LEXSEE 992 F.2D 1143

UNITED STATES of America, Plaintiff-Appellee, v. Rafael SANCHEZ and Luis Sanchez, Defendants-Appellants.

No. 90-5749.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

992 F.2d 1143; *1993 U.S. App. LEXIS 13202*; *7 Fla. L. Weekly Fed. C 382*

June 4, 1993, Decided

SUBSEQUENT HISTORY: Petition for rehearing DENIED.

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Southern District of Florida. DISTRICT BANKRUPTCY COURT DOCKET NO 89-10034-CR-JLK. D/C Judge KING

DISPOSITION: Affirmed in part, reversed in part, and remanded.

COUNSEL: FOR BOTH APPELLANTS: Out of case 2/16/91. Roy E. Black, BLACK & FURCI, P.A., 201 South Biscayne Boulevard, Suite 1300, Miami, FL 33131; (305) 371-6421.

For Plaintiff-Appellee: Dexter W. Lehtinen, USA, Frank H. Tamen, AUSA, Kathleen M. Salyer, Linda Collins Hertz, Mary K. Butler, AUSA, 155 S. Mia. Ave., Mia., FL 33130, (FTS-350-5420), (FTS-350-3000).

JUDGES: Before FAY and EDMONDSON, Circuit Judges, and HILL, Senior Circuit Judge.

OPINION BY: HILL

OPINION

[*1145] HILL, Senior Circuit Judge:

Defendants/Appellants Rafael Sanchez and Luis Sanchez, father and son, were arrested in October, 1988, in South Carolina for alleged local narcotics offenses. The South Carolina charges were dropped and the Sanchezes were extradited to Puerto Rico to face charges for the events which underlie the case now on appeal.

In Puerto Rico, the Sanchezes were charged with six offenses under the Puerto Rico criminal code: destruction (*P.R.Laws Ann. tit. 33 § 4334* (1989)); first degree murder (*P.R.Laws Ann. tit. 33 § 4002*); attempted murder (*P.R.Laws Ann. tit. 33 § 3121*); unlawful use of explosives (*P.R.Laws Ann. tit. 25 § 586*); unlawful possession of explosives (*P.R.Laws Ann. tit. 25 § 587*); and conspiracy to commit murder and to violate the explosives laws (*P.R.Laws Ann. tit. 33 § 4523*). Following a jury trial in the Superior Court in Mayaguez, Puerto Rico, Defendants/Appellants were acquitted on all counts.

Shortly thereafter, Defendants/Appellants were indicted in the Southern District of Florida, where [**2] they were charged with murder for hire (*18 U.S.C. § 1958 (1989)*); unlicensed transport of explosives (*18 U.S.C. § 842(a)(3)*); interstate transport of explosives with intent to injure or kill (*18 U.S.C. § 844(d)*); and flight to avoid prosecution (*18 U.S.C. § 1074*). Rafael Sanchez was additionally charged with interstate transport of explosives by a person charged with a criminal offense (*18 U.S.C. § 841(i)(1)*). Following a jury trial in the District Court for the Southern District of Florida, Defendants/Appellants were convicted on all counts. *741 F. Supp. 215 (1990)*.

Both defendants were sentenced to consecutive life sentences for the first three counts and five years' imprisonment on the flight count. Each sentence was followed by five years of supervised release, the terms to be [*1146] served concurrently. Rafael Sanchez was additionally fined $ 75,000 for transportation of explosives by a person charged with a criminal offense.

Rafael and Luis Sanchez are currently incarcerated.

Defendants/Appellants [**3] filed a timely notice of appeal and now challenge their conviction on numerous grounds. We find all of their arguments on appeal to be without merit with one important exception. The claim that their prosecution in the Southern District of Florida was invalid under the *Double Jeopardy Clause* has some merit and warrants full discussion. For the reasons stated below, we AFFIRM in part and REVERSE in part the order of the District Court.

I. Factual Background

In January, 1988, Rafael and Luis Sanchez resided in Tavernier, Key Largo, Florida, where Rafael owned a marina and fishing boats and ostensibly ran a lobster fishing operation. The boats were primarily used to further Appellants' marijuana and cocaine smuggling activities. Rafael Sanchez stored some of the narcotics near his home in Tavernier. Luis Sanchez would break drug shipments into marketable quantities and deliver them to distributors and customers.

Brian Williams, now deceased, worked for Rafael as a debt collector and bodyguard and shared a duplex apartment house with Luis Sanchez. Nelson Seda was Rafael's stepson-in-law and one of his customers. Seda was married to Vivian Sanchez, the daughter by a previous marriage [**4] of Carmen Sanchez, Rafael's wife.

In the summer of 1985, Seda received from the Sanchezes six ounces of cocaine, which he consumed with a friend, Alfonso Valentin. When Seda and Valentin failed to pay for the cocaine, Appellants met with Valentin and persuaded him to begin repayment. Seda apparently never paid for his share of the cocaine.

In August, 1985, Seda lost his job and began to work at Rafael Sanchez' marina. In late August or early September, 1985, using knowledge he had gained during his association with the Sanchezes, Seda went to Rafael's home and stole a wooden chest containing three kilograms of cocaine. Seda and Valentin consumed part of the cocaine and sold the remainder for $ 25,000.

Rafael Sanchez suspected Seda of the theft and, after Seda's initial protestation of innocence, subjected Seda and others to a polygraph examination. Seda attempted to skew the polygraph results by coughing each time he was asked about the missing chest. Rafael took no action against Seda immediately following the polygraph.

In 1986, Seda moved to Puerto Rico and dropped out of contact with Rafael and Luis Sanchez. Two years later, in May, 1988, Rafael was visiting Puerto Rico and, by [**5] chance, saw Seda. Upon returning to Florida, Rafael told his bodyguard, Brian Williams, that he had seen Seda and that he wanted Seda killed. In June, 1988, Williams approached Antonio Gonzalez, an employee at Rafael's marina, and asked Gonzalez to assist him in assassinating Seda. Gonzalez consented.

Williams and Gonzalez met with Rafael Sanchez at the latter's home, where Rafael explained that he wanted Seda killed for the theft of cocaine. Rafael told Williams and Gonzalez to fly to Puerto Rico and to check into a specified hotel close to Seda's presumed location. Rafael manifested indifference to the method of assassination and gave Williams and Gonzalez a bag containing $ 5,000. Rafael indicated that Gonzalez and Williams would receive additional payment after successful completion of the job.

Gonzalez and Williams then went to Luis Sanchez's residence and informed Luis that they had agreed to kill Nelson Seda. Luis gave the two a small electronic device which he described as a radio-detonated, remote controlled bomb. Luis took the device apart and demonstrated to Gonzalez and Williams the operation of the arming switch. Luis explained that the device could be detonated by remote [**6] control and he instructed Gonzalez and Williams to place the device under the seat or the gas tank of Seda's car.

On June 11, 1988, Gonzalez and Williams flew to San Juan, Puerto Rico. They concealed the bomb in a bag containing diving equipment which was checked and stored in the airplane baggage compartment. After [*1147] several days, during which time they made routine telephone reports to the United States, Gonzalez and Williams located Nelson Seda in Mayaguez. On June 19, Williams and Gonzalez drove to the street where Seda lived, parked, and waited for an opportunity to plant the bomb.

As he sat waiting, Williams toggled the unlabeled arming switch on the explosive device while trying to recall which position primed it for detonation. Unfortunately for Williams and Gonzalez, the toggling of the switch moved the mechanism controlling the

detonator and the bomb exploded, killing Williams and injuring Gonzalez. Gonzalez was arrested following his release from the hospital and, shortly thereafter, began to cooperate with the Puerto Rican police and the FBI.

Shortly after the bombing accident, Luis Sanchez and a confederate, Frank Cittadini, went to the duplex Luis had shared with Williams [**7] and removed a bomb, a silenced pistol, and some gold jewelry. In mid-July of 1988, Luis and Rafael Sanchez moved to Charleston, South Carolina, where they rented a house in the name of Rafael's girlfriend, Kim Burdsall. In August, 1988, Charleston police received information that cocaine was being kept at the Sanchez/Burdsall residence. On September 29, 1988, local police and DEA agents conducted a search of the premises. As a result of this search, all the occupants of the house were arrested for possession of cocaine.

On October 11, while the Sanchezes were incarcerated in South Carolina, the FBI advised local authorities of fugitive warrants which had been issued for Rafael and Luis Sanchez by the Commonwealth of Puerto Rico. The warrants were issued for violations of Puerto Rican law stemming from the bombing incident in Mayaguez. The South Carolina charges were dropped and the Sanchezes transferred to Puerto Rican custody for indictment.

Because the nature of the Puerto Rico prosecution is essential to the disposition of this appeal, we quote at length the charges (as translated) brought by the District Attorney of Puerto Rico:

I. The district attorney brings charges ... for the crime of Violation of Article 198 of the Crim.C. (Destruction), committed as follows: ... Rafael Sanchez and Luis Sanchez, on or about the 20th day of June, 1988, and in Mayaguez, P.R., ... unlawfully, willfully, maliciously and criminally, acting in common accord and by prior agreement with Antonio A. Gonzalez Olmeda and Brian Williams, threatened the life, physical integrity and property of the residents of Alfredo Quintana Street, District of Balboa, in Mayaguez, Puerto Rico, causing the detonation of a bomb, which they unlawfully had in their possession and were carrying to the aforementioned location.

[**8] II. The district attorney brings charges ... for the crime of Violation of Article 262 of the Crim.C. (Conspiracy), committed as follows: ... Rafael Sanchez and Luis Sanchez, from the 9th to the 20th day of June, 1988, in Florida, U.S.A. and Mayaguez, P.R., ... unlawfully, willfully, maliciously and criminally conspired, along with Antonio Alfredo Gonzalez and Brian Williams, with the intent to commit murder and violate Articles 26 and 27 of Law Number 134, passed on June 28, 1969, Law on Explosives. In said conspiracy, the conspirators realized acts in order to carry out the murder of Nelson P. Seda, consisting in their bringing to Puerto Rico an explosive device in order to place and detonate the same near said person.

[**9] III. The district attorney brings charges ... for the crime of Attempted Murder, committed as follows: ... Rafael Sanchez and Luis Sanchez, on or about the 20th day of June, 1988, and in Mayaguez, Puerto Rico, ... unlawfully, willfully, criminally, and with treachery, premeditated malice, and deliberation, acting in common accord and by prior agreement with Antonio A. Gonzalez Olmeda and Brian Williams, carried out acts unequivocally aimed at causing the death of the human being Nelson P. Seda, said actions consisting in the fact that they tried to place an explosive device on the property of the aforementioned Nelson P. Seda, and said device exploded as they tried to place it, without causing the attempted death due to circumstances beyond the control of the defendants.

[*1148] IV. The district attorney brings charges ... for the crime of First Degree Murder, committed as follows: ... Rafael Sanchez and Luis Sanchez, on or about the 20th day of June, 1988, and in Mayaguez, Puerto Rico, ... unlawfully, willfully, criminally, with premeditated maliciousness, acting in common accord and by prior agreement with Antonio A. Gonzalez Olmeda and Brian Williams, provoked and caused the death of the human being Brian Williams, upon perpetrating the crime of Destruction, by means of the detonation of a bomb in their possession and which they were transporting to the location of the events.

[**10] V. The district attorney brings charges ... for the crime of Violation of Article 26 of the Law on Explosives, committed as follows: ... Rafael Sanchez and Luis Sanchez, on or about the 20th day of June, 1988, and in Mayaguez, Puerto Rico, ... unlawfully, willfully, maliciously and criminally, knowingly and intentionally, acting in common accord and by prior agreement which took place in Florida, U.S.A., with Antonio Alfredo Gonzalez Olmeda and Brian Williams, used explosive

substances by means of an explosive device, in order to physically injure, frighten people and destroy property. The aforementioned defendants used said material without authorization or license issued by the Superintendent of Police of Puerto Rico.

VI. The district attorney brings charges ... for the crime of Violation of Article 27 of the Law on Explosives, committed as follows: ... Rafael Sanchez and Luis Sanchez, from the 9th to the 20th day of June, 1988, in Florida, U.S.A. and in Mayaguez, Puerto Rico, ... unlawfully, willfully, maliciously and knowingly and with criminal intent, acting together and in common accord with Antonio A. Gonzalez Olmeda and Brian Williams, had in their possession with the intention of using it, as in fact they did use it, an explosive device, in order to physically injure, frighten people and destroy property. The aforementioned defendants had in their possession said material without authorization or license issued by the Superintendent of Police of Puerto Rico.

[**11] Following their prosecution for, and acquittal of, each of these charges in Puerto Rico, the Sanchezes were indicted in the Southern District of Florida pursuant to an ongoing investigation by federal authorities. The Florida indictment charged Appellants with murder for hire, unlicensed transport of explosives, transport of explosives with intent to injure or kill, transport of explosives by an indicted felon (Rafael), and flight to avoid prosecution. The Sanchezes were convicted on all counts and now appeal that conviction, arguing, *inter alia,* [1] [**12] that they have been placed twice in jeopardy for the same offenses in violation of the *Fifth Amendment.*

1 Appellants' other claims on appeal are addressed in Section III, *infra.*

II. Double Jeopardy

The *Double Jeopardy Clause of the Fifth Amendment to the United States Constitution* provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. While the exact scope of this clause has resisted repeated efforts at definition, it is at least well established that successive prosecutions for the same unlawful act will not offend the Constitution when they are brought under the laws of separate sovereigns. *Abbate v. United States, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959)* (upholding successive state and federal prosecutions). In *Heath v. Alabama, 474 U.S. 82, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985)*, the Supreme Court explained [**13] this principle as follows:

> The dual sovereignty doctrine is founded on the commonlaw 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 [*1149] each, he has committed two distinct 'offences'. *United States v Lanza, 260 US 377, 43* SCt 141, *67 LEd 314 (1922)....* Consequently, when the same act transgresses the laws of two sovereigns, "it cannot truly be averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." *474 U.S. at 88, 106 S. Ct. at 437*, quoting *Moore v. Illinois, 55 U.S. 13, 19, 14 L. Ed. 306 (1852).*

In the instant case, the government contends that this dual sovereignty doctrine precludes application of the *Double Jeopardy Clause*. In other words, the government urges us to affirm the finding of the District Court [2] that Appellants' prosecution in Puerto Rico Superior Court was undertaken, [**14] not by the government of the United States, but under the authority of a separate sovereign, the Commonwealth of Puerto Rico.

2 The opinion of the district court is reproduced at *741 F. Supp. 215 (S.D.Fla.1990).*

The status of Puerto Rican courts [3] for the purposes of double jeopardy is a thorny issue. Application of the *Double Jeopardy Clause* to the facts of this case, however, presents an equally complex, and clearly constitutional, question. While we recognize that assessing the scope of the dual sovereignty doctrine necessarily involves constitutional consideration, we believe that it does not present a direct constitutional question. The purpose it serves is to forestall an unnecessary application of the *Double Jeopardy Clause*. As we avoid reaching constitutional questions where conflicts can be resolved on a non-constitutional basis, *see Burton v. United States, 196 U.S. 283, 25 S. Ct. 243, 49 L. Ed. 482 (1905)*, and, in the double [**15] jeopardy context, *Whalen v. United States, 445 U.S. 684, 702, 100 S. Ct. 1432, 1443, 63 L. Ed. 2d 715 (1980)* (Rehnquist, J., dissenting), we first address the applicability of the dual sovereignty doctrine to Puerto Rican courts.

3 The court system in Puerto Rico includes a federal district court and a hierarchy of local courts. It is this set of local courts that we intend to refer to with the phrase "Puerto Rican courts". The status of the federal district court in Puerto Rico for double jeopardy purposes is unquestioned: prosecution in the United States District Court for the District of Puerto Rico clearly precludes subsequent prosecution for the same offenses in the District Court for the Southern District of Florida. The existence of a double jeopardy bar is less clear where, as here, the first prosecution took place in the Puerto Rico Superior Court, a court established pursuant to the Puerto Rico Constitution.

A. *Dual Sovereignty Doctrine*

In *Heath* [**16] *v. Alabama,* the Supreme Court explained that the crucial question in determining whether two prosecuting entities (in that case two states) are separate sovereigns for purposes of the *Double Jeopardy Clause* is whether they derive their authority to punish from distinct sources of power. *Heath, supra, 474 U.S. at 88, 106 S. Ct. at 437.* Once posed, the question was easily answered in *Heath,* for the sovereignty of the states is the touchstone of our system of federalism. [4] Thus the Court upheld separate prosecutions by Alabama and Georgia of a man whose single criminal act was the hiring of two men to kill his pregnant wife.

4 After the creation of the Union from the original thirteen states, new states have been admitted to the Union from what had theretofore been territories of the United States. Although the process may never have been formally acknowledged, Congress must have, at some instant, relinquished its authority over territorial lands so that the people of those lands could approach the United States as an independent entity seeking admission to the Union. The process of statehood was, then, one by which a sovereign entity made a compact with the Union to submit to the (then limited) authority of the federal government in exchange for the benefits offered in Article IV Section IV of the Constitution: that "the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence." The language of the *Tenth Amendment,* reserving "powers not delegated to the United States" to new and existing states and to the people, acknowledges the reservoir of state sovereignty which permitted formation of a federal union.

[**17] In its discussion of dual sovereignty, the *Heath* Court made reference to cases upholding federal and state prosecutions for the same offenses, [5] noting that "the Court has [*1150] uniformly held that the states are separate sovereigns with respect to the federal government because each state's power to prosecute is derived from its own 'inherent sovereignty,' not from the federal government." *474 U.S. at 89, 106 S. Ct. at 437,* quoting *U.S. v. Wheeler, 435 U.S. 313, 320 n. 14, 98 S. Ct. 1079, 1084 n. 14, 55 L. Ed. 2d 303 (1978).*

5 *See Abbate, supra,* and *Bartkus v. Illinois, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959).*

Early cases concerning the status of territorial courts demonstrate that territories do not possess a similar inherent sovereignty. In *Grafton v. United States, 206 U.S. 333, 27 S. Ct. 749, 51 L. Ed. 1084 (1907),* [**18] the Court held that acquittal in a court martial proceeding in the Philippines barred subsequent prosecution in Philippine trial court. The Philippine Islands were, at that time, a territory of the United States, and the Supreme Court reasoned that "the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States." *206 U.S. at 354, 27 S. Ct. at 755.* [6]

6 With similar reasoning, the Court held in *Waller v. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970),* that successive prosecutions by state and municipal authorities violate the *Double Jeopardy Clause.*

Thirty years later, the Supreme Court applied this view of territorial courts in a case upholding the validity of a Puerto Rico antitrust law despite the coexistence of the Sherman Antitrust Act. In *Puerto Rico v. Shell Co., 302 U.S. 253, 58 S. Ct. 167, 82 L. Ed. 235 (1937),* [**19] the Supreme Court commented:

It is ... clear that the legislative duplication gives rise to no danger of a second prosecution and conviction, or

of double punishment for the same offense. The risk of double jeopardy does not exist. Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. *302 U.S. at 264, 58 S. Ct. at 172*, citing *Balzac v. Puerto Rico, 258 U.S. 298, 312, 42 S. Ct. 343, 348, 66 L. Ed. 627 (1922)*.

The *Shell* Court clearly found the dual sovereignty doctrine inapplicable to prosecutions in the courts of United States territories. This view is supported by Article IV of the Constitution which mandates that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. art. IV, § 3. Punitive authority in a territory of the United States flows directly from this plenary power. Every exercise of authority in a territory which does not proceed under [**20] a direct Congressional enactment proceeds, at least, at the sufferance of the Congress, which may override disfavored rules or institutions at will. [7] The United States Congress is the source of prosecutorial authority for both the courts of United States territories and the federal district courts. Therefore, under *Heath v. Alabama,* prosecutions in territorial courts are not protected by the dual sovereignty doctrine from application of the *Double Jeopardy Clause*.

7 See *Simms v. Simms, 175 U.S. 162, 168, 20 S. Ct. 58, 60, 44 L. Ed. 115 (1899)* ("In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state ..."); *United States v. McMillan, 165 U.S. 504, 17 S. Ct. 395, 41 L. Ed. 805 (1897)* (Congressional enactment for accounting of fees by clerk of territorial court overrides territorial enactment); *El Paso & Northeast Ry. Co. v. Gutierrez, 215 U.S. 87, 30 S. Ct. 21, 54 L. Ed. 106 (1909)* (under Congress' plenary authority over territories, Federal Employers' Liability Act applies to the Territory of New Mexico despite unconstitutionality of FELA with regard to the states); *National Bank v. County of Yankton, 101 U.S. 129, 25 L. Ed. 1046 (1880)* (Congressional annulment and reenactment of statute passed in territorial legislature of South Dakota authorized local issuance of railway bonds).

[**21] Our inquiry does not end here, however. The Florida district court concluded that the reasoning underlying the above-quoted portion of *Puerto Rico v. Shell* was overridden by the passage of the Puerto Rico Federal Relations Act, Pub.L. 600, ch. 446, 64 Stat. 319 (1950) (codified at *48 U.S.C. § 731 et seq. (1989)*), and, implicitly, that Puerto Rico is no longer a territory as that term was understood in the early part of this century. *741 F. Supp. at 219*. We must decide, therefore, whether the creation of the Commonwealth of Puerto Rico pursuant to [*1151] the Federal Relations Act so changed the status of Puerto Rico that it must now be considered a separate sovereign for the limited purpose of the dual sovereignty exception to the *Double Jeopardy Clause*.

Puerto Rico was ceded to the United States by Spain in the aftermath of the Spanish American War of 1898. [8] Between 1898 and 1950, the civil government established for Puerto Rico by Congress was given increasingly independent authority over local affairs, although Puerto Rico's governor, attorney general, and supreme court justices continued to be appointed by the President [**22] of the United States. Foraker Act, ch. 191, 31 Stat. 77 (1900); Jones Act (Puerto Rico), ch. 145, 39 Stat. 951 (1917). [9] In 1917, Congress provided for a bicameral, elected legislature and an elected Commissioner to Congress, and granted United States citizenship to the residents of *Puerto Rico. Jones Act, supra,* §§ 5, 25-27, 36.

8 Debate about the ideal status of Puerto Rico has continued, uninterrupted, since that time. The three participants in the debate are supporters of Puerto Rican statehood, supporters of Puerto Rican independence, and supporters of the status quo. *See, generally,* Jose Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine, 100 Harv.L.Rev. 450 (1986)*. While we consider the constitutional status of Puerto Rico to be highly significant, if not dispositive, of its status under the *Double Jeopardy Clause*, we note that other courts, taking a less literal approach, have suggested that Puerto Rico may be "like" a state for purposes of a particular constitutional provision. *See, e.g., Mora v. Mejias, 206 F.2d 377 (1st Cir.1953)* (discussing applicability of *Fourteenth Amendment* rather than *Fifth Amendment* due process); *Fornaris v. Ridge Tool Co., 423 F.2d 563* (1st Cir.), *rev'd on other grounds, 400 U.S. 41, 91 S. Ct. 156, 27 L. Ed. 2d*

174 (1970) (same).

[**23]

9 Provisions of each act not superseded by the Federal Relations Act of 1950, are codified at *48 U.S.C. § 731 et seq. (1989).*

In 1950, as part of a continuing effort to promote autonomous rule in Puerto Rico, Congress passed the Puerto Rico Federal Relations Act with the stated intention of permitting the people of Puerto Rico to "organize a local government pursuant to a constitution of their own adoption." *48 U.S.C. § 731(b)*. The Federal Relations Act authorized the Puerto Rico legislature to call a constitutional convention and to draft a constitution for submission to the President of the United States and ratification by the United States Congress. *48 U.S.C. § 731(d)*. The Puerto Rico Constitution was ratified by the people of Puerto Rico in March, 1952, and was amended and ratified by Congress shortly thereafter. Joint Res. ch. 567, 66 Stat. 327 (1952).

The First Circuit has concluded that passage of the Federal Relations Act and creation of a Puerto Rican constitution so altered [**24] the relationship between Puerto Rico and the Congress that Puerto Rico became sovereign for purposes of the dual sovereignty doctrine. In *United States v. Lopez Andino, 831 F.2d 1164 (1st Cir.1987), cert. denied, 486 U.S. 1034, 108 S. Ct. 2018, 100 L. Ed. 2d 605 (1988)*, the First Circuit relied on Supreme Court dicta stating that "Puerto Rico, like a state, is an autonomous political entity," to find that Puerto Rico is a separate sovereign under the *Double Jeopardy Clause*. *831 F.2d at 1168*, quoting *Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8, 102 S. Ct. 2194, 2199, 72 L. Ed. 2d 628 (1982)*. In subsequent cases, the First Circuit has reiterated this conclusion. *United States v. Bonilla Romero, 836 F.2d 39* (1st Cir.) *cert. denied, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 2d 33 (1988)*; *United States v. Quinones, 758 F.2d 40 (1st Cir.1985)*.

We disagree with the conclusion of the First Circuit [**25] that Congress' decision to permit self-governance in Puerto Rico makes Puerto Rico a separate sovereign for double jeopardy purposes. We are substantially in accord with Judge Torruella's concurrence in *Lopez Andino*. [10] We have referred for guidance to his discussion of the status of Puerto Rican courts and conclude, as he did, that Puerto Rico is still constitutionally a territory, and not a separate sovereign. As a territory, [*1152] Puerto Rico remains outside an exception to the *Double Jeopardy Clause* which is based upon dual sovereignty. The authority with which Puerto Rico brings charges as a prosecuting entity derives from the United States as sovereign.

10 We note, particularly, his discussion of the legislative history of P.L. 600, *831 F.2d at 1173-74*, and of recent Supreme Court cases permitting rational basis discrimination against residents of Puerto Rico in entitlement programs. *831 F.2d at 1175*, citing *Califano v. Torres, 435 U.S. 1, 98 S. Ct. 906, 55 L. Ed. 2d 65 (1978)*; *Harris v. Rosario, 446 U.S. 651, 100 S. Ct. 1929, 64 L. Ed. 2d 587 (1980). See also,* Juan Torruella, *The Supreme Court and Puerto Rico, The Doctrine of Separate and Unequal* (1985).

[**26] The Supreme Court's application of the *Heath* test to prosecutions in Native American tribal courts supports our conclusion that the Federal Relations Act did not fundamentally alter Puerto Rico's relationship to the United States. In *United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)*, decided twenty-five years after the passage of the Federal Relations Act, the Supreme Court relied on *Puerto Rico v. Shell* in *distinguishing* the dependent status of territorial courts from the separate sovereign status of Native American tribal courts. [11] The *Wheeler* Court held that the dual sovereignty exception permits federal prosecution of conduct already prosecuted in Navajo tribal court because Indian tribes are possessed of sovereignty which predates the formation of the United States:

11 Discussing *Heath's* focus on "the ultimate source of power" as the dispositive factor in dual sovereignty doctrine cases, the Court rejected a notion that the "extent of control exercised by one prosecuting authority over another" should govern the inquiry. As evidence that extent of control could *not* be dispositive of a dual sovereignty question, the Court noted: "Indeed, in the *Shell Co.* case the Court noted that Congress had given Puerto Rico an autonomy similar to that of the states.... *302 U.S. at 262, 58 S. Ct. at 171.*" *435 U.S. at 319-320 n. 13, 98 S. Ct. at 1084.*

[**27] The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete