IS PUERTO RICO A "SOVEREIGN" FOR PURPOSES OF THE DUAL SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE?

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Carlos Soltero is Chair, Litigation, McGinnis Lochridge and has analyzed issues impacting Puerto Rico and the Latino community. In 1994, he authored Is Puerto Rico a "Sovereign" for Purposes of the Dual Sovereignty Exception to the Double Jeopardy Clause? This published law review article analyzed the same issues the Supreme Court will hear this week in Puerto Rico v. Sanchez Valle re double jeopardy and separate sovereignty. Carlos is also the author of Latinos and American Law which details important issues that have faced the Latino community before the U.S. Supreme Court. He is working on a companion book.

For better or for worse, the thorny issue of the anomalous constitutional status of Puerto Rico faces the Supreme Court once again in an awkward and unexpected legal posture. On Wednesday January 13, 2016, the Supreme Court will hear oral argument on a case presenting the question of whether Puerto Rico is a "sovereign" for purposes of the dual sovereignty exception to the constitutional prohibition against double jeopardy (being tried twice for the same criminal offense).

The dual sovereignty exception to double jeopardy is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns "by breaking the laws of each, he has committed two distinct 'offenses'." Under *Heath v. Alabama* (1985), the inquiry is whether the two prosecuting entities "draw their authority to punish the offender from distinct sources of power." A federal prosecution subsequent to a state prosecution is permissible under the dual sovereignty exception, as is a state prosecution subsequent to a federal prosecution. In addition to being able to bring successive prosecutions on the same grounds as prior state prosecutions, the federal government may reprosecute someone who has been prosecuted in Indian tribal courts since Indian tribes are different "sovereigns." By contrast, the District of Columbia is not a different "sovereign" from the federal government for purposes of the dual sovereignty exception to double jeopardy.

Prior to Puerto Rico enacting its constitution in 1952 which paved the way for its first democratically elected governor, the Supreme Court ruled in a case styled *Puerto Rico v. Shell* (1938) that Puerto Rico was clearly an "unincorporated territory" and therefore the risk of double jeopardy did not exist because the territorial and federal laws and courts were creations emanating from the same sovereignty. Prosecution under one of the laws would thus necessarily bar an identical prosecution under the other law in another court, unlike the situation of states.

Why is this issue before the Supreme Court now? Because there is a direct conflict between, on the one hand, the Eleventh Circuit and the decision at issue this week from Puerto Rico's Supreme Court who have both ruled that the dual sovereignty exception does not apply to prosecutions involving the Federal Government and the Commonwealth of Puerto Rico, and the First Circuit on the

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other, which has ruled the dual sovereignty exception does apply. Appeals from Puerto Rico United States District Courts go to the First Circuit in Massachusetts.

What is the significance? To resolve the circuit split, the Supreme Court will have to decide whether the Constitution in 1952 and the so-called "compact" transformed Puerto Rico into an independent "sovereign" (as the Court has recognized the 50 states and foreign countries to be), or whether Puerto Rico's government remains one lacking sovereign power separate from the power of the federal government. A ruling reflecting that Puerto Rico is not a sovereign would be a judicial proclamation that the ultimate source of power to govern continues to come from Congress, through the Territory Clause of the Constitution, and not through the people of Puerto Rico, contrary to political and other pronouncements to the contrary. Additionally, as a practical matter a decision affirming the Puerto Rico Supreme Court in *Sánchez-Valle* would prohibit the government of Puerto Rico and the federal government from having independent prosecutions against a criminal defendant for the same crime.

Puerto Rico's Political Status with Relation to the Federal Government

If the dual sovereignty exception applies to Puerto Rico, how does it apply? Puerto Rico is not a state. Puerto Rico is not an Indian tribe whose sovereignty preceded federal rule. Puerto Rico is not a foreign sovereign. Constitutionally speaking, there are six possible relations to the federal government: a state, the District of Columbia, an "incorporated territory", an "unincorporated territory", an Indian tribal nation, or a foreign sovereign. Arguably there is a seventh: "Commonwealth" or "Estado Libre Asociado." The "Commonwealth" status of Puerto Rico has created a bizarre hodge-podge of legal rights, privileges, and obligations.

Not too long after the acquisition of Puerto Rico as war booty in 1898, the Supreme Court decided a series of opinions known collectively as the *Insular Cases*. These were a watershed in constitutional law regarding the United States' relation with its colonies, and involved several challenges based on the Uniformity Clause to duties imposed on commercial goods between the newly-acquired territories and the US. The cases themselves held that these territories were neither foreign countries, nor "part of the United States" for tariff purposes. These cases were the first manifestations of the judicially created "Territorial Incorporation Doctrine", which first created a distinction between "incorporated" and "unincorporated" territories in the United States constitutional system. While opinions through the years have cast doubt on the validity of the *Insular Cases*, the Supreme Court and other courts continue to cite these cases as authority, suggesting the distinction as still valid.

After 1952, supporters of the Commonwealth status option have argued that Puerto Rico is no longer an "unincorporated territory", because the 1952 law was a "compact" between sovereigns. Thus, the split between the First and Eleventh Circuits puts at center stage the question of whether the passage of Public Law 600, establishing the *Estado Libre Asociado*, transformed Puerto Rico into a "sovereign" for purposes of the dual sovereignty doctrine. Will the Supreme Court, like the First Circuit, be persuaded by the rhetoric of Commonwealth supporters about the "compact" theory of a seventh status in relation to the federal government?

Another line of cases provides insight as to what the Supreme Court might do. The Supreme Court has refused to decide which constitutional provision,

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the Fifth or the Fourteenth Amendment, is the source for the equal protection and due process guarantees to Puerto Rico. On one level, this indecision seems inconsequential: equal protection and due process are "fundamental" according to more than four justices on the Supreme Court at a given time, and therefore they apply to unincorporated territories. On another level however, the issue of whether the due process and equal protection constitutional guarantees apply via the Fifth or the Fourteenth, is crucial. At the heart of the dilemma lies the issue of the political status of the "unincorporated" territories in the constitutional scheme. Cloaked within the issue is the question of whether or not the territorial governments are "states" for constitutional purposes. If they are not, the Fourteenth is inapplicable, and its protections, if applicable at all, must emanate from the Fifth Amendment. If the Fifth Amendment is the source, then the Constitution's protection ensuring due process and equal protection must be based on some agency-like notion that the territorial governments are mere agents of Congress or outposts of the federal government under the direction of Congress, and therefore not sovereign entities. In a case alleging equal protection violations by an agency the government of Puerto Rico, Justice Rehnquist persuasively argued in dissent that the Fourteenth Amendment is inapplicable to Puerto Rico, and to other unincorporated territories:

> The Fourteenth Amendment is by its terms applicable to States: **Puerto Rico is not a State**. Doubtless constitutional inquiries shrouded as this one is in both history and case law cannot be definitively answered so simply as this, but I would be inclined to reject the claim that the Fourteenth Amendment is applicable to Puerto Rico until a case sufficiently strong to overcome this "plain meaning" obstacle, found in the language of the Amendment itself is made out...The wording of the Thirteenth Amendment shows that the Framers of the post-Civil War Amendments knew how to word those provisions where it was intended that their guarantees have application in all Territories of the United States rather than just as a limit upon the authority of a state government.
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> *Examining Bd. v. Flores de Otero* (1976) (Rehnquist, J. dissenting)

Implications

I anticipate that the Supreme Court will ultimately declare that Puerto Rico is not a sovereign for purposes of the dual sovereignty exception to double jeopardy. Puerto Rico is still an "unincorporated territory", governed by Congress through the Territorial Clause. An implication is that Puerto Rico's status will be exposed politically for what it is: a colonial status. The commonwealth government would be rendered impotent to engage in one of the essential functions of a sovereign state: enforcing its own criminal code in situations where the federal government could constitutionally preempt such enforcement. Of course, such a judicial slap in the face would be nothing new to the government or the people of Puerto Rico since "sovereignty" is unbeknownst to the people of Puerto Rico, who for a century have been U.S. citizens in a place that has never been sovereign, but rather continues to be governed ultimately by a legislative body in which those U.S. citizens have no voting representation, the U.S. Congress.

This article is an abridged version of the original 28 Rev. Juridica U. Inter. P.R. 183 (Jan.-Apr. 1994). For more information about *Puerto Rico v. Sanchez Valle*, please refer to http://www.scotusblog.com/case-files/cases/puerto-rico-v-sanchez-valle/?wpmp_switcher=desktop

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