, such as the U.S. Virgin Islands, have fielded teams. Hong Kong, now part of the People's Republic of China, still participates on its own. On the other side of the coin, South Africa, a sovereign nation, was denied participation while apartheid was that government's policy.

Puerto Rico's participation in these events is more a matter of social psychology than one of law. Separatists in Puerto Rico — a small portion of the population and less than 5 percent of the electorate — love to "beat the U.S.A." in any context. A lack of political power and being an island located one

SIDEBAR continued on page 10

thousand miles from Miami — combined with an uncertain political status — have resulted in a desire for recognition. The law, however, is not a barrier to ongoing participation in these international events.

Here, however, law and politics butt heads. Statehood has advantages and disadvantages. If it really wants statehood, Puerto Rico should face the reality that its inhabitants need to identify themselves as Americans and not merely as U.S. citizens and forgo whatever technical legal right Puerto Rico may have to continue participation in international events. Puerto Rico's eternal quest to have it both ways is at the root of the island's problems and a principal reason why people on the mainland look at Puerto Rico's quest to become a state with a certain degree of skepticism.

Myth No. 6: Puerto Rico pays no federal taxes.

Puerto Ricans pay all the federal taxes that Congress requires them to pay. The federal government does not tax local income, but it does tax income derived from outside Puerto Rico. Puerto Ricans pay full Social Security and Medicare taxes as well as other federal taxes. In addition, the tax burden that is imposed on Puerto Ricans by the "commonwealth" has marginal rates that are higher than those established for federal income taxes. Paying a regressive Social Security tax in Puerto Rico is particularly burdensome on people in lower economic brackets, because per-capita income in Puerto Rico is half that of the poorest state of the union. And unlike the tax code on the mainland, Puerto Rico does not have an Earned Income Tax Credit to alleviate taxes on low-income workers. From a tax perspective, the less fortunate in Puerto Rico have achieved the worst of both worlds.

Myth No. 7: Puerto Rico does not contribute to the national defense.

In Puerto Rico, people speak of the "blood tax." As of the end of June, approximately 40 of the more than 1,700 Americans killed in Iraq and Afghanistan were Puerto Rican. That puts Puerto Rico in the top 10 "states" for military deaths on a per-capita basis for those two theaters. Statistics from the Vietnam War are equally unbalanced. Puerto Ricans have been shedding blood under the American flag since World War I.

In terms of military recruitment, Puerto Rico consistently ranks in the top five "states."

In stark political terms, four million Puerto Ricans are invited to die for the President's decision to take the country to war, but they can cast no vote for this commander in chief nor for any voting member of Congress.

Myth No. 8: The people of Puerto Rico do not appreciate their U.S. citizenship.

As described in Myth No. 7, giving one's life for one's country in military service should be proof enough.

Moreover, if the people of Puerto Rico ever truly felt that their U.S. citizenship was at stake in a statehood versus independence plebiscite, most political observers in Puerto Rico would agree — at least privately — that statehood would win with about 80 percent of the vote.

Myth No. 9: The people of Puerto Rico do not want the territory to become a state.

The trend among the population is clearly to the contrary. Support for statehood was only at about 12 percent when Puerto Rico's Constitution was approved in 1952. By 1967, however, support for statehood had grown to nearly 39 percent, and plebiscites in 1993 and 1998 had the number up to nearly 47 percent. Votes for independence failed to reach 5 percent in either of the last two plebiscites. Anyone who has ever seen a chart can understand that trend.

Those who voted for "commonwealth" or, incredibly, for "none of the above"⁶ have been told by promoters of commonwealth status that, under this mythical status, Congress will give Puerto Rico powers that only sovereign nations enjoy; that an arrangement with the U.S. Congress can be reached allowing Puerto Rico to decide which federal laws apply to its inhabitants; that there will be no limit to Puerto Rico's participation in international commercial agreements; and that Congress will continue to appropriate all the federal funds to Puerto Rico that it needs.

If that sounds too good to be true, there's a reason it does.

Myth No. 10: The U.S. Congress would reject Puerto Rico's petition to become a state.

Even though Congress has failed to pass federal legislation that provides Puerto Rico with a meaningful plebiscite in which it could truly determine its own future, there have been some efforts over the years to show support for statehood should Puerto Rico choose that status. In 2000, the federal government enacted a law that supported Puerto Ricans' right to determine the island's status, with statehood given as one of those options. Bills passed by the House of Representatives in 1990 and 1998 also allowed Puerto Rico to choose its status, again with statehood given as one of the options. In 1998, the Senate passed a resolution supporting a plebiscite that included the statehood option. Every President since Harry Truman has recognized statehood as an option for Puerto Rico, and the platforms of both national political parties consider it as an option as well.

With the Hispanic vote about to become the largest minority vote in the United States, both parties are trying to capture this portion of the electorate. One could argue that it would be political suicide for either national party to oppose statehood for Puerto Rico if a majority of Puerto Ricans requested it. Indeed, it would be difficult to envision how Congress could stand for democracy and equality and still deny a petition in full view of the American people and the rest of the world. **TFL**

David C. Indiano is a member of the FBA editorial board and is partner with Indiano & Williams law firm in San Juan. © 2005 David C. Indiano. All rights reserved.

Endnotes

¹Cong. Res. Service, "Political Status of Puerto Rico: Background, Options, and Issues in the 109th Congress," CRS Report (2005) Order Code RL32933.

²"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 any Particular State." U.S. Const., Art. IV, Sec. 3, cl.2.

³This was the Supreme Court that gave us *Plessey vs. Ferguson* and "separate but equal."

⁴*Harris v. Rosario*, 446 U.S. 651 (1980).

⁵221 U.S. 559 (1911).

⁶50.3 percent in 1998.

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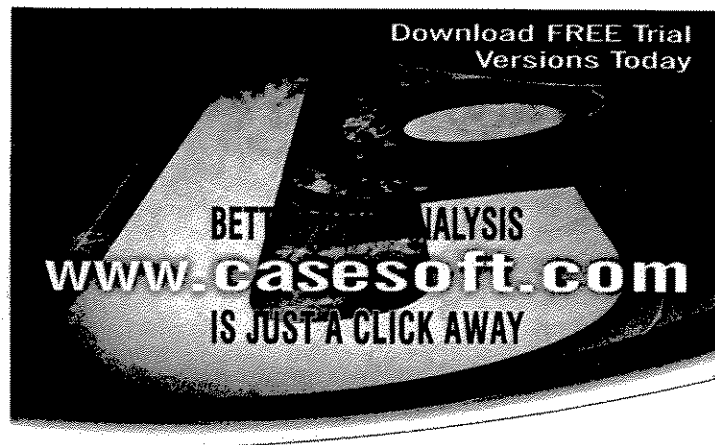
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