

**Dr. Rafael Cox Alomar**  
**The Future Status of Puerto Rico: A Question of Sovereignty**  
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**I. Introduction**

Many thanks for the kind introduction and, in particular, many thanks to Professor Gerry Neuman for organizing this seminar and making it a great success.

It is great to be back, as an alumnus, to discuss an issue that has always been very close to my heart and to which, during my years here, I devoted considerable attention, in part thanks to the generosity of great mentors, such as Professors Shapiro, Singer, and the late Arthur von Mehren.

**II. A Great Crisis brings forth Great Opportunities**

As you might very well know, Puerto Rico is undergoing today an economic meltdown of epic proportions.

As recent as February 4, Standard & Poor's lowered the Commonwealth's credit rating to below "investment-grade" or junk status.

Soon, Moody's and Fitch followed suit, on February 7 and 11, respectively.

As we speak the possibility of the Commonwealth defaulting on its US\$70 billion debt is a clear and present danger, due --- in no small measure --- to an absence of liquidity and over-extended obligations.

Contrary to Greece, Cyprus, Portugal, Ireland and Spain, the Commonwealth won't be bailed out by the U.S. Treasury and/or the Federal Reserve. (At least not at this stage).

Hence, Puerto Rico's economic meltdown will no doubt have a ripple effect in the mainland: distabilizing both the U.S. municipal bond market (valued at close to US\$4.3 trillion) and over 75% of U.S. muni bond funds where millions of American workers, retirees, and investors would be exposed in case of a Puerto Rican default.

From this gigantic fiscal crisis, however, comes forth a great opportunity --- not just for economic reestructing but, equally importantly, for politico-constitutional reengineering.

It is no secret, as the Federal Reserve Bank of New York, the General Accountability Office, and the White Task Force Reports on Puerto Rico's Status all have come close at hinting, Puerto Rico's economic crisis is a reflection of a wider and equally pervasive political meltdown.

The perpetuation of a quasi colonial relationship with Washington, one that unilaterally imposes on the island's weak economy all the regulatory costs of one the world's strongest and most expensive economies, along with the superimposition of values of over-dependency, have no doubt exacerbated the triggers behind the meltdown --- making it even harder for Puerto Rico to battle an endogenous fiscal meltdown, in a weakened global economy.

Thus, the opportunity has arisen for addressing the economic meltdown by way of addressing the more than evident politico-constitutional meltdown.

So what does the future hold for disentangling Puerto Rico's status conundrum, both procedurally and substantively?

### **III. Setting up a Procedural Mechanism**

Procedurally, as things stand right now, the ball is in Puerto Rico's court. The "omnibus spending bill," signed by President Obama on January 17, assigns US\$2.5 million for voter education and a plebiscite on status options that pass constitutional muster, as certified by the US Department of Justice.

Thus, the Commonwealth's legislature must now decide how to engage the political branches in Washington in a manner consistent with the procedural mechanism put forward by the Obama Administration in its "spending omnibus

bill;” while making sure that Congress sets in motion a full-blown self-determination process as soon as the status definitions are agreed upon.

Meanwhile, there are two (2) statehood bills before Congress: one in the House, presented by Resident Commissioner Pierluisi (HR 2000) on May 15, 2013 and another one in the Senate (S. 2020) presented on February 12, 2014 by Senator Heinrich (D-NM).

None of these statehood bills sets a clear path towards self-determination, as they exclude from the process the other non-colonial / non-territorial options available to the people of Puerto Rico besides statehood.

In my estimation, the most sensible procedural path is to activate the constitutional convention mechanism (as promised by the current PDP government during the 2012 campaign) and have it draft alongside the US DOJ constitutionally viable status options --- options that must also be non-colonial and non-territorial in nature.

The inclusion of the constitutional convention mechanism in the procedural equation (that is, a convention made up of both political and non-political delegates equally distributed among the existing ideological forces) would extricate the negotiating process from the vagueries of the island’s tight electoral timetable and

would stand as a guarantee that even in the face of a change of local government in 2016, this self-determination exercise will run its course.

In all probability, a consensus will be reached in the not so distant future on the procedural aspects surrounding the island's status Gordian knot.

#### **IV. Defining the Substantive Alternatives**

Let us now address the substantive aspects of this process.

I will not dwell on an analysis of the statehood and/or independence propositions. I will defer to my colleagues in the panel to do so.

I will, however, focus on one of the most intractable substantive challenges besieging the Puerto Rico's status process today. And that is the PDP's ideological crisis, the unwillingness of its current management to acknowledge that, as a matter of U.S. public policy, the so-called "enhancement" of the Commonwealth formula can only flourish outside the Territorial Clause (Art. IV, sec.3, cl.2).

The Commonwealth camp must urgently come to grasp with this unescapable reality. Only a new relationship, premised along the lines of an association model --- whereby the U.S.'s political branches transfer to Puerto Rico the powers of sovereignty acquired by the United States over the island under the terms of the

Treaty of Paris, will enable the so-called “enhancement” that for far too long the PDP has been pressing for.

The most recent hearings convened by the Senate’s Committee on Energy and Natural Resources, held on August 1, 2013, brought to the fore, in a most vivid way, the unviability of the Commonwealth “enhancement” formulation.

None of the PDP’s historic claims for so-called “enhancement” of Commonwealth status pursuant to which Puerto Rico would enjoy certain attributes normally associated with sovereign nations (i.e. inapplicability of federal legislation, participation in international organizations, authority to enter in its own right into international agreements, power to regulate commerce among Puerto Rico, the United States and foreign countries, power to levy, increase or reduce tariffs and quotas) will become available to the island under the Commonwealth’s current territorial condition or under any “enhancement” formulation that leaves intact the current arrangement whereby Congress retains sovereignty over Puerto Rico.

Not surprisingly, all attempts made since the days of the Eisenhower Administration at endowing the Commonwealth with further political authority have foundered, as shown by the outcome of the 1959 Fernos-Murray bill, the 1975 Compact of Permanent Union, and the post-1990 Office of Legal Counsel’s legal opinions regarding the constitutional unviability of the “enhancement” approach

and the political branches' disinclination to enter into legality mutual consent clauses (as evinced in the 1994 Guam opinion, as well as in the 2005, 2007 and 2011 White House Task Force Reports on Puerto Rico's Status).

The two questions that immediately arise are (a) why has the PDP leadership shied away from taking to task the obvious infirmities of the "enhancement" construct? And, more importantly, (b) what is the relevance of the PDP's ideological crisis to the overall question of the future status of Puerto Rico?

It is essential to note that for the most part Puerto Rico's Commonwealth movement has always sought intellectual refuge in European notions of "autonomy" and "dual sovereignties" available in, for instance, La Carta Autonómica of 1897, the Statute of Westminster of 1931, the Statute of the Dutch Kingdom of 1954, the British West Indies Act of 1967, among other European legal instruments --- notions that have been unavailable for the most part in American constitutionalism, particularly following the demise of the Indian Treaty System during the Reconstruction period and the hyper federalization of U.S. governance in the post-civil rights movement age.

The ideological posture within the Commonwealth camp is, however, swiftly changing. The obvious realities that the economic meltdown has brought to bear, together with the realization that clinging on to the "territorial" praxis leads

nowhere, has enabled the flourishing of inter-party alliances favoring a compact premised on Puerto Rican sovereignty --- inter-party alliances that go beyond the confines of the PDP. At the same time, an ideological decolonization at the base of the PDP itself is garnering a momentum of its own --- a base which has shown itself more inclined than the party's leadership to break away from the traditional "enhancement" praxis if seen in light of the 454,768 votes in favor of the *Estado Libre Asociado Soberano* at the November 2012 local plebiscite.

To the extent this ideological decolonization within and without the PDP ensues with ever more strength, the people of Puerto Rico will finally have real choices before it.

## **V. Conclusion**

In the final analysis, the principles of ordered liberty and fundamental fairness upon which this Republic was founded allow no other outcome than plodding along a transparent and legitimate process of self-determination leading, once and for all, to a dignified non-colonial and non-territorial relationship between Puerto Rico and the United States.

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