

## RECENT SCHOLARLY VIEWS ON THE CURRENT AND FUTURE STATUS OF THE COMMONWEALTH OF PUERTO RICO

Dean Alexander Aleinikoff of Georgetown Law School:

*If both the Congress and the people of Puerto Rico seek to establish a new relationship that recognizes space within the American constitutional system for “autonomous” entities, it ill behooves either the executive branch or the judiciary to set such effort aside in the name of nineteenth-century conceptions of sovereignty.<sup>1</sup>*

Constitutional Law Professor, Richard Pildes, from the New York University School of Law, while describing the Bush Reports on the status of Puerto Rico constitutional analysis as “unpersuasive and inadequate,” concludes that regarding the possible future development of Commonwealth:

*In my view, were the United States Congress and the people of Puerto Rico to prefer expanding the existing Commonwealth relationship, in a way that provides greater autonomy for Puerto Rico on the basis of mutual consent, it would be unfortunate, even tragic, for that option to disappear due to confusion or error about whether the Constitution permits Congress to adopt such an option.<sup>2</sup>*

Professor Pildes stated in his testimony before the Subcommittee on Insular affairs on March 22, 2007, that:

*“Congress does have the power, should it choose to use it, to enter into a mutual-consent agreement that would create and respect more autonomous form of Commonwealth status for Puerto Rico, in which Congress would pledge not to alter the relationship unilaterally.”<sup>3</sup>*

Other prominent scholars have reached similar conclusions recently. Professors W. Michael Reisman, from Yale University, and Robert Sloan, from the Boston University School of Law, in a memorandum prepared for the Popular Democratic Party Status Commission in 2006 expressed:

*“Yet in the late twentieth and early twenty-first century, all three branches of the U.S. federal government maintain legal positions on Puerto Rico rooted firmly in a nineteenth-century paradigm of international law.... This binary division (between states and territories),... is in fact, anachronistic: It neither accurately reflects nor properly accommodates the diverse political*

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<sup>1</sup> Aleinikoff, Alexander, *SEMBLANCE OF SOVEREIGNTY, THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP*, Harvard University Press. 2002, pages 92-93.

<sup>2</sup> Pildes, Richard, *TESTIMONY BEFOR THE COMMITTEE ON NATURAL RESOURCES SUBCOMMITTEE ON INSULAR AFFAIRS OF THE U.S. HOUSE OF REPRESENTATIVE ON H.R. 900 AND H.R. 1230*, page 1, March 22, 2007

<sup>3</sup> *Id.*, pages 6-7.

*arrangements embodied in the freely associated state of Puerto Rico, the CMNI, and the FAS. Legally created at a later date, those arrangements better represent current law.*<sup>4</sup>

Furthermore, in addressing specifically the valid aspirations of those of who believe in the possibility of enhancing the Commonwealth, professors Reisman and Sloan conclude that:

*“Should Puerto Rico decide that an “enhanced” commonwealth status best serves its long term interests, U.S. constitutional law, to our view would likely be able to accommodate that arrangement; the barriers to enhance commonwealth status are more political than legal.”*<sup>5</sup>

Similar conclusions were reached by Charles Cooper, former head of the Office of Legal Counsel at the U.S. Department of Justice:

*“In short, there is no support for a reading of the Constitution that unnecessarily restricts the political arrangements available to the President and Congress in fashioning binding consensual solutions to the Nation’s relations with the people of its territories.”*<sup>6</sup>

With regard specifically to the Commonwealth of Puerto Rico, Cooper adds:

*“The relevant Supreme Court cases confirm that Puerto Rico’s commonwealth status is predicated upon a binding compact, created through the mutual consent of the sovereign parties and revocable, only by mutual consent of the parties.”*<sup>7</sup>

And the binding nature of Commonwealth status was reaffirmed by Professor Sloan on a working paper that has yet to be published when he stated:

*“It is well-established that a State, by repeated, public representations intended to induce reliance on the part of other state (or another class of international participant), may bind itself unilaterally. The United States did just that; among other indicia of reliance, its representations induced the General Assembly to adopt a resolution agreeing that reports on Puerto Rico’s status under Article 73(e) were not required after 1952. The United States thereby bound itself, in international law, to the particular understanding of the bilateral compact and associated state relationship expressed before the United Nations orally and in writing. It may not, again as a matter of international law, invoke its domestic law to vitiate, or justify its failure to comply with, any consequent obligations.”*<sup>8</sup>

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<sup>4</sup> Reisman, Michael & Sloane, Robert, FUTURE STATUS OPTIONS AND PROCESSES FOR PRESERVING THE TIGHT TO SELF-DETERMINATION OTH THE COMMONWEALTH OF PUERTO RICO, A Study Prepared for the Status Commission of the Popular Democratic Party of Puerto Rico, 2006, page 72.

<sup>5</sup> Id., page 102.

<sup>6</sup> Cooper, Charles, THE POWER OF CONGRESS TO VEST JURIDICAL STATUS IN PUERTO RICO THAT CAN BE ALTERED ONLY BY MUTUAL CONSENT, page 7, September, 2005 (Memorandum presented to the U.S. Department of Justice on behalf of the Government of Puerto Rico).

<sup>7</sup> Id., page 58.

<sup>8</sup> Lawson, Gary and Sloane, Robert, The Constitutionality of Decolonization: Puerto Rico’s Domestic and International Legal Status, Working paper No. 09-19, page 33 (April 8, 2009).

Professor David Rezvani argued recently that after 1952, based on the U.S. Government's representations to the people of Puerto Rico and the international community, the Commonwealth of Puerto Rico has acquired some entrenched powers that cannot be withdrawn unilaterally,<sup>9</sup> and that *"Puerto Rico is a polity with a range of sovereign powers that is unincorporated into the domestic system of the core state it is associate with."*<sup>10</sup>

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<sup>9</sup> Rezvani, David, The Basis of Puerto Rico's Constitutional Status: Colony, Compact or "Federacy"?, 122 Political Science Quarterly 115, 125 (2007).

<sup>10</sup> Id., page 137.