LEXSEE 779 F. SUPP. 646

NEW PROGRESSIVE PARTY (PARTIDO NUEVO PROGRESISTA; SENATOR NICOLAS NOGUERAS-CARTAGENA, as a member of the Senate of Puerto Rico, and as a qualified voter in Puerto Rico elections; ANGEL LUIS OCASIO, JUAN BURGOS-ORTIZ, qualified voters in Puerto Rico elections, Plaintiffs, REPUBLICAN NATIONAL HISPANIC ASSEMBLY OF PUERTO RICO, LYNETTE ALVARADO ROSAS, ARTURO J. GUZMAN VARGAS, qualified voters in Puerto Rico elections, Plaintiffs-Intervenors, v. HON. RAFAEL HERNANDEZ COLON, Governor of Puerto Rico; COMMONWEALTH OF PUERTO RICO; STATE ELECTIONS COMMISSION (COMISION ESTATAL DE ELECCIONES) OF THE COMMONWEALTH OF PUERTO RICO, PRESIDENT JUAN R. MELECIO, COMMISSIONERS EUDALDO BAEZ GALIB (PDP), CARLOS CANALS (NPP), MANUEL RODRIGUEZ ORELLANA (PIP), Defendants.

CIVIL NO. 91-2232-HL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

779 F. Supp. 646; 1991 U.S. Dist. LEXIS 18012

November 15, 1991, Decided

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JUDGES: LAFFITTE

OPINION BY: HECTOR M. LAFFITTE

OPINION

[*649] *OPINION AND ORDER*

This case deals with a topic that has been a source of continuous debate in Puerto Rico throughout this century: the political status of the island. It is an issue charged with historical and emotional ramifications. This [**2] Court will focus on the legal aspects of the latest

explicit mandate that "each proposed amendment shall be voted on separately and not more than three Amendments may be submitted [**35] at the same referendum." Article VII, Section 1. Laws of P.R. Ann. Title 1.

10 See Comment, Judicial Review of Initiative Constitutional Amendments, 14 U.C. Davis L. Rev. 461 (1980); Lowestein, California Initiatives and the Single-Subject Rule, 30 UCLA L. Rev. (1983).

Plaintiffs claim that Acts 85 and 86 are unfair, confusing, and tilted towards the supporters of the "YES" formula, because:

1) the title of the Act, "Claim for Democratic Rights," is so appealing that voters would not reject such an expression of democratic ideals, [11] and consequently, it is the present administration, not the people, making the choice;

11 The ballot has been designed, pursuant to Section 3 of Act 86, for the voter to accept or reject "the Claim for Democratic Rights." See facsimile of ballot attached hereto.

2) the legend at the top of the ballot, [12] "Referendum for Approval or Rejection by the electors of the Claim for Democratic Rights Approved by the Legislature of Puerto Rico," carries a message to voters that the "Claim for Democratic Rights," put to a "YES" or "NO" vote, has already been approved by the legislature and therefore insinuates a "YES" vote;

12 Section 3 of Act 86 provides for this wording and its place on the ballot.

3) the referendum [**36] includes six proposals inducing voters to vote for all, notwithstanding that they might not have voted for all of the amendments had they been submitted separately; [13]

13 Plaintiffs Lynette Alvarado and Juan Ortiz Burgos wish to vote "YES" as to some and "NO" as to others of the six proposals.

4) the Claim for Democratic Right contains misrepresentations regarding the United States citizenship;

5) the Claim for Democratic Rights is a blatant attempt to freeze Commonwealth status and to close the door to other forms of status options, i.e., independence or statehood, by including in the proposals matters such as United States citizenship, culture, language, identity, and international representation in sports;

6) the channeling of campaign funds through the Commonwealth Elections Commission places the plaintiffs at a disadvantage because the Commission is controlled by the ruling party, a participant in the referendum on behalf of the "YES" vote;

8) Act 85 does not provide for a write-in vote. [14]

14 Concerning plaintiffs' allegation that Act 85 precludes a write-in vote, the Court finds *Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991)* dispositive. "Although the voter has a protected right to voice his opinion and attempt to influence others, he has no guarantee that he can voice any particular opinion through the ballot box."

[**37] Defendants contend that the statutes are neutral in contents; constitute a valid exercise [*660] of legislative power; do not violate the United States Constitution; and, the issues presented are not ripe for adjudication.

Act 85 constitutes a clear example of "logrolling," [15] a practice explicitly rejected by Article VII, Section 3 of the Commonwealth Constitution ("each proposed amendment shall be voted on separately and not more than three shall be submitted"). However, the issue before the Court is not whether Act 85 contravenes the letter or spirit of the Commonwealth Constitution -- a matter on which we express [**38] no opinion -- but whether Act 85 is in conflict with the Due Process clause of the United States Constitution on the grounds of unfairness, vagueness and one-sidedness.

15 Logrolling has been defined as a "practice of including in one statute or constitutional amendment more than one proposition, inducing voters to vote for all the entire measure, although they might not have voted for the entire measure if several amendments or statutes had been submitted separately." Black's Law Dictionary, 5th ed. p. 849.

Every election conducted under the aegis of a democratic government has necessarily the imprimatur of the state and therefore must be balanced, impartial and

neutral to the contestants. This is not only a duty but an obligation of government. [16] A referendum is a form of political speech at the center of democratic values. Free speech values require that the proposals submitted be clearly identified, free of confusion, and each one separately submitted for approval or rejection. The Claim for Democratic [**39] Rights lumps into one claim six proposals, forcing the voter to either reject or adopt them all, and has the effect of weighting the ballot in favor of the "Yes" vote.

> 16 Governor Hernandez Colon, one of the defendants in this case, recognized this principle regarding legislation on the status of Puerto Rico when he implored Congress to approve balanced options in any status bill:
>
> "In order for the decision to rest with the people of Puerto Rico, the U.S. Congress has to present them three balanced options. If the options are unbalanced, if Congress loads the choices in a way that steers the Puerto Rican people to select a particular outcome, it is Congress which will have made the choice, not the people." (Governor Rafael Hernandez Colon at the Hearing before the Committee on Finance of the United States Senate, One Hundred and First Congress, held on November 14, 1989 in relation to S. 712 at page 12.)

Let us examine, for the sake of brevity, only two of the six proposals. Proposal number 1 [17] of the Claim for [**40] Democratic Rights provides "the right to choose a status of full political dignity without colonial or territorial subordination to the [plenary] full powers of Congress." Voters are not told, and there is silence in Acts 85 and 86, that the source of constitutional power for the exercise of federal authority in Puerto Rico is the Territory Clause.

"The argument that the Territory Clause does not apply [to Puerto Rico] is tantamount to a claim that there is no constitutional source for federal lawmaking in Puerto Rico. . . . Not surprisingly, every court to consider the Territory Clause issue has reaffirmed that the Territory Clause provides the fundamental constitutional source of authority governing the relationship between the United States and the Commonwealth."

U.S. Insular Areas, Applicability of Relevant Provisions of the U.S. Constitution, GAO/HRD-91-18, p. 60-61.

> 17 The numbering is used for ease of reference, though they appear unnumbered in Section 2 of Act 85.

Likewise, if proposal number 1 is to [**41] be read for the proposition that the *Tenth Amendment* may be made applicable to Puerto Rico in lieu of the Territory Clause, the matter is fraught with controversy and ambiguity:

We also have concerns with some provisions that define the Commonwealth option. For example, section 402(a) would declare that Puerto Rico "enjoys sovereignty, like a state, to the extent provided by the *Tenth Amendment*" and that "this relationship is permanent unless revoked by mutual consent." These declarations are totally inconsistent with the [U.S.] Constitution. Under the Territory Clause of the U.S. Const. Art. IV, cl. 2, an area within the sovereignty of the [*661] United States that is not included in a state must necessarily be governed by or under the authority of Congress. Congress cannot escape this constitutional command by extending to Puerto Rico the provisions of the *Tenth Amendment*, which by its terms apply only to the relationship between the federal government and states. We also doubt that Congress may effectively limit, by a statutory mutual consent requirement, its constitutional power under the Territory Clause to alter Puerto Rico's Commonwealth status in some respect in the future. Not even [**42] so-called 'enhanced Commonwealth' can ever hope to be outside this constitutional provision.

Statement of Dick Thornburgh, Attorney General, before the Committee on Energy and Natural Resources, United States Senate, concerning S. 245, The Puerto Rico Status Referendum Act, Feb. 7, 1991.

Both the statements of the GAO and the Attorney General's rest on the jurisprudence of the United States Supreme Court, which in its most recent expression, HARRIS v. ROSARIO, states:

Congress, which is empowered under the Territory Clause of the Constitution, *U.S.Const., Art. IV, § 3, cl. 2*, to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," may treat Puerto Rico differently from States so long as there is a rational basis for its actions. [18]

18 *446 U.S. 651, 652, 64 L. Ed. 2d 587, 100 S. Ct. 1929 (1980)*. In Harris, the Supreme Court found that Congress had a "rational basis" for discriminating against Puerto Rico in the allotment of aid to family with needy dependent children, as compared with similar families in the United States. Thus, it is clear, beyond doubt, that the Territory clause is the source of Congress' power to legislate over Puerto Rico. The scope of that power is plenary.

[**43] It should be remembered that Puerto Rico has been since 1901, and continues to be, an unincorporated territory. [19] The constitutional ramifications which flow from Puerto Rico's being an unincorporated territory are that Congress has plenary authority when legislating for Puerto Rico to treat Puerto Rico as equal to a state or to discriminate in favor or against Puerto Rico. [20] Even should Congress decide to exercise its lawmaking authority in Puerto Rico to the extent provided by the *Tenth Amendment*, it may do so only by virtue of the Territory Clause. Hence, the inescapable truth is that the Territory Clause is, and will continue to be, under our federal constitutional scheme, the source of congressional authority over Puerto Rico. That basic constitutional reality can only be changed if the people of Puerto Rico should decide to opt for statehood or independence. [**44]

19 *Califano v. Gautier-Torres, 435 U.S. 1, 3 n. 4, 55 L. Ed. 2d 65, 98 S. Ct. 906 (1978)*, cites *Downes v. Bidwell, 182 U.S. 244, 45 L. Ed. 1088, 21 S. Ct. 770 (1901)*, the origin of the doctrine of unincorporated territory, as authoritative precedent. See also Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1985).

20 Compare *Harris v. Rosario, 446 U.S. 651, 64 L. Ed. 2d 587, 100 S. Ct. 1929 (1980)*; *Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431 (3rd Cir. 1966)*, cert. denied, *386 U.S. 943, 17 L. Ed. 2d 874, 87 S. Ct. 977 (1967)*, with *Examining Board v. Flores de Otero, 426 U.S. 572, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976)*; *Rodriguez v. Popular Democratic Party, 457 U.S. 1, 72 L. Ed. 2d 628, 102 S. Ct. 2194 (1982)*. While there is a segment of Commonwealth advocates that rely on certain language in *U.S. v. Quinones 758 F.2d 40, 42 (1st Cir. 1985)*, in support of the proposition that the Territory Clause does not apply to Puerto Rico, the comment is dicta and was not necessary to the decision, and therefore is lacking in precedential value.

Proposal number 6 states: The right that any consultation concerning status guarantee, under any alternative, the American citizenship safeguarded by the Constitution of the United States of America." United States citizenship is highly valued by most Puerto Ricans. The format of the ballot is such that a "NO" vote implies that United States citizenship is in jeopardy, [**45] and that only a "YES" vote would assure U.S. citizenship. This means that independentistas who want to vote in favor of the first five proposals are forced to vote "YES" on a proposition that is historically inconsistent with the struggles, philosophy, and ideology of the independentista movement. "Independence for [*662] Puerto Rico must mean real independence, which must include a loss of United States citizenship for residents of Puerto Rico." Statement of the Attorney General, at p. 24. Likewise, statehooders who may want to vote "YES" for proposals 1 through 6 may very well feel compelled to vote "NO" on account of proposal 5, which is inconsistent with the statehood ideology.

The Court agrees that some of the propositions in the "Claim" for Democratic Rights are confusing, vague, contradictory, and deceptive. This is the end result of the logrolling procedure permeating the referendum, and could have been easily avoided by having the six propositions submitted separately. Hence, a strong argument can be made that lumping into one Claim six distinct propositions, infringes upon the *First Amendment* right to petition, free of confusion, vagueness and ambiguities. When [**46] the election process suffers from unfairness there is precedent for federal intervention and relief.

But while . . . local election irregularities, including claims of official misconduct, do not usually rise to the level of constitutional violations where adequate state corrective procedures exist, there remain some cases where a federal role is appropriate. The right to vote remains at bottom, a federally protected right. If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 is therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully

adequate state is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election even if derived from apparently neutral action. (citations omitted) (emphasis added)

GRIFFIN v. BURNS, 570 F.2d 1065, 1077 (1st Cir. 1978). [21]

21 For garden variety irregularities not warranting federal relief, see *Navedo v. Acevedo, 932 F.2d 94 (1st Cir. 1991)*; *Partido Nuevo Progresista v. Barreto-Perez, 639 F.2d 825 (1st Cir. 1980).*

[**47] Other aspects of plaintiffs' claims are not ripe for decision. Ante, pp. 10-17, but the claim that the ballot is unfair and confusing is ripe. The unfairness of the ballot is now present and will continue to be present throughout the referendum process and thereafter.

However, there remains a more difficult and sensitive question of whether unfairness justifies enjoining the referendum. Pre-election lawsuits challenging referendums inevitably draw the courts into the arena of highly charged political partisanship. Absent egregious circumstances, intrusion by federal courts into a local electoral matter is not warranted. The ballot is unfair. However, this unfairness does not rise to the level of a federal constitutional deprivation. Accordingly, it does not justify the drastic step of an injunction.

The Court is mindful that the proposal submitted to the voters may be rejected. If approved, a second referendum must be held to amend the Constitution of Puerto Rico. Consequently, this or any future referendum is not binding on Congress. The President may ignore it or take no action thereon.

"Congress retains all essential powers set forth under our constitutional system, and it will [**48] be Congress and Congress alone which ultimately will determine the changes, if any, in the political status of the island." [22]

22 Concurring statements of Representative Crawford and Delegate Barlett of Alaska during debate on Law 600, 81st Cong., 2d Sess., Cong. Record, June 29 and 30, 1950, p. 9595.

Even though the potential for confusion in the referendum is great and that the process appears tilted towards the "YES" vote -- a matter that in the future may weigh heavily in Congress -- this Court concludes that the sound constitutional course to follow is to defer to the voters and to the free competition of ideas. At this stage, it is for the voters, not this Court, to decide whether "YES" or "NO" on the ballot will prevail.

[*663] WHEREFORE, the petition for injunctive relief is *denied* and the complaint ordered *dismissed without prejudice.* Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, November 15, 1991.

HECTOR M. LAFFITTE

U.S. District Judge.