



PUERTO RICO FORWARD

Episode 15: PROMESA, PT.2

Transcript

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In the last episode, I began our current discussion about the *Puerto Rico Oversight, Management, and Economic Stability Act*¹, or PROMESA for short. In this episode, I'll pick up where I left off. In order to avoid any confusion, I strongly advise that you listen to that episode first before continuing with this one.

When we talk about PROMESA, we need keep in mind that it's one of the most blatant manifestations of Congress' colonial powers over Puerto Rico (henceforth PR). However, power is meaningless without a channel through which it can be exerted. In the case of PROMESA, the Financial Oversight and Management Board (hereinafter FOMB) is that conduit. As we mentioned in the last episode, Section 101(c) of the bill states the following: "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."²

One of the most important issues that arose when PROMESA was approved was the FOMB's composition. After all, those who sit at the board have a tremendous ability to shape PR's future, possibly for generations to come. PROMESA takes great care in elaborating a detailed, yet convoluted, process to follow in completing this task. First of all, Section 101(e)(1) of the bill states the following: "The Oversight Board shall consist of seven members **appointed by the President** who meet the qualifications described in subsection (f) and section 109(a)."³ (*emphasis added*) That said, Section 101(e)(2) describes multiple steps that must happen before the President's selection. In essence, the process goes like this:

The first member of the FOMB is selected in the President's sole discretion.⁴ After that, the Speaker of the House of Representatives drafts two separate lists of candidates so that the

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

² *Id.* at §101(c)

³ *Id.* at §101(e)(1)

⁴ *Id.* at §101(e)(2)(A)(vi)

President may make one selection per list.⁵ Then, the Majority Leader of the Senate proposes another list from which the President must select two candidates.⁶ This is followed by an additional list drafted by the Minority Leader of the House of Representatives; where the President only makes one selection.⁷ The last list is offered by the Minority Leader of the Senate so that the President may make one additional appointment.⁸

At first glance, the process is simple enough. The President of the United States chooses one member to his liking while the remaining six appointments are made from rosters that have been prepared by different members of Congress. However, the next Section contains language that served as a foreshadowing of a present day conflict. Section 101(e)(2)(E), in discussing the six list-based appointments, indicates that “...such an appointment shall be by and with the **advice and consent** of the Senate, unless the President appoints an individual from a list, as provided in this subsection, in which case no Senate confirmation is required.”⁹ (*emphasis added*)

The phrase “advise and consent” is a direct reference to the US Constitution’s Appointments Clause, which states that the President:

...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... [all] *Officers of the United States*, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, *in the President alone*, in the Courts of Law, or in the Heads of Departments.¹⁰ (*emphasis added*)

What we’re talking about here is no small thing. The concept of advice and consent contained in the Appointments Clause is a fundamental structural element that allows for the implementation of checks and balances between branches of government. As Prof. Geoffrey R. Stone put it:

The principle of checks and balances suggests overlapping functions in which each branch is able to intrude on and thereby to check the power of the others. The constitutional framework is best understood as a scheme that embodies a partial, rather than complete, separation of powers, and that supplements the separation by creating devices by which each branch can monitor and check the others. In order to provide the important checking function, the Constitution had to allow the branches to play a role in functions assigned to the others. For

⁵ *Id.* at §§ 101(e)(2)(A)(i) - 101(e)(2)(A)(ii)

⁶ *Id.* at §101(e)(2)(A)(iii)

⁷ *Id.* at §101(e)(2)(A)(iv)

⁸ *Id.* at §101(e)(2)(A)(v)

⁹ *Id.* at §101(e)(2)(E)

¹⁰ U.S. Const. Art. II, § 2, Cl. 2

example, [...] the Senate is required to consent to presidential appointments, and the power to withhold consent has sometimes been important in permitting Congress to impose its views on the executive branch.¹¹

Even the most casual of observers will notice that the scheme created by PROMESA to choose the FOMB's members is not in line with the Appointment Clause's instructions. However, one would first need to consider whether or not the selection of the FOMB's membership is subject to said clause. If it is, then the appointment process described in PROMESA would be unconstitutional, voiding all actions of said body. In fact, that was exactly the hub issue of a recent legal battle that took place before US District Judge Hon. Laura Taylor Swain (henceforth Judge Swain).

In August of 2017, Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC, collectively referred to as simply **Aurelius**, presented a motion to the court¹² requesting that Judge Swain dismiss a petition presented by the FOMB on the grounds that it lacked lawful authority to do so since the selection process of its members, as required by PROMESA, violated the Constitution's Appointments Clause. To make this work, Aurelius had to convince Judge Swain that the FOMB's members are in fact **Officers of the United States**. Otherwise, the Appointments Clause would not apply. To meet this requirement, Aurelius offered various arguments. To begin, Aurelius offered a direct and blunt statement:

The Board's members are Officers of the United States because they derive their authority from the federal government, are appointed by the federal government, are overseen by the federal government, and exercise significant executive authority under the laws of the United States. Accordingly, the Board's selection method must comply with the Appointments Clause. The Board's members are "principal officers" under the Appointments Clause because they are supervised by the President alone, and then only in limited ways. Because the Senate *never* confirmed them—as the Appointments Clause requires for principal officers—each Board member's appointment is invalid.¹³

Aurelius' theory is actually well supported by the multitude of powers assigned to the FOMB through PROMESA. Among its many abilities, the bill's text reveals that the FOMB can "...hold hearings, [...] take testimony, and receive evidence [and] administer oaths or affirmations...";¹⁴ "...secure copies, whether written or electronic, of [...] records, documents,

¹¹ GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 357 (6th ed. 2009).

¹² OBJECTION AND MOTION OF AURELIUS TO DISMISS TITLE III PETITION, In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO *et al.* Debtors, No. 17 BK 3283-LTS (PROMESA Title III Aug. 7, 2017) [hereinafter *MOTION*]

¹³ *Id.* at 19

¹⁴ PROMESA, *Supra* note 1, at §104(a)

information, data, or metadata from the territorial government...”;¹⁵ “...issue subpoenas requiring the attendance and testimony of witnesses and the production of books, records, correspondence, memoranda, papers, documents, electronic files, metadata, tapes, and materials of any nature...”;¹⁶ and these are only **some** of its powers.

According to Aurelius, the cumulative effect of these powers is that the FOMB is **not a part** of PR’s territorial government, **but rather above it**.

PROMESA’s drafters attempted to sidestep the [advise and consent] problem by declaring that the Board is “an entity within the territorial government” and “shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.” [...] The apparent goal was to set up the defense that the Board members are not *federal* officers at all, and thus that the Appointments Clause is irrelevant. [...] While “[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory,” it does not give the Government “the power to decide when and where its terms apply.”¹⁷
(*citations omitted*)

Here we can observe the clash of two Clauses that are born from the US Constitution: the **Territorial Clause** and the **Appointments Clause**. Aurelius highlights this clash and favors a legal theory that would not allow Congress to use the first to circumvent the requirements of the latter. Now in my opinion, this is a very compelling argument. However, if this view legitimized, it would result in a weakening of Congress’ plenary powers over its territories. Remember, the only reason Congress was able to legislate the way it did in PROMESA is because of those very same plenary powers that Aurelius then claimed yield before the Appointments Clause. Not surprisingly, Judge Swain ruled against Aurelius.

All the logic in the world really is no match for the Constitution’s Territorial Clause. It knows no equal and accepts no challenge. At least that’s what you’d think after reading Judge Swain’s Opinion and Order¹⁸ denying Aurelius’ Motion.

In discussing Congress’ power under the Territorial Clause, Judge Swain writes the following:

The constitutional division between state sovereignty over affairs within state borders and affairs ceded to the federal government pursuant to the Constitution is not applicable to territories, whose governments are “the creations,

¹⁵ PROMESA, *Supra* note 1, at §104(c)(2)

¹⁶ PROMESA, *Supra* note 1, at §104(f)(1)

¹⁷ MOTION, *Supra* note 11, at 16

¹⁸ OPINION AND ORDER DENYING THE AURELIUS MOTIONS TO DISMISS THE TITLE III PETITION AND FOR RELIEF FROM THE AUTOMATIC STAY, In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO *et al.* Debtors, No. 17 BK 3283-LTS (PROMESA Title III Aug. 7, 2017) [hereinafter *OPINION*]

exclusively, of [Congress], and subject to its supervision and control.” [...] Congress can thus amend the acts of a territorial legislature, abrogate laws of territorial legislatures, and exercise “full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.” [...] With respect to territorial governance, Congress exercises the governance powers reserved under the Constitution to the people in respect of state matters. [...] **In this sense, Congress occupies a dual role with respect to the territories of the United States: as the national Congress of the United States, and as the local legislature of the territory.**¹⁹ (*citations omitted and emphasis added*)

At this point, I'd like to make a quick side note. As you know, the PR issue is something I feel very passionately about. My attraction to this subject has defined me all my life and has been the object of my efforts for many years long before this podcast was even an idea. Early on, when I was initially confronted by the reality of my country's subordinate status, I'd feel a genuine frustration; the kind one only feels when exposed to a true example of unfairness. Now, I'm not talking about the violation of a statute or an article of a constitution, but rather the emptiness you feel when you now something should not be the way it is, but is anyway. It's that straining sense of disappointment that everyone feels at some point when one becomes aware of the fact that fairness is not a constant, and that, at times, injustice really does prevail.

Some of us might feel this way after seeing a movie, or reading a book. For others, it might be something more personal, like the death of a loved one, or a betrayal from a friend. Everyone, at some point, for some reason, has this emotional reaction.

Reading the above cited excerpt of Judge Swain's Opinion reminded me of this feeling. Of course, after being familiar with the subject for so long, the intrinsic evil and inhumanity that characterizes colonialism hardly surprises me anymore. That said, I can't help but recognize the bluntness of the aforementioned text. The Opinion really does quite well at providing a piercing legal explanation that allows us to conclude, without question, that the archipelago's "self government" is a pathetic and meaningless sham. Judge Swain drives this point home with the following commentary:

Congress has plenary power under the Territories Clause to establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States. **It has exercised this power with respect to Puerto Rico over the course of nearly 120 years, including the delegation to the people of Puerto Rico elements of its plenary Article IV authority by authorizing a significant**

¹⁹ *Id.* at 14-15

degree of local self-governance. [...] Such territorial delegations and structures may, however, be modified by Congress.²⁰ (*citations omitted and emphasis added*)

You see? Clearly the court, supported by lengthy jurisprudence, affirms that PR's local government and institutions are nothing more than the result of a delegation by Congress to its people. As a result, Congress can alter them as it sees fit. And just in case there's any doubt of the contrary, Judge Swain's opinion states the following:

Aurelius' argument that only Puerto Rico itself could have created an entity that was not effectively part of the federal government is unavailing because it ignores both the plenary nature of congressional power under Article IV and the well-rooted jurisprudence [...] that establishes that **any powers of self-governance exercised by territorial governments are exercised by virtue of congressional delegation rather than inherent local sovereignty. Thus, creation of an entity such as the Oversight Board through popular election would not change the Oversight Board's ultimate source of authority** from a constitutional perspective. [...] **Popular elective authority in territories of the United States derives from Congress**, which explicitly states in PROMESA that it has exercised its own power to create a territorial entity.²¹ (*citations omitted and emphasis added*)

Now, lets take a moment and reflect on that. What this means is that, **when popular elections are held in PR to choose members of its government, it's really Congress who is legitimizing said electoral process, NOT THE PEOPLE.**

Finally, Judge Swain sums up her Opinion the following way:

Affording substantial deference to Congress and for the foregoing reasons, the Court finds that the Oversight Board is an instrumentality of the territory of Puerto Rico, established pursuant to Congress's plenary powers under Article IV of the Constitution, that its members are not "Officers of the United States" who must be appointed pursuant to the mechanism established for such officers by Article II of the Constitution, and that there is accordingly no constitutional defect in the method of appointment provided by Congress for members of the Oversight Board.²²

As we can see the FOMB survived with its legitimacy unscathed. In any case it was strengthened. So, what does this all mean in relation to the PR issue? Well, by ruling against Aurelius, and thus in favor of the FOMB, the court's ruling allows PROMESA to continue to be

²⁰ *Id.* at 21

²¹ *Id.* at 24-25

²² *Id.* at 34

the controlling force in the archipelago's fiscal and economic development. However, at a grander scale, this decision follows a worrying trend in which at least two branches of the federal government seem to be pushing the envelope further and further, as if testing how far Congress' plenary powers can stretch.

That said, PROMESA's text provides other characteristics and requirements of the FOMB. For example, Section 101(e)(3) of the bill states that PR's Governor does in fact have a seat at the FOMB. However, as an *ex officio* member, the position carries no voting rights.²³ As a result, the presence of PR's Governor in said body, far from providing any comfort, simply adds insult to injury since it would have no impact on its decisions. Meanwhile, Section 101(f) provides a laundry list of requirements that must be met in order for an individual to be eligible for appointment as a member of the FOMB.

An individual is eligible for appointment as a member of the Oversight Board only if the individual (1) has knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and (2) prior to appointment, an individual is not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.²⁴

Now, although PROMESA states that the FOMB's members serve without pay,²⁵ Section 104(e) allows for the FOMB to:

...accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Oversight Board. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in such account as the Oversight Board may establish and shall be available for disbursement upon order of the Chair, consistent with the Oversight Board's bylaws, or rules and procedures.²⁶

In addition, PROMESA states that "[t]he Oversight Board, its members, and its employees **shall not be liable for any obligation of or claim against the Oversight Board or its members or employees or the territorial government** resulting from actions taken to carry out this Act."²⁷ (*emphasis added*) Now, this section actually makes sense. To a certain degree, immunity is a necessary requirement for those bodies or positions of government that take part in activities that are prone to controversy and backlash. That said, the FOMB is not

²³ PROMESA, *Supra* note 1, at §101(e)(3)

²⁴ PROMESA, *Supra* note 1, at §101(f)

²⁵ PROMESA, *Supra* note 1, at §101(g)

²⁶ PROMESA, *Supra* note 1, at §104(e)

²⁷ PROMESA, *Supra* note 1, at §105

just any body of government, but rather an *ad hoc* legal structure whose membership is not elected by the constituents it rules over. The result is a body of government that is not subject to the general scrutiny usually expected in an electoral process and is shielded from any and all consequences of its action.

However, any amount of indignity felt so far pales in comparison to that provoked by Section 107's content.

The Oversight Board shall use its powers with respect to the Territory Budget of the covered territory to ensure that sufficient funds are available to cover all expenses of the Oversight Board. [...] [T]he territorial government shall designate a dedicated funding source, not subject to subsequent legislative appropriations, sufficient to support the annual expenses of the Oversight Board as determined in the Oversight Board's sole and exclusive discretion.²⁸

Now in case that wasn't clear enough, what the aforementioned text says is that Puerto Rico is **forced** to pay **to the FOMB** any amount of money that **the FOMB**, in its sole discretion, deems is necessary for its yearly operation. In other words, Congress, through PROMESA, has forcefully inserted a creature of its own creation into the lives of millions of Puerto Ricans without their consent and, as if this weren't violent enough, Congress forces the already bankrupt archipelago to reach into its meager coffers and cover the yearly cost of maintaining the instrument of its demise in tip top shape.

Perhaps some of you have already concluded that refusing to cooperate with the FOMB is the right way to go. However, PROMESA makes the territory's Legislative body and Governor cooperation inconsequential.

Neither the Governor nor the Legislature may (1) exercise any control, supervision, oversight, or review over the Oversight Board or its activities; or (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board.²⁹

The FOMB, as created by PROMESA, is such a truly ghastly example of a total disregard for a people's right to self-determination that it verges on legal sadism; and that's only scratching the surface.

PROMESA really is a watershed moment, not only for PR, but also for our conception of democracy. After knowing that Congress willingly and aggressively passed a law such as PROMESA, all US citizens must ask themselves a fundamental question: **does my government act according to the values it professes?** It's a simple question with profound

²⁸ PROMESA, *Supra* note 1, at §107(b)

²⁹ PROMESA, *Supra* note 1, at §§108(a)(1) - 108(a)(2)

implications. The way this bill is drafted, and the zeal with which it has been defended by both the Judicial and Executive³⁰ branches reflects the federal government's preparedness to supplant the will of millions of its own citizens with the will of an unelected and **untouchable** Oversight Board. For that reason, and others, knowing and understanding this bill is crucial; not only for the PR issue, but for democracy's sake.³¹

³⁰ *The United States, which has exercised its statutory authority to intervene in these proceedings to defend PROMESA's constitutionality [...], argues that PROMESA's appointment mechanism is not subject to the Appointments Clause because (i) the Oversight Board members are territorial officers rather than "Officers of the United States," and (ii) the Appointments Clause does not govern the appointment of such territorial officers. [...] In support of its position, the United States cites historical practice and argues that Congress's plenary power over the territories is not subject to the distribution of powers provisions that regulate the federal government. OPINION, Supra note 18, at 13*

³¹ In the next episode of Puerto Rico Forward, I'll continue analyzing this unprecedented piece of legislation.