



## PUERTO RICO FORWARD

### Episode 14: PROMESA, PT.1

#### Transcript

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Before Hurricane María placed Puerto Rico (hereinafter PR) in the headlines of all major news outlets, it was the archipelago's financial crisis that made it relevant for most people in the United States (hereinafter US). Now days, with PR's financial downward spiral no longer sexy enough to sell ad-space, the subject has largely fallen out of people's radar; which is a very good thing if you're a member of the of the Financial Oversight and Management Board (hereinafter FOMB). In this short series, I'll discuss how the FOMB came to be and why it's so vital to always keep an eye on this undemocratic body.

The FOMB is an entity that was created back in 2016 through the *Puerto Rico Oversight, Management, and Economic Stability Act*<sup>1</sup>, or PROMESA for short; which is also how you would say “promise” in Spanish. To understand the genesis of this law, we need to consider the lobbying efforts portrayed by two opposing groups: PR's colonial government on one side, and various investment groups on the other. Now, the central point of contention between the two was the possibility of PR gaining access to Chapter 9 Bankruptcy (henceforth Ch9). As I mentioned back in episode eight<sup>2</sup>, unlike US states, PR's municipalities do not have access to Ch9 bankruptcy. That's because in 1984 *The Bankruptcy Amendments and Federal Judgeship Act*<sup>3</sup> was passed amending the US Bankruptcy Code. Section 421(j) of the Act states the following: “Section 101 of title 11 of the United States Code is amended... by inserting [...] the following: [...] 'State' includes the District of Columbia and Puerto Rico, **except for the purpose of defining who may be a debtor under chapter 9 of this title;**...”<sup>4</sup> (*citations omitted and emphasis added*). As a result PR was specifically removed from the definition of the term “State” in regards to its ability to allow its political subdivisions to seek Ch9 Bankruptcy protection.

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<sup>1</sup> Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101–2241 (2016) [hereinafter *PROMESA*]

<sup>2</sup> <http://puertoricoforward.libsyn.com/puerto-rico-forward-pr-v-franklin-california-tax-free-trust>

<sup>3</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Public Law 98-353 (1984)

<sup>4</sup> *Id.* at §421(j)(6)

A little over thirty years later, this small amendment would set a battleground upon which lobbyists and special interest groups would wage war against each other. At the early stages of PR's debt crisis becoming a relevant issue, the fact that the archipelago's municipalities did not have access to Ch9's protections became the central point of contention. As Catherine Ho reported in the Washington Post back in 2015, neither side of the debate was willing to yield to the other.

As Puerto Rico's debt crisis came into clearer view this week, so too did a noisy faction of voices both supporting and opposing the Puerto Rican government's push to allow the island to restructure its debt in bankruptcy. The two sides of the debate have enlisted high-powered lobbying and public affairs firms to make their case as the long-simmering issue of Puerto Rico's deteriorating financial condition is now coming to a boil. Puerto Rico's government is pushing Congress to allow it to seek Chapter 9 municipal bankruptcy, which is currently not permitted under the law because the island is a commonwealth, not a city or municipality. This would allow Puerto Rico to protect itself from creditors while it develops a plan to restructure debts. [...] The bankruptcy option is riling up some investment funds that hold a significant portion of bonds issued by [the] Puerto Rico Electric Power Authority (PREPA), the cash-strapped government-owned utility. **Bondholders bought the bonds with the understanding that Puerto Rico would not be able declare bankruptcy**, and allowing the island to do so now would violate the terms of that agreement and impose a risk on bondholders that they did not anticipate.<sup>5</sup> (*emphasis added*)

One of the more vocal groups to oppose PR's access to Ch9 was the *60 Plus Association*, a "seniors advocacy group" that pushes conservative policies within the Beltway. As we demonstrated in episode eleven<sup>6</sup> of this podcast, this organization has very close ties with the DCI Group, which was founded in 1996, and is a top Republican lobby and public relations firm, with offices in Washington, Brussels, and Houston.

So when we talk about PR's financial crisis, we're talking about a game that involves really big players in the lobbying and influencing circuit. This isn't some small squabble over some general policy of little importance, but rather an all out war involving the heaviest of hitters. And what was the objective? As I've already mentioned, these pressure groups and lobbyists sought to stop any attempt at legislation that would give PR access to Ch9; however, their efforts did not stop there. Their ultimate goal was to force Congress into approving legislation

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<sup>5</sup> Catherine Ho, *Competing Lobbying Campaigns Clash over Puerto Rico Debt Crisis*, The Washington Post (Jul. 2, 2015)  
[https://www.washingtonpost.com/news/powerpost/wp/2015/07/02/competing-lobbying-campaigns-clash-over-puerto-rico-debt-crisis/?noredirect=on&utm\\_term=.29dcbb581c6b](https://www.washingtonpost.com/news/powerpost/wp/2015/07/02/competing-lobbying-campaigns-clash-over-puerto-rico-debt-crisis/?noredirect=on&utm_term=.29dcbb581c6b)

<sup>6</sup> <http://puertoricoforward.libsyn.com/puerto-rico-forward-a-look-behind-the-smoke-and-mirrors>

that would create an oversight board that could take the reins.<sup>7</sup> As stated in a piece written by Amilcar Antonio Barreto back in May of 2016, this idea was a favorite from the very beginning.

So far, the congressional proposals for remedying Puerto Rico's economic catastrophe involve creating some kind of federally appointed oversight board. In short, this represents the re-imposition of direct colonial rule. Thus far, the proposals coming from the House Republican majority envision an oversight board empowered to crack the fiscal bullwhip.<sup>8</sup>

And that's exactly what happened.

PROMESA was approved partially because it was framed as the opposite of a "bailout". You see, after suffering through the huge financial debacle that began back in 2007, most, if not all North Americans, cringe at the mere idea of a bailout. To this day, the word provokes a visceral reaction of hate a disgust in most people. And this should not surprise anyone. Although technically the word is defined as "a rescue from financial distress",<sup>9</sup> when we think of a bailout, we think of the monumental amounts of money that had to be spent through the Troubled Asset Relief Program<sup>10</sup>, more commonly known as TARP, in order to avoid certain financial institutions from going under. Now days, the term has become a way of expressing disapproval towards policies that prevent an irresponsible actor from facing the consequences of their actions. It carries an element of dishonor and injustice that goes against the most basic understanding of fairness. With this in mind, lobbyists and special interest groups jumped at every single opportunity to label PROMESA as a sort of "anti-bailout-bill".

This strategy proved to be very successful, especially when one considers how different the narrative was in regards to another bill that was ultimately never approved: H.R.870, titled *The Puerto Rico Chapter 9 Uniformity Act of 2015*<sup>11</sup>. This piece of legislation, presented by then Resident Commissioner for Puerto Rico, Pedro Pierluisi, was only two pages long and had a singular objective: include Puerto Rico under the term *State* for the purpose of defining who may be a debtor under Ch9 bankruptcy. The opponents of the measure were quick to lobby against it, and began referring to the bill as a bailout. In a piece written in December of 2015 titled *No Bailout for Puerto Rico*,<sup>12</sup> one Kevin D. Williamson boldly argued against the bill.

There is a bankruptcy law for U.S. cities and municipal agencies, but not for states or for a commonwealth such as Puerto Rico. Some in Washington wish to pretend

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<sup>7</sup> "A spokesman for the group said the bankruptcy option would be a government handout and proposed an alternative solution: form an outside control board that would manage Puerto Rico's debts so the island can meet its debt obligations." Ho, *Supra* note 5

<sup>8</sup> <http://fortune.com/2016/05/10/puerto-rico-debt-default-crisis/>

<sup>9</sup> <https://www.merriam-webster.com/dictionary/bailout>

<sup>10</sup> Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201-5261 (2008)

<sup>11</sup> The Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114<sup>th</sup> Cong. (2015)

<sup>12</sup> Kevin D. Williamson, *No Bailout for Puerto Rico*, National Review (December 14, 2015) <https://www.nationalreview.com/2015/12/puerto-rico-bailout-just-say-no/>

that Puerto Rico is a municipality and to then extend to it the protections of Chapter 9 of the bankruptcy code, which Detroit took advantage of recently. But Puerto Rico is not a municipality, and declaring that it is one does not make it so.<sup>13</sup>

Of course, these views did not go unchallenged. In an article published in the *National Review*, author Ramesh Ponnuru offered a rebuttal.

Williamson says that “some in Washington” want to pretend that Puerto Rico is a municipality and let it go into Chapter 9, and he especially criticizes the Republicans within that “some.” [...] To Williamson, allowing it would be a “bailout.” But it wouldn’t be a normal bailout, in which taxpayers rescue the creditors of insolvent institutions. The creditors would have to write down the value of their loans and taxpayers would be protected. Oddly, Williamson gets the endgame right: “Puerto Rico should be allowed to default on its debt payments, leaving creditors — who knew the risks when they were chasing those high returns — to work out what they can.” Yes: Doing that in a structured way is basically the purpose of bankruptcy.<sup>14</sup>

As we can observe, back when the topic of PR’s financial troubles were at their hottest, any option that would allow PR to access Ch9’s bankruptcy protection would be given the kiss of death by being labeled a bailout. That, together with innumerable slippery slope fallacies that falsely warned about setting a “detrimental precedent” paved the way for PROMESA to become law.

A short time after it’s approval, the Congressional Research Service published a report<sup>15</sup> that quickly reviews PROMESA’s legislative journey.

This report provides a summary and analysis of H.R. 5278, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which Representative Duffy introduced on May 18, 2016. [...] The House passed an amended version of H.R. 5278 on June 9, 2016, by a 297-127 vote. [...] The Senate then concurred with the House amendment to S. 2328 on June 29, 2016, by a 68-30 vote, thus approving PROMESA. The President signed the bill on June 30, 2016.<sup>16</sup>

As we can see, although at the time both the House and the Senate were controlled by the Republican Party, it was a Democratic president, Barack Obama, who signed PROMESA into

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<sup>13</sup> *Id.*

<sup>14</sup> Ramesh Ponnuru, *Congress Should Let Puerto Rico File for Bankruptcy-And Say 'No' to a Bailout*, *National Review* (December 17, 2015) <https://www.nationalreview.com/2015/12/puerto-rico-bankruptcy-no-bailout/?fbclid=IwAR1hmf802-cjROiDTrBk3Hw3Ukp1Wslx69G3sfci3zG0EWaEDcfAGYoL4Lw>

<sup>15</sup> D. Andrew Austin, Cong. Research Serv., R44532, *The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA; H.R. 5278, S. 2328)* (2016)

<sup>16</sup> *Id.* at 1.

law. By all accounts, PROMESA was the result of a **bipartisan effort**, which is just another example of how time and time again, both parties, despite their incompatible views on many subjects, agree to exercise Congress' plenary powers to treat PR however is most convenient. Both Democrats and Republicans see the archipelago as a piece of property to be managed in whichever way pleases the special interest groups they serve. PROMESA is an example of this.

Reviewing the political climate surrounding PR's financial crisis, and considering how fierce the lobbying efforts were for pushing a non Ch9 solution, it really is no surprise that PROMESA was signed into law. The fight was a miss-match from the very beginning. What chance would anyone have against some of the biggest and influential hedge and vulture firms in the USA? None. And that's not to say that they didn't work arduously and spared no expense to reach their goal. PROMESA is the fruit of their labor, and the FOMB is their prize. Let us now take closer look to this robustly colonial piece of legislation.

Although I will discuss the most relevant parts of the bill, I advise anyone interested in the PR issue to read the law's full text. Our aim is to focus on those clauses that have a high level of importance and in fact affect the PR issue.

Title I of the bill establishes the FOMB and immediately indicates that said body is chartered with the task of establishing "...a method for a covered territory to achieve fiscal responsibility and access to the capital markets."<sup>17</sup> Now, what could this mean exactly? PROMESA does not define "fiscal responsibility" anywhere in its text. Of course, some of you might be thinking that this phrase needs no definition since its meaning is plainly understood. However, Section 5 of PROMESA serves up numerous superfluous definitions of terms that are widely understood and need no explanation.<sup>18</sup> However, Congress took no time in describing the most fundamental justification of the bill's approval. If we do not have a clear idea of what fiscal responsibility is, how will we know when it has been accomplished? Are we supposed to rely on the opinion of some third party? Who gets to decide **when** PR has reached "fiscal responsibility"?

And it's not just I who considers this to be a pitfall; even the *American Enterprise Institute*, a right wing think tank, published an article back in March of 2012 titled *What Does 'Fiscal Responsibility' Mean?* In the piece, author Steve Conover describes the different and conflicting definitions that have been offered to describe the phrase.

What, exactly, does "fiscal responsibility" mean? Opinions are diverse. To some, it means paying down the federal debt. To others, it means balancing the federal budget. Wrong, says another group, it means keeping the debt at a sustainable level in relation to the size of the economy. Wrong, wrong, wrong, says an emerging school of thought: it's not about deficits and debt, it's about outcomes, it

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<sup>17</sup> PROMESA, *Supra* note 1, at §101(a)

<sup>18</sup> PROMESA, *Supra* note 1, at §5

means doing what it takes to sustain the world leadership role of the U.S. dollar and economy.<sup>19</sup>

Just imagine attempting to use any of these definitions in order to conclude that the FOMB's objective has been met. Whoever makes that claim could be faced with an opposing party that insists on a different meaning. Who is to say which one is right? And more importantly, who is to say which one is **best**? Finally, the above cited article offers an additional warning in its conclusion.

Everybody is for "fiscal responsibility," nobody is against it. Shouldn't that be a red flag? Isn't that a hint that something might be amiss in the so-called debate? If we don't define "fiscal responsibility," we can't measure it; if we can't measure it, we can't manage it. It's easy for politicians to say, and it fits conveniently on bumper stickers, placards, and webpages. But when it can have many conflicting meanings, it's nothing more than political prestidigitation or rhetorical ornamentation.<sup>20</sup>

It is my opinion that this phrase, that so far has gone unnoticed, might at some point spawn a debate that would eventually be won by whatever group has the most financial muscle; which in this case would most likely be the very same vulture and hedge funds that rammed PROMESA through.

Moving along, Section 101(b)(3) plainly declares that PROMESA is possible due to the US Constitution's Territorial Clause. "The Congress enacts this Act pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories."<sup>21</sup> Not only is this a reality, but Congress has no qualms in expressing where their colonial power comes from.

Although the first seven sections of the bill have generally standard content, Sec. 101(c) breaks this tendency. "An Oversight Board established under this section— (1) shall be created as an entity within the territorial government for which it is established in accordance with this title; and (2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government."<sup>22</sup> This is ridiculous; this is outrageous; but it also has turned out to be perfect... for Congress. One might wonder how it is that a government-created entity, in this case the FOMB, can be considered to be **within** the government of PR but **is not subject** to its powers. The answer, as often happens in this program, lies within a court case titled *Centro de Periodismo Investigativo v. Financial*

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<sup>19</sup> Steve Conover, *What Does 'Fiscal Responsibility' Mean?*, American Enterprise Institute (March 29, 2012) <http://www.aei.org/publication/what-does-fiscal-responsibility-mean/>

<sup>20</sup> *Id.*

<sup>21</sup> PROMESA, *Supra* note 1, at §101(b)(3)

<sup>22</sup> PROMESA, *Supra* note 1, at §101(c)



*Oversight and Management Board for Puerto Rico.*<sup>23</sup> In this case, the plaintiff is a non-profit Puerto Rican news outlet that has grown a reputation for in-depth investigative journalism. Although its name translates to English as Center for Investigative Journalism, it's more commonly for the initials of its name in Spanish: CPI. The defendant, of course, is the FOMB.

What happened in this case was that CPI, pursuant to PR's Constitution, brought suit against the FOMB requesting that it access to documents that were in its control. The court provides a brief explanation about how PR's Constitution comes into play in this regard.

Due to its close relationship with the First Amendment's freedom of speech and association, and the right to seek redress from the government, the Supreme Court of Puerto Rico has declared access to public information a fundamental right under Puerto Rico's Constitution. [...] The Bill of Rights incorporated into Puerto Rico's Constitution "recognizes and grants some fundamental rights with a more global and protective vision than does the United States Constitution." [...] Years after its adoption, the Supreme Court of Puerto Rico recognized "the constitutional right to examine information held by the State... [as] a necessary corollary to the freedom of speech consecrated in Art. II, Sec. 4 of the Commonwealth Constitution." Puerto Rico's Supreme Court has reasoned that access to public information allows citizens to adequately evaluate and supervise the public duty of the government, and contributes to an effective participation of citizens in the governmental processes that affect [sic] their social environment.<sup>24</sup>  
*(citations omitted)*

The court concludes that CPI does in fact have the right to inspect the requested documents and that the FOMB must produce them. However, the legal reasoning that justifies this conclusion is what draws me to this case.

Early in its opinion, the court analyzes a Motion to Dismiss presented by the FOMB. In it, the defendant argues that it is an entity **within** PR's government and as such is entitled to the US Constitution's Eleventh Amendment immunity. The court actually explains what this immunity consists of.

The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [...] The Supreme Court has interpreted the Eleventh Amendment to mean "that each State is a sovereign entity in our federal system; and second, that [i]t is inherent in the nature of

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<sup>23</sup> Centro de Periodismo Investigativo v. Financial Oversight and management Board for Puerto Rico, No. 17-1743 (D.PR filed Jun. 1, 2017)

<sup>24</sup> *Id.* at 32-33

sovereignty not to be amenable to the suit of an individual without its consent.” [...] The Court has long recognized that the Eleventh Amendment’s “greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.” [...] As a result, the Eleventh Amendment not only protects a state’s treasury, but also a state’s “dignity interest as a sovereign in not being [hauled] into federal court.” [...] The First Circuit Court of Appeals has consistently held that Puerto Rico is to be treated like a state for Eleventh Amendment purposes.<sup>25</sup> (*citations omitted*)

In broad terms, what this means is that a state cannot be sued in federal court. However, if said state passes a law or amends its constitution to allow it, it can be. This responds to a long held belief that states still retain a degree of sovereignty even after the formation of the federal government. As a result, said sovereignty includes the ability to choose whether or not a citizen can bring suit against its government. The defendant uses this legal construct to push the following theory: since PR is treated as a state for Eleventh Amendment purposes, and PROMESA declares that the FOMB is an entity **within** PR’s government, allowing someone to sue the FOMB in federal court would violate the Eleventh Amendment. This argument is well rounded and quite logical. However, the FOMB seems to have forgotten that it had entered the bizarre world of legal colonialism. The court quickly rejected this theory and proceeded to provide a legal analysis that has PR’s colonial reality at its core.

The court begins its reasoning by highlighting Congress’ plenary powers over the archipelago through the Territorial Clause.

In relevant part, Article IV of the U.S. Constitution states that “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....” [...] The Supreme Court has interpreted this clause to give Congress plenary powers over the territories. [...] Thus, our jurisprudence makes it clear that Congress’s power over Puerto Rico is plenary. The Territorial Clause is not just a grant of power, but also a constitutional mandate to enact essential legislation for the U.S. territories. [...] Armed with plenary powers, Congress responded to Puerto Rico’s crushing public debt by enacting PROMESA. [...] The Act also created the Board, which [...] operates as an entity within the government of Puerto Rico.<sup>26</sup> (*citation omitted*)

With PR’s colonial condition clearly established, the court moves on to explain how this reality results in the US Constitution’s Eleventh Amendment not applying to the FOMB.

Most salient to this case is Section 106(a) of PROMESA, which states in relevant part that “any action against the Oversight Board, and any action otherwise arising out of this Act in whole or in part, shall be brought in a United States district court

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<sup>25</sup> *Id.* at 10

<sup>26</sup> *Id.* at 6



for the covered territory....” Puerto Rico is a “covered territory” under PROMESA. [...] Thus, interpreting the statute under its plain meaning, PROMESA authorizes this Court to hear any suit brought against the Board. [...] As explained above, Congress has plenary powers over the territories and, therefore, can treat the territories differently than States when enacting laws. [...] As a result, Congress’s authority in enacting laws dealing with territories is not restrained the same way as it is when enacting laws at the national level. [...] In this case, Congress exercised its plenary powers to act on behalf of Puerto Rico and waived the Board’s Eleventh Amendment immunity. [...] The Territorial Clause gives Congress the power to enact statutes on behalf of the territories. [...] Here, Congress, in its function as administrator of the territories enacted PROMESA, which created an oversight board subject to suit in federal court. [...] This needful legislation is within Congress’s power as it can directly legislate for the territories, and in the rarest of cases, act as their legislature. [...] It is evident from Section 106(a) that Congress meant to subject the Board to suits in federal court. *(citations omitted)*

What we have here is a truly remarkable situation. In essence, what the court is revealing is that Congress, through the use of its plenary powers over PR, not only forcefully inserted the FOMB into the archipelago’s government, but also completely supplanted its legislative and executive branch and decided, in the name of PR’s government, to relieve the FOMB from its Eleventh Amendment immunity. Now, although the result is favorable in terms of transparency, it might have the effect of bringing the US-PR relation a step closer to a much more vulgar and tyrannical form of colonialism. You see, part of what has made colonialism in PR such a successful enterprise is the element of deniability that Congress so skillfully constructed by allowing PR to have its own constitution and local government. As we’ve pointed out in prior episodes, this brought a sense of legitimacy to PR’s political status and was even enough to remove PR from the United Nations’ list of Non-Self-Governing Territories back in 1953.<sup>27</sup> However, this seems to be changing.

The mere fact that Congress can legislate as if it were the archipelago’s legislature is the legal equivalent of ventriloquism. What’s the point of the Puerto Rican people having elections if Congress, armed with the US Constitution’s Territorial Clause, can simply possess the body of the elected government and speak for it? No government can claim to have even a shadow of legitimacy if its actions mean nothing. Under such circumstances, one cannot honestly speak of representation; much less of democracy.

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<sup>27</sup> Jose A. Delgado, *Oversight Board Reveals the Colony*, El Nuevo Dia (June 21, 2016) <https://www.elnuevodia.com/english/english/nota/oversightboardrevealssthecolony-2212962/>

With PROMESA, Congress has taken a large step towards egregiously exerting its plenary powers, making the archipelago's colonial reality undeniable.<sup>28</sup>

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<sup>28</sup> In the next episode of Puerto Rico Forward, I'll continue analyzing this unprecedented piece of legislation.