

The Virgin Islands Consortium

In Historic Case, U.S. Supreme Court To Decide Whether U.S. Territories Should Be Allowed To Govern Themselves

VIC News / **Published On October 14, 2019 09:01 AM /**

Staff **October 14, 2019**



The Revised Organic Act of 1954 gave U.S. Virgin Islands residents the right to choose their own government. A similar law was passed for Puerto Rico in 1947 by the U.S. Congress giving the people of the commonwealth the right to elect their own governor, among other leaders.

But that freedom will be put to the test this week, as the U.S. Supreme Court is scheduled, beginning Tuesday, to decide whether the U.S. territories should select their own chief executives. The court is not expected to reach a decision soon, however,

according to [the Scotus blog](#), "we can be sure that lawyers, law professors and the bond markets, as well as residents of Puerto Rico, will all be waiting anxiously for the result."

Residents of the U.S. Virgin Islands and other U.S. territories will also be paying attention to the decision, as the outcome will impact all U.S. territories.

[According to the New York Times](#), the highest court of the land is being asked to decide whether a constitutional provision that ordinarily limits Congress applies when Congress legislates for a territory. That provision, the appointments clause, requires all "officers of the United States" to be appointed by a specified procedure, typically by the president with Senate confirmation. Because of this clause, it would be unconstitutional for Congress to allow voters to elect the attorney general or secretary of state; those officers must be appointed and confirmed. But on the assumption that the appointments clause doesn't apply to territories or the District of Columbia, Congress allowed for the election of Puerto Rico's governor in 1947 and the district's mayor in 1973 (along with similar allowances in other U.S. territories, including the Revised Organic Act of 1954 for the U.S. Virgin Islands).

According to the Supreme Court's blog, the justices' resolution of these issues could have "powerful real-world implications."

The case will review a 2016 law known as PROMESA, in which Congress created an unelected oversight board to restructure Puerto Rico's multibillion-dollar debt. Describing the board as an agency of the Puerto Rican government, Congress even gave it power to revise the territory's laws. The creditors went to court, asserting that the board's members were appointed in violation of the appointments clause. A Federal District Court judge rejected the creditors' argument on the ground that the appointments clause doesn't apply in the territories. But in February, the United States Court of Appeals for the First Circuit reversed that ruling, holding that Congress is bound by the appointments clause everywhere.

The First Circuit considered the possibility that if the appointments clause applies to Puerto Rico, it might also require the appointment, not election, of Puerto Rico's governor or the District of Columbia's mayor. But it distinguished these officers on the ground that the appointments clause applies only to "officers of the United States," according to the Times.

The court maintained that the governor of Puerto Rico, by contrast, is an officer "of the territory," suggesting that the governor's authority comes from the Puerto Rican constitution and not federal law. But only three years ago, in another case involving Puerto Rico, the Supreme Court emphasized that the Puerto Rican Constitution is United States law: Congress approved that Constitution and can amend it, which Congress effectively did with PROMESA. Territorial officers thus are officers of the United States in the same way that William Barr, as attorney general, is both an officer of the Department of Justice and of the United States.

Moreover, according to the Times, the First Circuit's distinction between territorial law and United States law wouldn't save the Washington mayor, whose authority undoubtedly comes from federal law. So if the Supreme Court upholds the First Circuit's application of the appointments clause to Puerto Rico without offering a new explanation

why the clause shouldn't also apply to its governor, it could doom territorial — and district — home rule, the Times said.

The latest court battle arises from the Puerto Rico debt crisis and bondholders who challenged the oversight board's decisions. Here's the full explanation, as found on the Scotus blog:

"In 2015, Puerto Rico faced a financial crisis. The island was operating under a crushing debt – over \$70 billion – that it was unable to repay. Because the island's debt was not only massive but also held by a large number of individual investors on the U.S. mainland, in 2016 Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) to restructure the commonwealth's debt.

"PROMESA created a Financial Oversight and Management Board to make fiscal, legal and governance reforms to bring financial stability back to Puerto Rico, including by restructuring the island's debt. The board is made up of seven voting members, six of whom are supposed to be chosen from a list compiled by members of Congress; if they are chosen that way, Senate confirmation is not required. The law also gives the president discretion to select the seventh voting member of the board.

"In May 2017, the board began proceedings in a federal court in Puerto Rico to restructure the island's debt. But Aurelius Investment, a hedge fund that had invested in distressed Puerto Rico bonds, and a labor union that represents employees of Puerto Rico's electric utility challenged the appointment of the board members. The U.S. Court of Appeals for the 1st Circuit agreed, ruling that the board members are "Officers of the United States" who must be nominated by the president and confirmed by the Senate.

"But the court of appeals rejected a request by Aurelius and the union to invalidate all the actions that the board had already taken. Instead, relying on the de facto officer doctrine, the court of appeals concluded that those actions should stand. Reversing them, the court of appeals explained, would have "negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now" and would "likely introduce further delay into a historic debt restructuring process that was already turned upside down" by "the ravage of hurricanes."

"The lower court's ruling spawned five separate petitions for review: three – from the board, the federal government and a committee of unsecured creditors – asking the justices to review the 1st Circuit's ruling that the appointment of the board members violated the Constitution and two more – from Aurelius and the union – asking the court to weigh in on whether the de facto officer doctrine prevents invalidation of the board's prior actions. The justices granted all five petitions at the end of June and fast-tracked the cases for oral argument in October.

"The threshold question before the justices is whether the appointment of the board's members must comply with the appointments clause. The board, the federal government and others argue that the appointments clause only applies to "officers of the United States," which means officers of the federal government. It does not extend to the local government of a territory like Puerto Rico, as confirmed by the fact that other words in the appointment clause (such as Congress and the president) also refer to the national government.

"Further evidence that Congress does not need to comply with the appointments clause, they say, can be found in the territory clause of the Constitution, which gives Congress "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments." And historically, they add, Congress has not always complied with the appointments clause when selecting officers for U.S. territories.

"Here, they argue, there is no doubt that the members of the board are officers of Puerto Rico, rather than officers of the United States: Congress clearly intended the board to be a local entity that acts for Puerto Rico, rather than part of the federal government. And they warn of serious consequences if the 1st Circuit's ruling is upheld. The board, for example, cautions that the ruling "throws into doubt the legality of" its actions and "threatens the progress that Puerto Rico has made to this point," while the federal government tells the justices that the ruling "threatens to upend the government of all five major U.S. territories and the District of Columbia."

"Aurelius and the union counter that the appointments clause does indeed apply to members of the board because they are "officers of the United States." Board members are "appointed, overseen, and removable by the federal government alone," they contend, and the board members "exercise significant federal authority" that goes beyond the authority exercised by territorial officials – for example, the sole power to enforce PROMESA in federal court and "investigative powers that sweep far beyond Puerto Rico."

"Aurelius and the union reject any suggestion that the territory clause carves out some sort of exception to the appointments clause. And allowing the 1st Circuit's ruling to stand, they assure the justices, would not pose a threat to other territorial officers because it has long been understood that "purely local, territorial officers who enact and enforce primarily local law" are not "officers of the United States" and "may be elected or appointed in any manner of ways."

"The board and the government (among others) argue in the alternative that, although the board members' appointments were legitimate, it is in any event well established that the de facto officer doctrine applies when it is later determined that appointments violate the Constitution. They stress that the harm from invalidating the board's past actions as it attempted to restructure billions of dollars in debt would be significant – as one group of bondholders put it, it could "wreak havoc with the entire economy of Puerto Rico." Indeed, they note, one proceeding filed by the board has already led to the confirmation of a plan to adjust billions of dollars' worth of Puerto Rico's debt by issuing new bonds, which are already on the market.

"By contrast, they suggest, the benefit to Aurelius and the union would be minimal, because the proceedings that the board has initiated are no different from any other bankruptcy case in which Aurelius has participated – the board does not, for example, prosecute or adjudicate the case. And the violation, if it existed, was relatively small, because Congress did help to select the members of the board even if they were not confirmed by the Senate.

"Aurelius and the union push back, arguing that the de facto officer doctrine should not apply and the board's actions should be invalid. The Supreme Court has made clear that the de facto officer doctrine should not apply to violations of the Constitution, they

contend, and it would be particularly inappropriate to apply the doctrine here, when the violation of the appropriations clause was “so open and notorious.” Adding insult to injury, they continue, the board has continued to work even after the 1st Circuit ruled that its members’ appointments violated the appointments clause.

“Aurelius suggests that a ruling that the de facto officer doctrine applies to this case could lead to a variety of undesirable effects. First, it observes, private parties won’t have an incentive (and may not even have a legal right to sue) if a remedy is not available for past violations of the appointments clause. Second, it contends, such a result “would also encourage Congress to usurp executive authority, confident that it will suffer no repercussions.”

Aurelius also urged the justices not to be swayed by dire warnings that chaos will ensue if the de facto officer doctrine does not apply. These claims, it argues, “boil down to an extraordinary assertion that the constitutional violation here is simply too blatant and too big to remedy” – an argument that “turns the Constitution upside down.”