

LEXSEE 417 F.3D 145

**GREGORIO IGARTUA-DE LA ROSA, ET AL., Plaintiffs, Appellants, v. UNITED STATES OF AMERICA, Defendant, Appellee.**

No. 04-2186

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

417 F.3d 145; 2005 U.S. App. LEXIS 15944

August 3, 2005, Decided

**SUBSEQUENT HISTORY:** As Corrected, October 29, 2005.

US Supreme Court certiorari denied by, Motion granted by *Igartua De La Rosa v. United States*, 2006 U.S. LEXIS 2457 (U.S., Mar. 20, 2006)

**PRIOR HISTORY:** **[\*\*1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Raymond L. Acosta, U.S. Senior District Judge. *Igartua de la Rosa v. United States*, 331 F. Supp. 2d 76, 2004 U.S. Dist. LEXIS 16380 (D.P.R., 2004)

**DISPOSITION:** Affirmed.

**COUNSEL:** Gregorio Igartua-de la Rosa for appellants.

Francisco J. Domenech with whom Angel J. Vargas-Carcana, Office of the Legal Counsel & Federal Affairs for the President, Senate of Puerto Rico, was on brief for the Senate of the Commonwealth of Puerto Rico and its President, the Honorable Kenneth D. McClintock, Amicus Curiae.

Richard H. Fallon, Jr. with whom Jose A. Fuentes-Agostini, Reed Smith LLC, John M. Garcia, Garcia & Fernandez PSC, Joaquin A. Marquez, Philip J. Mause and Drinker Biddle & Reath LLP were on brief for the Puerto Rican-American Foundation, joined by the Republican Party of Puerto Rico, Amici Curiae.

Amy B. Abbott, Kirkpatrick & Lockhart Nicholson Graham LLP, Glenn R. Reichardt, Shanda N. Hastings, Kirkpatrick & Lockhart Nicholson Graham LLP on brief for Dick Thornburgh and Citizens' Educational

Foundation-US, Amici Curiae.

Gael Mahony, Stephen S. Young, Martha Born, Holland & Knight LLP and Israel Roldan-Gonzalez on brief for Israel Roldan-Gonzalez, Amicus Curiae.

Gregory G. Katsas, Deputy Assistant **[\*\*2]** Attorney General, with whom Peter D. Keisler, Assistant Attorney General, H.S. Garcia, United States Attorney, Michael Jay Singer and Matthew M. Collette, Appellate Staff, Civil Division, Department of Justice, were on brief for appellee.

**JUDGES:** Before Boudin, Chief Judge, Campbell, Senior Circuit Judge, Torruella, Selya, Lynch, Lipez and Howard, Circuit Judges. CAMPBELL, Senior Circuit Judge, concurring. LIPEZ, Circuit Judge, concurring in the judgment. TORRUELLA, Circuit Judge (dissenting). HOWARD, Circuit Judge, (dissenting).

**OPINION BY:** Boudin

**OPINION**

**[\*146]** OPINION EN BANC

**Boudin, Chief Judge.** This case brings before this court the third in a series of law suits by Gregorio Igartua, a U.S. citizen resident in Puerto Rico, claiming the constitutional right to vote quadrennially for President and Vice President of the United States. Panels of this court have rejected such claims on all **[\*147]** three occasions. <sup>1</sup> We now do so again, this time *en banc*, rejecting as well an adjacent claim: that the failure of the Constitution to grant this vote should be declared a violation of U.S. treaty obligations.

processes relating to Constitutional amendments or the admission of a new state to eventually give citizen residents of Puerto Rico the right to vote for President and Vice President. Such hope and speculation does not satisfy the "case or controversy" requirement of Article III. On that basis alone, I would decline to exercise jurisdiction over Igartua's request for declaratory relief.

**DISSENT BY: TORRUELLA; HOWARD**

**DISSENT**

**TORRUELLA, Circuit Judge (dissenting).** <sup>16</sup> In its haste to "put [plaintiffs-appellants] [**\*\*38**] constitutional claim fully at rest," <sup>17</sup> *maj. op.* at 6, the majority has chosen to overlook the issues actually before this en banc court as framed by the order of the rehearing panel, *see Igartua de la Rosa v. United States*, 404 F.3d 1 (1st Cir. 2005) (order granting panel rehearing), which panel the en banc court suppressed, but whose order was adopted as establishing the parameters of the issues to be decided by the en banc court. *See Igartua de la Rosa v. United States*, 407 F.3d 30, 31 (1st Cir. 2005) (converting to en banc review panel rehearing in which "the parties [are] to address two issues: first, the plaintiffs' claim that the United States was in default [**\*159**] of its treaty obligations and, second, the availability of declaratory judgment concerning the government's compliance with any such obligations."). It is these issues that the parties were asked to brief. Instead the majority has sidetracked this appeal into a dead end that is no longer before us: Puerto Rico's lack of electoral college representation, *see U.S. Const. art. II, § 1, cl. 2*, and our lack of authority to order any constitutional change to such status by [**\*\*39**] reason of that constitutional impediment.

<sup>16</sup> I acknowledge the participation of amici, whose briefs contributed to the clarification of various important issues. I regret that not all amici were granted the opportunity to express themselves at oral argument.

<sup>17</sup> Is this the constitutional equivalent of "rest in peace"? Of course, if Judge Lipez and Judge Campbell are correct that we lack jurisdiction to consider plaintiffs' claim, then the majority's various conclusions on the merits would be mere dicta, lacking any precedential value. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law,

and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCordle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1868) (quoted in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)). Furthermore, if the concurring opinion is correct, the majority is issuing an advisory opinion of the same kind that Judge Lipez claims results from the declaratory judgment that I propose.

[**\*\*40**] In doing so, the majority fails to give any weight to the fundamental nature of the right to vote, and the legal consequences of this cardinal principal. Under the combined guise of alleged political question doctrine, its admitted desire to avoid "embarrassment" to the United States, and its pious lecturing on what it deems to be the nature of the judicial function, the majority seeks to avoid what I believe is its paramount duty over and above these stated goals: to do justice to the civil rights of the four million United States citizens who reside in Puerto Rico. The majority labels this duty with disrespect as "rhetoric" and "intuitive values." *Maj. op.* at 3. I beg to differ, and so, I suspect, do a considerable number of those four million U.S. citizens who, lacking any political recourse, look to the courts of the United States for succor because they are without any other avenue of relief. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4, 82 L. Ed. 1234, 58 S. Ct. 778 (1938) ("Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied [**\*\*41**] upon to protect minorities and . . . may call for correspondingly more searching judicial inquiry."). <sup>18</sup>

<sup>18</sup> Reducing the majority and concurring opinions to their bare bones, the former leaves the four million nationally disenfranchised United States citizens residing in Puerto Rico to claim their rights through a nonexistent political forum, while the latter deny an existing judicial forum the authority to state the actuality of an undeniable fact. Both outcomes leave the citizens in question in an unjust legal limbo.

Considering that justice and equity are the handmaidens of the law, I believe it is the duty of this court to exercise its equitable power under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), <sup>19</sup> in its

decision of the issues that are properly before the en banc court, and to declare that the United States has failed to take any steps to meet obligations that are cognizable as the supreme law of the land<sup>20</sup> regarding plaintiffs-appellants' voting rights. "This is [\*\*42] of the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L. Ed. 60 (1803).

19 The Act states that "in a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). 20 U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Because I believe that the majority fails to meet this duty, I respectfully dissent.

I.

**A. How did we come to this state [\*\*43] of affairs?**

On July 25, 1898, in the closing days of the Spanish-American War, the United [\*160] States invaded<sup>21</sup> Puerto Rico. At that point in time the inhabitants of Puerto Rico had full rights as Spanish citizens. This included the right to elect sixteen deputies and three senators, with full voting rights, to the Spanish Cortes (Parliament).<sup>22</sup> Fernando Bayron Toro, *Elecciones y partidos de Puerto Rico* 108 (2003). Furthermore, Puerto Ricans had recently been granted a high measure of self-government. See generally Autonomic Charter of 1897, reproduced at, *Documents on the Constitutional Relationship of Puerto Rico and the United States* 22-46 (Marcos Ramirez Lavandero, ed., 1948).

21 In what must be the height of euphemism, the majority refers to this turn of events as Puerto Rico's becoming "associated" with the United

States. *Maj. op.* at 4. A similar, but more pernicious, mischaracterization follows its description of the congressional enactments that authorized local self-government for Puerto Rico, which the majority calls an "agreement" for a "unique 'Commonwealth' status," *id.*, and which the majority states resulted in the current "negotiated relationship," *id.* at 9 (emphasis in original), between the U.S. and Puerto Rico. Of course, these statements are simply inaccurate and do not reflect the facts. There is no room for doubt that Public Law 600, 64 Stat. 319 (1950) (codified at 48 U.S.C. § 731b, *et seq.*) (authorizing Puerto Rico to enact a constitution for local self-government), and its sequel, Public Law 447, 66 Stat. 327 (1952) (resolution approving Puerto Rico's Constitution), did nothing to change the underlying constitutional status of Puerto Rico as an unincorporated territory, subordinated to Congress' plenary powers under the Territorial Clause, U.S. Const., Art. IV, § 3, cl. 2. See generally David M. Helfeld, *The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico*, 21 Rev. Jur. U.P.R. 135 (1952); David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and The Constitution of the Commonwealth of Puerto Rico*, 21 Rev. Jur. 255 (1952) (containing numerous citations to the Congressional record and reports indicating that these measures did not change Puerto Rico's basic status under the Constitution nor Congress' powers over this unincorporated territory); Keith Bea, Congressional Research Service, *Political Status of Puerto Rico: Background, Options, and Issues in the 109th Congress*, at CRS-2 (updated Jun. 6, 2005) ("While the approval of the commonwealth constitution marked a historic change in the civil government for the islands, neither it, nor the public laws approved by Congress in 1950 and 1952, revoked statutory provisions concerning the legal relationship of Puerto Rico to the United States. This relationship is based on the Territorial Clause of the U.S. Constitution."). It is not just the majority's inaccuracies in describing the colonial relationship between Puerto Rico and the United States to which I object. The majority's unfortunate choice of language obviously favors the colonial condition and this bias will, without any question or doubt, be exploited politically.

The debate over what status Puerto Rico ought to have with respect to the United States is, of course, hotly contested. What that status should be is *not* the issue before us. The only issue is whether the U.S. citizens in Puerto Rico should have the right to vote nationally. The right to vote will benefit all U.S. citizens residing in Puerto Rico regardless of their position on status, since it will give them a meaningful political voice until that issue is resolved, and on that issue itself.

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22 In fact, Puerto Rico had been represented in the Spanish *Cortes* as early as 1812, *see Constitucion politica de la Monarquia Espanola* (promulgated in Cadiz on Mar. 18, 1812), as a result of which its one deputy, Ramon Powers, became Vice President of the *Cortes* in 1812. Thereafter, depending on the vagaries of Spanish politics, constitutions, and special laws enacted to apply to Spain's overseas provinces and colonies, Puerto Rico was variously represented in the *Cortes*.

All this came to naught with the signing of the Treaty of Paris on December 10, 1898, which officially concluded this "splendid little war" <sup>23</sup> and ended four hundred [\*161] years of Spanish colonial rule. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754. Thus commenced, in its place, a new period of colonialism which has so far lasted one hundred and seven years. <sup>24</sup> Notwithstanding Puerto Ricans' loss of these major political grants from Spain, the transition to United States sovereignty was largely seamless. <sup>25</sup> This was at least partially [\*\*45] due to the fact that Spanish rule had been less than kind, <sup>26</sup> but more importantly, because of the prospect of joining a democratic nation that promised the Puerto Rican people that it had come to "bestow upon [Puerto Ricans] the immunities and blessings of [the] liberal institutions of our government." Letter of Nelson Miles, Major-General Commanding the U.S. Army to the Inhabitants of Porto Rico (Nov. 5, 1898) in *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1900 19-20* (1902). *See generally* Bailey W. Diffie & Justine Whitfield Diffie, *Porto Rico: A Broken Pledge* (1931).

23 John Hay, U.S. Ambassador to Great Britain in 1898, and a leading expansionist of the time, wrote to then Colonel Theodore Roosevelt, at the

time of only Rough Rider fame, "it has been a splendid little war; begun with the highest motives, carried on with magnificent intelligence and spirit, favored by that fortune which loves the brave." Frank Freidel, *The Splendid Little War* 3 (1958); Hugh Thomas, *Cuba, The Pursuit of Freedom* 404 (1971).

24 *See generally* Jose Trias Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* (1997).

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25 U.S. troops were received in Ponce, Puerto Rico's second largest city, by the municipal band playing the "Star Spangled Banner," and General Nelson Miles, commanding general of the expeditionary force wired Washington: "Please send any national colors that can be spared, to be given to the different municipalities." 1 *Messages and Documents, 1898-1899*.

26 *See* Antonio Salvador Pedreira, *El Ano Terrible del 87: Sus Antecedentes y Sus Consecuencias*, Ed. Edil, Rio Piedras (1974).

In fact, the Treaty of Paris left to future action by Congress what should be "the civil rights and political status of the native inhabitants of the territories . . . ceded to the United States". Treaty of Peace, art. IX, para. 2, 30 Stat. 1754, 1759. Thus, for the first time in American history, the United States acquired territory without *ipso facto* granting its inhabitants citizenship, <sup>27</sup> and therefore, also contrary to its founding history, the United States became a colonial nation. *See* Julius William Pratt, *America's Colonial Experiment* 68 (1950). Immediately after the invasion, [\*\*47] Puerto Rico settled into a military government that lasted until 1900, when Congress enacted the so-called Foraker Act. Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.). This statute established a civil government composed almost totally of officials appointed by the President. A local legislature was provided, but only its lower house was elected by Puerto Rican residents. The Foraker Act declared these residents to be "citizens of Porto Rico." <sup>28</sup> Foraker Act § 7 ("All inhabitants [\*162] continuing to reside [in Puerto Rico] who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States . . .") As such, they became "nationals" of the United States.