

**Hearing on “Four Million American Citizen Residents of Puerto Rico”
October 5, 2018 11:30 a.m. to 1:00 p.m.
Wolf Law Building, 401 UCB
Schaden Commons Room
2450 Kittredge Loop Road
Boulder, CO 80309**

CONTEXT:

The Inter-American Commission on Human Rights (IACHR) has requested a **merits hearing** to discuss two petitions pertaining to “voting rights” in Federal elections by residents of Puerto Rico. The meeting was called at the request of Pedro Rosselló after numerous formal requests for hearings were declined by the Commission. **After the petitioners give their 25-minute presentation, you will give a 25-minute oral presentation rebutting petitioners’ arguments on the merits.**

BACKGROUND:

The Petitioners in *Four Million American Citizen Residents of Puerto Rico*, which we refer to under the name of the lead Petitioner, Gregorio Igartua, claim that their right to vote in U.S. Presidential elections is denied on a discriminatory basis. The Petitioners in *Rosselló* claim that their right to vote in U.S. presidential and congressional elections is denied on a discriminatory basis. The United States objected to the admissibility of the petitions in 2010, however in 2017, the Commission found them admissible; the United States submitted a merits reply in June 2018. Although these petitions are framed as a denial of the right to vote, at base, they litigate the political status of Puerto Rico as a Commonwealth rather than a state. Indeed, petitioners appear to be using these proceedings to generate publicity and support for their campaign to achieve statehood. On September 19, Puerto Rico Governor Rosselló —son of one of the petitioners in this case—wrote to President Trump to advocate for Puerto Rico’s bid for statehood and contest representations made in our June 2018 merits reply. On September 24, Governor Rosselló wrote to the Commission seeking to participate in the hearings in this matter; the Commission forwarded the letter but does not plan to respond to the Governor.

TALKING POINTS:

Introduction

- Distinguished Commissioners, Secretariat colleagues, and friends at the other table – again, my name is Carlos Trujillo and I am U.S. Ambassador to the Organization of American States. It is an honor to appear before you today and to reiterate our support for the important work of the Commission across the hemisphere.
- Thank you to the Commission for the opportunity to present the United States' position on the *Igartua* and the *Rossello* petitions. We appreciate the Commission's efforts to review these submissions. Having said that, on all counts we think the petitions fail to state a claim and we disagree with the facts as they have been represented by the petitioners.
- Both petitions raise the same fundamental issue --- the scope of federal representation accorded to residents of Puerto Rico under the U.S. Constitution. This is a domestic political issue if there ever was one.
- The *Igartua* petition focuses on participation in U.S. Presidential elections. The *Rossello* petition focuses on participation both in Presidential as well as in Congressional elections. Given the similar legal and factual issues here we have consolidated our responses to both petitions and we encourage the Commission to do the same.
- We hope consolidation will also help the Commission start to clear the backlog of cases like this one – which has been pending now more than a decade.
- The petitions are framed in terms of voting rights. However, these petitions are really about the political status of Puerto Rico as a Commonwealth in the U.S. Federal system. As a Commonwealth, Puerto Rico does not have voting representatives in the U.S. House of Representative and Senate, or voting electors in the Electoral College—just as other non-state territories in our Federal Union. Residents of Puerto Rico—as U.S. citizens—are free to reside in U.S. states that do have voting representatives and voting electors, as delineated by the United States Constitution, and to participate in elections for those representatives and electors.

- The U.S. Constitution's allocation of representatives and electors with respect to Puerto Rico is not inconsistent with the American Declaration or the Inter American Democratic Charter. Nothing in the American Declaration entitles Puerto Rico to statehood in the U.S. Federal system. I will address this in more detail in a few minutes.
- But it bears emphasizing at the outset that these petitions plainly seek to litigate the political status of Puerto Rico before this Commission. The Commission should not allow itself to be used in this way.
- On behalf of the U.S. Government, we reiterate our request that the Commission dismiss both petitions in their entirety and wrap up these cases promptly. The petitions are totally without merit and attempt to convert a domestic political matter into a human rights matter.
- The question of Puerto Rico's legal status is one under consideration now within the United States. Just last year, the residents of Puerto Rico voted in an island-wide public referendum to pursue statehood. The Government of Puerto Rico is now pursuing that path energetically.
- Finally, I urge the Commission to focus on the subject of these petitions. This hearing is not about the scope or effectiveness of hurricane relief efforts after Hurricane Maria. Nor are these petitions about the scope of federal relief efforts related to Puerto Rico's fiscal crisis. And the question of the political status of Puerto Rico within the U.S. Federal system is well-beyond the competence of this Commission. The petitioners would seek to have the Commission merge all these issues together and somehow identify violations of the American Declaration.

Competence of the Commission

- Before I turn to the merits of the *Ignartu* and *Rossello* petitions, I must make one observation about the competence of the Commission.
- The only relevant instrument which the Commission could be competent to evaluate in relation to the conduct of the United States would be the nonbinding American Declaration.
- Article 27 of the Rules of Procedure directs the Commission to “consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments”
- Article 23 of the Rules, in turn, identifies the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention. Although Article 23 lists several other instruments, the United States is not a party to any of those other instruments. Thus, for the United States, the American Declaration is the only “applicable instrument.”
- However, in its’s 2017 admissibility report on the *Igartua* petition, the Commission indicated its intent to “take into account the terms of” the Inter-American Democratic Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights in the present case.
- Under the Rules of Procedure, the application of instruments beyond the American Declaration in the present case would be manifestly improper and beyond the competence of the Commission.

Merits of the Petitions

- Turning now to the merits of the petitions.
- The United States Constitution governs how states are represented in the House of Representative and the Senate, and how states participate in the

Electoral College, which chooses the President. Article 1 of the United States Constitution, the supreme law of our land, establishes apportionment of representatives and Senators amongst the states. Article 2 of the Constitution, and the 12th Amendment, provide the procedure for electing the President and Vice President by states through the Electoral College.

- As a result, pursuant to Article 1 of the U.S. Constitution, Senators and U.S. Representatives are elected by the people of the **states**. Pursuant to Article 2 of the U.S. Constitution, the President of the United States is chosen by Electors –and those electors are chosen by the **states**.
 - There is one significant exception to these rules -- the only **non-state** within the United States that chooses Presidential electors is the District of Colombia, which acquired that right by an express amendment to the Constitution adopted in 1961.
- Citizens of the United States are free to reside in whichever State they wish.
- Other provisions under the U.S. Constitution govern how U.S. territories may evolve into U.S. states. Specifically, Article 4 of the Constitution provides for the admission of new States. Consistent with that process, a number of territories have become U.S. states over time.
- Puerto Rico, however, is **not a state**. Accordingly, under the U.S. Constitution, residents of Puerto Rico enjoy US citizenship—and all of the rights and benefits thereof—but do not participate directly in Presidential or Congressional elections because Puerto Rico is not a state and, under Articles 1 and 2 of the United States constitution, only states are represented by voting Electors, Senators, and U.S. Representatives.
- This does **not** mean that residents of Puerto Rico somehow enjoy fewer rights than other U.S. citizens.
- If a resident of Puerto Rico wants to participate fully in Presidential or Congressional elections, the Constitution does not bar them from doing so – provided they move and begin to reside in any state of the United States.

- I want to digress here a moment to correct the record. It is clearly not true, as Petitioners allege, that the residents of Puerto Rico have no “political voting rights at the federal level”. Puerto Rico residents can, among other things, vote in the presidential primaries for the purposes of choosing the party candidates for President. Puerto Rico residents also can vote in congressional elections, both in party primaries and in the general election. Thus, the residents of Puerto Rico **do** enjoy representation at the Federal level.
- The difference in Federal election participation between residents of U.S. states and residents of territories arises from the very nature of statehood under the U.S. Constitution. Through the Constitution, the people of the United States created a federal union. That federal union provided for the distribution of political power among the states in that union. Within that structure, states that elected to join the union gave up a portion of their sovereignty. They took on certain responsibilities and obligations. They also acquired at the same time certain rights including the rights to choose the President, the Vice President, and members of Congress.

If Puerto Rico wishes to participate differently in this process, it must comply with the requirements under our Constitution to become a state. And as the Commission knows, the Government of Puerto Rico is vigorously pursuing that statehood path now.

- Pursuing statehood is not just a theoretical possibility. Recall that Puerto Rico’s legal status has evolved significantly through the course of the 20th century. It has evolved from being a territory in 1898 to its current status as a self-governing Commonwealth. It can continue to evolve and join a number of other U.S. territories which have been admitted as States to the federal union during the course of our history.
- The Commission’s role is not to help Puerto Rico bypass the political process of achieving statehood through a baseless claim of discrimination. It also is not the Commission’s task to influence that process or promote a particular outcome in that campaign.

- Puerto Rico's legal status is governed by the U.S. Constitution which reflects a careful balancing of the rights of the federal government, the states, and the territories.
- Moreover, the U.S. Constitution's structure of Federal representation does not violate Articles 2, 17, 18, or 20 of the American Declaration. Nor does it violate any provision of the Inter American Democratic Charter. I will highlight some key considerations in support of our position.
- Article 2 of the Declaration focuses on the right to equality before the law. The U.S. Constitution's structure of Federal representation does not constitute unequal treatment within the meaning of Article II the American Declaration. The difference in the political representation of states and other territorial entities under our Federal system is not based on race, sex, language, creed or any other invidious distinction barred by Article 2. Rather, it arises from the very nature of statehood under the U.S. Constitution.
- There is nothing discriminatory in this constitutional structure. U.S. citizens resident in Puerto Rico enjoy the freedom to move at will within the United States, and to establish new residency at any time, in any of the states – as state residents, those U.S. citizens have the same voting rights as any other state resident to participate in elections for the state's Federal representatives and Electors.
- Similarly, U.S. citizens resident in any of the states may at any time move to Puerto Rico and establish residency there – at which time they could not directly participate in Presidential and Congressional elections because Puerto Rico, as a Commonwealth, does not have voting Federal representatives or Electors.
- Nothing in Article 2 or elsewhere in the American Declaration suggests that parties may not maintain federal systems in which their citizens' participation in federal elections is determined by their residence or the status of the federal entity in which they reside.

- Article 17 of the Declaration provides that every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights. Residents of Puerto Rico are U.S. citizens and enjoy the very same civil rights as all citizens. With respect to participation in federal elections, the same rules apply to all citizen of the United States. Residents of Puerto Rico are recognized everywhere in the United States as persons having rights and obligations, and entitled to enjoy basic civil rights. Petitioners have failed entirely to present a cognizable claim under Article 17 of the Declaration.
- Article 18 of the Declaration provides that every person may resort to the courts to ensure respect for his legal rights. Residents of Puerto Rico have access to the courts of the United States just as any other citizen of the United States. As noted in our written submissions, petitioners' claim here is really about the legal status of Puerto Rico. And the question of Puerto Rico's legal status has been litigated repeatedly before the U.S. courts, including the Supreme Court. Most notably the Supreme Court took up two cases involving the legal status Puerto Rico within the last year. Petitioner *Igartua*, himself, has pursued claims similar to those raised in his petition before this Commission before federal courts. The notion that the residents of Puerto Rico have somehow been denied access to U.S. courts is fanciful. Petitioners have failed to state a claim under Article 18. What Article 18 of the Declaration does not provide is that a court will always side with petitioners' views.
- To the extent that the Commission proposes to “analyze whether allegedly contradictory and restrictive decisions of Federal Courts could constitute a violation of the petitioners’ right to effective judicial remedies,” this evaluation of domestic judicial decisions would run afoul of the Commission’s “fourth instance formula.”
- The fourth instance formula recognizes the proper role of the Commission as subsidiary to States’ domestic judiciaries, and indeed, nothing in the American Declaration, the OAS Charter, the Commission’s Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: “The Commission ... lacks

jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts.” It is not the Commission’s place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state’s domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task.

- Article 20 of the Declaration, provides that “every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.” The residents of Puerto Rico have that right. Residents of Puerto Rico, for example, elect their own Governor and Senate and House of Representatives. They also have the right to vote in US elections in various capacities and even have had the right to vote repeatedly on their fundamental legal relationship with the United States periodically through public referendum. And, as I noted earlier, residents of Puerto Rico are represented by an elected delegate to the U.S. House of Representatives, known as the Resident Commissioner. As such, residents of Puerto Rico participate in both the government of their country as well as popular elections.
- But the American Declaration does not dictate the exact modalities of such participation in elections. Specifically there is no indication, for example, whether political participation may or may not be effectuated through federated states. There is also no indication of whether political participation should be by majority or proportional rule, whether there should be a popularly-elected Presidents, mayors, regional councils, a parliamentary system, bicameralism, federalism, or any other specific feature of democratic participation
- Further there is no allegation that Petitioners are prevented from residing anywhere they choose within the United States, including in states where they could participate in different federal elections.

- Similarly, neither Article 20 nor any other provision of the American Declaration mandates that every Federal office be subject to universal popular election by every citizen. Petitioners suggest, for instance, that Article 20 requires the United States to permit the popular election of federal judges, however nothing in Article 20 supports that claim. In the United States, Federal judges are appointed under the Constitution by the President, with the advice and consent of the Senate.
- Moreover the idea that a state's constitution can regulate representation at the Federal level is not dissimilar to the decision taken by some nations to exclude overseas residents from voting in elections or otherwise restrict participation in elections based on duration of stay abroad.
- Finally, Petitioners' suggestion that participation in particular U.S. federal elections is an intrinsic human right that flows from citizenship is simply not supported by the plain text of the American Declaration. There is no legal basis for the Commission to infer such a right here.

Conclusion

- In sum, there is good reason for the Commission to exercise restraint in considering these two petitions. Constitutional issues surrounding the appropriate framework of federal entities are complex political issues that far exceed the competence of the Commission.
- As a result, we believe that both the *Igartua* and *Rossello* petitions fail to state claims that warrant the Commission's review. Therefore, we respectfully request the Commission dismiss both petitions in their entirety.
- The petitioners would have you believe that dismissing the petitions as they put it would be "turning a blind eye to the unfinished business of American democracy". All democracies are works in progress. And an equally important point is that it is people of that state who have the responsibility to continue to perfect a state's democracy. It is not a task for this Commission. That is not what the American Declaration requires and it is not what the American Declaration states.

- The United States is a vibrant democracy and will continue to remain a democracy and work with Puerto Rico as part of that federal union.

Drafted: V Botet and T Weatherall– 7-6823 9/28/18

Cleared:

WHA/OAS – A Stevenson – ok

WHA/CAR – S Roynter – ok

WHA/PPC – S Miller - ok

H – W Killion – (no response)