AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era—Separation of Powers/Appointment and Removal Power

**Financial Oversight and Management Board for Puerto Rico v. Aurelius Investments, LLC, \_\_\_ U.S. \_\_** (2020)

*The territory of Puerto Rico has been largely self-governing since the 1950s. Puerto Rico had long run substantial budget deficits, but the situation worsened dramatically when federal tax shelters for companies operating based on the island were phased out starting in the 1990s and Puerto Rico entered a sustained economic downturn and population drain. In 2015, the Puerto Rico governor declared the debt “unpayable.” Federal bankruptcy law allowed only municipalities but not states or territories to declare bankruptcy, however. In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) to put the territory into a functional state of bankruptcy and to facilitate a restructuring and reduction of the territory’s debt. The act created a Financial Oversight and Management Board, with members appointed by the president but without Senate confirmation. The seven-member board had substantial authority over the operation of the territorial government in order to contain costs and pay down the debt.*

*A group of creditors moved to have debt restructuring actions taken under PROMESA nullified on the grounds that the board was unconstitutionally constituted. The trial judge denied those motions, and a circuit court reversed. The circuit court held that the lack of Senate confirmation for the board members violated the appointment clause of the federal Constitution, but concluded that the actions that the board had taken prior to the ruling were nonetheless legally valid. In a unanimous decision, the U.S. Supreme Court reversed the circuit court and upheld the appointments to the board as constitutionally consistent with officers performing territorial duties.*

JUSTICE BREYER delivered the opinion of the Court.

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The Appointments Clause reflects . . . . the Founders’ reaction to “one of [their] generation’s greatest grievances against [pre-Revolutionary] executive power,” the manipulation of appointments. The Founders addressed their concerns with the appointment power by both concentrating it and distributing it. On the one hand, they ensured that primary responsibility for nominations would fall on the President, whom they deemed “less vulnerable to interest-group pressure and personal favoritism” than a collective body. On the other hand, they ensured that the Senate’s advice and consent power would provide “an excellent check upon a spirit of favoritism in the President and a guard against the appointment of unfit characters.” . . .

These other structural constraints, designed in part to ensure political accountability, apply to all exercises of federal power, including those related to Article IV entities. . . . The objectives advanced by the Appointments Clause counsel strongly in favor of that Clause applying to the appointment of all “Officers of the United States.” Why should it be different when such an officer’s duties relate to Puerto Rico or other Article IV entities?

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That text firmly indicates that it applies to the appointment of all “Officers of the United States.” And history confirms this reading. Before the writing of the Constitution, Congress had enacted an ordinance that allowed Congress to appoint officers to govern the Northwest Territory. As soon as the Constitution became law, the First Congress “adapt[ed]” that ordinance “to the present Constitution of the United States,” in large part by providing for an appointment process consistent with the constraints of the Appointments Clause. In particular, it provided for a Presidential-appointment, Senate-confirmation process for high-level territorial appointees who assumed federal, as well as local, duties. Later Congresses took a similar approach to later territorial Governors with federal duties. . . .

Given the Constitution’s structure, this history, roughly analogous case law, and the absence of any conflicting authority, we conclude that the Appointments Clause constrains the appointments power as to all “Officers of the United States,” even when those officers exercise power in or related to Puerto Rico.

The more difficult question before us is whether the Board members are officers of the United States such that the Appointments Clause requires Senate confirmation. If they are not officers of the United States, but instead are some other type of officer, the Appointments Clause says nothing about them. . . . And as we shall see, the answer to this question turns on whether the Board members have primarily local powers and duties.

The language at issue does not offer us much guidance for understanding the key term “of the United States.” The text suggests a distinction between federal officers—officers exercising power of the National Government—and nonfederal officers—officers exercising power of some other government. The Constitution envisions a federalist structure, with the National Government exercising limited federal power and other, local governments—usually state governments—exercising more expansive power. But the Constitution recognizes that for certain localities, there will be no state government capable of exercising local power. . . .

. . . . Longstanding practice indicates that a federal law’s creation of an office in this context does not automatically make its holder an “Officer of the United States.” Rather, Congress has often used these two provisions to create local offices filled in ways other than those specified in the Appointments Clause. When the First Congress legislated for the Northwest Territories, for example, it created a House of Representatives for the Territory with members selected by election. It also created an upper house of the territorial legislature, whose members were appointed by the President (without Senate confirmation) from lists provided by the elected, lower house. And it created magistrates appointed by the Governor.

The practice of creating by federal law local offices for the Territories and District of Columbia that are filled through election or local executive appointment has continued unabated for more than two centuries. . . .

Puerto Rico’s history is no different. It reveals a longstanding practice of selecting public officials with important local responsibilities in ways that the Appointments Clause does not describe. . . .

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. . . . We know of no case endorsing an Appointments Clause based challenge to such selection methods. Indeed, to read Appointments Clause constraints as binding Puerto Rican officials with primarily local duties would work havoc with Puerto Rico’s (federally ratified) democratic methods for selecting many of its officials.

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[T]he Board possesses considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials. But this power primarily concerns local matters. Congress’ law thus substitutes a different process for determining certain local policies (related to local fiscal responsibility) in respect to local matters. And that is the critical point for current purposes. The local nature of the legislation’s expressed purposes, the representation of local interests in bankruptcy proceedings, the focus of the Board’s powers upon local expenditures, the local logistical support, the reliance on local laws in aid of the Board’s procedural powers—all these features when taken together and judged in the light of Puerto Rico’s history (and that of the Territories and the District of Columbia)—make clear that the Board’s members have primarily local duties, such that their selection is not subject to the constraints of the Appointments Clause.

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*Reversed*.

JUSTICE THOMAS, concurring.

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As I have previously explained, the original public meaning of the phrase “Officers of the United States” includes “all federal civil officials who perform an ongoing, statutory duty.” *Lucia v. SEC* (2018). At the founding, the term “officer” referred to “anyone who performed a continuous public duty.” And the phrase “of the United States” limited the Appointments Clause to “federal” officers.

Territorial officials performing duties created under Article IV of the Constitution are not federal officers within the original meaning of the phrase “Officers of the United States.” Since the founding, this Court has recognized a distinction between Article IV power and the powers of the National Government in Articles I, II, and III. The founding generation understood the phrase “Officers of the United States” to refer to officers exercising the powers of the National Government, not officers solely exercising Article IV territorial power. Because the Board’s members perform duties pursuant to Article IV, they do not qualify as “Officers of the United States.”

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Because territorial governments “are not organized under the Constitution,” they are not “subject to its complex distribution of the powers of government.” Ibid. Congress may give Territories “a legislative, an executive, and a judiciary, with such powers as it has been their will to assign.” And, since the founding, Congress has done so in ways that do not comport with the Constitution’s restrictions on the National Government. For example, Congress has delegated Article IV legislative authority to territorial officials and legislatures, which it could not do with Article I legislative power. . . .

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One cannot plausibly conclude that the First Congress—seeking to “adapt” the Northwest Ordinance to the Constitution —prescribed methods of appointing territorial officers that violated the Appointments Clause. Rather, the First Congress recognized the distinction between territorial and national powers, and understood that officers performing duties pursuant to only Article IV territorial powers are not officers “of the United States.” For these reasons, I would hold that the original meaning of the phrase “Officers of the United States” does not include territorial officers exercising only powers conferred under Article IV.

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Today’s decision reaches the right outcome, but it does so in a roundabout way that departs from the original meaning of the Appointments Clause. I would hold that the Board’s members are not “Officers of the United States” because they perform ongoing statutory duties under only Article IV. I therefore cannot join the Court’s opinion and concur only in the judgment.

JUSTICE SOTOMAYOR, concurring.

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With the passage of Public Law 600 [in 1950] and the adoption and recognition of the Puerto Rico Constitution [in 1952], “the United States and Puerto Rico . . . forged a unique political relationship, built on the island’s evolution into a constitutional democracy exercising local self-rule.” . . .

Of critical import here, the Federal Government “relinquished its control over [Puerto Rico’s] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States.” Indeed, the very “purpose of Congress in the 1950 and 1952 legislation was to accord Puerto Rico the degree of autonomy and independence normally associated with States of the Union.” . . .

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In concluding that the Board members are territorial officers not subject to the strictures of the Appointment Clause, the Court does not meaningfully address Puerto Rico’s history or status. Nor need it, as the parties do not discuss the potential consequences that Congress’ recognition of complete self-government decades ago may have on the Appointments Clause analysis. But in my view, however one distinguishes territorial officers from federal officers (whether under the Court’s “primarily local” test, or some other standard), the longstanding compact between the Federal Government and Puerto Rico raises grave doubts as to whether the Board members are territorial officers not subject to the Appointments Clause. When Puerto Rico and Congress entered into a compact and ratified a constitution of Puerto Rico’s adoption, Congress explicitly left the authority to choose Puerto Rico’s governmental officers to the people of Puerto Rico. That turn of events seems to give to Puerto Rico, through a voluntary concession by the Federal Government, the exclusive right to establish Puerto Rico’s own territorial officers.

No less than the bedrock principles of government upon which this Nation was founded ground this proposition. When the Framers resolved to build this Nation on a republican form of government, they understood that the American people would have the authority to select their own governmental officers. . . .

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Of course, it might be argued that Congress is nevertheless free to repeal its grant of self-rule, including the grant of authority to the island to select its own governmental officers. And perhaps, it might further be said, that is exactly what Congress has done in PROMESA by declaring the Board “an entity within the territorial government” of Puerto Rico. But that is not so certain.

This Court has “‘repeatedly stated . . . that absent “a clearly expressed congressional intention”’” to repeal, “‘[a]n implied repeal will only be found where provisions in two statutes are in “irreconcilable conflict,” or where the latter Act covers the whole subject of the earlier one and “is clearly intended as a substitute.”’” Not so, it seems, with PROMESA on the one hand, and Congress’ 1950 and 1952 legislations on the other. As written, PROMESA is a temporary bankruptcy measure intended to assist in restoring Puerto Rico to fiscal security. It is not an organic statute clearly or expressly purporting to renege on Congress’ prior “gran[t to] Puerto Rico [of] a measure of autonomy comparable to that possessed by the States.” . . .

Further, there is a legitimate question whether Congress could validly repeal any element of its earlier compact with Puerto Rico on its own initiative, even if it had been abundantly explicit in its intention to do so. The truism that “one Congress cannot bind a later Congress,” appears to have its limits: As scholars have noted, certain congressional actions are not subject to recantation.

Plausible reasons may exist to treat Public Law 600 and the Federal Government’s recognition of Puerto Rico’s sovereignty as similarly irrevocable, at least in the absence of mutual consent. Congress made clear in Public Law 600 that the agreement between the Federal Government and Puerto Rico was “in the nature of a compact.” . . .

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After all, the Territories Clause provides Congress not only the power to “make all needful Rules and Regulations respecting the Territor[ies],” but also the power to “dispose of ” them, which necessarily encompasses the power to relinquish authority to legislate for them. U. S. Const., Art. IV, §3, cl. 2. And some have insisted that the power to cede authority exists no less in the absence of full “dispos[al]” through independence or Statehood. . . .

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. . . . I am skeptical that the Constitution countenances this freewheeling exercise of control over a population that the Federal Government has explicitly agreed to recognize as operating under a government of their own choosing, pursuant to a constitution of their own choosing. Surely our Founders, having labored to attain such recognition of self-determination, would not view that same recognition with respect to Puerto Rico as a mere act of grace. Nevertheless, because these issues are not properly presented in these cases, I reluctantly concur in the judgment.