# WITH PLENARY POWERS COMES PLENARY RESPONSIBILITY: PUERTO RICO'S ECONOMIC AND FISCAL CRISIS AND THE UNITED STATES

ARTICLE

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## INTRODUCTION

I WANT TO THANK THE *UNIVERSITY OF PUERTO RICO LAW REVIEW* FOR THEIR invitation to participate in this symposium, *The Debt Crisis and the Fate of Puerto Rico*. As a former Puerto Rico legislator, Resident Commissioner in Washington, D.C., and Governor of Puerto Rico, and as someone who has written and spoken publicly in recent times about Puerto Rico's debt crisis and our dire economic situation,[1] I consider my contribution as being more from a political,

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1 *See* ANÍBAL ACEVEDO VILÁ, TOWARDS THE ECONOMIC REFOUNDING OF PUERTO RICO AND ITS COMMONWEALTH STATUS (Juanita Colombani ed., 2014); Aníbal Acevedo Vilá, *The Moment of Truth*, ACEVEDO VILÁ (Nov. 9, 2015), http://acevedovila.net/es/?v=item&id=117; Aníbal Acevedo Vilá, *Yes You*

social and economic multidimensional perspective than from the purely legal standpoint.

Like the vast majority of Puerto Ricans, I am deeply concerned about the future of our country. We are facing the greatest economic crisis since the Great Depression. Most of our political institutions are facing multiple challenges. Pessimism permeates our population like never before, while tens of thousands of Puerto Ricans are leaving the Island every year.[2] Regardless of some positive steps taken by the current Government administration to resolve this inherited crisis, I perceive a widespread sensation that there is no light at the end of the tunnel.

In this paper, I will briefly summarize the political, constitutional and economic relationship between Puerto Rico and the United States, as well as the historical background of the different provisions in the Constitution of the Commonwealth of Puerto Rico regarding the budget and public debt.[3]

From that legal and historical background we can arrive at a clear conclusion: there is a shared responsibility between the U.S. Government and Puerto Rico for the current crisis. One basic principle in life is that with the power to do or not to do, comes the responsibility for what you do or do not do. It has now become evident that regarding Puerto Rico, it is the United States who ultimately holds power and therefore, under the current political relationship, has the ultimate responsibility. In the third section of this paper I will address the moral, political and legal responsibility of the United States when it comes to the legal and economic consequences of the Government of Puerto Rico's insolvency.

Finally, I will make policy recommendations to come out of this crisis and help achieve sustained economic development for Puerto Rico. What needs to be done can be summarized in this introduction with one assertion: there is an urgent need to establish a new economic relationship between Puerto Rico and the United States and based on that new economic relationship, the legal, fiscal, and political ties between both countries will have to be modified accordingly.

## I. THE POLITICAL, CONSTITUTIONAL AND ECONOMIC RELATIONSHIP

It is not the purpose of this paper to analyze the legal and constitutional relationship between Puerto Rico and the United States; there already exists ample

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*Should, Yes You Can, and Yes, It Is Also Your Debt*, ACEVEDO VILÁ (Mar. 19, 2015), http://acevedovila.net/es/?v=item&id=107.

2 *See* Patrick Gillespie, *Puerto Rico's Terrible Economy is Causing a Population Exodus*, CNN MONEY (June 15, 2015), http://money.cnn.com/2015/06/15/news/economy/puerto-rico-debt/; D'Vera Cohn et al., *Puerto Rican Population Declines on Island, Grows on U.S. Mainland*, PEW RESEARCH CENTER (Aug. 11, 2014), http://www.pewhispanic.org/2014/08/11/puerto-rican-population-declines-on-island-grows-on-u-s-mainland/; Lizette Alvarez, *Economy and Crime Spur New Puerto Rican Exodus*, NEW YORK TIMES (Feb. 8, 2014), http://www.nytimes.com/2014/02/09/us/economy-and-crime-spur-new-puerto-rican-exodus.html?_r=0.

3 *See* CONST. PR art. VI, §§ 2, 7, 8.

legal and political literature about that.[4] For the purpose of this multidimensional discussion, let us briefly go over some uncontested elements of our historical and constitutional relationship.

*A. Self-government*

The official position of the U.S. Government, up until 1952, was to slowly and gradually grant Puerto Rico more autonomy over local matters, pursuant to the plenary powers of Congress under the Territorial Clause of the U.S. Constitution.[5] The *Foraker Act of 1900*,[6] the *Jones Act of 1917*,[7] the *Elective Governor Act of 1947*,[8] and the actions that concluded with the adoption of the Commonwealth's Constitution of 1952 were all part of this process.[9] Nonetheless, none of these acts granted Puerto Rico any new economic development tools or even real control over our economic variables, with the exception of fiscal autonomy, which allows us to establish our own tax system. After 1952 there have been no new concessions of more autonomy or self-government for the Island. In fact, due to the general expansion of the Federal Government's sphere of action, we control less of our economic variables today than we did fifty years ago.[10]

The most recent developments in the U.S. Congress in response to the current debt and economic crisis suggest that Congress is not only reluctant to enhance the level of autonomy and self-government for the Commonwealth, but that Capitol Hill seems to be more inclined to encroach the level of self-government obtained in 1952. The bills introduced by Senators Orrin Hatch, Chuck Grassley, and Lisa Murkowski,[11] and by Congressman Sean Duffy,[12] as will be discussed later, are

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**4** *See, e.g.*, JOSÉ JULIÁN ÁLVAREZ GONZÁLEZ, DERECHO CONSTITUCIONAL DE PUERTO RICO Y RELACIONES CONSTITUCIONALES CON LOS ESTADOS UNIDOS: CASOS Y MATERIALES (2009); FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997); 1 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO (1980); 2 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO (1981); 3 JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO (1982).

**5** U.S. CONST. art IV, § 3, cl. 2.

**6** Foraker Act of 1900, Pub. L. No. 56-191, 31 Stat. 77 (1900).

**7** Jones Act of 1917, Pub. L. No. 64-368, 39 Stat. 951 (1917).

**8** Elective Governor Act of 1947, Pub. L. No. 80-362, 61 Stat. 770 (1947).

**9** *See* Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950); Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (1952).

**10** For example, when the Commonwealth was established in 1952, neither the Environmental Protection Agency (E.P.A) nor the Occupational Safety and Health Administration (O.S.H.A.) existed. Both were created under President Nixon's Administration in 1970.

**11** Puerto Rico Assistance Act of 2015, S. 2381, 114th Cong. (2015).

**12** Puerto Rico Financial Stability and Debt Restructuring Choice Act, H.R. 4199, 114th Cong. (2015).

essentially a revocation of the limited powers that were granted to the Government of the people of Puerto Rico, and almost constitute a regression to the *Foraker Act* times.

### *B. Statehood for Puerto Rico has never been the official U.S. policy*

Making Puerto Rico a state of the Union has never been the official public policy of the United States. As José Trías Monge clearly summarized:

> Prior to the Spanish-American War, since the Northwest Ordinance of 1787 . . . . Territories were acquired with a view to eventual admission to the Union. They were part of the United States in both the domestic and the international sense. The Constitution followed the flag and accordingly applied in all of them, only they were governed under the plenary powers granted Congress by the so-called territorial clause of the Constitution. The inhabitants were made citizens of the United States.[13]

All this changed in 1898:

> The acquisition of the new colonies—the start of an empire—led the administration to devise a policy different from the established territorial one from the mass of theories within it, some of them conflicting. Its fundamental tenets would be that the people of Puerto Rico were not ready for self-government; a learning period, of unspecified duration, was necessary before self-government could be extended; *the eventual status should be neither statehood nor independence, but a self-governing dependency, subject to the plenary power of Congress*; the learning process required a policy of political and cultural assimilation, which necessarily involved the extension of United States laws, institutions, and language to the island; and living conditions should be improved to the extent possible. This colonial policy, still incipient at that moment, would prove to be a hardy one once it jelled. *Parts of it still plague the relationship between the United States and Puerto Rico*.[14]

The new colonial policy was enacted into law with the *Foraker Act*,[15] and some of its provisions have survived until this day as part of *Law 600*.[16] Moreover, the new colonial policy was validated and elevated to a constitutional status with the first few of the famous (or infamous) Insular Cases,[17] decided between 1901 and

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**13** TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD, *supra* note 4, at 38.

**14** *Id.* at 38-39 (emphasis added).

**15** Foraker Act of 1900, Pub. L. No. 56-191, 31 Stat. 77 (1900).

**16** Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950).

**17** *See* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. UPR 225 (1996); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2007).

1905.[18] Although the constitutional text of the Territorial Clause makes no distinction regarding "the Territory,"[19] confronted with the fact that the new "possessions" acquired after the Hispanic-American War were not on the path towards statehood, the United States Supreme Court created a new constitutional category, that of a *non-incorporated territory*:

> While no particular provision of the Constitution is referred to, to sustain the argument that it is impossible to acquire territory by treaty without immediate and absolute incorporation, it is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States and which are not so completely incorporated as to be in all respects a part of the United States. . . . But this reasoning is based on political, and not judicial, considerations.[20]

With the Insular Cases, the basic principles of the new colonial policy were granted constitutional footing: the Constitution does not follow the flag; Puerto Rico belongs to, but is not part of the United States, it is rather a possession of the United States under the plenary powers of Congress; "and Puerto Rico could accordingly be held and governed indefinitely, without the restrictions of the Constitution, except those relating to certain undefined human rights of a fundamental nature."[21]

The fact that Congress's clear public policy towards Puerto Rico was never to prepare the Island for statehood is even more evident when compared to the congressional and the Supreme Court treatment of Hawaii and Alaska during that same time. As noted by Trías Monge:

> Hawaii's organic act, passed shortly after the Foraker Act in 1900, made Hawaii part of the United States and started it on the path to statehood. That incorporation of Hawaii by Congress had taken place, contrary to what happened to Puerto Rico, was confirmed in 1903 in the *Mankichi* case (another of the Insular Cases). By 1905, in the *Ras[s]mussen* case, the Supreme Court decided that Alaska was also an incorporated territory where the Constitution applied.[22]

The extension of United States citizenship to Puerto Ricans with the *Jones Act* made no change to the basic underpinnings of the constitutional theory regarding Puerto Rico and did not reflect a policy change in favor of eventual statehood for

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**18** Dorr v. U.S., 195 U.S. 138 (1904); Downes v. Bidwell, 182 U.S. 244 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

**19** "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 of any particular State." U.S. CONST. art IV, § 3, cl. 2.

**20** TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD, *supra* note 4, at 48 (alteration in original) (quoting *Downes*, 182 U.S. at 311-12).

**21** *Id.* at 51.

**22** *Id.* at 50 (footnote omitted) (citing Hawaii v. Mankichi, 190 U.S. 197 (1903); Rassmussen v. U.S., 197 U.S. 516 (1905)).

the Island. This principle was clearly outlined by President William Howard Taft in his 1912 State of the Union address, advocating in favor of a bill pending in Congress to grant American citizenship to all Puerto Ricans, where he stated:

> I believe that the demand for citizenship is just, and that it is amply earned by sustained loyalty on the part of the inhabitants of the island. But it should be remembered that the demand must be, in the minds of most Porto Ricans is, *entirely disassociated from any thought of statehood*. I believe that no substantial public opinion in the United States or in Puerto Rico contemplates statehood for the island as the ultimate form of relation between us. I believe that the aim to be striven for is the fullest possible allowance of legal and fiscal self-government, with American citizenship as the bond between us; in other words, a relationship analogous to the present relationship between Great Britain and such self-governing colonies as Canada and Australia.[23]

The enactment of the *Jones Act* and the extension of citizenship to Puerto Ricans made no dents on the legal and constitutional framework of the Insular Cases. On the contrary, in *Balzac v. Porto Rico* the Supreme Court unanimously reaffirmed the doctrine of non-incorporated territory and ruled that the extension of United States citizenship to Puerto Ricans under the *Jones Act* did not incorporate the Island to the United States.[24]

*C. The creation of the Commonwealth, a move forward but . . .*

The process of granting Puerto Rico more self-government took a giant leap forward during the period of 1940-1952 with the resounding victory of the Popular Democratic Party in 1940, the *Elective Governor Act of 1947*,[25] and the creation of the Commonwealth in the process between 1950 to 1952 that allowed Puerto Rico to draft and adopt its own Constitution.[26] As summarized by Trías Monge, the aspiration of the Puerto Rican leadership at that time was to change the relationship based on three principles: (1) the recognition of the right of the people of Puerto Rico to adopt a constitution of their own; (2) to base the new relationship between Puerto Rico and the United States on a mutual consent basis, and (3) to obtain substantial changes in the relationship between both parties. In the eyes of Trías Monge, *Law 600* of 1950 authorizing Puerto Rico to adopt its own Constitution, "was clear as to the first objective, murky as to the second, and completely

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**23** TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD *supra* note 4, at 64 (emphasis added) (quoting President William Howard Taft, Annual Message of the President to Congress 11-12 (1912)).

**24** Balzac v. Porto Rico, 258 U.S. 298 (1922). Curiously, the Court's opinion in *Balzac* was written by then-Chief Justice William Howard Taft.

**25** Elective Governor Act of 1947, Pub. L. No. 80-362, 61 Stat. 770 (1947).

**26** Puerto Rican Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950); Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (1952).

omitted the third."[27] Regarding the powers of Congress over Puerto Rico, the reports of the House and Senate committees on the bill that eventually became *Law 600* explicitly state that "[t]he measure would not change Puerto Rico's fundamental political, social, and economic relationship to the United States."[28]

I have no doubt that the creation of the Commonwealth and the adoption of our own Constitution to rule over matters of local concern were a great victory in the struggle of the people of Puerto Rico to obtain more democratic powers and autonomy. However, the language and the process of that period left the door wide-open for the actions and inactions of Congress in the years to come in their exercise of the plenary powers over Puerto Rico.

*D. The post-1952 period*

Notwithstanding the fact that: (1) at the request of the United States, the United Nations approved a resolution in 1953 excluding Puerto Rico from that organization's list of non-self-governing territories;[29] (2) there are United States Supreme Court cases stating that Puerto Rico, "like a state, is an autonomous political entity, 'sovereign over matters not ruled by the [United States] Constitution'";[30] (3) "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union,"[31] and (4) "Puerto Rico occupies a relationship to the United States that has no parallel in our history,"[32] the reality is that specific claims for more powers and autonomy have always been denied by the U.S. Government. In fact, for the last twenty-five years, the official position of the Executive and Legislative branches of the U.S. Government has been that Puerto Rico is still under the plenary powers of Congress.

Regardless of what anyone thinks of the current Commonwealth status and of the fact that in the United States there has never been the political will to grant Puerto Rico statehood, the legal theory of the Commonwealth as an irrevocable bilateral compact based on mutual consent is not supported by anyone in Washington D.C., neither in the White House nor in Congress. The Young Bill of the late 1990s,[33] the Clinton White House's position on that bill, and the two Task

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**27** TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD, *supra* note 4, at 109.

**28** *Id.* at 113 (quoting Puerto Rico Constitution: Hearings Before the House Comm. on Public Lands, 81st Cong. 162 (1950)).

**29** G.A. Res. 748 (VIII) U.N. Doc. A/RES/748 (Nov. 27, 1953).

**30** Rodríguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 670 (1974)).

**31** Examining Bd. Of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 594 (1976); *see, e.g.*, Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987).

**32** *Flores de Otero*, 426 U.S. at 596; Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986).

**33** United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. § 2 (1998).

Force Reports under President George W. Bush[34] are clear evidence of the rejection of the legal theory that the adoption of the Commonwealth status somehow changed the basic relation of power between Puerto Rico and the United States. More recently, the 2011 Status Report of the Obama Administration very clearly states that Puerto Rico remains under the Territorial Clause of the U.S. Constitution and denies the bilateral and mutual consent nature of the relationship.[35] My personal experience dictates that even the so called "friends" of the *status quo* in Washington D.C. usually defend Puerto Rico's right to choose, and in some cases even staunchly oppose statehood, but never openly advocate the historical and traditional tenets of the Commonwealth status as theorized by its supporters on the Island.

The bills introduced in Congress on 2015 and 2016 regarding the fiscal and debt crisis by Senators Hatch, Grassley and Murkowski,[36] and by Congressman Duffy[37] are an evident showing of Congress exercising its plenary powers over Puerto Rico, while the *amicus curiae* brief of the Solicitor General on behalf of the United States filed before the U.S. Supreme Court on December 23, 2015,[38] clearly summarizes the official position of the Executive Branch regarding the process of 1950-1952:

> Those events were of profound significance for the relationship between the United States and Puerto Rico, but they did not alter Puerto Rico's constitutional status as a U.S. territory. . . . Congress authorized Puerto Rico to exercise governance over local affairs. That arrangement can be revised by Congress, and federal and Puerto Rico officials understood that Puerto Rico's adoption of a constitution did not change its constitutional status. . . .
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> . . . . Congress did not enter into an irrevocable "compact" with Puerto Rico, and as a constitutional matter, Congress cannot irrevocably cede sovereignty to Puerto Rico while it remains a U.S. territory. The designation of Puerto Rico as a

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**34** REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS (2007), https://www.justice.gov/archive/opa/docs/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf.

**35** The report by President Obama's Task Force states specifically the following:

> [C]onsistent with the legal conclusions reached by prior Task Force reports, one aspect of some proposals for enhanced Commonwealth remains constitutionally problematic—proposals that would establish a relationship between Puerto Rico and the Federal Government that could not be altered except by mutual consent. This was a focus of past Task Force reports. The Obama Administration has taken a fresh look at the issue of such mutual consent provisions, and it has concluded that such provisions would not be enforceable because a future Congress could choose to alter that relationship unilaterally.

REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 26 (2011), https://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf

**36** Puerto Rico Assistance Act of 2015, S. 2381, 114th Cong. (2015).

**37** Puerto Rico Financial Stability and Debt Restructuring Choice Act, H.R. 4199, 114th Cong. (2015); Puerto Rico Oversight, Management, and Economic Stability Act, H.R. 4900, 114th Cong. (2016).

**38** Brief for the United States as Amici Curiae Supporting Respondents, P.R. v. Sánchez Valle (U.S. filed Dec. 23, 2015) (No. 15-108).

> "commonwealth" reflects Puerto Rico's significant powers of self-government, but it does not denote a constitutional status.[39]

Moreover, "[a]lthough Public Law 600 granted the people of Puerto Rico an unprecedented amount of control over internal affairs, it did not change Puerto Rico's status under the U.S. Constitution."[40]

The reality is that sixty-four years after the creation of the Commonwealth we are still basically having the same type of political and legal discussions regarding the relationship between Puerto Rico and the United States that we had during the first fifty-four years of openly colonial rule under the American flag.

## II. Legal and Constitutional Framework of the Budget and Debt Crisis

We must take into account the previous background when examining the current legal and economic crisis of Puerto Rico. In this section, I will identify the relevant articles of the Commonwealth's Constitution and federal law that serve as a framework to Puerto Rico's fiscal and budget powers and its government debt.

The powers of the Government of Puerto Rico to impose and collect taxes and to issue bonds and other obligations come from an authorization granted in 1900 by Congress in the exercise of its plenary powers. That legal authorization remains essentially intact, with some technical and clarifying amendments, until today. Section 38 of the *Foraker Act of 1900* states:

> That no export duties shall be levied or collected on exports from Porto Rico; *but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by act of the legislative assembly; and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law*, and to protect the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the War Department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August eighth, eighteen hundred and ninety-nine: *Provided, however,* That [sic] no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property.[41]

It is clear from the language of this section of the *Foraker Act* that Congress was granting the civil Government of Puerto Rico created by that Act the power to impose taxes and to issue bonds, with certain limitations. That authorization

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**39** *Id.* at 7-8.

**40** *Id*. at 21-22.

**41** Foraker Act of 1900, Pub. L. No. 56-191, § 38, 31 Stat. 77, 86 (1900) (emphasis added).

was essentially incorporated into Section 3 of the *Jones Act*, which among other things states that "taxes and assessments on property, *internal revenue[s]*, and license fees, and royalties for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Porto Rico."[42] Regarding the power of Puerto Rico to issue bonds and obligations, the language of Section 3 of the *Jones Act* is very similar to the *Foraker Act*. But that section incorporates important language very much pertinent to the current crisis:

> [A]nd all bonds issued by the government of Porto Rico, or by its authority, shall be exempt from taxation by the Government of the United States, or by the government of Porto Rico or any political or municipal subdivision thereof, or by any State, or by any county, municipality, or other municipal subdivision of any State or Territory of the United States, or by the District of Columbia.[43]

With this language in 1917, in a clear exercise of its plenary powers over Puerto Rico, Congress not only reaffirmed the competence of the Government of Puerto Rico to impose taxes and issue bonds, but went further in the exercise of that power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[44] The enactment of *Law 600* by Congress authorizing the people of Puerto Rico to adopt its own Constitution did not alter this section of the *Jones Act*. Sections 4 and Section 5 of *Law 600* specifically did not repeal Section 3 of the *Jones Act*. This "authorization" for Puerto Rico to impose and collect taxes, to issue bonds, and to give the benefit of triple tax exemption that those bonds currently enjoy was left intact after the enactment of *Law 600*.[45]

This historic legal background demonstrates that the power that the Government of Puerto Rico has today to impose and collect taxes and to issue bonds and incur in other obligations, as well as the triple tax exemption benefits that those bonds enjoy, comes from federal legislation adopted prior to the creation of the Commonwealth in a clear exercise of the plenary powers of Congress. Not even an affirmation of the theory of mutual consent regarding Commonwealth status would change that conclusion. *Law 600* states that "[t]his Act shall be submitted to the qualified voters of Puerto Rico for acceptance or rejection."[46] However, that acceptance or rejection would have had no effect regarding Section 3 of the *Jones Act*. If the people of Puerto Rico had rejected *Law 600*, the entire *Jones Act* would

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**42** *See* Jones Act of 1917, Pub. L. No. 64-368, § 3, 39 Stat. 951 (1917) (emphasis added).

**43** *Id.*

**44** U.S. CONST. art. IV, § 3, cl. 2.

**45** 48 U.S.C. § 745 (2012) ("All bonds issued by the Government of Puerto Rico, or by its authority, shall be exempt from taxation by the Government of the United States, or by the Government of Puerto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia.").

**46** Puerto Rican Federal Relations Act, Pub. L. No. 81-600, § 2, 64 Stat. 319 (1950).

have stayed in effect. By accepting *Law 600*, the same result was achieved by virtue of its Sections 4 and 5. Section 3 of the *Jones Act*, the one that grants the Government of Puerto Rico the basic fiscal and budget powers, has never been repealed and was not one of the powers delegated or granted to the people of Puerto Rico by Congress by virtue of *Law 600*. Therefore, until today, the ultimate source of those powers is federal law.

The powers to levy and collect taxes were codified in Article VI, Section 2, of the Commonwealth of Puerto Rico Constitution.[47] But it is interesting that although this section recognizes "[t]he power of the Commonwealth of Puerto Rico to impose and collect taxes" and "to contract and to authorize the contracting of debts," including bonds, the Commonwealth Constitution does not say if this is an inherent or delegated power.[48] As we have seen, the explanation for this omission could be that the corresponding article of the *Jones Act* was not repealed. Therefore, one may assume that these powers of the Commonwealth, recognized in its Constitution, are those that were afforded by Congress in Section 3 of the *Jones Act*. This is made even clearer when we examine the other provisions of the Commonwealth's Constitution related to the budget and the public debt, in which the *Jones Act* precedents were indeed repealed.

There are three main provisions in the Commonwealth Constitution regarding budget and debt issues: Article VI, Section 6, regarding the situation in which

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**47** Article VI, Section 2 of the Constitution of Puerto Rico states:

> The power of the Commonwealth of Puerto Rico to impose and collect taxes and to authorize their imposition and collection by municipalities shall be exercised as determined by the Legislative Assembly and shall never be surrendered or suspended. The power of the Commonwealth of Puerto Rico to contract and to authorize the contracting of debts shall be exercised as determined by the Legislative Assembly, but no direct obligations of the Commonwealth for money borrowed directly by the Commonwealth evidenced by bonds or notes for the payment of which the full faith, credit and taxing power of the Commonwealth shall be pledged shall be issued by the Commonwealth if the total of (i) the amount of principal of and interest on such bonds and notes, together with the amount of principal of and interest on all such bonds and notes theretofore issued by the Commonwealth and then outstanding, payable in any fiscal year and (ii) any amounts paid by the Commonwealth in the fiscal year next preceding the then current fiscal year for principal or interest on account of any outstanding obligations evidenced by bonds or notes guaranteed by the Commonwealth, shall exceed fifteen (15) percent of the average of the total amount of the annual revenues raised under the provisions of Commonwealth legislation and covered into the Treasury of Puerto Rico in the two fiscal years next preceding the then current fiscal year; and no such bonds or notes issued by the Commonwealth for any purpose other than housing facilities shall mature later than 30 years from their date and no bonds or notes issued for housing facilities shall mature later than 40 years from their date; and the Commonwealth shall not guarantee any obligations evidenced by bonds or notes if the total of the amount payable in any fiscal year on account of principal of and interest on all the direct obligations referred to above theretofore issued by the Commonwealth and then outstanding and the amounts referred to in item (ii) above shall exceed fifteen (15) percent of the average of the total amount of such annual revenues.

CONST. P.R. art. VI, § 2.

**48** *Id.*

a new budget is not approved for the next fiscal year;[49] Article VI, Section 7, which mandates a balanced budget,[50] and Section 8 of the same article that establishes the order of payments in case of insufficiency of funds.[51] These three sections of the Commonwealth's Constitution also come from the *Foraker Act* and the *Jones Act,* of 1900 and 1917, respectively. The precedents for Section 6 are Section 31 of the *Foraker Act* and Section 34 of the *Jones Act*. That same Section 34 of the *Jones Act* is the basis for Sections 7 and 8 of the Commonwealth Constitution. However, contrary to Section 3 of the *Jones Act* regarding the power to impose and collect taxes, issue bonds, and exempt the revenues of those bonds from taxes, which are still in force today, all these sections of the *Jones Act* regarding the budget were repealed by *Law* 600 and the adoption of our own Constitution.

Something is clear from this legal background, and it bears significantly on the current crisis and the legal responsibility of the United States regarding Puerto Rico's debt and possible insolvency. While the current constitutional provisions regarding the mandate to have a balanced budget, and more to the point, the one granting the constitutional guarantee to the payment of bonds issued by the Government of Puerto Rico, emanate from the Commonwealth's Constitution because the relevant provisions of federal law were repealed by *Law 600* in the 1950-52 process, the provisions granting Puerto Rico the power to impose and collect taxes, to issue bonds, and to guarantee the revenues of those bonds triple tax exemption are still federal law since 1917.

## III. THE UNITED STATES' MORAL AND LEGAL RESPONSIBILITY

More than a legal relationship, the history between Puerto Rico and the United States has been a political, economic, and military relationship. Since the Insular Cases, legal theories and Court rulings have basically created the necessary framework to validate the policy interests of the United States, and in some cases, like in the process of the creation of the Commonwealth, to respond to the legitimate claims of the people of Puerto Rico and the international community. But at the end of the day, the interests and policies of the political branches of the U.S.

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**49** *Id.* at § 6 ("If at the end of any fiscal year the appropriations necessary for the ordinary operating expenses of the government and for the payment of interest on and amortization of the public debt for the ensuing fiscal year shall not have been made, the several sums appropriated in the last appropriation acts for the objects and purposes therein specified, so far as the same may be applicable, shall continue in effect item by item, and the Governor shall authorize the payments necessary for such purposes until corresponding appropriations are made.").

**50** *Id.* at § 7 ("The appropriations made for any fiscal year shall not exceed the total revenues, including available surplus, estimated for said fiscal year unless the imposition of taxes sufficient to cover said appropriations is provided by law.").

**51** *Id.* at § 8 ("In case the available revenues including surplus for any fiscal year are insufficient to meet the appropriations made for that year, interest on the public debt and amortization thereof shall first be paid, and other disbursements shall thereafter be made in accordance with the order of priorities established by law.").

Government have prevailed over the legitimate claims of the people of Puerto Rico. The federal courts have basically crafted legal theories to justify those policies of the other two branches of the federal government. Again, it is not the purpose of this paper to go through that history, but it is important to remember, as an example of the Court's accommodation of the other two branch's policies, that although there is nothing in the U.S. Constitution about non-incorporated territories, when the time came to create a constitutional framework for the new "possessions" of the United States that were not on the path toward statehood, the Supreme Court was there, and the new dichotomy of incorporated or non-incorporated territories was created and elevated to constitutional standard.

One of the problems, perhaps the biggest, that the current relationship with the United States has is that currently there are no clear U.S. political, economic or military interests in Puerto Rico. While Puerto Rico first produced sugar for the American and world markets, and then offered soldiers and bases for the U.S. armed forces, the United States was definitely paying attention to Puerto Rico. While Puerto Rico provided thousands of acres of our limited land for military training and target range and there was a need to balance the influence of the Cuban regime and the challenges of the Cold War, the United States told the world that we were working together. And, when the U.S. economy needed to open new doors for American businesses to invest, flourish and prosper, we were "partners" in that endeavor.

However, today there is no Cold War, relations with Cuba have been reestablished, the United States has free market agreements all around the world, and consequently, Puerto Rico is merely an afterthought (or a crisis) for American policy makers. Policy makers in the United States and the American people must be clear; we have arrived at this crisis together. Our own hands did a lot of the good and the bad, but a lot of the good and the bad were done by the actions and inactions of the United States. Now, Puerto Rico is in a deep crisis that is threatening essential government services including safety, education and healthcare. But, contrary to the good old times, this time the U.S. Government is so far keeping its distance. The most recent developments in Congress and within the Obama administration hint that Washington, D.C., is finally recognizing that they cannot keep their distance, but we are still waiting to see when and how they will act.

Puerto Rico is confronting two crises simultaneously: the greatest economic downturn of our modern history, and an overwhelming government debt burden. The combination of the elimination by the U.S. Congress of Section 936 of the Internal Revenue Code back in 1996,[52] with its dire economic consequences and adversarial effect on the structural deficit of the Government of Puerto Rico and its major public corporations, in addition to a ballooning debt service in the coming years, has yielded the perfect storm. The fiscal crisis worsens the economic crisis, and this in turn affects the former. It has been a vicious cycle in which the

52 *See* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996).

feasible measures of economic stimulus exacerbate the fiscal crisis and the attention to the fiscal crisis has negative effects on our economy. To top it off, for the first time in our history our population is shrinking at an alarming rate.

Although Puerto Rico bears a great part of the blame, the United States is also responsible for the economic crisis. This is not only because of Congress' elimination of Section 936 of the Internal Revenue Code without granting any new powers or tools to compensate,[53] but also because the indiscriminate application of federal laws to Puerto Rico has the effect of imposing variables and standards of the most economically developed country in the world to an insular economy that has never attained full development, making Puerto Rico less competitive in the world economy.

From an economic standpoint, we need to understand that, with the exception of the federal income tax laws and some other laws, all federal laws and regulations that affect and impact the economy of the United States apply to Puerto Rico as in the fifty states. The truth is that Puerto Rico's economy is still in development. For many years we were made to believe the contrary, and we have behaved as such, but the economic numbers unequivocally show that this is not the case. The root of our economic problems lay there; Congress and the federal agencies approve laws and regulations based on the interests of their economic reality without taking into consideration the consequences that these regulations have over a weak and developing economy like ours.[54] The other side of the equation is that Congress sometimes excludes Puerto Rico from laws that would benefit it, while also denying the same level of funding that the fifty states get to enjoy with regards to theirspecific financial situations or to fund federally-mandated programs.[55]

The only area in which we have control over our economic variables is our fiscal autonomy, which allows us to establish our own tax system. This is the best evidence of how having control over economic variables means greater potential for economic growth. Our major initiatives for economic development, from Muñoz´s Operation Bootstrap to Acts 20 and 22 of Governor Luis Fortuño's administration to encourage wealthy individuals to invest and resettle in Puerto Rico,[56] are based on the fact that it is our Government, and not the U.S. Congress, who has the power to decide how much taxes are paid in Puerto Rico.

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**53** *Id.*

**54** Nobody in their right mind would impose Switzerland´s minimum wage on Haiti or the environmental standards in Germany to the Dominican Republic. Every economy needs some set of rules that effectively adapt to its reality so that they serve as economic developers rather than economic impediments.

**55** The exclusion of Puerto Rico from Chapter 9 of the Federal Bankruptcy Act is an example of the former. The cap on funding for the Medicaid program, even though Puerto Rico's health system has to comply with all the federal health care standards, is an example of the latter.

**56** Act to Promote the Export of Services, Act No. 20 of Jan. 17, 2012, 13 LPRA §§ 10831-10844 (2012 & Supl. 2014); Act to Promote the Relocation of Individual Investors to Puerto Rico, Act No. 22 of Jan. 17, 2012, 13 LPRA §§ 10851-10855 (2012 & Supl. 2014).

Nonetheless, the other areas that affect our competitiveness, like wages, labor laws, environmental laws, transportation laws and others are under the total control of Congress and federal agencies, and as we know, they act according to the economic realities of the United States and not on the basis of the needs and specificities of Puerto Rico.[57] In fact, due to the expansion of the sphere of action of the Federal Government, today we control less of our economic variables than we did fifty years ago. Even the most recent report of the Federal Reserve Bank of New York specifically mentions as elements that hinder our economic growth the application to the Island of the federal minimum wage and the *Jones Act* (cabotage law),[58] which are both clear examples of economic variables beyond our control. Additionally, the Chairman of the House of Representatives' Natural Resources Committee, Congressman Rob Bishop, has publicly expressed concerns about the negative economic impact that the application of certain E.P.A. rules especially regarding our high cost of energy and the need to move towards the use of natural gas.[59]

Controlling these variables or the majority of them is necessary to come out of this crisis, but more important, it is essential to achieve real and sustained economic growth. Our economy and our society cannot handle quick fixes. We cannot settle for short-term solutions that depend on the temporary will of the U.S. Congress.

With regards to the much discussed $72 billion dollar debt, we need to remember that all that debt was originally incurred when Puerto Rico had a positive credit rating by the American credit agencies, and was all originally sold in the strongly regulated federal municipal bond market. Yes, the Government of Puerto Rico was asking to borrow too much, no doubt about that. But excessive lending and borrowing was possible because that was the U.S. monetary policy. The period in which the amount of money being borrowed exploded was during the time the Federal Reserve Bank carried out its expansive monetary policy with near zero interest rates. To the same extent, the crisis of the banking system in the U.S., which almost collapsed in 2008, had a similar origin. The *real estate bubble* was possible because the Federal Reserve was allowing easy money into the system. Lenders with access to free money at near zero interest rates went crazy providing mortgages to people they knew had little chance of paying it back. In part, that is

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**57** The recent report by the Federal Reserve Bank specifically mentions as elements that hinder our economic growth the application to the Island of the federal minimum wage and shipping laws, clear examples of economic variables beyond our control. FEDERAL RESERVE BANK OF NEW YORK, AN UPDATE ON THE COMPETITIVENESS OF PUERTO RICO'S ECONOMY 6-7 (2014).

**58** FEDERAL RESERVE BANK OF NEW YORK, REPORT ON THE COMPETITIVENESS OF PUERTO RICO'S ECONOMY 7, 13 (2012).

**59** José Delgado, *Rob Bishop, el congresista con jurisdicción sobre Puerto Rico*, EL NUEVO DÍA (Mar. 15, 2015), http://www.pressreader.com/puerto-rico/el-nuevo-dia/20150315/283931701219742/TextView ("With regards to the fiscal crisis, what can Congress do to help Puerto Rico? – From my committee's point of view, we can ease the EPA's requirements so that the viability of the natural gas project is not blocked. For it to go forward, it is necessary for Puerto Rico to have a sound energy plan . . . and energy at a reasonable cost. We can assist in that.") (translation by the author).

precisely why the Federal Government bailed out the financial sector in 2008. The banks were responsible for their mismanagement and the homeowners for taking the bait, but the Feds were accomplices in that failure. In our case, if we were incurring too much debt, it was in part because the Feds kept the interest rates artificially low, which in turn opened the appetite in Wall Street and Puerto Rico for higher yielding bonds from Puerto Rico, all under the watchful eyes of the various credit rating agencies.

Crucially, if the United States were undergoing today a crisis similar to the one Puerto Rico has on its hands, they would take immediate measures that Puerto Rico cannot take. The first one being: go and print more money. The second one: borrow unlimited amounts of money to stimulate the economy, and use its Central Bank (the Federal Reserve Bank) to establish a monetary policy to foster economic development. Puerto Rico has none of those tools available. Even in Europe, with its common market and the Euro Zone, the European Central Bank continuously reacts to the different needs of its members. On top of that, Puerto Rico's cities and towns, as well as its public corporations, cannot use the mechanism of the Federal Bankruptcy Code, like Detroit recently did. As a friend told me, more than a year ago we were being compared to Detroit and Greece and our intuitive reaction was "no way." Now we wish we were Detroit and Greece. At least one could get protection from the court and the other had a central bank that intervened. Detroit is coming out of bankruptcy by restructuring its debts using the federal law we cannot use, and Greece at least has a central European bank to fight with and to cut a deal with the rest of the European Union. We have no one.

My position since this crisis started has been clear: (1) this is a structural crisis not merely a cyclical one: the two crises, the economic and fiscal crisis, are intertwined; (2) the United States has to be part of the solution, and (3) a permanent solution to our economic crisis requires deep changes in the economic relationship between Puerto Rico and the United States. A new economic relationship has to be established that will result in a new political status relationship.[60] But for the purpose of this paper, I will concentrate on the need of the United States to be part of the short-term solution to the fiscal crisis.

When I initially published in August 2014 my essay anticipating that Puerto Rico was going to default in its debts and that it was urgent to bring the U.S. Government to the table, there was little response from either the Government of Puerto Rico or from Government and elected officials in Washington, D.C. Since Summer of 2015 that has finally changed. The official position of the Government of Puerto Rico and of the Obama Administration is that the burden of the debt service is so severe that Puerto Rico cannot pay its debt as originally structured, that there is a need to restructure the debt, and that Congress should act by allowing Puerto Rico's public corporations and municipalities access to Chapter 9 of the *Bankruptcy Code* and advancing other legislative changes. Although there

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**60** *See* ACEVEDO VILÁ, TOWARDS THE ECONOMIC REFUNDING OF PUERTO RICO AND ITS COMMONWEALTH STATUS, *supra* note 1.

have been multiple hearings in both the House and the Senate, so far there has been no congressional action.

The fact that there is movement in Washington is a positive development. The problem is that the Executive Branch has adopted the position that without congressional action there is nothing that they can do, and so far, the proposals that have been seriously discussed by Congress are not real solutions, but merely political moves that deny the most basic elements of self-government that Puerto Rico obtained in 1952.

Let us first analyze the position of the Obama Administration. Saying that Congress is the only one who can act is incorrect: the federal Executive Branch has the power to act. A report by professor and economist Arturo Estrella, commissioned by the Carvajal Foundation and published recently, establishes that the Federal Reserve Bank (which has made statements but has taken no direct action on the subject of Puerto Rico and its fiscal crisis), together with the Treasury Department, can take immediate actions without the need of authorization from Congress.[61]

According to this study:

1. Under Section 14(2) of the *Federal Reserve Act*, the Federal Reserve Bank can buy out Puerto Rico's debt with a maturity of six months. That would solve the problem of short-term liquidity, would allow the payment of the debt, and avoid a partial closure or the reduction of the public employees' work day.
2. Under that same section and treating Puerto Rico as a foreign jurisdiction –which we already are for purposes of the Federal Internal Revenue Code and also under certain regulations of the Reserve Bank– it may buy out the Puerto Rico debt regardless of the maturity date. This would give us immediate access to capital markets at much more reasonable interest rates.
3. Under Section 13(3) of that law, some public corporations, like the Government Developmental Bank, the Puerto Rico Electric Power Authority, and the Highway Authority, could benefit from credits from the Federal Reserve. This would alleviate the fiscal situation of these entities without the need to reach further into the pockets of our people.[62]

The support of the Obama Administration to the legitimate claims of the Government of Puerto Rico is not enough. They have the power to act. They need to act. It is a matter of political will.

With regards to Congress, there is no doubt that they have the power to act. We will see in the following weeks if there is a will to act and to what extent. So

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**61** ARTURO ESTRELLA, FUNDACIÓN FRANCISCO CARVAJAL, PUERTO RICO GOVERNMENT DEBT AND THE U.S. FEDERAL GOVERNMENT: POTENTIAL ASSISTANCE TOOLS AND POLICY PRACTICE (2014), http://sincomillas.com/wp-content/uploads/2015/10/Estudio-Fundación-Carvajal.pdf.

**62** *Id.* at 22-23.

far, there has been resistance to restoring the pre-1984 legal reality by which Puerto Rico had the same access to Chapter 9 of the *Bankruptcy Code* as the states. There has also been resistance to fixing the unfair treatment that Puerto Rico gets under Medicaid, where we have to comply with the standards and requirements established by Congress and the Federal Government, but that same Congress denies us the funding that the fifty states get.

But perhaps the final solution to this gridlock and inaction is a realization of an argument I have been making for the last year and will elaborate here: the Government of the United States is legally responsible for Puerto Rico's debt. And yes, on this we will hit the status issue head-on. It is inevitable.

First, let's understand how that debt was incurred. As I discussed in section II of this essay, the power of the Government of Puerto Rico to impose and collect taxes comes from the *Foraker Act*, was reaffirmed in the *Jones Act*, and is still federal law applicable to Puerto Rico. Moreover, the power of the Government of Puerto Rico to issue bonds is also a power that comes from federal law.[63] Even more important in the context of the current debt crisis, the *Jones Act* includes a provision exempting all bonds issued by the Government of Puerto Rico from state and federal taxation.[64]

Although the Commonwealth's Constitution has provisions related to the imposition and collection of taxes and the issuance of debt and obligations, the ultimate source of that power is a federal law. Regardless of the interpretation one adopts as to what were the legal consequences of the creation of Commonwealth in 1952, as we pointed out earlier, the provisions related to local taxes, public debt and triple tax exemption included in the *Jones Act* were not repealed by *Law* 600 and are still good law. Therefore, our taxes have been established and collected under a provision of federal law. Our bonds have been marketed based on a federal law, playing by the federal rules. This provision was adopted in 1917 as part of the plenary powers of Congress over the territory of Puerto Rico. Congress ordered states not to tax our bonds, something that clearly Congress has no power to do with regards to the bonds of one particular State.

The official position of the Executive Branch of the Government of the United States is that Puerto Rico is still under the plenary powers of Congress, as clearly expressed in the *amicus curiae* brief in *Puerto Rico v. Sánchez Valle*. This same stance clearly manifests itself in the bills recently introduced in the House and the Senate that would effectively deprive the Government of Puerto Rico of some of

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**63** 48 U.S.C. § 741 (2012) (citing Section 3 of the *Jones Act* which was not repealed by *Law 600*).

**64** *Id.* at § 745 ("All bonds issued by the Government of Puerto Rico, or by its authority, shall be exempt from taxation by the Government of the United States, or by the Government of Puerto Rico or of any political or municipal subdivision thereof, or by any State, Territory, or possession, or by any county, municipality, or other municipal subdivision of any State, Territory, or possession of the United States, or by the District of Columbia.").

the self-government powers that were granted in 1952.[65] Although slightly different in their implementation, these bills would effectively override key elements of Puerto Rico's "self-government" by creating a federally mandated fiscal control board that would supervise and control virtually every aspect of the Island's internal fiscal affairs. In both bills, this board would essentially run parallel to our entire constitutionally-organized Government apparatus and could not be held accountable by any dependency of the Commonwealth of Puerto Rico. And more importantly, their members would not be elected by the people of Puerto Rico or selected by Puerto Rican Government officials or institutions. These bills would be clear exercises of Congress' plenary powers over Puerto Rico and are evidently undemocratic.

Although I recognize that the U.S. Supreme Court in the case *Puerto Rico v. Sánchez Valle* might finally decide the ultimate issue about the legitimacy and nature of the Commonwealth status, the oral arguments for this case, heard on January 13, 2016, seem to indicate that there is no clear consensus between sitting Supreme Court justices regarding Puerto Rico's status, and that there seems to be little support for the position that the Commonwealth was established in 1952 as a compact based on mutual consent between Congress and the people of Puerto Rico. For the purpose of this analysis, I will part from the position maintained by the U.S. Department of Justice in its *amicus curiae* and in the oral argument before the Supreme Court and the position expressed by the different congressional committees in the last twenty years. After all, these are the two political branches of the Federal Government that continuously exercise their powers over Puerto Rico.

If Congress still has plenary powers over Puerto Rico; if the power of the Government of Puerto Rico to impose taxes and to issue bonds comes from federal law, and if those bonds are marketed under a federal provision granting them triple tax exemption, then, who is ultimately responsible for that debt? With plenary powers come plenary responsibilities. If the official position of the Executive Branch as expressed in the *amicus* brief in *Puerto Rico v. Sánchez Valle* is that "Congress cannot irrevocably cede sovereignty to Puerto Rico while it remains a U.S. territory,"[66] it is an oxymoron to argue at the same time that they can "cede" their responsibility over the actions taken by a territory, in this case, in the incurrences of its public debt and the consequences of a possible insolvency of Puerto Rico.

If Puerto Rico has no sovereignty, then, who is responsible for its "sovereign debt"? If Puerto Rico is merely a territory, therefore its $72 billion dollar debt is legally *territorial debt*. Moreover, if the Commonwealth's Constitution is a mere delegation of powers legislated by Congress in 1952 that can be changed or even

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**65** *See* Puerto Rico Assistance Act of 2015, S. 2381, 114th Cong. (2015); Puerto Rico Financial Stability and Debt Restructuring Choice Act, H.R. 4199, 114th Cong. (2015); Puerto Rico Oversight, Management, and Economic Stability Act, H.R. 4900, 114th Cong. (2016).

**66** Brief for the United States as Amici Curiae Supporting Respondents, P.R. v. Sánchez Valle 25 (U.S. filed Dec. 23, 2015) (No. 15-108), *supra* note 38.

eliminated by Congress at any given time, then who is really the ultimate guarantor of the "constitutional debt" recognized in Article VI, Section 8, of the Commonwealth's Constitution? Again, with plenary powers comes plenary responsibility.

I acknowledge that Section 6 of the *Jones Act* states:

> All expenses that may be incurred on account of the government of Puerto Rico for salaries of officials and the conduct of their offices and departments, and all expenses and obligations contracted for the internal improvement or development of the island, not, however, including defenses, barracks, harbors, lighthouses, buoys, and other works undertaken by the United States, shall, except as otherwise specifically provided by the Congress, be paid by the treasurer of Puerto Rico out of the revenue in his custody.[67]

This language could be construed to mean that there is no responsibility of the United States, but a careful reading of this article points to the real meaning. This language, that comes from the *Jones Act* and was not repealed by *Law 600*, is basically an instruction and authority to pay, but not a denial of potential responsibility. It is interesting that in the Senate bill introduced recently by Senator Hatch there is specific language stating that the United States would not be responsible for the debt incurred by the newly created entity to manage the fiscal crisis of Puerto Rico.[68] It is a language that is not present in the current federal legislation regarding Puerto Rico. It is also interesting that the revised Organic Act of the Virgin Islands, the federal law that organizes the Territorial Government of the U.S. Virgin Islands, does have a provision that explicitly limits the U.S. Government's liability over bonds issued by the Government of the Virgin Islands.[69] There is no such language with regards to Puerto Rico.

But even if there were such a language or if Section 6 of the *Jones Act* were to be construed as limiting the exposure of the Federal Government to Puerto Rico's debt, the ultimate question is: can Congress constitutionally relinquish its responsibility over a territory? Or more bluntly, who is ultimately responsible for the consequences of the insolvency of a territory?

On January 8, 2007, the U.S. Supreme Court issued a decision on the case *Limtiaco v. Camacho*.[70] The issues are quite particular, but the rationale of the decision is very interesting. There was a "local" dispute between the Governor of Guam and its Attorney General regarding a bond issuance and whether it was an infringement of a debt limitation provision included in the federal Organic Act of Guam. The Governor of Guam sought a declaration from the Guam Supreme Court that the issuance of bonds to fund the territory's continuing obligations, authorized by Guam's legislature, was not in violation of debt limitation provision

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**67** 48 U.S.C. § 795 (2012).

**68** S. 2381, 114th Cong. § 335 (2015).

**69** 48 U.S.C. § 1403b ("Bonds or other obligations issued pursuant to sections 1403 to 1403b of this title shall not be a debt of the United States, nor shall the United States be liable thereon.").

**70** Limtiaco v. Camacho, 549 U.S. 483 (2007).

contained in the Organic Act of Guam, contrary to the contention of Guam's Attorney General. The Guam Supreme Court agreed with the Governor. The U.S. Court of Appeals for the Ninth Circuit dismissed the Attorney General's appeal. The U.S. Supreme Court reversed.

The mere fact that the Supreme Court took the case was by itself surprising. I do not know how many cases from Guam have gone all the way to the Supreme Court, but I am pretty sure not too many have in the more than one hundred years since the Pacific Island has been a U.S. territory. The facts by themselves seem to represent a local political dispute with minor national consequences. The answer as to why the Court took the case might be in the last paragraph of the Court's opinion, written by Justice Thomas, which brings some light to the Federal Government's responsibility with regards to the debt of a territory:

> It may be true that we accord deference to territorial courts over matters of purely local concern. This case does not fit that mold, however. *The debt-limitation provision protects both Guamanians and the United States from the potential consequences of territorial insolvency*. Thus, this case *is not a matter of purely local concern*.[71]

It is true that in this case the Supreme Court was interpreting a federal law that established the Government of Guam. In our case, the Government of Puerto Rico is ruled by our own Constitution that was authorized and approved by Congress and the people of Puerto Rico. But, as we have found out, the legal authorization of Puerto Rico to issue bonds and the benefit of triple tax exemption that those bonds enjoy come from federal law. And the official position of both the Executive and Legislative Branch is that Puerto Rico is still a territory under the plenary powers of Congress.

If "the potential consequences of territorial insolvency . . . [are] not a matter of purely local concern",[72] then what are they? Well, obviously, according to *Limtiaco*, the possible consequences of the insolvency of a territory are a matter of national interest of the United States, and if it is a matter of national interest, the reason is clear: the United States is responsible for the financial well-being of its territories. If, under the Territorial Clause of the U.S. Constitution, Congress has plenary powers over the territories, then, at the end of the day, it also has plenary responsibility.

The Federal Government cannot claim that Puerto Rico is still "subject to the Territorial Clause of the U.S. Constitution" in order to deny Puerto Rico's power and authority to solve our economic and social crisis,[73] and then turn around and say they have no responsibility over our debt because the debt crisis is "a matter of purely local concern."[74] It is not about denying our responsibility. It is about

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**71** *Id.* at 491-92 (emphasis added) (citations omitted).

**72** *Id.* at 492.

**73** TASK FORCE ON PUERTO RICO'S STATUS, *supra* note 34, at 26.

**74** *Limtiaco*, 549 U.S. at 492.

asserting and reclaiming the legal responsibility of the United States. The legal consequence of having plenary powers is that you have plenary responsibility.

For many years during my political life I have argued against the definition of Commonwealth as a "territory." Nevertheless, the official position of the political branches of the United States is that we are still a territory. If that is the case, taken together with legislative history regarding our power to impose and collect taxes and issue bonds and obligations, there is a strong argument that the United States should bear the *potential* consequences of Puerto Rico's insolvency and that the $72 billion dollar debt *is not a matter of purely local concern*.

## IV. A POSSIBLE BREAKTHROUGH

If policy arguments and political persuasion do not motivate the Obama Administration and Congress to move, the potential liability they might have over Puerto Rico's debt and possible insolvency might be the ultimate argument for action. So far the discussion in Washington has been framed as "Puerto Rico is in trouble and is asking for help", or even worse, "Puerto Rico has mismanaged its budget, *they* have a problem, let see if we can do something."

We need to change the tone of the discussion. If Congress and the Executive Branch are restating that Puerto Rico is a territory, totally dependent on the will of Congress, let us take that argument and turn it around: then you, the United States, bear full responsibility of the consequences of what happens to Puerto Rico. It is not a matter of good will, or good politics, it is a matter of legal responsibility. Puerto Rico is not begging for anything. If the United States has not relinquished its sovereign powers over Puerto Rico, not even in the limited manner that was intended in 1952 by the establishment of Commonwealth, then what we are requesting is for the U.S. Government to assume its responsibility. If Puerto Rico has been denied by Congress the economic tools to deal with this crisis and to foster economic development, then what we are demanding is for the U.S. Government to answer for the consequences of their actions and inactions.

The short-term solution to this crisis needs action from the U.S. Government. But this crisis is a unique opportunity to also deal with the long-term solutions. It is in the best interest of the United States to change the territorial status of Puerto Rico. Something this crisis and the legal theory that Congress cannot even partially renounce to is that sovereignty over a territory has proven that the problems of Puerto Rico will forever be national problems, unless we move beyond the territorial status issue.

Puerto Ricans cherish their U.S. citizenship and having a close relationship with the United States. But as someone clearly summarized back in 1992: "it's the economy, stupid." We need a new economic relationship with the United States that gives Puerto Rico the tools to have sustained economic development. It is in the best interest of Puerto Rico and of the United States. Without those economic tools, we might get a short-term solution to the current fiscal crisis, but another one will come in the near future. It is not the purpose of this paper to consider the different alternatives, nor to discuss here my ideas, which are public:

> No matter what one thinks about the causes of the present crisis and the tools we have under the current Commonwealth, the truth is that neither under statehood or independence we will emerge from this crisis. However, if we do not resolve the status issue, we will not be able to get out of the crisis. The only true and lasting solution is to rebuild the Commonwealth as a Sovereign Commonwealth.[75]

I firmly reaffirm that position and the specifics of my proposal. But what is most important is to realize that business as usual will not work anymore; we need to move forward. And the message to the United States needs to be clear and strong: with plenary powers comes plenary responsibility. If you do not want to have plenary responsibility, you need to renounce to your plenary powers. And a new economic relationship between Puerto Rico and the United States has to be developed. That should be the basis for a new non-colonial, non-territorial political status. That must be the beginning of the real solution.

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**75** ACEVEDO VILÁ, TOWARDS THE ECONOMIC REFOUNDING OF PUERTO RICO AND ITS COMMONWEALTH STATUS, *supra* note 1, at 29 (translation by the author).