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HOW THEY INFLUENCED PUERTO RICO'S TAX
REFORM FROM 1898-1901 AND LED TO THE ADOPTION
OF THE IMPORT EXCISE AND PROPERTY TAX

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Constitutional Separation and the Foraker Act: how they influenced Puerto Rico's tax reform from 1898-1901 and led to the adoption of the import excise and property tax¹

Paul Salamone²

“History is the witness that testifies to the passing of time; it illumines reality, vitalizes memory [and] provides guidance in daily life...” Cicero - Pro Publico Sestio.

Introduction

Thomas Carlyle once observed that “history is the essence of innumerable biographies”³. While H.G Wells remarked that human history is “in essence a history of ideas.”⁴ Puerto Rico's constitutional future was certainly influenced by both men and ideas and historical circumstances. The period of 1898-1901 was marked by the Spanish-American War, the deadly Hurricane San Ciriaco of 1899 and electoral and protectionist concerns in Congress. They undoubtedly provide depth, color and a setting to this momentous turning point in Puerto Rico's history.

Puerto Rico's current fiscal structure and constitutional underpinnings hark back to the Spanish American War of 1898 and the historical developments that occurred during the period from 1898-1901. The individuals caught in this drama were many, but the influence exerted by President McKinley, Elihu Root, Secretary of War, J.H. Hollander, Puerto Rico's first Treasurer under the Foraker Act, Governor Charles H. Allen, first civil governor under the Foraker Act, Governor W. Davis, the Island's last military governor, Senator Foraker and Congressman Payne was disproportionate. Their unorthodox ideas on what the constitutional underpinnings for Puerto Rico and its tax system should be have had a lasting impact.

Thus, it is of immense value to examine the historical context in which all of these developments took place. For Puerto Rico, the principal result of the Span-

¹ This article is dedicated to the late David Rivé Rivera, Esq., a gentleman and scholar of the law, family man and good friend, to whom I am eternally indebted for my passion for the Law and for history.

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³ *Book of Quotations*, Harper Collins, (2000), pg. 341.

⁴ *Barlett's Familiar Quotations*, 720 (15th ed. 1980).

ish-American War of 1898 was the Foraker Act of 1900,⁵ Congress' first attempt at framing a territorial relationship for its new colony. Congress used tariffs enacted as part of the Foraker Act, as its leading edge to test the assumption held by the McKinley Administration, that Puerto Rico remained constitutionally separated from the country that governed it locally and exercised sovereignty internationally as well. Puerto Rico tax reform also became entwined with this experiment, when Congress directed in the Foraker Act that such reform must take place, in order for the tariff barriers that were visibly established to support the constitutional principle of separation to expire.

The compromises evident in the Foraker Act of 1900. This caution, mainly directed at the newly acquired, densely populated but rebellious Philippines, derailed the first attempt at extending citizenship to Puerto Rico residents, but what emerged was a fiscal structure that in a modified form lives on.

The Supreme Court's views on the issues that most concerned Congress when the Foraker Act was debated and collected in the so-called Insular cases,⁷ reflect

⁵ 31 Stat. 77, ch. 191 (1900).

⁶ The McKinley Administration was certainly not the first preoccupied by territorial expansion. The Louisiana Purchase under President Jefferson, the Mexican-American War, the purchase of Alaska from Russia (also known as "Secretary Seward's folly"), the push to the West and south to Florida were key events in forging the United States. Less known to students of history were the failed efforts at expansion. For example, until 1870, diplomatic exchanges with Great Britain explored the possibility of the annexation of Canada. In December of 1822, the government of El Salvador, armed with a decree from its Congress, sent three commissioners to Washington to offer the sovereignty of the country, but the proposal was abandoned before the Commissioners arrived in the United States. In 1848, Mexico offered the Yucatán peninsula, but the opportunity was passed. Also in 1848, Spain refused the US's offer to purchase Cuba for \$100 million. In 1868, the President of the Dominican Republic invited the U.S. to place the country under its protection and occupy Samaná Bay as a preliminary step toward annexation. Subsequent negotiations led to a treaty of annexation that was submitted by President Grant to the Senate for ratification but was not adopted. Bassett Moore, John, *Principles of American Diplomacy*, Harper & Brothers, NY, (1918), pgs. 360-362. The Senate also rejected a treaty put forth by the Grant Administration to acquire from Denmark what is now the US Virgin Islands. Bemis, S.F. *The United States as a World Power: A Diplomatic History 1900-1955*, Henry Holt & Co., rev. Ed., N. Y. (1955), pg. 51. The failure to pass the Dominican treaty of annexation and the purchase of the Virgin Islands must have cast shadow over the policy-makers of the McKinley Administration.

⁷ *De Lima v Bidwell*, 182 US 1 (1901); *Dooley v United States*, 182 US 222 (1901), *Armstrong v United States*, 182 US 243 (1901); *Downes v Bidwell*, 182 US 244 (1901). Frederic Coudert, counsel in one of the *Insular Cases*, remarked that: "[i]t is difficult to realize how fervent a controversy [this was] over the question of whether the Constitution follows the flag. This question, arising as the result of our acquisitions of territory following the Spanish War, divided courts, judges and lawyers, but public opinion generally. It led to a flood of controversial literature, to phrase-making in and out of Congress, and to bitterness which almost threatened to resemble the controversies over the Fugitive Slave Law [Dred Scott case] and the Missouri Compromise." Coudert, F., *The Evolution of the Doctrine of Territorial Incorporation*, 26 Colum. L. Rev. 823, 823 (1926). Now, it is a sad statement that "all but forgotten is the fact that the *Insular Cases* were great cases at the time..." Schwartz, Bernard, *A History of the Supreme Court*, Oxford University Press, 1993, pg. 186, not only at the time but their influence is very much alive



a deference bordering on institutional abdication to the judgments made and applied by the political departments of Government. Their impact and relevance today is such that Puerto Rico's constitutional status and its fiscal structure is very much always front-and-center of never-ending controversy, vigorous commentary and political debate.

The historical record will also provide a clearer understanding of how Puerto Rico's first civil government in 1900 viewed and construed Puerto Rico's tax powers under the Foraker Act when in turn legislation was passed to enact tax reform to end the tariffs imposed to establish its constitutional status. The end result was that Puerto Rico adopted a modified version of the federal import excise with interdiction and inspection of imports at the water's edge and a property tax molded principally from Maryland law. These two modes of taxation have expanded and are very much in use today.

I. 1898-1900 - The Spanish-American War - Spain Cedes Puerto Rico - Puerto Rico Imposes Import Duties under US Military Administration

As a result of the short but momentous Spanish-American War⁸, Spain "cede[d]"⁹ Puerto Rico to the US¹⁰ as part of the settlements contained in the

today. See *Harris v Rosario*, 446 US 651 (1980). But, see Justice Marshall's dissent in *Harris*, ante questioning the continued vitality of these cases. Of significance also is the fact that leading textbooks on Constitutional Law unfortunately fail to discuss or even mention in passing the *Insular cases*. For examples see, Lockhart, William B.; Kamisar, Yale, Chopper, Jesse H., *Constitutional Law*, West Publishing Company (1970), Cohen, William; Varat, Jonathan, *Constitutional Law, Cases & Materials*, 11th Ed; Gunther, Gerald, *Constitutional Law*, Foundation Press, 12 ed (1991), Shapiro, Martin, *American Constitutional Law*, McMillan, 4th Ed, (1975), Nowak, John E., Rotunda, Ronald D, *Constitutional Law*, West Group, 6th Ed.

⁸ On April 25, 1898, Congress declared that a state of war existed between the United States and the Kingdom of Spain (30 Stat. 364, ch. 189 (1898)), then the colonial power over Puerto Rico, Guam, the Philippines and Cuba. In 1897, Spain had granted a fair amount of autonomy to Puerto Rico that included its own parliament. See García Martínez, Alfonso L., *La Constitución Autónoma de 1897: Un Desarrollo no Igualado en Nuestra Historia*, 35 Rev. Col. Abog. , Num. 3, agosto, (1974), pgs. 387-404.

⁹ Art. II of the Treaty of Paris employed the more gentle term "cedes" unlike Art. I of the treaty when referring to Cuba: "Spain relinquishes all claim of sovereignty over and title to Cuba."

¹⁰ Prior to commencement of hostilities, Puerto Rico had not figured prominently as a choice for strategic expansion of American territory during the great race by Western European powers to acquire colonies at the turn of the century. Morales Carrión, *Puerto Rico, A Political and Cultural History*, W.W. Norton and Company, Inc., (1983) at 133-134. For a contrary view see, Estades Font, María E., *La presencia militar de Estados Unidos en Puerto Rico, 1898-1918*, Ediciones Huracán, Río Piedras, Puerto Rico, (1988), pgs. 32-33. This was not to say that the island's importance was lost on military planners during the rising friction between Spain and the U.S. over the Cuban insurrection. Once hostilities commenced, Puerto Rico had become key to American naval and strategic planning in this hemisphere. " [Teddy] Roosevelt took a strong position in favor of expulsion of Spain from the hemisphere. As he left the McKinley Administration to join the Rough Riders, he wrote to Senator Cabot Lodge to pursue a hard line stance with Spain: ' do not make peace until we get Porto Rico while Cuba is made independent and the Philippines at any rate taken from Spain' ". Morales Carrión at pg. 133. Reluctantly,



Treaty of Paris.¹¹ Prior to the conclusion of hostilities, and upon landing in Puerto Rico¹², Major General Miles took control of civil administrative matters of the increasing portion of the Island that fell under his command. After the Peace Protocol was signed, the Island was left under military administration.¹³ Pursuant to General Orders 101 Spanish municipal laws continued to be enforced,¹⁴ in-

throughout this article the author will cite the historical record without correcting the erroneous reference to Puerto Rico as "Porto Rico." Porto, is the term for port in Portuguese and Italian. By citing it, I do not intend offense to the noble and good People of Puerto Rico. Reflecting the record the way it exists is done only to underscore that, from 1900, with the enactment of the Foraker Act of 1900, 31 Stat. 77, ch. 191 (1900), until 1932, when Congress finally amended the law, 47 Stat. 158 (1932), Congress designated the Island with such a name. The erroneous reference also appeared in reports issued by military governors and, prior to that, in the provisions of the Treaty of Paris.

¹¹ For an excellent discussion of the history of the Spanish-American war and its aftermath in Puerto Rico see, Rosario Natal, Carmelo, *Puerto Rico y la Crisis de la Guerra Hispanoamericana* (1895-1898), San Juan, Puerto Rico, Ramallo Brothers Printing Co., (1975). Briefly, war was declared on April 25, 1898, US troops landed in Puerto Rico on July 25, 1898 and hostilities with Spain ended on August 12, 1898 with the signing of a peace protocol. The Treaty of Paris was signed on Dec. 10, 1898, was approved by the Senate, signed by the president on February 6, 1899 and became effective upon exchange of ratifications on April 11, 1899. *Dooley v United States*, 182 US 222, 230 (1901). United States-Spain, 30 Stat. 1754, T.S. No. 343. Also pursuant to the Treaty of Paris, the US acquired Guam and the Philippines, the latter upon the payment of \$20 million. The American commissioners had demanded the cession of these three territories at the Paris peace conference. But Spain hesitated and resisted relinquishing Puerto Rico, populated by its most loyal and steadfast overseas citizens at the time. Rosario Natal, at p. 193 and pgs. 274-276. Spain's view was that the island had not been a visible element that triggered hostilities and as such urged to keep it out of the peace negotiations. This stance failed to persuade and was rebuffed by President McKinley's negotiators despite Spain's offers to trade other territory, even Cuba (which was declined) for Puerto Rico. Rosario Natal, Carmelo, pgs. 274-276. Morales Carrión, A. *Puerto Rico, A Political and Cultural History*, W. W. Norton & Co. Inc., 1983, at 135. See also references cited in Cabranes, J., *Citizenship and the American Empire*, Yale University Press, 1979 at p 2, fn 5.

¹² On July 25, 1898, in the port town of Guánica, located in the southwestern part of the island of Puerto Rico.

¹³ The military campaign was short of 19 days and ended with the signing of the peace protocol in August of 1899. At the time of the signing of the protocol, General Miles troops controlled nearly half of the island's territory. *First Annual Report of Charles H. Allen, Governor of Porto Rico*, May 1, 1901, Washington: Government Printing Office (1901), pg. 11.

¹⁴ General Miles "appears to have had no special instructions from the President respecting the government that should be established [in Puerto Rico], but it was well understood that he and those under him were [still] subject to the [standing] instructions communicated by President McKinley to the Secretary of War under date July 13 with reference to Cuba...and published by the War Department as General Order 101." *Ochoa v Hernández & Morales*, 230 US 139, 154 (1913). In pertinent part, the Order reads as follows: "Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent and, in practice, they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is so far as possible to be adhered to on the present occasion." Cited in *Ochoa*, ante at page 155. General Orders 101 was observed more in the breach than anything else. General Orders 101 did allow room for the military governors to replace political institutions and others that could clash with the new order, such as doing away with state-sponsored religion. However, this rule of exception



cluding collection of the existing colonial tariffs¹⁵ on all imports entering the Island, from both foreign and United States origin alike,¹⁶ unless expressly repealed or modified by military order. Federal law was not extended or enforced, since the Island was considered just occupied foreign territory.¹⁷ All these policies were instituted to ensure the maintenance of public order and the continuity of the revenue for the support and stability of the new military provisional government.¹⁸

became the primary legal source for justifying the wholesale dismantling by decree of longstanding social and legal institutions to make way for what the military governors' thought was a preferable system. Some of the efforts were novel and, at times, constituted inspired social thinking, such as the attempt to establish a minimum wage and reform of the penal system. Others were simply short-sighted and lacked sensitivity toward local attitudes and culture. For example, the establishment of divorce in a Catholic community that until then had banned it, the reorganization of the local courts, the reorganization of municipal governance, the abolishment of the Diputacion Provincial, the establishment of a parallel court system that was patterned after a US District Court overlapped and eclipsed the local courts and other decrees. Military tribunals were also constituted and employed under General Order 27, issued by General Brooke on October 4, 1898, to try civilians or "tiznaos" accused of arson and murder, in order to stem a phenomenon that arose after hostilities ceased and was directed principally as reprisals against Spanish landowners. For an interesting account of this period of reprisals see Picó, Fernando, *La Guerra Después de la Guerra*, Ediciones Huracán, Río Piedras, Puerto Rico (May 1998). These efforts clearly went beyond tinkering and administering municipal law, as envisioned in General Orders 101, and were at variance with the views of the Secretary of War Root, particularly on the subject of not tampering with the civil law tradition of Puerto Rico. *Report of the Secretary of War, 1899*, Washington Printing Office, pg. 30. However, the Secretary could have, but did not override any of the controversial orders issued by his military commanders in Puerto Rico. For a comprehensive view of the military administration, see Berbuse, Edward J., *The United States in Puerto Rico, 1898-1900*, The University of North Carolina Press, 1966. See also Trias Monge, José, *Historia Constitucional de Puerto Rico*, Vol. I, Editorial Universitaria, Río Piedras, Puerto Rico, (1980), pgs. 165-172.

¹⁵ "During the first six months of the American occupation of Porto Rico the essential revenues of the island were received and disbursed by an officer of the U.S. Army, acting as collector of customs. On May 8, 1899, by an Executive Order of the President of the U.S., the office of treasurer of Porto Rico was established as an organic part of the military government of the island and the position filled by the appointment of an army officer." *Report of the Treasurer of Porto Rico to Governor Charles Allen*, included in *Annual Report of Governor Charles H. Allen*, May 1, 1900-May 1, 1901 at 138.

¹⁶ On August 16, 1898, four days after the signing of the peace protocol with Spain, the US lifted the naval blockade of Puerto Rico and opened the port of San Juan for business. Rosario Natal, Carmelo, at pg. 247.

¹⁷ *22 Opinions of the Attorneys General 560, 562 (1899)*, V *Decisions of the Comptroller of the Treasury*, July 1898-June 1899, pgs. 493-495 (Geographer and geologist's work in Puerto Rico not performed within the United States under the Act establishing the Geological Survey.) ("It is quite evident from a reading of the entire treaty [of Paris] that there was no intent...to extend by that instrument either the Constitution...or its statute laws.") There were exceptions. Naturally, federal military law was enforced on military personnel serving in Puerto Rico. The second important exception inconsistent with the view of statutory exclusion was public lands and riverbeds. They were deemed transferred by the Crown of Spain to the United States by the treaty of Paris and immediately, therefrom, subject to federal law. *22 Opinions of the Attorneys General 544 & 546 (1899)*.

¹⁸ "Upon the occupation of the country by the military forces of the United States, the authority of the Spanish government was superseded, but the necessity of the revenue did not cease. The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is a requisite for that purpose...The most natural

President McKinley¹⁹, as Commander-in-Chief and in exercise of his war powers, subsequently superseded through executive order²⁰ the grandfathered Spanish colonial tariffs in Puerto Rico with a new but less burdensome set of customs tariff schedules. They were applicable to all imports originating, from either the mainland or a foreign country,²¹ and remained in force until May 1, 1900, when civil administration was formally established under the Foraker Act.²² During this same time span, US tax collectors in the US enforced the federal customs laws and the Dingley tariffs on Puerto Rico exports, as if they had originated from a foreign country.²³

President McKinley adopted a similar course of action for the Philippines with the establishment, on July 12, 1898, of Provisional Customs tariffs

method was the continuation of existing duties." *Dooley v United States*, 182, US 222,230-231 (1901).

¹⁹ Born in Niles, Ohio, on January 29, 1843, the son of an iron founder. A college dropout, he volunteered in 1863 and served in the Civil War with the Twenty-third Regiment, Ohio Volunteer Infantry, until its conclusion, ending with a rank of captain and brevet major with the same unit, at the age of 22. Studied law, engaged in private practice and, subsequently, served as prosecuting attorney. Elected to Congress in 1876, he served as Republican floor leader for several terms. Elected Governor of Ohio in 1891, President in 1896 and once again in 1900. While in Congress and later as President, he championed and succeeded in having Congress pass protectionist tariffs. He passed away in September, 1901 of gunshot wounds inflicted by an anarchist, while attending the Pan American Exposition in Buffalo, N. Y. *Biographical Directory of the American Congress, 1774-1961*, United States Government Printing Office, p. 1307.

²⁰ The President, as Commander in Chief, and his representatives on the island, the military governors, had the sanction of the US Attorney General for taking these administrative actions. See 22 *Opinions of the Attorneys General* 560, 562 (1899): "...the military authorities in possession, in the absence of legislation by Congress, may make such rules and regulations and impose such duties upon merchandise imported into the conquered territory as they may ...deem wise and prudent". Fiscal flexibility was needed at the time, since the state of the Puerto Rico Treasury when sovereignty changed was particularly acute: "[f]iscal matters went from bad to worse in the transition. The last Spanish budget, 1897-1898, had left a \$483,157 surplus; Brooke [second US military governor], however, found an empty treasury." Morales Carrión Id. at 144.

²¹ General Miles', proclamation was effective from July 26, 1898 until August 19, 1898. It was superseded by President McKinley's order of August 20, 1898 which was subsequently amended on January 20, 1899 (Customs Tariff Regulations for Ports in Porto Rico, 1899) in response to a report issued by a presidential commission that urged that such provisional tariffs be reduced to ease the burden on the poor. Díaz Olivo, Carlos E., *The Fiscal Relationship Between Puerto Rico and the United States: A Historical Analysis*. 51 Rev. Jur. Col. Abog. 1, 6, (1990) citing Torruellas, Luz, *The United States Commercial Policy Towards Puerto Rico: An Inquiry into its Impact on the Puerto Rico Economy and Trade*, Radcliffe, at 38 (1950) (unpublished thesis). See also 3 *Treasury Decisions*, Number 22410-G.A. 4739, at 67, August 1, 1900.

²² 31 Stat. 77, ch. 191 (1900).

²³ 22 *Opinions of the Attorneys General* 560 (1899) (Puerto Rico exports are subject to tariffs as if they originated in a foreign country). *Fleming v Page*, 50 US 603 (1850) provided some support to the proposition that the collector of customs could treat Puerto Rico as a foreign country.



that were enforced under the guise of a “military contribution”.²⁴ The provisional customs tariffs survived until November 15, 1901, when civil administration was established by the Act of the Philippine Commission.²⁵ Tariffs collected by the military authorities in Puerto Rico and the Philippines were earmarked exclusively for the support of the local provisional government.²⁶

Once Spain’s sovereignty over Puerto Rico and the Philippines passed from a state of suspension, due to US military occupation, to one formally displaced by the ratification of the Treaty of Paris, the need to address conclusively their constitutional and political status became acute. Even prior to the ratification, the search was on for a coherent constitutional framework that would support the McKinley Administration’s treatment that the Philippines and Puerto Rico were lawfully under US sovereignty, while at the same time treated as foreign countries for constitutional and federal statutory purposes, including tariff matters.²⁷

Understandably, all of this generated considerable academic²⁸ and political

²⁴ For reasons that are not entirely clear from the historical record, their implementation was delayed until November 11, 1898 while, in the interim, the old Spanish tariffs were enforced.

²⁵ *The Government of the Philippine Islands v Standard Oil Co*, 20, Phil. 30 (1911). Unlike the case of Puerto Rico, the Treaty of Paris allowed Spanish exports duty-free access to the Philippine market for 10 years.

²⁶ “The revenues thus collected were used by the military authorities for the benefit of the provisional government.” *Dooley v United States*, 182 US 222, 223 (1901).

²⁷ There were narrow exceptions. Federal law was considered to govern public lands in the islands once ceded by the Crown of Spain to the United States under the treaty of cession. 22 *Opinions of the Attorneys General* 544 & 546 (1899). General Davis was of the mind that some federal law applied in Puerto Rico, such as US postal laws and federal criminal statutes protecting against larceny of US property. In order to address this, General Davis created a special court patterned against a US District court but with a more generous diversity of citizenship jurisdiction, through General Order 88. This would be the precursor of the US District Court that was officially created by the Foraker Act. When Senator Foraker initially proposed its creation under Senate bill 2264, General Davis, as governor, testified in committee hearings in full support of the tribunal. This spawned a debate in the Senate, where General Davis’ lack of qualifications in the law were laid bare, and his role recommending such tribunal called into questioned, and the future constitutional dimensions, either Art. I or Art. III of the Constitution examined and finally, the sense and purpose of such court when engrafted within a larger framework of constitutional exclusion for Puerto Rico. Since Senator Foraker’s plan called for the extension of all federal law to Puerto Rico (except where locally “inapplicable”) establishing such a federal district court was, in his judgment, a logical extension of such application of law.

²⁸ Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393 (1899); Pfeil, *The Status of Porto Ricans in Our Polity*, 30 Forum 717 (1901); Randolph, Carman F., *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291 (1898); Lowell, *The Status of Our New Possessions - A Third View*, 13 Harv. L. Rev. 155 (1899); Whitney, Edward B., *The Porto Rico Tariffs of 1899 and 1900*, Yale L. Journal 297 (1899-1900); Langdell, C.C., *The Status of our New Territories*, 12 Harv. L. Rev. 159 (1899); Baldwin, Simeon, *The People of the United States*, 8 Yale L. J. 159 (1899); Baldwin Simeon, *The Constitutional Question Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393 (1899); Adams, Elmer B. *The Causes and Results of Our War with Spain from a Legal Standpoint*, 8 Yale L. J. 119 (1899). Beach, J. K., *Constitutional Expansion*, 8 Yale L. J. 255 (1899).

attention in Congress, the press and public opinion.²⁹ The questions ranged from the broader; the territories' fit within the constitutional structure and the future citizenship and political role of its residents within the Union,³⁰ to the particular; the constitutional underpinnings of Puerto Rico's surviving fiscal autonomy exercised through the military provisional government acting on behalf of the President as Commander in Chief. Many other interrelated questions were examined, including the constitutionality of the duties enforced on trade between the United States and Puerto Rico.

The debate over the future of the Philippines and Puerto Rico would become further clouded within and without Congress by concerns over the need to preserve the homogeneity of the American racial and social fabric³¹, and the burdens of taking on what seemed then as unfathomable problems.³² In the meantime, the

²⁹ Coudert, F., ante pg. 823. A commentator indicates that the "constitutional polemics [really] began almost five years before, with the proposed annexation of Hawaii in 1893" citing several journal articles which included among others, Patterson, *The Constitutional Effect of Hawaiian Annexation Upon the Tariff Act of 1890*, 33 AM. L. Reg. 309, (1893). See Neuman, Gerald L., *Whose Constitution?*, 100 Yale L. J. 909, 958 and footnote, 290 (1991)

³⁰ Langdell, *The Status of our New Territories*, 12 Harvard L. Rev. 365; Thayer, *Our New Possessions*, 12 Harvard L. Rev. 464; Lowell, *The Status of Our New Possessions - A Third View*, 13 Harv. L. Rev. 155 (1899). Lowell postulated that a territory could be acquired but not fully "incorporated" in a constitutional sense, a unique and yet unexplored thesis that ran counter to US past practice and experience under the Northwest Ordinances, with acquisitions through purchase, conquest or cession of sparsely populated and settled territories. The Northwest Ordinances of 1787 and 1798 prescribed basic law and stages for the full attainment of statehood for territories that later comprised the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, Alabama and Mississippi. These ordinances also guided the Northwest and Southwest toward statehood, with Florida and Louisiana handled separately. Friedman, L. M., *History of American Law*, Simon & Schuster, Second Ed., 1985 at 160.

³¹ As a sign of the mores of the times, the congressional record is rife with offensive comments, uneasiness at incorporation and in some cases even racial disdain directed at the people of the just occupied Philippine islands. A few samples will suffice. Democratic Senator Bate of Tennessee, a former confederate army officer, expressed in the well of the Senate that annexing Louisiana posed less vexing problems than the Philippines, particularly since the latter would involve integrating to the American bosom "...millions of savages, cannibals, Malays, Mohammedans, head hunters, and polygamists." 33 Cong. Rec. 3613. There were other remarks of the same vein uttered on the floor of the House. Congressman Gilbert's fear of incorporating the Philippines was that this could "open wide the door by which these Negroes and Asiatics can pour like the locusts of Egypt into this country" 33 Cong. Rec. 2172 (1900). Congressman James W. Denny of Maryland, a former confederate army cavalry officer, stated: "I hope never to see the representantives of Asiatic peoples in the Congress, or their millions of subjects allowed to compete with American labor." 33 Cong. Rec. - House, February 27, 1900, pg. 2356. Congressman Albert S. Berry from Kentucky and also a veteran of the Confederate army remarked that "If that Malayan, Oriental civilization threatens to be an injury to the institutions of this country, then I say, let those islands go for the interests of our people, because I love this Anglo-Saxon race on this continent better than any other on God's earth." 33 Cong. Rec. - House, Feb. 28, 1900, pg. 2403. Senator Bate, Congressmen Gilbert, Berry and many others would have undoubtedly been dismayed to know that once the treaty of cession with Spain was ratified, Puerto Rico residents although "not ...citizens of the United States by virtue of the cession...by...treaty" and similarly under the Foraker Act of 1900, 31 Stat. 77, ch. 191 (1900), (23 *Opinions of the Attorneys General* 3780, 371 (1901)) ceased to be aliens under the immigration laws and thus could freely migrate to the United States. *Gonzalez v Williams*. 192 US 1 (1904).

³² Cabranes, pgs. 20-44.



McKinley Administration worked in earnest to obtain an accurate picture of the state of its newly-acquired territories from as many reliable sources as possible.³³

The American consul in Puerto Rico, Phillip C. Hanna, Presidential commissions³⁴ and the military provisional governors obliged with a stream of reports. They reflected the individual biases of the authors but they uniformly painted a bleak landscape of economic underdevelopment, poverty, and disease. The reports recommendations differed in key areas, such as, when and if to grant citizenship and how much and when to extend self-rule and free trade privileges. Further complicating the picture was a weak banking system and a lack of credit in the Island.³⁵ In the end, the McKinley Administration was caught woefully unprepared to meet the pressing challenges that territorial expansion suddenly imposed. For the task, it needed to scramble to formulate a coherent constitutional framework,³⁶ policies for trade, attract and recruit colonial administrators and adopt a strategy for the future of the nationals and the administration of the newly-acquired islands.

Once the Treaty of Paris was ratified, President McKinley, in a surprise move,

³³ Justice Moody described the need and process as follows: "By the ratifications of the treaty of peace [Paris], Porto Rico ceased to be subject to the crown of Spain and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but practically, there always have been delays and always will be. Time is required for a study of the situation and for the maturing and enacting of an adequate scheme of civil government." *Santiago v Nogueras*, 214 US 260, 265 (1909).

³⁴ See *Report of Brig. Gen. George W. Davis on Industrial and Economic Conditions of Puerto Rico, as Affected by the Hurricane*, Sept., 5, 1899, War Department, Division of Insular Affairs, (1899). Carrol, Henry K.; *Report on the Island of Puerto Rico*, Washington, Government Printing Office (1899); *Report on the Insular Commission to the Secretary of War upon investigation made into the Civil Affairs of the Island of Porto Rico*, Washington Government Printing Office, 1899. Morales Carrion, at 149-150. See also Torres, E., *The Puerto Rico Penal Code of 1902-1975: A Case Study of American Legal Imperialism*, 45 Rev. Jur. UPR Nums. 3-4, pgs. 1, 6-9.

³⁵ *First Annual Report of Charles H Allen, Governor of Porto Rico*, May 1, (1901), Washington: Government Printing Office, (1901) at page 66-67.

³⁶ The Attorney General of the United States acknowledged this reality when the Department of Justice requested added funding to establish a bureau or division on territorial affairs dedicated to examining complex legal issues. As part of the cession "there has been a great addition to the labors and responsibilities of the Department in connection with the possessions recently belonging to Spain and the Hawaiian Island. No less than sixty formal opinions have been furnished... to the President and heads of Departments concerning questions arising in connection with these countries...It has been necessary to deal with the doings of people speaking foreign tongues, to interpret foreign laws and to adjust to our system a multitude of affairs in strange and distant lands. That the work has been accomplished thus far by the present force of the Department does not argue that it can wisely and thoroughly be carried on in that way. It was thrust upon the Department as a matter of urgent necessity and was done because it had to be done and done at once." *Report of the Attorney General 1901*, Washington, Government Printing Office, 1901 at p. 36.

appointed Elihu Root³⁷ as his new Secretary of War³⁸ and relied principally on him for the task of framing colonial policy.³⁹ Secretary Root brought to the office not only his legendary energy and skills as a trial lawyer, but also a clear mandate from the President (and subsequently his successor President Theodore Roosevelt) to formulate and administer colonial policy.

Secretary Root, unlike Senator Foraker, was no champion of universal suffrage and citizenship for the residents of the new colonies, although he favored their material improvement.⁴⁰ For this, Secretary Root was influenced by observations and recommendations made by Brigadier General George W. Davis, then the military provisional governor of Puerto Rico.⁴¹ Ultimately, with the latter's assistance, he contributed to the shaping of the policies underpinning the unorthodox legislative and constitutional foundation of Puerto Rico's current fiscal relationship with the US.⁴² They noted that, after the cession, Puerto Rico's access to traditional markets was closed. Spain erected tariff barriers to Puerto Rico's exports which practically sealed off its markets, Cuba followed, while, on the mainland, US tariff enforcement continued on Puerto Rico's exports, as if the

³⁷ As Root would immodestly recall it, an assistant to the President called him by phone while in his country home in July 1899. He thought the offer to serve as Secretary of War was "absurd", since he knew nothing of war or the army. The President's assistant then relayed the President's view "that he is not looking for any one who knows anything about war or for any one who knows anything about the army; he has got to have a lawyer to direct the government of these Spanish Islands, and you are the lawyer he wants." *The Military and Colonial Policy of the United States, Addresses & Reports by Elihu Root*, Harvard University Press, 1916, pg. xiv.

³⁸ August 1899. *Proceedings of the American Society of International Law at its 18th Annual Meeting held at Washington, D.C., April 24-26 (1924)*, pg. 3.

³⁹ Root, a prominent trial attorney in New York, counted on clients such as Theodore Roosevelt, when he held office as NY Police Commissioner and subsequently as a gubernatorial candidate, and H.F. Havemeyer and the Sugar Trust. Of Mr. Root, it was said, that "no lawyer practicing at the American Bar in the 1890's...was more sought after". See Jessup, Philip C., *Elihu Root*, Dodd, Mead & Co., (1938) Vol, I, at 183-184. Secretary Root career was impressive. He served as a US Attorney for the Southern District of New York from 1883-1885, as Secretary of War from 1899-1904, Secretary of State from 1905-1909, Senator for New York, from 1909-1914. He also served as special envoy for President Wilson during the time of the overthrow of the Romanovs in Russia. He was awarded the Nobel Peace Prize for, among other things, his role in shaping the administration of the new colonies. 18 *American National Biography*, Oxford University Press, N.Y., (1999), pgs. 838-840.

⁴⁰ *Report of the Secretary of War*, Washington, Government Printing Office (1900), pg. 30.

⁴¹ Military Governor from May 9, 1899 to May 1, 1900. Generals Guy V. Henry, John R. Brooke, and Major General Miles preceded him, in turn. General George V. Davis drew, in turn, upon a wealth of reports left by his predecessors and forwarded by his field and district commanders to formulate his opinions and recommendations. For a good discussion of the administration of the military provisional government see, Berbusse, Edward, J., *The United States in Puerto Rico, 1898-1900*, The University of North Carolina Press, 1966.

⁴² Morales Carrión, at 148; Bemis, S. Flagg, *The United States as a World Power: A Diplomatic History 1900-1915*, Rev. Ed., Henry Holt & Co., NY (1955) at page 33.



island's was foreign territory⁴³, hindering access to mainland markets as well.⁴⁴

With Puerto Rico's exports bottled up, and its economy in disrepair, Secretary Root and Governor Davis eschewed government grants as a permanent solution. They, in turn, favored free trade with the U.S. as Puerto Rico's only viable alternative for spurring the influx of American investment, creation of jobs, and economic development.⁴⁵ The challenge for Secretary Root was how to accomplish this without compromising the Administration's convenient stance that newly-acquired territories were now under the sovereignty of the United States but not covered by its Constitution. In other words, that it was possible to acquire territory by conquest, claim full sovereignty over such territory, but not be straitjacketed by the only two known formulas that the Constitution provided and past practice supported; either an incorporated territory where most provisions of the Constitution and federal law applied as preparatory but inevitable step toward statehood and a state. But the McKinley Administration and the GOP were not prepared to face the fire and, even less, pay the political price associated with the consequences of an automatic commitment to admission for statehood for the newly-conquered territories.

Thus, Secretary Root's analysis called for a framework that would eventually encompass Puerto Rico within the US' tariff union or common market, while maintaining the Island and its residents constitutionally and statutorily quarantined from the United States. While contrary to precedent, Secretary Root had

⁴³ 22 *Opinions of the Attorneys General* 560 (1899).

⁴⁴ *Report on the Insular Commission to the Secretary of War upon the Investigation made into the Civil Affairs of the Island of Porto Rico*, Washington, Government Printing Office, 1895, p. 61-67. See also remarks by House majority leader Sereno Payne, 33 Cong. Rec. – House 1941 (Feb 19, 1900), when HR 8245 was being debated. In 1897, Puerto Rico trade with Spain and Cuba exceeded 45% of the island's total trade. Of the Island's exports for that year, 65 percent was coffee, 22 percent was sugar, 6 percent tobacco and 7 percent miscellaneous. Report Entitled "Conditions Existing in Puerto Rico upon the Assumption of Control by the United States", included in Appendix U 5 of *Report of Brig. Gen. George W. Davis on Industrial and Economic Conditions of Puerto Rico as Affected by the Hurricane*, submitted September 5, 1899, War Department, Division of Insular Affairs, 1899, at pgs. 305-306.

⁴⁵ Puerto Rico's interdependence with US markets was well established prior to the Spanish-American War of 1898. A Congressional report prepared in 1880 indicated that imports from Puerto Rico consisted mostly of sugar and, although totaled less than those of Brazil, Cuba, Mexico, the British West Indies, and Venezuela, was ahead of imports from the Caribbean and the rest of Latin America. Puerto Rico also consisted of the US tenth largest market in the hemisphere with a favorable trade balance of nearly \$2.5 million. Morales Carrión, at 133. At the turn of the century, Puerto Rico's agricultural economy relied mainly on three crops: sugar, coffee and tobacco, with coffee being the main export to Europe and the United States its main export market for sugar. Morales Carrión, at 137. Wessman, *The Demographic Structure of Slavery in the Late Nineteenth Century*, 12 *J. Latin American Studies* 271, 272 (1980), citing Fernandez Mendez, E., *Historia Cultural de Puerto Rico*, Ediciones Cemi, 2d Ed., (1971) at 208. Coffee shipments to the US were exempt from tariffs under the Dingley Act because the US was not a grower or producer of this commodity.

some recent statutory basis⁴⁶ and administrative precedent⁴⁷ to believe that constitutional exclusion was supportable and what Congress intended for the interim and from where he could build support to extend full commercial integration to

⁴⁶ Section IX of the Treaty of Paris expressed in pertinent part: "that [the] civil rights and political status of the native inhabitants *shall be determined by Congress*". (Emphasis added.) This suggested to some that Congress was unfettered by the Constitution on when and what particular constitutional provisions to extend to the territories. On the administrative front, the McKinley Administration assumed that, even after the treaty cession, the recently-acquired territories remained outside the Constitution's reach and the statutory laws of the United States, until such time as Congress legislated otherwise. For example, see V *Decisions of the Comptroller of the Treasury*, July 1898-June 1899, pgs. 493-495. The Treasury's Comptroller office ruled on February 20, 1899 against reimbursing the expense accounts of a geographer and geologist connected with orders issued by the US Geological Survey for a 'reconnaissance' of the Island to determine the methods and cost of making a topographic survey for the benefit and in coordination with the military administration. The justification given was that the work was not performed within "the United States" or the "national domain", as the terms were used in the Act establishing the Geological Survey or the Act of July 1, 1898. 30 Stat. 622. The ruling suggested that either the military government in Puerto Rico or the War Department defray the expense. Another ruling indicated that: "It is quite evident from a reading of the entire treaty [of Paris] that there was no intent on the part of the treaty-making powers to extend by that instrument either the Constitution of the United States or its statute laws over this ceded territory. While there is a conflict of authority on the proposition, the consensus of the best legal thought of the day holds that, under such circumstances, the people of the island, on the taking effect of this treaty, and until further action by Congress, were exclusively under the laws of the former sovereignty, where those laws were not in conflict with the terms of such treaty, and the military laws of the United States by virtue of our occupation of this island as conquerors...The United States, by the act of cession, became the owner of the island but such island nor its people did not, by mere act of cession, become an integral part of the United States." VII *Decisions of the Comptroller of the Treasury*, July 1900-June 1901, Washington: Government Printing Office, 1901, pgs. 145, 147.

⁴⁷ When the McKinley Administration argued the first of the *Insular cases* to be reported, *De Lima*, 182 US 1 (1901), it had conveniently and disingenuously ignored certain of its administrative practices on tariff matters over the new territories. They were checkered with interdepartmental inconsistencies designed to suit immediate *ad hoc* results. Unlike an exception made for the Philippines, the Treasury Department had ruled that Puerto Rico was *not* a foreign country within the meaning of the tariff drawback provisions. But this result was inconsistent with another ruling that held that Puerto Rico, as a foreign country under other provisions of the tariff laws, required collectors of customs in the US to collect tariffs on the island's exports to the mainland. 3 *Treasury Decisions* 361, No. 22157, April 17, 1900, Government Printing Office, Washington, (1900). The issue was whether drawback (or refund) of federal customs duties was allowed on salt used in curing meats on the mainland that were subsequently shipped to Puerto Rico, Cuba and the Philippines. The Treasury Department answered in the affirmative for Cuba and the Philippines but concluded "that Porto Rico is *not* a foreign country within the meaning of the drawback law." (Emphasis added). However, the Treasury had insisted that Puerto Rico was a foreign country under the Dingley Tariff Act for the purposes of collecting duties on merchandise shipped to the mainland. Apparently, this was not the position that the McKinley Administration took for internal revenue excise tax purposes, since it took an act of Congress in 1915 to clarify that the drawback provisions for federal excise tax purposes applied to both Puerto Rico and the Philippines. P. L. 313 of March 4, 1915, 38 Stat. at L. 1189 ch. 164. See also P. L. 258 of April 28, 1904, 33 Stat. at L ch. 1826, at page 574 (to relieve obligors of bonds given to the US upon exportation to the Philippines of articles subject to the internal revenue tax upon presentation of evidence of shipment to a port in the Philippines will be treated as a foreign country). Curiously, this latter provision would dovetail with the exclusion of the island from internal revenue taxes that would be explicitly included in the Foraker Act of 1900 along with the eventual inclusion of Puerto Rico within the U.S. customs union. See also 30 *Opinions of the Attorneys General* 231 (1913) (Guam and Tutuila not foreign countries under the drawback provisions of the Tariff Act of 1909). But see 33 *Opinions of the Attorneys General* 488 (1923) (Puerto Rico not part of the US for purposes of the drawback provisions for manufactured items in the US with foreign materials under Section 313 of the Tariff Act of 1922, 42 Stat. 858).



Puerto Rico, while not compromising the exclusion stance.⁴⁸ A currency union was already being explored which was consistent with the goal of commercial integration.⁴⁹ Equally important to Secretary Root, was how to accomplish this integration without compromising the United States' ability to maintain the necessary constitutional flexibility to tread a different path for the Philippines, should one be necessary.⁵⁰ Initially, the McKinley Administration viewed the kindred issues associated with both territories as hopelessly joined at the hip. As part of this effort, Secretary Root requested the Attorney General to opine whether the President, through executive order, could exempt Puerto Rico from the Dingley tariffs.⁵¹ The response was that Puerto Rico remained as before the war, a foreign

⁴⁸ Secretary Root was not alone in his belief that there was no constitutional impediment or downside to engaging in commercial integration with the United States. Although handed down after Secretary Root had enunciated his policies in *Huus v New York & Porto Rico Steamship Co.*, 182 US 391, 396 (1900), reported the same day as the first of the *Insular cases*, (*De Lima v Bidwell*, 182 US 1 (1900)(Puerto Rico not foreign territory under the Dingley Tariff rules after the cession of Puerto Rico under the Treaty of Paris)) contained dicta to the effect that Puerto Rico was within the US coastal trade provisions since the ratification of the Treaty of Paris. In *González v Williams*, 192 US 1 (1904), Puerto Rico residents, although not yet citizens of the US, ceased to be aliens under the federal immigration laws of 1891, since the treaty of cession with Spain.

⁴⁹ Treasury reasoned that: “[i]t is highly important that American *capital should find no obstacles in its transfer to and from* Puerto Rico, if the United States and the island alike are to reap the benefits which ought to flow from their proximity, their new relations, and from the enterprising commercial spirit of our people. A wide difference in the rate of exchange, occasioned by the use of a differing and unrelated currency, is a serious obstacle to the transfer of capital, as it is to legitimate industry. The obstacle can and ought to be removed.” (Emphasis added). *Annual Report of the Secretary of the Treasury on the State of the Finances for the year 1898*, Washington Government Printing Office, 1898 at LXXV. In order to advance the effort at market integration, the dollar would be officially adopted by virtue of Section 11 of the Foraker Act of 1900, 31 Stat. 77, ch. 191 (1900). Unlike Puerto Rico, the Philippines was allowed to coin its own currency. See Sections 2 and 3 of P. L. 137 of March 2, 1903, 32 Stat. at L., ch. 980, at p. 952; P. L. 43 of February 6, 1905, 33 Stat at L. ch. 453, Sec. 10, p. 697; P.L. 274 of June 23, 1906, 34 Stat. at L., ch. 3521, at p 453; Jones Act of 1916, P. L. 240 of August 29, 1916, 39 Stat. at L. ch. 416, Section 10 at p. 548.

⁵⁰ American military occupation of the Philippines triggered a bloody insurrection led by independence advocate Emilio Aguinaldo. Mr. Aguinaldo had been brought back from China by US warship, to assist in the war effort against Spain. The Aguinaldo rebellion “took...three years to crush, using seventy thousand troops – four times as many as were landed in Cuba and thousands of battle casualties” in excess of those suffered in Cuba. Zinn, Howard, *A People's History of the United States, 1492-Present*, Harper Collins, N.Y., N.Y. (1999), at pg. 313. US policymakers were decidedly influenced by this and other social and economic developments and, as a consequence, poised the Philippines early on a track toward independence that was promised officially by Congress in 1916. In the statement of purposes of the Jones Act of 1916, P. L. 240 of August 29, 1916, 39 Stat. at L. ch. 416, p. 545, Congress stated that: “...it has always been the purpose of the people of the United States to withdraw their sovereignty over the Philippines Islands and to recognize their independence, as soon as a stable government can be established therein...” Independence was finally granted effective in 1946. Cabranes at page 3 fn. 5. Congressional policy annexing and incorporating Hawaii, while relinquishing sovereignty incrementally over the Philippines, is of particular interest when contrasted with Congress' treatment of Puerto Rico during this same period. Unlike Puerto Rico, the Philippines throughout the years would enjoy significant and increased levels of autonomy prior to independence. It would include the power to impose import duties, coin its currency, membership in certain international bodies and other unmistakable attributes toward independence.

⁵¹ P. C. Jessup, *Elihu Root*, Dodd, Mead & Co., NY (1938), Vol I at 373.

country under the tariff laws, and that the President lacked authority to exclude the Island from federal tariff provisions.⁵² The Attorney General was certainly trying to keep the Administration's future options open, while protecting its current exclusion stance.

Immediately after hurricane San Ciriaco devastated Puerto Rico's agricultural economy, Secretary Root seized the opportunity to plead directly with the President for a Puerto Rico relief effort.⁵³ Root issued a call to end the imposition of Dingley tariffs on Puerto Rican products, "either by executive order or by calling Congress together in an extra session."⁵⁴ His call for immediate action apparently motivated a spirited debate within the councils of the reflexively-protectionist and high-tariff McKinley Administration that moved the newly-sworn Secretary Root to retreat and, for a time, ply a more cautious approach. Secretary Root now instructed Governor Davis in more measured terms, "after a full consideration and discussion, the conclusion was reached that the subject must be deemed within the province of Congress, and that the President ought not to

52 22 *Opinions of the Attorneys General* 560 (1899).

53 On August 8, 1899, hurricane San Ciriaco hit the island with such force and devastation that approximately 3,000 lives were lost, coffee, the island's main exports crop, was destroyed and there was a severe loss of property. Then, provisional military governor Davis sought food and other emergency assistance from private and public sources in the US, and pushed for the authorities to extend to Puerto Rico free access to the US market, something he considered key to Puerto Rico's economic rehabilitation. Morales Carrión at 150. Picó, Fernando, *La Guerra Después de la Guerra*, Ediciones Huracán Río Piedras, Puerto Rico (May 1998), pgs. 193-196. For a contemporary description of the hurricane's effects and relief efforts see *Report of Brig. Gen. George W. Davis on Industrial and Economic Conditions of Puerto Rico as Affected by the Hurricane*, September 5, 1899, War Department, Division of Insular Affairs, 1899.

54 Secretary Root's exasperated call for Executive or Legislative action was evidenced in a letter of August 18th (ten days after hurricane San Ciriaco) to the President, delivered while the latter vacationed around Lake Champlain in Vermont: "I see no other recourse, except to see the people starve, for we cannot continue to support them indefinitely." Jessup, Vol I at 373. Root's request to the Attorney General was dated August 3, 1899 and was answered August 10, 1899, two days after hurricane San Ciriaco devastated the island.

55 Jessup, at Vol. I, p. 374.

56 Jessup, at Vol. I, at 374-375. Secretary Root was also instrumental in expeditiously seeking and obtaining from the Comptroller of the Treasury an opinion to the effect that the President could disburse, as hurricane relief to Puerto Rico, the unexpended balance of the \$3 million in the emergency discretionary fund created by law on March 3, 1899, 30 Stat at L. 1223, to "meet unforeseen contingencies" related to military matters. The ruling indicated that such relief was warranted, since the military government was in charge and would disburse in furtherance of a military matter. VI *Decisions of the Comptroller of the Treasury* 177, 178, Washington, Government Printing Office (1899).

57 *De Lima v Bidwell*, 182 US 1 (1901); *Dooley v United States*, 182 US 222 (1901), *Armstrong v United States*, 182 US 243 (1901); *Downes v Bidwell*, 182 US 244 (1901).

58 *Report from President McKinley's Special Commission for the United States to Porto Rico, The Island of Porto Rico* 59-61 (1899).

59 The treaty was signed in Paris on December 10, 1898 and ratifications exchanged on April 11, 1899, 30 Stat. 1754, T.S. No. 343. (1899).



attempt to regulate [trade between Puerto Rico and the US] by executive order.”⁵⁵

He further impressed upon Governor Davis that the President could not be seen invading “a field properly belonging to Congress” and “guaranteeing to the People of Porto Rico what Congress will do.”⁵⁶ Perhaps Secretary Root’s sober counsel may have been motivated, in part by, the McKinley Administration’s assessment of what executive action of this sort could have had on litigation that led to the Insular Cases.⁵⁷ Lastly, perhaps, was the need to avoid getting the Administration embroiled with such a thorny political problem so close to the elections of 1900, without congressional debate and support. Eventually, President McKinley came around to accept Secretary Root’s⁵⁸ call for free trade without first having a resolution of the Philippine question. But considerable political risks accompanied the move to advance this proposition.

The tone of the debate and ratification of the Treaty of Paris early in 1899⁵⁹ by a razor thin one-vote margin established how contentious was the policy of forced annexation of the larger, more distant, densely-populated and ethnically- and religiously-diverse Philippines.⁶⁰ Not surprising, then, was the Congressional Republican majority’s convenient institutional deference to the President on the decision of when, and how, to commence the formal debate over their future. What changed the status quo was, President’s McKinley’s surprising December of 1899 message urging Congress to extend free trade to Puerto Rico. After all, the President and the GOP had long championed protected markets, hailed the adoption of the McKinley Tariff of 1890 and, more recently, enacted the protectionist Dingley Tariff Act of 1897. Now, the President’s message blazed a trail in a reverse direction, when it boldly stated that the United States had a “plain duty” to exempt Puerto Rico from the Dingley tariffs.⁶¹ Or simply put; open the US market to Puerto Rico’s exports, when it was unwilling to do so with other trade partners.

Unlike the President’s short message, the need and justification for free trade would be clearly articulated by military Governor Davis⁶² before Congress, as follows:

If [Puerto Rico] could have free trade with the United States, not much in the way of financial aid would be needed. It would set all the wheels of the industry in motion, for the margin of profits on sugar and tobacco would then be large

⁶⁰ Cabranes, at pg. 24. The treaty of Paris nearly suffered the same fate as the Grant Administration’s treaty of annexation of the Dominican Republic and the purchase of the Virgin Islands, both rejected by the Senate. Bassett Moore, pags. 360-362. Bemis, pg. 51.

⁶¹ *Annual Message of the President*, Journal of the Senate 16, 56th Congress, 1st Session, Washington, Government Printing Office (1900).

⁶² His eloquent message to Congress during the deliberations of the bills that eventually evolved to the Foraker Act of 1900 has withstood the test of time. In some form or another the arguments espoused have been used or implied in the ongoing debate over maintaining Puerto Rico’s common market privileges and assigning to the Island fisc customs revenues generated from foreign imports entering the island.



enough to justify foreign capital to come in large sums. This would give employment to labor and the future of the Island being assured, the coffee industry would derive indirect help, business generally would revive, importations would increase and everything would receive new life and vigor. Free trade with the United States would, however, deplete the revenues, and if such a measure should be applied, probably all the customhouse collections would, of necessity inure, to the United States Treasury. Then the Island would have no source of income save internal taxation, and, from this, very little could be expected until the industrial recuperation became general. Deficits would ensue for two or three years.

If the custom-house collections on goods from foreign countries could be left as our insular income, the deficit would be considerably reduced.”⁶³

The Administration’s economic plan made sense. Once in place, free trade and a common currency would poise the Island for access to increased and seamless trade and capital with a larger, geographically closer, commercially more dynamic and affluent export market than what Spain, already eclipsed in Europe by Britain, Germany and France and in clear decline as a military and economic power since before the start of the 19th century, could ever hope to offer. At the time, the US population, at just a shade over 76 million and growing, constituted several orders of magnitude greater than that of Spain. ⁶⁴

Naturally, a constitutional dimension did not prompt the President’s reference to a “plain duty”, but rather, commercial imperatives. The President’s short message was equally significant, for all that was left unsaid on Puerto Rico - and the Philippines. This was no oversight. After nearly 16 months of military administration, the proposal failed to include a call for Congress to reinstate a civil government in Puerto Rico, or extend a promise of eventual statehood, was silent on citizenship and was opaque on whether federal law would be made extensive to Puerto Rico. In short, the McKinley Administration continued to move cautiously on the future of Puerto Rico and the Philippines.

II. Political Considerations and the Legislative Process Leading to the Adoption of the Foraker Act

The legislative process and the provisions of the Foraker Act⁶⁵ reveal the

⁶³ *Report of Brig. Gen. George W. Davis on Civil Affairs in Puerto Rico*, H.R. Rep. No. 2, 56th Cong., 1st Sess. (1900). (Emphasis added). The report of the *President’s Special Commission for the United States to Porto Rico, The Island of Porto Rico*, at 59-61 (1899) had also urged the extension of free trade privileges to the island.

⁶⁴ The 1900 census pegged the population of the United States at 76,212,168. The population of Spain was estimated to be in 1998 at 39,133,996. See *The 1999 New York Times Almanac*, at pgs. 266 & 657 respectively.

⁶⁵ 31 Stat. 77, ch. 191 (1900).



unmistakable fingerprints left behind by industry and labor lobbies.⁶⁶ More importantly, it was to be Congress' first attempt since the ratification of the Treaty of Paris, at fashioning a legislative response, within the constitutional policy of separation, to govern new non-contiguous territories, densely inhabited by peoples of different culture, race, languages, religions, and legal traditions.⁶⁷ The result was the Foraker Act,⁶⁸ an unsatisfactory attempt at partial self-rule⁶⁹ and balancing many other competing national agendas - hidden and overt - including bold and untested constitutional premises in an unprecedented experiment⁷⁰ with colonial administration.⁷¹

⁶⁶ The following references provide varying but excellently-researched discussions of the legislative process and politics surrounding the adoption of the Foraker Act. Cabranes, J. A., *Citizenship and the American Empire*, Yale University Press (1979) at 21-44; Gould, Lyman, *La Ley Foraker: Raíces de la Política Colonial de los Estados Unidos*, 91-95, Editorial Universitaria (1956); Fuster, *The Origins of the Doctrine of Territorial Incorporation and its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce*, 43 Rev. Jur. U.P.R. 258, 288 *et. seq.* (1974). Former Governor of the Philippines and former President and then Chief Justice Taft was intimately familiar with the status issues and noted that the stridency of the debate over Puerto Rico's constitutional status had not abated twenty-two years after the passage of the Foraker Act: "[f]ew questions have been the subject of such discussion and dispute in our country as the status of our territory acquired from Spain in 1899. The division between the political parties in respect to it, the diversity of the views of the members of this court in regard to its constitutional aspects, and the constant recurrence of the subject in the House of Congress, fixed the attention of all on the future relation of this acquired territory to the United States." *Balzac v Porto Rico*, 258 U.S. 298, 306 (1922).

⁶⁷ The Treaty of Paris constituted a major departure in U.S. policy, since it was the first recorded instance in which the United States deliberately failed to extend any promises, actual or implied, of citizenship and eventual statehood to residents of acquired territories. Congressman Brantley summarized the Congressional Democratic Party's position on this as follows: "...there is no parallel in all our past history to the proposition now pending to permanently retain the Philippines [and Puerto Rico] without any declaration of intention to accord them statehood." 33 Cong. Rec. - House 2072 (February 22, 1900). He was referring to the Northwest Ordinances of 1787 and 1798 that established such policy. Judge Cabranes observes that the pattern for the policy of promise of citizenship and eventual statehood when acquiring territory through treaty was clearly established by 1803 in the treaty by which the United States purchased the Louisiana territory and was followed with the acquisitions of Florida, California, Arizona, Alaska and Hawaii. Cabranes at 20, fn. 63.

⁶⁸ 31 Stat. 77, ch. 191 (1900).

⁶⁹ Trías Monge, J., *Historia Constitucional de Puerto Rico*, Vol. II, Editorial Universitaria, Univ. de Puerto Rico, (1981), pgs. 1-24.

⁷⁰ This was so obvious that it prompted Carman Randolph, a prominent attorney from the New York bar to remark: "Porto Rico is being used as an *experiment* station for testing novel schemes which, if legitimated, may be applied seriously elsewhere.", Randolph, Carman F., *The Law & Policy of Annexation*, Longmans, Green and Co., N.Y. (1901), pg. 84. (Emphasis added). There were many remarks made in the House and Senate on the Democrat side of the aisle expressing such sentiments. Typical was the one made by Texas Congressman Henry in the course of the debate on HR 8245 which lead to the Foraker Act, 31 Stat. 77, ch. 141 (1900): "We are about to make the most radical departure in legislative enactments that the American Congress has ever undertaken." 33 Cong. Rec. - House 2045 (Feb. 21, 1900).

⁷¹ While Congress fashioned legislation leading to the compromise Foraker Act of 1900, 31 Stat. 77, ch. 191 (1900), Puerto Rican civic and political leaders, in a rare show of bipartisanship, had already been on record and were vocal about seeking citizenship, full representative democracy and free trade. Trías, Monge, at, Vol. I, pag. 215.

Aside from strategic considerations⁷², the intractable issues thrust upon the McKinley Administration⁷³ and Congress by territorial expansion were of unparalleled importance to the United States.⁷⁴ Certain anti-imperialist elements in Congress argued that, by virtue of the treaty of cession, Puerto Rico and the Philippines had been incorporated and federal law and most of the Constitution applied.⁷⁵ The implications of this were enormous. The logical conclusion of this line of thought was that citizenship had been extended to Puerto Rico and the Philippines' residents and that statehood was implied as the next invariable step in the process. By 1900, it was estimated that the Philippines had nearly 9 mil-

⁷² According to Bemis, the aims for acquiring Puerto Rico differed markedly from those for the Philippines. The United States' primary strategic foreign policy concern was "to consolidate the newly-established position in the Caribbean and Central America, to make the necessary diplomatic arrangements for the construction of the [Panama] canal, and to assure the protection of the approaches from both coasts of the United States." Bemis, S. F., *The United States as a World Power: A Diplomatic History 1900-1955*, Henry Holt & Co., Rev. Ed., NY 1955, at 33. As part of this process the U.S. had signed in Jan 24, 1902, a treaty with Denmark for the purchase of the Danish West Indies for \$5 million, now the U.S. Virgin Islands. The treaty was ratified by the Senate but rejected by the upper house of the Danish Parliament by a one-vote margin. Bemis at 51. As mentioned in footnote 3 of this article, this had not been the first attempt by the United States to acquire the U.S. Virgin Islands. The Senate had rejected a treaty during President Grant's Administration to acquire the islands. Bemis at 51. Eventually, in 1917, the U.S. purchased the islands for \$25 million, under the shadow of a raging war in Europe, and in part, prompted by concern that Germany would acquire the Danish West Indies for use as a naval and submarine base. Bemis, at 51. For another account of the purchase negotiations, concerns of German expansionism and U.S. policy considerations leading up to the purchase of the Danish West Indies see Logan, J. A., *No Transfer, An American Security Principle*, Yale University Press, (1961), pgs. 268-276.

⁷³ The number and importance of the issues surrounding the constitutional status of the new territories gave the Attorney General reason for noting the added burdens placed on his department for answering queries on them: "...there has been a great addition to the labors and responsibilities of the Department in connection with the possessions recently belonging to Spain and the Hawaiian Island. No less than sixty formal opinions have been furnished by the Attorney General to the President and heads of Departments concerning questions arising in connection with these countries..." *Report of the Attorney General* (1901) Washington, Government Printing Office (1901) at 36.

⁷⁴ Many issues of immense importance to the newly-acquired territories were to be addressed. Among them: could Congress, consistent with the Constitution, isolate Puerto Rico from its provisions by, not extending citizenship to its residents, and not incorporating it within its customs union, while simultaneously asserting unfettered U.S. sovereignty over the island? Was this constitutional vacuum to imply, then, that Puerto Rico juridically retained at least some inherent attributes of sovereignty, particularly those regarding the establishment of its own trade policy and tariffs? More importantly, could Congress decide when and how to extend the Constitution to the territories the Constitution or even single out portions of the Constitution that it would *not* extend to the territories? Furthermore, could Congress extend federal law, without simultaneously extending the same express and implied constitutional provisions supporting such exercise of statutory authority that applied in the states, or could this exercise be independently supported by the Territorial Clause? Finally, was Congress constitutionally *required* to comit to admit Puerto Rico as a state, after a preparatory period of administration during which most provisions of the Constitution applied? The *Insular cases* answered these questions. See also *Balzac v People of Porto Rico*, 258 US 298 (1922).

⁷⁵ The view was widely held. In fact in *González v Williams*, 192 US 1, 12 (1904) (Puerto Rico residents are not aliens under the Immigration Act of 1891), this argument was pressed but sidestepped by the Court; that by virtue of the Treaty of Paris or, alternatively, the Foraker Act, Puerto Rico had been incorporated and its residents collectively granted US citizenship.



lion residents, more population than New York, then the largest state of the Union at the time.⁷⁶ Statehood, soon after, would have meant that the Philippines could have ended up with the largest delegation in Congress and perhaps hold the key to the balance of power in the House, with unfathomable consequences to the affected states individually and the future direction of the United States. Similarly, Puerto Rico in 1900 had nearly a million residents, which at the time constituted more population than nearly 20 states in the Union.⁷⁷ Statehood also could have had enormous consequences in the balance of power in Congress. Not only seen individually but collectively, the admission of Hawaii, Puerto Rico and the Philippines as states in short order was perceived by the Administration as too much for the Republic's political and social foundation to bear.

Externally, for trade-protectionist reasons, and internally, to avoid upsetting the political balance of power in Washington, the McKinley Administration concluded that a new political and constitutional status was not only called for, but plainly required, to avoid a constitutional and political crisis of unprecedented dimensions in the Republic.⁷⁸ The Administration believed or, more precisely, governed consistently with the notion that the Constitution was flexible enough to allow taking a different path from one based simply on the state or incorporated territory dichotomy that past congressional and constitutional practice implied. In the Administration's view, the fact that this new option had not been explored and, even less, invoked by past Administrations, was more a result of the lack for the need to do so, rather than an inherent limitation in the Constitution, or so the argument would go. The Administration further believed that, once constitutionally ratified by the Senate, the unprecedented reservation made in the last paragraph of Article IX of the Treaty of Paris⁷⁹ provided a basis or even a confirmation for such an unorthodox approach.

Certain members of Congress feared that Congressional action over Puerto Rico free trade would compromise its latitude to deal with the Philippines, particularly, if that implied that citizenship had been granted to the Island's residents and Puerto Rico incorporated.⁸⁰ The Philippines was still in the throes of an insur-

⁷⁶ The Census of 1900 indicated that New York, then the most populous state in the Union, had a population of 7,268,894, while the Philippines' 9 million plus, exceeded such amount. The New York Times 1999 Almanac, at pg. 266.

⁷⁷ *Id.*

⁷⁸ England's colonial administration of India, Burma, and other colonies in the Far East and the West Indies and, subsequently, of large portions of Africa did not raise any of the constitutional dilemmas and difficulties the United States faced. Great Britain has no written constitution. Thus, Parliament, as the supreme repository of the country's legislative power and sovereignty, was not hampered by such strictures and, so it was, that it was an easy matter to maintain through law its colonies at arms length.

⁷⁹ "...the civil rights and political status of the native inhabitants shall be determined by Congress."

⁸⁰ If the last paragraph of Art. IX of the Treaty of Paris did not already give reason for pause, undoubtedly, just raising and seeking answers to these questions should have ominously signaled to Puerto Rico's political leadership that Congress was bent on breaking away from settled

rection,⁸¹ so caution was not an unreasonable path to follow under the circumstances. At the heart of all of this debate were the protectionist, the balance of political power and even racist concerns that granting citizenship rights could induce mass migration of cheap labor⁸² or, barring that, undermine industry through cheap imports⁸³. Once the President opened the door for a debate, however slight, “members of Congress were eager to legislate for Puerto Rico in a manner that would leave no doubt about Congress’ powers under the Constitution to do with the newly-acquired territories as it wished.”⁸⁴

The President’s proposal was now before Congress or, more precisely, on Sereno Payne, House majority leader,⁸⁵ and Senate majority

policies of United States territorial expansion. Until then, they had confidently relied on the fact that extending citizenship and mapping a clear path toward statehood had always been assumed, promised or implied, since the Ordinances of 1787 and 1798 and subsequent treaties acquiring territory. Cabranes, p. 20, fn. 63. As we shall discuss, the debates over how to answer these questions took centerstage during the deliberations of the bills leading up to the Foraker Act, and determined the economic relationships to be established with Puerto Rico and, subsequently, with the Philippines.

⁸¹ As mentioned, the Philippines had been the flashpoint of the opposition to the ratification of the Treaty of Paris, ratified by only one vote above the two-thirds majority needed. A week after ratifying the Treaty, the Senate (but not the House) adopted a resolution stating that it had no intention of “incorporat[ing] the inhabitants of the Philippine Islands into citizenship of the United States” or “permanently annex said islands” as part of the United States. An implicit promise of independence was made when the resolution provided that, after a period of tutelage “...in due time” there would be a “disposition of said islands as will best promote the interests of the citizens of the United States and the inhabitants of said islands”. S.J. Res. No. 240, 55th Cong., 3rd Sess., 32 Cong. Rec. 1846 (1899). Cabranes, pg. 24. At the time, Emilio Aguinaldo’s insurrection was still raging on in the Philippines. See Zinn, Howard, pg. 313. Congress never passed a similar resolution concerning Puerto Rico, although, as noted before, the Treaty of Paris was the first time that the U.S. had either not promised or implied incorporation, citizenship and ultimately statehood to a newly-acquired territory.

⁸² Both the Republican and Democratic parties were deeply preoccupied with the racial and labor consequences of admission of cheap foreign labor, particularly from the Far East and Europe, and expressed those concerns in their party platforms. The Democratic Party’s platform for the 1896 elections on which William Jennings Bryan ran, used economic condition as a key to exclusion: “...the most efficient way of protecting American labor is to prevent the importation of foreign pauper labor to compete with it in the home market...” The Republican Platform under which then candidate McKinley ran and won the elections used literacy as the tool of choice for exclusion: “For the protection of the quality of our American citizenship and of the wages of our workingman against the fatal competition of low-priced labor, we demand that the immigration laws be thoroughly enforced, and so extended as to exclude from the entrance to the United States those who can neither read or write.” Hutchinson, E. P., *Legislative History of American Immigration Policy; 1798-1965*, Appendix A, pg. 629.

⁸³ 33 Cong. Rec. –House 2001 (February 20, 1900) (Remarks by Democrat Congressman Newlands)

⁸⁴ Cabranes, pgs. 24-25.

⁸⁵ Sereno Elisha Payne was born in 1843 to a farming family in New York. A practicing lawyer, he was elected to Congress in 1882, where he served continuously except for one term until his death in 1914. He gained membership in the important Committee of Ways and Means, where tax legislation is initiated, early in his career in 1889. He was not known as a great orator, as Senator Foraker was, but was keen, industrious and a dependable party man. He was one of the architects of the McKinley Tariff of 1890 and the protectionist Dingley Tariff Act of 1897, the provisions of the latter which were applied to Puerto Rico exports and became



Joseph B. Foraker's⁸⁶ lap for leadership, without much further guidance from the Administration. After nearly derailing the ratification of the Treaty of Paris, the anti-imperialist faction in Congress, consisting mostly of the opposition southern Democrats, were spoiling once again for an opportunity to question and chastise the President's aims and plans for the territories. While the President's proposal was remedial and narrow in scope, the glare and dynamics of the electoral and legislative process unexpectedly forced the hand of the Administration. It was then forced to cease procrastinating and dissembling and engage the Congress to fashion some resolution to Puerto Rico's future. Thus, by early 1900, Congress had moved from fact-finding hearings, to considering various bills related to tariff matters associated with Puerto Rico,⁸⁷ to expanding their scope to include a civil government and finally, to enacting the compromise Foraker Act of 1900⁸⁸

front and center of the debate on free trade with Puerto Rico in 1900 and the constitutionality of this practice under the *Insular Cases*. In 1899, he became chairman of the House Ways and Means Committee and majority leader. He was later one of the architects of the tariff reduction reform (the Payne-Aldrich Act of 1909) that contributed to the Republican loss of the House. 17 *American National Biography*, Oxford University Press, NY (1999) pgs. 175-176.

⁸⁶ Joseph Benson Foraker was born in Ohio on July 5, 1846 into a farming family of modest background. As a young man, he served in the Union army during the Civil War, where he saw action in West Virginia, Tennessee, Georgia, and on General Sherman's march to the sea, mustering out at the conclusion of the war in 1865 as brevet captain. After obtaining his law degree, he practiced law and entered into politics in support of the Republican Party. He was twice elected to Ohio's governorship and, during his tenure, laws mandating segregation of schooling facilities for black children were repealed. He earned a reputation for vehemently championing the cause of racial justice, particularly for blacks in the South, at a sensitive time when Reconstruction had ended and just after the re-admission of the former Confederate states to the Union. This crusade earned him the nickname "Fire Alarm Joe." His strong enforcement of barring liquor sales on Sunday and political infighting within his state party organization earned him a defeat on his third try for the governorship. He was elected to the Senate in 1896 and had strong links to President McKinley, evidenced when he gave a strong nomination speech on behalf of candidate McKinley in 1896. A protectionist, he was a strong backer of higher tariffs. He served on the Senate Foreign Relations Committee and became intimately involved in the debate over the Cuba insurrection and, subsequently, the Spanish-American War. His relationship with Teddy Roosevelt, President McKinley's successor, was uneven, supporting his presidency on the Panama Canal but dissenting vigorously on certain aspects of domestic policy, such as regulation and rate-making by the Interstate Commerce Commission. Foraker also clashed publicly with Roosevelt over the latter's handling of the so-called Brownsville affair, an incident that induced President Roosevelt to discipline and dismiss outright 167 black soldiers stationed outside of town that were accused by white residents of instigating a shoot-out. Foraker championed the cause of the dismissed soldiers in the Senate, which induced the President to groom William Howard Taft, former governor of the Philippines, a talented federal circuit judge and Roosevelt's Secretary of War (future President and Chief Justice of the US who authored *Balzac v People of Porto Rico*, 258 US 298 (1922)), for the Senate. All of this contributed to undermining Senator Foraker's presidential aspirations. Senator Foraker's acceptance of large retainers from Rockefeller's Standard Oil monopoly played into the hands of Roosevelt and was exposed and used by him, not only to irreparably tarnish Foraker's reputation, but also to attack the sincerity of his championed cause for the Brownsville 167. This motivated Senator Foraker to withdraw his reelection effort. An attempt at a comeback in 1914 resulted in ignominious defeat for this proud Senator. He died in 1917. 8 *American National Biography* 198-199, Oxford University Press, NY, (1999).

⁸⁷ For a good discussion of the legislative history, with particular emphasis on the citizenship issue, see Cabranes, pgs. 22-44.

⁸⁸ 31 Stat. 77, ch. 191 (1900).

that addressed both free trade and re-established civil government.⁸⁹

III. The Legislative History of the Foraker Act

In keeping with the President's initial caution, H.R. 6883 was introduced on January 19, 1900 by Representative Sereno Payne of New York, Chairman of the House Committee on Ways and Means. The bill was narrowly drawn "to extend the laws relating to customs and internal revenue over the island of Puerto Rico ceded to the United States". The bill called for the extension of the federal internal revenue laws to Puerto Rico and free trade between the island and the US, by treating the Island as part of the United States for customs purposes. Under the then prevailing thought, if the bill passed, it would have implied that Puerto Rico was incorporated to the United States, since common market treatment had always been part and parcel of the commercial relationships of incorporated territories on their way to statehood.

Congressman Payne described HR 6883 as a tariff relief provision and a source for a new export market for Puerto Rico, framed to help its economy right itself, particularly after Hurricane San Ciriaco, by substituting the Island's now-closed traditional export markets. HR 6883 immediately met with derision from the Democratic minority in the House. Democrat Congressman Norton of Ohio rhetorically asked Payne that, if the purpose of the bill was simply assistance to the Island's economy, why was the Administration then attempting to peg the exchange of the peso to the dollar at only 60 percent, rather than at a one-to-one ratio. This raised laughter on that side of the aisle. Congressman Payne demurred on the question, and noted prophetically with the metaphor that the "first gun" had been fired in the upcoming debate over Puerto Rico's future.⁹⁰

The reaction to HR 6883 by certain sectors of industry, particularly sugar and tobacco, was swift and furious.⁹¹ As Democrat Congressman Henry from Texas

⁸⁹ Spain, prior to the onset of the Spanish-American War, and undoubtedly concerned with the effects and possible success of the Cuban insurrection, granted Puerto Rico a measure of self-rule under the short-lived Autonomic Charter of 1897. The Charter was immediately abolished by military decree under General Brooke. In many respects, its provisions exceeded the grants of self-government extended to Puerto Rico in the subsequent Foraker Act of 1900, 31 Stat. 82 (1900). See Trías Monge, J., *La Carta Autonómica de 1897*, 43 Rev. Jur. U.P.R. 179 (1965). Under the Treaty of Paris (see also Section 7 of the Foraker Act) it would later agree to *not* allow Puerto Rico residents *born* in the island to have the right to elect to keep Spanish citizenship.

⁹⁰ 33 Cong. Rec. – House 1942 (February 19, 1900).

⁹¹ The Sugar Trust, one of Root's principal clients prior to serving on the McKinley Administration, was one formidable force in the American economic and political scene of the 1890s. A commentator has estimated that, in 1892, the American Sugar Refinery Company had approximately 95% of the US sugar production. Zerbe, R., *The American Sugar Refinery Company 1887-1914: The Story of a Monopoly*, 12 Journal of Law & Economics 339, 354 (1969). This company bucked the populist trend sweeping the US, flexed its muscles, challenged the Sherman Antitrust Act of 1890 before a sympathetic Supreme Court, and prevailed in *United States v E. C. Knight Co* (1895), 156 US 2 (1895). This prompted commentators to view *E. C. Knight Co.* as gutting the Act itself. Friedman, Lawrence M., *A History of American Law*,



would put it, quite undelicately: “Representatives of the sugar interests and the tobacco interests [in the South] hovered and swarmed around the Committee and said [HR 6883] would be disastrous to their interests.”⁹² Governor Davis also took issue with HR 6883, particularly, on the portion of the bill that extended the federal internal revenue laws. He reported his concerns to Secretary Root and subsequently, to the House Committee. Congressman Payne was chastened, and he relented under the combined industry and Administration pressure. He did not publicly blame the Administration for the miscalculation, despite the fact that the proposal for free trade had very publicly originated from the White House. Guarding the President’s image, he remarked, disingenuously, that HR 6883 was framed and introduced “...without consultation with anyone, on my own individual motion...”⁹³

After further internal debate within the Administration, and, without a doubt, at the Administration’s request, on February 8, 1900, Payne substituted H.R. 6883 for H.R. 8245, a bill “to regulate the trade of Puerto Rico, and for other purposes.”⁹⁴ This second bill preserved the application of US tariffs on foreign imports entering Puerto Rico but, unlike HR 6883, exempted the Island from the internal revenue laws. For protectionist purposes, it applied the internal revenue law (excises) to Puerto Rico’s exports, once introduced to the United States. Finally, it maintained a regime similar to one that existed during military administration, but at 75 percent lower rates than those of the Dingley tariffs, by instituting a reciprocal tariff of 25 percent on export trade between the US and Puerto Rico. In other words, for tariff purposes, Puerto Rico exports were to remain subject to customs tax, as if they had originated in a foreign country, in the same way as they were treated while under military administration.

Nearly two weeks after HR 8245 was introduced, Congressman Payne announced that the reason for maintaining a tariff barrier to Puerto Rico’s exports, albeit lower than in the past, was to establish a clear constitutional precedent directed at preserving the Congress’ options over the Philippines:

“I want to ...declare to the country and to the world that when we legislate for this island [of Puerto Rico], when we propose a tariff, we have the duty and the power and the privilege, under the Constitution, of imposing a tariff on all articles going to the territory belonging to the United States from the United States,

Second Ed., Simon & Schuster, (1985) at 465-466. Eventually, the US Supreme Court moved closer toward upholding the letter and spirit of the Sherman Antitrust Act, leaving *E.C. Knight* “distinguished to a mystery”. Friedman, p. 466.

⁹² 33 Cong. Rec. – House 2045 (February 21, 1900).

⁹³ 33 Cong. Rec. – House 1942 (February 19, 1900).

⁹⁴ 33 Cong. Rec. – House 1654 (February 8, 1900).

or coming to the United States from the territory belonging to the United States. I want to make a precedent... with reference to the Philippine Islands.”⁹⁵

The sudden change in the Administration’s policy revealed what a poor job Secretary Root had done in taking measure of the likely opposition that would erupt from industry, and even labor, to a free-trade bill. After all, the population of the Philippines, of nearly 9 million, represented a significant amount of available cheap labor and a direct threat to tobacco interests in the South and the former clients in the sugar industry.⁹⁶ The trade concerns were to be candidly and openly communicated by industry representatives in Committee hearings and later acknowledged on the floor of the House.⁹⁷ Furthermore, lacking guidance from the Supreme Court, there was the potential risk that a free-trade bill could constitutionally jeopardize the Administration’s pending court cases and irrevocably compromise the United States Congress in future legislation dealing with the Philippines. So, HR 6883 died before being born, and its introduction constituted a major misstep for the normally politically-adroit President.

The disarray also carried over to the Administration’s allies in Congress. The withdrawal of HR 6883 left both Congressman Payne and, later, Senator Foraker chastened, and exposed the Administration to unsparing demagoguery and hyperbole, that anti-imperialist congressional Democrats were more than willing to dish out with relish until the final vote was taken.⁹⁸ Once reported out of Committee, House Democratic congressman Talbert remarked on the floor⁹⁹ that the in-

⁹⁵ 33 Cong. Rec. – House 1942 (February 19, 1900).

⁹⁶ The census of 1900 was the first that incorporated information on Puerto Rico and the Philippines.

⁹⁷ For example, see 33 Cong. Rec. – House 2001 (February 20, 1900) (Remarks of Congressman Newlands).

⁹⁸ I agree with Judge Cabranes when he observes that; “[i]t is ironic, but not surprising, that racist overtones were most clearly discernible in the remarks of those who opposed American imperialism... It was often left to the proponents of colonialism and annexation to extol the virtue and dignity of the colonial peoples whom they sought to bring, and keep, under the American flag.” Cabranes, at pg. 39. The anti-imperialist faction in Congress was concentrated in the South and within Democrats. They chastised the President for seeming to renege on immediate free trade and implicitly incorporating Puerto Rico, while, in reality, they were not opposed to such a solution at all. Their rhetoric on the floors of the House and Senate, while cloaked in constitutional flourishes at times, stained the next with racist invective and had, at the core, a protectionist concern. Senator Tillman candidly admitted what the mostly Democratic South really feared: “[The Philippines] sugar comes in direct competition with the sugar of Louisiana and their rice with the rice of South Carolina and their tobacco with the tobacco of the southern States, which is largely the same texture and quality. This Senator demands protection for the manufacturing industries of the country. We of the South are opposed to admitting these islands in the Pacific because we will come in direct competition with them in the products of agriculture...” 33 Cong. Rec. – Senate, March 8, 1900, pgs. 2651-57.

⁹⁹ We approach with caution any effort at eliciting the intent behind colloquies and floor statements made in the course of the passage of a bill, in this case, the Foraker Act. Divining what the real



roduction of the substitute H.R. 8245 reflected:

“In the first place, they [Republicans] began by framing a bill with absolute free trade. I do not know what caused them to change their mind,¹⁰⁰ but they did change it, and then they came in with another bill, taxing the imports to and exports from the island of Puerto Rico....

I must say that never before since I have been a member of this House have I seen such a complete rout as that given to the Republican Party since the discussion of this bill commenced.”¹⁰¹

Congressman Denny, in turn, remarked correctly that:

“If this bill should become law, we will thereby announce to the world that Congress has at last assumed the power to deal with territorial possessions as it may deem desirable, outside of and beyond all constitutional restrictions...in order to assist a few tobacco manufacturers and beet-sugar producers in the United States.”¹⁰²

On the floor of the House, HR 8245 prompted many Democratic Congressmen to explore in depth and espouse extended oratory on constitutional points of law directed at the reciprocal tariffs that sidestepped the Uniformity Clause of the Constitution. After many debates, the House finally passed HR 8245 on February 28, 1900.

While Congress debated HR 8245, it did immediately agree with the President that Puerto Rico needed tax revenues urgently to shore up its weak finances.¹⁰³

and collective intent behind the Babel of political language used prior to the vote of over 500 congressmen and senators is hazardous business at best. It is a common occurrence in Congress for members to make speeches and debate in a certain way to posture and impress constituencies and be “on record”, while a legislative provision in question could serve another equally important purpose. Sometimes language in Committee and conference reports is inserted at the last minute to attempt to skew the “intent” of the law. Case law is now increasingly approaching these legislative debates with healthy trepidation, placing less reliance on what a particular Congressman or Senator said, or how a Committee Report reads, but on the plain meaning of how the law reads. For example see Teuber, *Colloquies: What They Are and What They Do*, 33 Tax Notes 128 (October 13, 1986).

¹⁰⁰ This is incorrect. The reasons were clearly spelled out on the floor of the House by Congressman Payne as a measure directed at establishing a precedent for the Philippines. 33 Cong. Rec. – House 1944 (February 19, 1900).

¹⁰¹ 33 Cong. Record – House, February 27, 1900, at page 2351.

¹⁰² 33 Cong. Record – House 2353 (February 27, 1900),

¹⁰³ Congress chose at that time to keep the application of US tariffs, in order to emphasize that the island remained outside of the Constitution’s boundaries and, as such, was equivalent, tariff-wise, to a foreign country. The motivation for this action was candidly exposed by Senator Bacon, who stated: “...no member of either House of Congress...does not know the fact that the purpose and effect to levy tariffs duties upon commerce between Puerto Rico and



A bill was forthwith passed that transferred, for the benefit of the administration of the military provisional government in Puerto Rico, all the Dingley tariffs collected in the US on Puerto Rico exports that entered the mainland after Oct. 18, 1898.¹⁰⁴

In the Senate, Senator Foraker wasted no time, and upstaged Congressman Payne by the introduction of S. 2016 on January 3, 1900, that was substituted on January 9, 1900 by S. 2264. The bill offered a lot more than what Secretary Root had initially urged for and the President requested in his December 1899 message to the Congress and what Congressman Payne would provide ten days later in HR 6883. Senator Foraker appears not to have coordinated his efforts closely with his counterpart in the House, or the White House, as much as Congressman Payne endeavored to do. Alternatively, Senator Foraker was willing to part ways with the Administration and take a more liberal path than that ventured by the President. At the time, S. 2264 was a bold piece of legislation that provided for free trade, a collective grant of US citizenship, provisions that barred legislation inconsistent with the Constitution, extended the internal revenue and commercial laws, provided for an elected delegate to the Congress and a civil government with an elective chamber. HR 2264 was reported out of Committee favorably. Clearly, some of these provisions were at odds with the Administration's stance in the cases that would be reported as the Insular cases that were winding their way up to the Supreme Court.

Senator Foraker recommitted S. 2264 to committee, once the Administration clearly signaled its policy change on tariffs that the House leadership followed, and further, caught Senator Foraker's attention on the resulting difficulties of treading a separate path on colonial policy. There, he merged its civil government provisions to the adopted HR 8245, as passed by the House, and proceeded to amend it extensively to negate any inference of incorporation. An amendment removed the grant of citizenship and created a new and separate citizenship for Puerto Rico residents in its place.¹⁰⁵ Another amendment changed the non-voting

the United States did not have that as a motive [tax resource generation]..." 33 Cong. Rec. 2923-2924.

¹⁰⁴ 31 Stat. at L. 51 (1900). This Act was passed on March 24, 1900, almost three weeks before the President signed into law, on April 12, 1900, the Foraker Act of 1900, 31 Stat. 77, ch. 191, that re-established civil administration after the island's cession from Spain to the US. The Attorney General of the United States was to opine that the Foraker Act did not repeal or was inconsistent with the former. 23 *Opinions of the Attorneys General* 329 (1900).

¹⁰⁵ Foraker's elimination of the collective grant of citizenship prompted a quick response from Senator Allen. He chastised Senator Foraker, known for championing the civil rights cause of blacks, for ducking the issue of the resolution of the status of Puerto Rico: "we ought not to run away from the question of settling the political status and the classification of the Island. I doubt it there can be found in the history of the United States a bill drawn exactly as this bill ...The Island is to be a political entity known as the people of Puerto Rico. What relation do those people hold to the United States?...[i]f we want to follow precedents, it must be a Territory." 33



delegate's role to simply a consular one before the executive departments of the government. The amendments were ostensibly adopted to avoid implying that Puerto Rico had been incorporated and on the path toward statehood.

Another amendment deleted Section 5 of the bill that provided that “[t]he laws of the United States relating to commerce, navigation and merchant seamen are hereby extended to and over Puerto Rico...”, since the latter-added provision that extended all federal law except where “locally inapplicable” was understood to cover the former.¹⁰⁶ Section 5 was consistent with the intent to achieve market integration, and its replacement with the extension of all federal law was simply a way to take this process one step further in that direction. Senator Foraker was clear on the intent of all these changes;

“In passing this bill...we would assert the right to discriminate between Puerto Rico or the Philippine Islands and the United States. Thus we would establish a precedent which, if followed [by the Supreme Court], would enable us to protect the cigar makers and the growers of tobacco, as well as our beet-sugar factories in the United States from products and cheap labor of the Philippines, where the condition is much more important and the menace much greater.”¹⁰⁷

The bill as amended, now included all of the defining features of the Foraker Act. It included a new sunset provision for the precedent-setting tariffs but significantly, was linked to the adoption of tax reform for Puerto Rico. By so doing, the whole weight of the experiment of constitutional separation through tariffs shifted and hinged on the future enactment of tax-reform legislation. After extensive debate, and when H.R. 8245, as amended, neared a final vote in the Senate, Democrat Senator Bacon attempted to throw sand in the gears of the legislative process by seeking to re-introduce Senator Foraker's original bill (S. 2264). Evidently, this last minute maneuver was an attempt to politically embarrass the Administration once more, and have Senator Foraker take the heat and explain again, this time from the well of the Senate, why the the Republican leadership and the Administration in the Senate backed-off from the original bill. He did as follows

“When I made this original draft (S. 2264) I had the same opinion that I have now as the relation of Puerto Rico to the United States. I regarded it as a possession or as a dependency and not as a part of the United States. But I recognized

Cong. Rec. – Senate - 3037 (March 19, 1900). Senator Foraker chose not to respond and demurred on procedural grounds. *Id.*

¹⁰⁶ 33 Cong. Rec. Senate 3038 (March 19, 1900).

¹⁰⁷ 33 Cong. Rec. – Senate 2646 (March 8, 1900). (Emphasis Added).

that the Congress had a right to make it a part of the United States, if the Congress saw fit to do so, and in the framing of this bill I had that in view and I accordingly extended the Constitution and proceeded generally upon that theory.

When, however, that question came up for consideration and discussion, it was thought by my colleagues that we could at any time make it a part of the United States; that it was not wise policy to make it so now; and that for that reason such provisions in this bill as looked in that direction [incorporation] should be eliminated, and that the legislation with respect to Puerto Rico should be as legislation for a dependency and not as a Territory or a part of the territory of the United States in any other sense than that it belongs to the United States.

The general provisions [of the bill] are the same, but the expressions to which he refers, that would carry with them the idea that we were incorporating it into the Union and making it, in effect, a Territory, if not in name a Territory, thus putting it in a state of pupillage for statehood, have been purposely eliminated.”¹⁰⁸

Senator Bacon’s motion to substitute HR 8245 was defeated, and on April 3, 1900, the Senate passed the heavily amended HR 8245 by a vote of 40 to 31.¹⁰⁹ The House, on April 11, accepted the Senate’s amendments by a vote of 161 to 153, a very narrow margin.¹¹⁰ The President signed the bill into law the following day. The Foraker Act would be effective on May 1st, 1900 and would have a profound and lasting effect that continues to this day.

IV. A Further Look at the Foraker Act’s Structure

The enactment of the Foraker Act,¹¹¹ President McKinley’s subsequent reelection in 1900¹¹² and, particularly, the Insular cases¹¹³ gave the President and,

¹⁰⁸ 33 Cong. Rec. – Senate 3554 (March 31, 1900).

¹⁰⁹ 33 Cong. Rec. –Senate 3697-98 (April 3, 1900).

¹¹⁰ 33 Cong. Rec. 4071.

¹¹¹ 31 Stat. 77, 191 (1900).

¹¹² President McKinley defeated William Jennings Bryan by a wider margin than that obtained in 1896, in an election where the Democratic platform called imperialism the “paramount issue” before the nation. *The 1999 New York Times Almanac*, p. 108-9. The President was shot in Buffalo, New York by the anarchist Leon Czolgosz and died two weeks later on September 14, 1901.

¹¹³ *De Lima v Bidwell*, 182 US 1 (1901); *Dooley v United States*, 182 US 222 (1901), *Armstrong v United States*, 182 US 243 (1901); *Downes v Bidwell*, 182 US 244 (1901). *De Lima* held that, after the Treaty of Paris, Puerto Rico ceased to be foreign territory, for customs purposes. This was a setback to the McKinley Administration, that had advocated for a harsher exclusion rule until Congress specifically legislated otherwise, and one that provoked quite a hub hub at the Treasury Department. Once *De Lima* was handed down, the Treasury Department shifted and argued through administrative channels and then later concluded that it was without authority



subsequently, the Roosevelt Administration all the necessary political cover and constitutional endorsement¹¹⁴ under the new but evolving doctrine of unincorporated territory¹¹⁵ for such legislation. The Insular cases ratified the core assump-

to refund the duties illegally collected. In the Treasury's view, the customs laws allowed refunds of duties paid and timely *protested* on "importations", the latter term in the Treasury's view was applicable only to shipments arriving from foreign countries. Since *De Lima* held that shipments from Puerto Rico did not originate from a foreign country, as the term was understood under the tariff laws, the duties collected were technically unrefundable. The Treasury Department subsequently softened its policy. Although expressing doubts as to the legality of allowing a refund under these circumstances, Treasury grudgingly conceded that the "importation" requirement would be treated as met but not without continuing to insist that protests had to have been timely filed to preserve rights to refunds. 7 Decisions of the Comptroller of the Treasury 848, 851-852 Washington, Government Printing Office (1901). 8 Decisions of the Comptroller of the Treasury 511, 512 Washington, Government Printing Office (1902). The Comptroller further concluded that those mainland importers who made involuntary payments but had not protested the exactions were without a right to a refund and had no other recourse except Congressional relief: "These [unprotested] duties...have ...long since been covered into the Treasury of the United States. Having thus gone into the Treasury by regular covering warrants, it is beyond [the] power [of the Secretary of the Treasury] to take them out, unless...specifically authorized by Congress so to do (sic) or been specifically given authority to refund an equivalent amount." *VIII Decisions of the Comptroller of the Treasury* 511, 512, Washington, Government Printing Office (1902). Congress finally stepped in to extend relief to such importers. P. L. 180 of March 3, 1905, 33 Stat at L. 1013, ch. 1447, an act to extend the time to file refund suits in Court of Claims under Act of April 29, 1902 for recovery of duties paid to military authorities in Puerto Rico for importing from the US between April 11, 1899 to May 1, 1900, the effective date of the Foraker Act of 1900.

¹¹⁴ Coudert described the problems brought upon by the Administration, and ultimately settled by the Supreme Court, as follows: "the Court [and, prior to that, the Administration] found itself confronted with a most difficult problem. If it construed the Constitution literally, as desired by the Government, and held it applicable to the States only, it took a position *contrary to many precedents* and wholly at variance with the underlying and basic historic view of our Federal Government, that Congress could have no power anywhere, save as found in and derived from the Constitution of the United States. On the other hand, unless this basic postulate of our constitutional system were to be *eliminated or greatly altered*, how was the United States properly to govern a people so alien to the traditions of the common law that our constitutional guarantees and prescribed procedure might well lead to conditions of anarchy and bring into our political body a great mass of alien and perhaps semi-civilized peoples?" Coudert, F., pgs. 827-828 (My emphasis). Frederic René Coudert's biography is also of interest, since his career intersected and influenced in an important way Puerto Rico's political future. He was born in New York, in 1871, and was founder of Coudert Brothers international law firm based in New York City. A graduate of Columbia University Law School in 1891, he also earned a PHD in political science at Columbia in 1894. He was a litigator and argued many cases before the Supreme Court, his first at age 26. He interrupted his lucrative practice to serve in the Spanish-American War as a volunteer first lieutenant and commanded Troop A, New York Cavalry, under General Nelson A. Miles. He subsequently represented DeLima & Company in the leading *Insular* case of *DeLima v Bidwell*. He served as a special assistant to the US Attorney General from 1913-14 and to the British Ambassador, for issues associated with the legality of the naval blockade during World War I. He served in many other distinguished capacities, including trustee of Columbia University, earning him international distinctions such as the French Legion of Honor, an officer of the Crown of Belgium and an honorary member of the International Olympic Committee. He passed away in 1955. 5 *American National Biographies*, Oxford University Press, NY (1999), pgs. 576-577.

¹¹⁵ As Chief Justice Taft would summarize the *ratio* finally emerging from the *Insular* cases and their long progeny, in *Balzac v People of Porto Rico*, 258 US 298, 305 (1922), "...neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it..." See also Coudert, Frederic, at p. 823, calling the evolution of this case law "...indeed a drama and a long one."

tions underpinning the McKinley Administration's governance of Puerto Rico.¹¹⁶ In order to accomplish this, it judicially constructed an unprecedented two-tier system for territories. The first was for incorporated territories, meaning those covered by most provisions of the Constitution and on a path to statehood. The second was an inferior status for other territories under US sovereignty, whose future was yet undefined by Congress¹¹⁷ but under its wardship while remaining outside of the Constitution's shadow, save for some unspecified provisions aimed at protecting fundamental individual rights.¹¹⁸ This judicial construct provided Congress with the comfort that it had the constitutional authority implied when Art. IX of the Treaty of Paris and the Foraker Act were enacted. Thus, Congress had a wide constitutional latitude, not only to deal with Puerto Rico in a manner different from the Philippines, but also to maintain Puerto Rico and its residents outside of the United States constitutional system, until such time as Congress deliberately legislated otherwise.¹¹⁹

The legislative history and, ultimately, the enactment of the Foraker Act¹²⁰ addressed or examined expressly or implicitly most of these trade and constitu-

116 Frederic Coudert hailed the judicially-created doctrine of incorporation as "...an ingenious and original doctrine of Mr. Justice White, ...created by circumstances. It had the advantage of reconciling American reverence for the Constitution, the theory of a government everywhere limited by its constituent act, with large discretion left to Congress regarding the amount of liberty to be given to the new peoples. The very vagueness of the doctrine was valuable, in that, while the doctrine admitted that the Constitution was everywhere applicable to the actions of Congress, it failed to specify what particular portions of the Constitution were applicable..." Coudert, F., p. 850.

117 Under this construct of law, Congress was constitutionally allowed to decide when, what and even if to decide the future status of unincorporated territory. The perniciousness of this system is evident; it has no checks and balances. With such a system, Guam was left in limbo under military rule for over fifty years. Residents of such a territory do not have the constitutional means available to all citizens of the states through the periodic election of their representatives to Congress and the President to influence in any way the political process, except through the Resident Commissioner's office, which is consular in nature. The un-incorporated territory doctrine in reality leaves residents of such a territory as second-class US citizens with no voting rights to influence their future status or grant consent to the shape and direction of the federal laws that they are required to comply with.

118 Leibowitz keenly observes that: "the ...distinction between incorporated and un-incorporated territories was created by the judiciary and was a way of preventing the word 'territories' in the Constitution from having the same constitutional result in all areas." Leibowitz, A. H. *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 37 Rev. Jur. UPR 615, 643 (1968).

119 Frederic R. Coudert describes a conversation held with Justice White in the aftermath of the *Insular cases*, in which he describes Justice White's "...dread, lest by a ruling of the court it might have become impossible to dispose of the Philippine Islands and of his regret that one of the great parties had not adopted his doctrine of incorporation in its platform, as providing the solution for the then, (as now), much mooted matter of the ultimate disposition of the Philippine Islands. It is evident that he was much preoccupied by the danger of the racial and social questions of a very perplexing character and that he was quite as desirous as Mr. Justice Brown...that Congress should have a very free hand in dealing with the new subject populations." Coudert, F., pg. 832.

120 31 Stat. 77, ch. 192 (1900).



tional concerns.¹²¹ But, the Foraker Act was not aimed to be simply an exercise to establish a congressional precedent of constitutional separation; powerful pragmatic and commercial considerations also motivated it. For one, the need to adopt a civil government to replace the untenable military administration in Puerto Rico,¹²² and get on with creating the conditions necessary for business to invest and integrate the new market.¹²³ The hope was that the passage of the Foraker Act would, not only signal political stability to mainland investors, but also placate local aspirations for further self-rule, by an extension of a semblance of representative democracy, albeit closely supervised by the United States.¹²⁴ In the interest of continuity, Congress chose to ratify the decrees issued by the military provisional government,¹²⁵ to further institutionalize the process well underway of adopt-

¹²¹ Cabranes, pgs. 22-44.

¹²² Military Governor Davis, in his report entitled "*Report of Brig. Gen. George W. Davis on Industrial and Economic Conditions of Puerto Rico as affected by the hurricane*", War Department, Division of Insular Affairs, 1899, at 75, stated; "...the continuance of any government enforced by the orders of a general of the Army is obnoxious to Americans, and should be replaced, as soon as possible, by one in which the people themselves should have a voice, and as complete control as they are capable of exercising. The people of Puerto Rico should not wish for more power than they were capable of justly and wisely exercising." (Emphasis added).

¹²³ Republican Congressman Bromwell captured the sentiment, when he remarked that it was widely believed in and out of Congress "that Puerto Rico is to be a new market for our manufactured goods and food products." 33 Cong. Rec. – House 2044 (February 21, 1900).

¹²⁴ *Porto Rico v American R. Co.*, 254 F. 369, 370 (Cir. 1, 1918) (one of the purposes of the Act was to establish a government under "American auspices"). Almost thirty years after the enactment of the Foraker Act, a Brookings Institution report would remark that "[t]he Foraker Act was designed to assure the people of Porto Rico full opportunity to express their will in all public matters through regularly-elected representatives, but to prevent their political inexperience from provoking crises or engaging them in unwise public projects." *Porto Rico and its Problems*, The Brookings Institution, Washington D.C. 1930, pg. 94. (Emphasis ours).

¹²⁵ See Art. 29 of the Foraker Act, 31 Stat. 77, ch. 191 (1900). When Congress enacted the Foraker Act in 1900, it specifically saved all local laws "not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable", including those amended and modified by Military Orders and decrees. Section 8, Foraker Act. The US Supreme Court observed that this saving clause was a product of over-abundant caution by Congress, rather than a legal necessity, since municipal laws of an acquired territory continue in force after cession, without the need for Congressional action. *Ortega v Lara*, 202 U.S. 339, 342 (1906). However, Section 8 of the Act also saved the amendments and modifications to those laws made through Military Orders and decrees. By so doing, Congress ratified the Military Provisional Government's administration for the period encompassing from the ratification of the Treaty of Paris until the passage of the Foraker Act. In *Alvarez y Sánchez v United States*, 216 U.S. 167, 176 (1910), the Court suggested that such ratification may not have been necessary to sustain the validity of a military order abolishing a public office that under former Spanish laws was treated as property amenable to conveyance for consideration. Unlike Section 8 of the Foraker Act, the Platt Amendment contained more explicit ratification language extended to all acts and decrees rendered by the Military provisional Administration in Cuba: "all acts of the United States in Cuba during its military occupancy thereof are ratified and validated..." Act of March 2, 1901, [chap. 803, 31 Stat. at L. 897]. C.f. *O'Reilly de Cámara v Brooke*, 209 U.S. 48 (1908). Prior to *Alvarez y Sánchez*, and *Santiago*, the Attorney General of the United States had noted that the status of Guam, also a territory acquired in the course of the Spanish-American War, was "anomalous". He noted that: "[n]either the Constitution nor the laws of the United States have been extended to them" and only military administration existed through the authority of the President as Commander in Chief of the Armed Forces. 25 *Opinions of the*



ing traditions, values and, eventually, a new body of laws,¹²⁶ including tax statutes that were shaped and had evolved within the US constitutional framework.¹²⁷ As Gibbon would delicately describe it, when speaking of the expansion of the Roman Empire, this was nothing other than the tried and true use of “the gentle, but powerful influence of laws and manners ...[to] ceme[nt] the union of the provinces.”¹²⁸

In sum, despite Secretary Root’s misgivings,¹²⁹ Congress determined that the extension of federal law, a territorial government rooted on a semblance of representative democracy supervised by federal and local courts, a Commission that would facilitate the review and adoption of familiar rules of civil, commercial and tax laws,¹³⁰ the exemptions from federal internal revenue laws,¹³¹ eventual

Attorneys General 292 (1904). Guam was left in a legal limbo, governed for 52 years by military administration until 1950, on the strength of these cases.

¹²⁶ Despite the winds of change pulling toward the adoption of US common-law concepts and methods, Secretary Root had rejected a proposal made in 1899 by Judge H. G. Curtis (appointed by Secretary Root’s predecessor, Russell A. Alger), as part of the panel recommendations made to the Secretary of War, to replace the Puerto Rico Civil Code. Triás, Monge, pgs. 199-200.

¹²⁷ Section 40 of the Foraker Act, 31 Stat. 77, ch. 191 (1900) called for a Commission to revise and compile laws, with the obvious view to bring Puerto Rico closer to the American commercial orbit. James S. Harlan, Puerto Rico’s Attorney General, noted in his second annual report to the U.S. Attorney General after the Foraker Act’s enactment, that “[o]ne of the most important features of our insular history during the past year has been *radical changes* and amendments in the body of [Puerto Rico’s] laws.” He concluded that it was his “confident belief that substantial progress ha[d] been made during the year in the process of establishing American institutions in this island.” *Annual Report to the Attorney General of the United States*, October 1, 1901 to September 30, 1902, in *Opinions of the Attorney General of Porto Rico*, Vol. I, 265, 278 (Nov. 1, 1902). (Emphasis added).

¹²⁸ Gibbon, Edward, *The History of the Decline and Fall of the Roman Empire*, Vol. I, Chap. II, p. 31.

¹²⁹ *Report of the Secretary of War*, (1899), Washington Printing Office, p. 24.

¹³⁰ A priority for the newly-installed Puerto Rico Legislature was not only enacting tax reform, but also adopting a law on corporations inspired by the New Jersey Corporation Act, as well. See 26 *Opinions of the Attorneys General* 176 (1907) (Foraker Act allows Puerto Rico to adopt a corporation act). Both Acts were considered crucial for attracting stateside investment, by molding the island’s legal system to one more aligned with US legal traditions. Puerto Rico’s Attorney General would report to the U.S. Attorney General, that a modified version of the New Jersey corporate act would “affor[d] investors an opportunity to organize companies in the island on a plan that has been perfected in the light of judicial decisions and is more or less familiar to the American investing public.” *Annual Report to the Attorney General of the United States*, included in *Opinions of the Attorney General of Puerto Rico*, Vol. I, at 265, 266, Oct 1, 1901 to Sept. 30, 1902. As the Attorney General had noted, the choice of New Jersey corporate law was not an idle one. New Jersey, by the late 1890s, had gained immense popularity with corporations seeking a jurisdiction in which to incorporate under flexible and versatile corporate instruments that allowed for absentee ownership. Legal commentary trumpeted such advantages. Keasbey, E. Q., *New Jersey and the Great Corporations*, 13 Harv. L. Rev. 198 (1899). They were none other than corporate “flags of convenience”, as Lawrence M. Friedman called the shopping for friendly jurisdictions to incorporate. Friedman notes that under New Jersey’s corporation act of 1896, 1,336 corporations were organized, including a significant amount of major industrial corporations at the time. In 1899, Delaware also passed a popular corporation act and eventually established itself as the jurisdiction of choice to incorporate. Friedman, Lawrence M., *A History of American Law*, Second Ed., Simon & Schuster,



free trade with the US, and an ample supply of cheap labor, would collectively form a strong draw for the Island to attract and expand mainland investment.¹³²

Under the Foraker Act, military administration transitioned to a civil government comprised of three branches, although not nearly patterned to the US con-

(1985) at 525-6. Puerto Rico would eventually adopt a modified version of the Delaware Corporation Act in 1956, since repealed, and more recently, substituted in the last decade by a more modern amended version.

¹³¹ Upon the advent of the Commonwealth of Puerto Rico in 1952, judge Magruder of the First Circuit Court of Appeals, would remark that this federal tax exemption would render inapplicable any argument of "taxation without representation". Magruder, *The Commonwealth of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 7 (1953). But, there was no mention in the debates over the Foraker Act about taxation without representation. Self sufficiency and economic development were the driving forces for the exemption, rather than any concern for impinging on this emotional argument or doctrine that originated in the US colonies while resisting British colonial rule. Eventually, the potential loss of the exemptions was used to dissuade Puerto Rico's political leadership from promoting further political and status reforms. For example, on March 11, 1903, the Judiciary Committee of the Executive Council, as the upper house of the new Legislature was called under the Foraker Act, rendered a report recommending the shelving of a lower House resolution petitioning Congress for the extension of the Constitution as a stepping stone toward eventual statehood. The report countered that extending the Constitution would eliminate all fiscal advantages that Puerto Rico had of not being subject to federal internal revenue laws and the benefits of the proceeds of all U.S. customs duties collected on the island on foreign imports:

"The imposition upon us of the internal revenue system of the United States would destroy our industries, and the absorption of the large annual taxes collected under that system, as well as the absorption of the revenues now accruing to us from custom duties, would make it impossible to support the highly-organized government now existing here without throwing upon real estate and industry an extraordinary and crushing burden of taxation.

With the present conditions undisturbed, there is no limit to what may be accomplished in the future for the good of the people of the island. If our products and our industries and our energies may remain unburdened for national purposes and be taxed only for our own benefit and only as our own legislative authority shall direct, our schools will multiply, our roads be lengthened and in every other way we shall be able to work out the highest development of which we are capable." *Report of the Judiciary Committee to the Executive Council of Porto Rico, included in Opinions of the Attorney General of Porto Rico*, Vol. 1, 210, 217-218.

The humiliating reprimand directed at the House of Delegates further admonished that it was "wiser [for Puerto Rico to] retain these advantages *in silence*...without giving forth the impression of discontent", darkly hinting a loss of these arrangements, if Puerto Rico continued to insist on greater political reforms. *Report of the Judiciary Committee to the Executive Council of Porto Rico* at 216. (Emphasis added).

¹³² The groundwork for this policy had already been underway during the military provisional government's administration, ("American military governors in Puerto Rico saw it as their main duty to pave the way for the influx of capitalists from the states"). Torres, at 59. During the course of the debates, southern Democrat Senators, such as Senator Tillman from South Carolina, made many allusions to the harsh treatment the South received during Reconstruction. He contrasted this with what the South perceived as being a favorable interest of the McKinley Administration in building roads and schools in Puerto Rico. With the Reconstruction era so fresh in their minds, these southern senators also recalled the carpetbaggers that crisscrossed the South in search of businesses and property at bargain prices and expressed concerns that the Island would also be subject to a more modern version of these hustlers: "Is it the purpose of this adverse legislation to wait until the carpet baggers have gone to Puerto Rico and, by misgovernment and some kind of devilish combination, seize all the valuable property in that island and then we will have a change of policy? That is not a far-fetched thought, although I see some of my friends on the other side smiling." 33 Cong. Rec. -Senate 2974 (March 16, 1900) (Remarks of Senator Tillman while HR 8245 was being debated.)

stitutional model of separate and co-equal branches of government.¹³³ The governor was a Presidential appointee and the Legislature a hybrid bicameral body that incorporated features of the English parliamentary system, with only the Lower House (House of Delegates) to be a fully-elected body. The members of the Executive Council, as it was denominated by the Act, consisted exclusively of presidential appointees, of which several served simultaneously at the President's discretion in the governor's cabinet. Five members of the Executive Council had to be "native inhabitants of Porto Rico."

The Foraker Act also provided for the election of a non-voting delegate to the United States, to be paid a salary by the federal government. It also included courts, consisting of a local Supreme Court and a US District Court,¹³⁴ with appellate jurisdiction as a Circuit Courts of the United States.¹³⁵

¹³³ The Foraker Act (31 Stat. 77, ch. 191 (1900)) was passed by Congress on April 12, 1900 and made effective on May 1, 1900. Given the short time frame for the President to select and appoint and the Senate to confirm all presidential appointees for the new colonial administration of the island, including the new Governor's post and his Cabinet, and the election of a lower House, Congress approved Joint Resolution Number 23, directing that the military provisional government officers continue to exert executive authority under the new Act, until no later than August 1, 1900. The McKinley Administration wasted no time. On May 1, 1900, Charles Allen was inaugurated as the first civil governor of Puerto Rico. The President also appointed four Puerto Ricans as members of the Executive Council and William Hunt as its chairman. The Puerto Rican Council members hopelessly deadlocked over party lines on electoral redistricting. The Federal Party members of the Council resigned and the party abstained from participating in the first general elections to elect the House of Delegates, as the Lower House was called in the Foraker Act. This turned out to be a blunder of historic proportions. Elections were held and the Republican Party, friendlier to the new Governor, swept unopposed, gaining control of the House of Delegates and the Executive Council. Morales Carrión, at 160.

¹³⁴ Initially, the new civil government set aside resources to fund the District court's payroll, under the assumption that the court was simply another local court whose judge, officers and employees were insular government employees. On October 1, 1900, the US Comptroller of the Treasury ruled otherwise under Sections. 34, 36 and 14 of the Foraker Act. 31 Stat. 77, ch. 141 (1900): "[i]t cannot be doubted that the above section[s] creat[e] a United States district court and makes a federal district out of the Territory of Porto Rico." *VII Decisions of the Comptroller of the Treasury, July 1900-June 1901*, Washington, Government Printing Office, 1901, ps. 145-151

¹³⁵ Judgments from both courts were reviewable by the U.S. Supreme Court, Section 34 of the Foraker Act, 31 Stat. 77, ch. 191 (1900). Prior to the Foraker Act, Governor Davis, through General Order No. 88 of June 27, 1899, had already constituted a court that functioned similarly to a U.S. District Court. Par. II of this General Order provided that this Court's jurisdiction would "extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution..." (Emphasis added.) This jurisdiction implied that the Constitution extended to Puerto Rico, which was clearly inconsistent with the McKinley Administration's posture on constitutional separation, and the decree exceeded his orders under General Orders 101 issued by the Secretary of War and rulings by the Attorney General and the Secretary of the Treasury. 22 *Opinions of the Attorneys General*, 560 (1899). *V Decisions of the Comptroller of the Treasury, July 1898-June 1899*, pgs. 493-495 ("there was no intent...to extend by [the treaty of Paris] either the Constitution or its statute laws.") The Foraker Act also had provisions that would imply, inconsistently, that the Constitution applied. After the Foraker bill was enacted, the Attorney General of the United States noted that conferring trial and appellate jurisdiction to the U.S. District Court could leave parties "...in a large class of cases...no means of [independent] review whatever... in cases determined by the district court of the United States, which is presided over by a single judge." *Annual Report of the Attorney General of the United States*, 1900, Washington, Government Printing Office (1900) at 402-403.



As part of Congress' assumption that Puerto Rico remained outside the Constitution's shadow, the Foraker Act underscored that the Island residents formed "a body politic", separate from the United States, to be known as "The People of Puerto Rico". This polity would have the power to sue and be sued.¹³⁶ Citizenship, one of the unifying mortars of any nation¹³⁷, was deliberately not extended to residents of Puerto Rico.¹³⁸ Bowing to protectionists concerns,¹³⁹ Congress

¹³⁶ *Porto Rico v Rosaly*, 227 US 270 (1913) (the territorial government enjoyed sovereign immunity).

¹³⁷ With his characteristic flourish, Gibbon noted that, had Rome "always confined the distinction of [its citizenship] to the ancient families within the walls of the city,...[it] would have been deprived of some of its noblest ornaments", such as Virgil, Horace, Cicero, Cato and others. Gibbon, Edward, *The History of the Decline and Fall of the Roman Empire*, Vol. I, Chap. II, p. 63.

¹³⁸ The Foraker Act of 1900, 31 Stat. 77, ch. 191 (1900), conspicuously omitted to extend to Puerto Rico and its residents the provisions of the U.S. Constitution and the grant of US citizenship to local Puerto Rico residents, 23 *Opinions of the Attorneys General* 370, 371 (1901), and, unlike the Philippines in 1902, even a bill of rights. P.L. 235 of July 1, 1902, 32 Stat. at L. ch. 1369, Sec. 5, p. 691-692. This certainly had not been Congress' *modus operandi* in the past. On the contrary, Congress, through the Ordinance of 1787 and 1798, provided territories a clear path toward statehood and full enjoyment of the rights of citizenship to its residents. L. M. Friedman, *A History of American Law*, Second Ed., Simon & Schuster, at 157-167 (1985). When Congress enacted the Organic Act for the territory of New Mexico, it provided that: "[t]he Constitution, and all laws of the United States which are not locally inapplicable, shall have the same form and effect within the said Territory of New Mexico as elsewhere in the United States." Act of Sept. 9, 1850, Sec. 17, 9 Stat. at L. 452. The U.S. annexed Hawaii, on August 12, 1898, scarcely 3 weeks after landing troops in Puerto Rico. In Sec. 5 of its first Organic Act approved just 18 days after the Foraker Act of 1900 was passed, Congress provided "[t]hat the constitution, and except as herein otherwise provided, all the laws of the United States which are not locally inapplicable." and Sec. 88 made Hawaii a U.S. customs district. 56th Cong., Sess. I, Chap. 339, 31 U.S. Stat. at L. 141.

¹³⁹ By denying residents the U.S. citizenship they had been entitled to by cession under the law of nations, protectionists codified what administratively had been the immigration policy of the McKinley Administration for the new territories. 23 *Opinions of the Attorneys General* 370, 371 (1901). With this, protectionists and elements in Congress preoccupied about racial matters put up the immigration laws as a barrier against their fears of mass migration of cheap labor to the mainland, perhaps induced by an expanding economy or significant disparity in wages and standards of living at home. This policy of alien exclusion would end with *González v Williams*, 192 US 1 (1904) (Puerto Rico residents not aliens under the immigration laws.) As said, the exclusion, which was implied but unclear in the last paragraph of Art. IX of the Treaty of Paris, was in itself unprecedented. At the time, international law considered that, upon cession, the inhabitants of the annexed territory were automatically extended the nationality, and owed allegiance to the acquiring state. Despagnet, *Droit International Public*, 2d Ed. 420; Philimore, Vol. I *International Law*, pgs. 585, 604. This was also how case law understood the rule: "The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise as may be provided." *Boyd v Nebraska ex rel Thayer*, 143 US 135, 162 (1891). Furthermore, Art. IX also indicated that lacking a specific show of allegiance to the ceding state, the island residents shall be held to have renounced their former allegiance "and have adopted the nationality of the territory in which they reside." This being understood to mean the United States.

140 Judge Cabranes examines in depth the politics and legislative history of how Senator Foraker's bill, S2264 mutated from one that called for a collective grant of American citizenship to scrapping the same and in its place engrafting a provision to consider persons residing in Puerto Rico as "citizens of Puerto Rico". Cabranes, pgs 22-44. Until recently, this citizenship was widely considered a juridically empty concept that was not meant to confer meaningful rights within or outside of Puerto Rico. But see *Miriam J. Ramírez de Ferrer v Juan Mari Brás*,¹⁴²

established that Spanish residents in the island were to be just “citizens of Porto Rico”.¹⁴⁰ This established a new and unprecedented class of political non-descripts outside of the U.S. constitutional system, that were to be extended the “protection” of the United States, unless allegiance by peninsular-born Spanish residents of Puerto Rico to Spain was expressly reaffirmed.¹⁴¹ This model conformed to Secretary Root’s idea that Puerto Rico should be a protectorate.

Thus, Puerto Rico continued to be constitutionally quarantined and its residents, considered aliens for immigration purposes¹⁴² in what would look more like an amorphous protectorate, in a constitutional “no man’s-land.” Obviously, the McKinley Administration had no long-range thought as to where this experiment would eventually lead. It was clear, that the efforts were aimed at putting off hard decisions and buy time for the McKinley Administration to get a handle on its newly-acquired colonies, while moving toward improving the material well-

¹⁴⁰ DPR 941 (1997) (a local resident that renounced his US citizenship is still entitled to vote in Puerto Rico elections, by virtue of his Puerto Rico citizenship.) Senator Foraker disingenuously explained that Congress was more intent in addressing revenue needs, albeit at the expense of citizenship, since, presumably, the latter, constitutionally, would impede the relief measures sought: “if we made [Puerto Ricans] citizens of the United States, we thereby made them a part of the United States, and...that provision of the Constitution with respect to uniform taxation would apply, and we could not raise revenue in the way proposed in this bill.” Cabranes at p. 42. Chief Justice Taft, (formerly President of the United States and Governor of the Philippines) described the provision extending the Foraker Act citizenship of Puerto Rico to local residents, as an “anomalous status”. The Court further held, when reviewing the significance of the collective grant of United States citizenship provided for in the Jones Act of 1917, 39 Stat. 951, ch. 145, that, contrary to Senator Foraker’s view, this grant did not change Puerto Rico’s constitutional status to that of an incorporated territory. *Balzac v Porto Rico*, 258 U.S. 298 (1922). Not surprising, then, was the fact that Puerto Rico’s Attorney General did not attach much significance to the concept of Puerto Rico citizenship put forth in the Foraker Act. He opined that municipalities were not empowered under such Act to issue certificates in lieu of passports, since this was an act of sovereignty that only the United States could exercise. Essentially, the certificates established that the holder, as a citizen of Puerto Rico, was entitled to the protection of the United States and should be accorded the same courtesies and legal protections extended by foreign countries to US citizens. *Opinions of the Attorney General of Porto Rico*, Vol. I, 175, 175-76 (1902). Unbeknownst to Puerto Rico’s Attorney General at the time was the fact that the President had already signed into law a bill that delegated authority to Puerto Rico to issue passports to those “owing allegiance, whether citizens or not, to the U.S.” 40 Stat. at L. 386, ch. 1088.

¹⁴¹ Section 7 of the Foraker Act, 31 Stat. 77, ch. 191(1900). Under Spanish law, persons born in Puerto Rico were Spanish citizens. The Treaty of Paris stripped them of their citizenship, if they chose to remain residents of Puerto Rico. This was unlike the case of Puerto Rico residents born in the Spanish peninsula prior to the treaty of cession, who could elect to retain their Spanish citizenship. Section 7, of the Foraker Act, 31 Stat. 82 (1900). *González v Williams*, 192 US 1, 9-10 (1904). The politics, congressional debates and constitutional implications flowing from granting US citizenship outright to Puerto Rico under the Jones Act of 1917, 39 Stat. 951, ch.145 (1917) and the policy implications of selective exclusion of such privilege to the Philippines is discussed in depth in Cabranes. See 23 *Opinions of the Attorneys General* 370, 371 (1901) and 400, 401 (1901).

¹⁴² Until *González v Williams*, 194 US 1 (1904) held otherwise, island residents were viewed and treated as aliens under the Foraker Act, 31 Stat. 77, ch. 191 (1900) and could be denied access to migrate to the mainland, unless, as any other alien was required to do, they could prove they were not going to end up being a public charge. For a comprehensive history and survey of US immigration policy see Hutchison, E.P., *Legislative History of American Immigration Policy, 1798-1965*, University of Pennsylvania Press, Philadelphia, (1981), pgs. 97-127.



being of the residents. Despite this, by virtue of the Foraker Act, federal law now applied in Puerto Rico except, “where locally inapplicable.”¹⁴³ The extension of federal law and the establishment of a federal District Court,¹⁴⁴ clearly, were incompatible with the spirit of the McKinley Administration’s formula of constitutional exclusion¹⁴⁵ but equally, if not more so, consistent with the goal of commercial integration.

This result was driven not by constitutional dogma of any sort, but more plausibly, by protectionism and market integration. After protectionists on both sides of the aisle in Congress failed to keep Puerto Rico permanently outside of the tariff union of the US, their alternate efforts bore fruit to avoid allowing the island’s industries or others that could migrate to the island, to operate under considerably lighter legal burdens - i.e. under exemptions from federal law - than those weighing down their competition on the mainland.¹⁴⁶ Protectionists and

¹⁴³ Congress’ future approach to the Philippines, which called for only an *ad hoc* extension of federal law, was the one that Secretary Root had favored (*Report of the Secretary of War, 1899*, Washington, Government Printing Office, pg. 24) for Puerto Rico but was rejected in S. 2264 and the Foraker Act of 1900 when enacted. See section 5 of the Jones Act of 1916 for the Philippines: “...the statutory laws of the United States...shall *not* apply...*except* when they specifically so provide...” (Emphasis added.) P. L. 240 of August 29, 1916, 39 Stat. at L. ch. 416, 545 at p. 547. One example of the exception was extending the laws of US coastal trade (cabotage) to the Philippines. P. L. 114 of April 15, 1904, 33 Stat. at L., ch. 1314 at pgs. 181-182.

¹⁴⁴ During its first year of operation under the Foraker Act, the court’s case volume was negligible: *First Annual Report of Charles H. Allen, Governor of Porto Rico, May 1, 1901*, Washington, Government Printing Office, 1901, pg. 27. (“Since the organization of the district court of the United States, presided over by the honorable W. H. Holt, in August of last year, the volume of business has been small, but it has received all the requisite attention.”)

¹⁴⁵ Congress deliberately took a different approach for Hawaii, annexed on Aug. 12, 1898. The distinction was driven by military strategic concerns and, most importantly, by the islands low population density. Democrat Congressman Newlands explained with prescience the sense of the Congress for the need to annex and incorporate Hawaii: “[Hawaii] is an outpost in the Pacific, controlling our defensive line from the Aleutian Islands to San Diego, and in the possession of a hostile power [read Japan] it could be made the base of attack upon our entire [west] coast. The annexation of Hawaii [involved] no complex problems in regards to the people occupying those islands. Only 100,000 people occupied them.” 33 Cong. Rec. – House 2001 (February 20, 1900). The disparate treatment when compared with Puerto Rico evidenced itself in Hawaii’s first Organic Act (“An Act to Provide a Government for the Territory of Hawaii) that provided for the extension of the Constitution, and all US laws “which are not locally inapplicable.” 56th Cong., Sess. I, Chap. 339, 31 Stat at L. 141 (1900). Significantly, the Hawaii provision was enacted shortly after the Foraker Act of 1900, 31 Stat. 77, ch. 191 (1900).

¹⁴⁶ Regional protectionist battles also raged within the United States, particularly during the New Deal era. When the Roosevelt Administration proposed the Fair Labor Standards Act (FLSA), the Industrial northeast was concerned that maintenance of lower wages in the South would increasingly attract jobs away from its region. The Roosevelt Administration thought that a uniform wage law would not only provide social justice but would level the playing field wage-wise. Southern senators insisted that regional and even industry differences and considerations be kept into account in the wage laws. The end product, as is usual in a parliamentary democracy, was a compromise. For further information on the history and adoption of the FLSA see Koretz, Robert, F. *Statutory History of the United States Labor Organization*, Chelsea House Publishers, NY (1970), pgs 454; Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. of Miami L. Rev. 607 (1972).

their allies in Congress, concluded that the Foraker Act had enough provisions underscoring the point of constitution exclusion, to allow Congress the flexibility to extend federal law as another means to regulate local affairs. Free-market proponents were in favor of the extension of federal law, since it was in harmony with the goal of market integration under uniform-trade federal rules.¹⁴⁷ The extension of federal law contrasted with Secretary Root's preference of an extension on an ad hoc basis, which was the system that was used with the Philippines.

Despite the fact that Congress considered, but chose not to extend citizenship to Puerto Rico residents, the application of federal law to the island, reasonably fueled the notion that the Foraker Act had chipped away considerable armor from the Administration's opening and convenient stance of constitutional separation. That was because the wholesale application of federal law had been normally associated with incorporated territories that were on their way to being admitted as states. Further, the view that federal laws could be extended and enforced untethered from their constitutional moorings seemed like an absurd construct of law.¹⁴⁸ Even certain of the Foraker Act's provisions implied otherwise.¹⁴⁹

¹⁴⁷ See 33 Cong. Rec. –Senate 3359-60 (March 27, 1900) (Remarks of Senator Foraker, laws governing federal national banks and currency applied in Puerto Rico under the bill that would become the Foraker Act.) The immediate and wholesale extension of federal law to Puerto Rico undermined the purpose and salutary effects of extending a semblance of representative democracy under the Foraker Act.

¹⁴⁸ Even before Secretary Root took charge of colonial policy, the McKinley Administration had administratively assumed that such lack of linkage was constitutionally possible: “[i]t is quite evident from a reading of the entire treaty [of Paris] that there was no intent...to extend by that instrument *either* the Constitution or its statutes” (Emphasis supplied). *V Decisions of the Comptroller of the Treasury*, July, 1898, June, 1899, pgs. 493-495. The use of the disjunctive “either” and “or” would imply that the latter or even some federal laws (general or specific to Puerto Rico) could be enforced without all other federal laws and the Constitution applying to Puerto Rico. The Foraker Act of 1900's premise was that the Constitution did not apply to Puerto Rico but all federal law did, unless a particular piece of legislation was “locally inapplicable.”

¹⁴⁹ Section 14 of the Foraker Act. 31 Stat. 77, ch. 191 (1900). The legislative history of the Foraker Act is rife with concerns expressed by Senators and Congressmen that, in reality, were aimed at the perils of integration and avoiding extending the Constitution to Puerto Rico to cause this to happen. However, Section 16 of the Act required “all officials authorized by this Act shall, before entering upon the duties of their respective offices, take an oath to support the Constitution of the United States...” (Emphasis added). The inconsistency was noted by Tennessee Senator Bate, when he remarked: “If the Constitution of our country has not extended its vigor along with the flag...why is it that those officers who are there...are required to take the oath of office to the Constitution of the United States?” 33 Cong. Rec. – Senate 3609 (April 2, 1900). But the inconsistencies did not end there. Section 34 of the Foraker Act established writs of error and appeal from the US District Court and the Puerto Rico Supreme Court “in all cases where *the Constitution of the United States*, or a treaty thereof, or an Act of Congress is brought into question and the right claimed is denied...” (Emphasis added). All “statutory laws”, as opposed to Constitutional provisions, of the United States were to have full force and effect, except when “locally inapplicable”. Nevertheless, was it to be understood by this blanket extension of federal laws that the Constitutional provisions empowering and limiting Congress' were implicitly extended when legislating for Puerto Rico? If Congress did not intend to extend any portion of the Constitution to Puerto Rico, what then was the underlying reason for establishing rights to appeal to the US Supreme Court, when the basis was an assertion that a constitutional right had been denied or requiring government officials to uphold such Constitution in the discharge of their official duties? Congress may have intended to have some Constitutional



But that is exactly what Congress intended, and the Foraker Act was meant to accomplish. This provision, which did not hint under what conditions federal laws would not apply in Puerto Rico, was inspired from similar language included in other organic laws extended to other territories on the mainland. The conspicuous and still significant difference now was that the portion of the phrase that spoke of the extension of the Constitution was deliberately left out.¹⁵⁰ Further underscoring this constitutional point, the Act failed to provide for a bill of rights, leaving local residents now “citizens of Puerto Rico”, outside of the mainland job market,¹⁵¹ while, at the same time, as formally disenfranchised from fundamental rights at home, as when military administration governed the Island.¹⁵²

But, the deliberate omission without safeguards could have cut both ways. A constitutional wasteland in a newly-created free-trade zone, the McKinley Administration initially had envisioned it, would have also left mainland investors intending to do business in Puerto Rico, without adequate protections against

protections extend at least to U.S. citizens residing on the island, but shied away from stating which ones, to avoid further suggestions that the Constitution applied in Puerto Rico. More plausibly, it may have been a case of bad “cut and paste” drafting, using the Hawaii bill as a guide. This may be one of many reasons why in his first annual report to the U.S. Attorney General, Puerto Rico’s Attorney General noted that the United States District Court in the island handled “very few [civil] cases [that involved] the constitution, laws or treaties of the United States.” *Annual Report to the Attorney General of the United States* dated Nov. 10, 1901, included in *Opinions of the Attorney General of Porto Rico*, Vol. I, 237, 249 Oct. 1, 1900 to Sept. 30, 1901. In contrast to this congressional attitude, was the different approach taken with Hawaii, annexed on Aug. 12, 1898. Hawaii’s first Organic Act (“An Act to Provide a Government for the Territory of Hawaii) provided for the extension of the Constitution, and all US laws “which are not locally inapplicable.” 56th Cong., Sess. I, Chap. 339, 31 Stat at L. 141.

¹⁵⁰ Leibowitz indicates that the inspiration for this provision is traceable to the act of 1836 establishing a civil government for the territory of Wisconsin. Leibowitz, p.634. Two further examples on the use of this provision suffice: New Mexico: “The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within said territory of New Mexico as elsewhere within the United States.” Act of Sept 9, 1850, ch. 49, Sec. 17, 9 Stat. 452; Hawaii; “That the Constitution, and except as herein provided, all the laws of the United States which are not locally inapplicable...” Act of April 30, 1900, Sec. 5, 56th Cong., Sess. I, Chap. 339, 31 Stat. at L. 141.

¹⁵¹ Naturally, until *González v Williams*, 192 US 1 (1904) ruled otherwise.

¹⁵² Habeas corpus was allowed, with some exceptions, both under military administration and the Foraker Act. 31 Stat. 77, ch. 191 (1900). See Trías Monge, J., *Historia Constitucional de Puerto Rico*, Vol. I, Editorial Universitaria, Río Piedras, Puerto Rico (1980), at p. 223. The omission of a lack of a bill of rights was corrected in the Second Organic Act of 1917 (“The Jones Act”). 39 Stat. 951, ch. 145 (1917). In the interim, a weak bill of rights was enacted by the Puerto Rico legislature on February 27, 1902. *Leyes de 1902*, at pg. 12. The Judiciary Committee of the Executive Council of Porto Rico had a more positive view of this omission and of the locally-enacted bill of rights: “Our insular constitution [Foraker Act] and the body of our laws give to us now all the constitutional guarantees enjoyed by citizens of the United States. We can, by appropriate legislation, give ourselves anything that is lacking.” *Report of the Judiciary Committee to the Executive Council*, at 218. Congress’ failure to include a bill of rights in the Foraker Act did not seem to be an oversight. The concern then was that any attempt to engraff language, similar in nature to the Bill of Rights in the Constitution, could have given a basis for the argument that the Constitution had been extended to Puerto Rico. This was precisely what happened when a statutory bill of rights and US citizenship was extended under the Jones Act of 1917. *Balzac v Porto Rico*, 258 US 298 (1922). Justice Brown’s reply to this

offending territorial laws, regulations or administrative actions. Initially, this may have not been a cause for alarm, since the Foraker Act had ample structural safeguards to ensure American political and administrative control of the courts and key branches of government.¹⁵³ But even then, a lack of minimal constitutional safeguards would prove to be so contrary to long-held Anglo-Saxon notions of fairness, that the Supreme Court, in the Insular Cases, would yield to the sirens of constitutional order. As Chief Justice Taft would later remark, the “guarantees of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty or property without due process of law, had, from the beginning, full application in the Philippines and Porto Rico”¹⁵⁴

The enactment of Puerto Rico’s second organic act (Jones Act of 1917),¹⁵⁵ that expanded local citizen participation through two elected chambers and provided for a bill of rights, further induced the local bar to invoke federal constitutional and statutory provisions as a counterweight for redress against local legislation perceived as governmental overreach.¹⁵⁶

Constitutional voids are abhorrent to any organized society that cherishes a system of laws. So, the Foraker’s Act recognition of a polity, the Island’s constitutional isolation would eventually be recast by Puerto Rico’s government, not as a shortcoming, but an affirmation of the Island’s continued and inherent sover-

omission was:” There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.” *Downes v Bidwell*, 182 U.S. 244, 280 (1901). Justice Harlan retort was swift, unsparring and on the mark: “[The framers of the Constitution] well remembered that Anglo-Saxons across the ocean had attempted, in defiance of the law and justice, to trample upon the rights of Anglo-Saxons on this continent.” *Downes*, at 381.

¹⁵³ When summarizing the accomplishments of the first legislative session, Governor Allen noted that the Executive Council served as a more experienced and “valuable conservative force in the onward rush of progressive legislation.” In schoolmaster fashion, he also noted that “it is not so much what the legislative assembly did, as what it refrained from doing, which entitles it to the encomium from the people of Porto Rico...Among the 36 acts [passed]...not one foolish expression of the legislative will is to be found, and [consequently] not one of these acts will be speedily repealed.” *First Annual Report of Charles H. Allen, Governor of Porto Rico*, May 1, 1901, Washington, Government Printing Office (1901), at page 76.

¹⁵⁴ *Balzac v People of Porto Rico*, 258 US 298,312-313 (1922).

¹⁵⁵ *Id.*

¹⁵⁶ Even before the enactment of the Jones Act of 1917, Puerto Rico’s Attorney General’s Office assumed that the Commerce Clause applied to Puerto Rico. 1 *Opinions of the Attorney General of Porto [sic] Rico*, 107, 111 (1902) and, in particular, to matters associated with collections of the import excise tax at the water’s edge. 4 *Opinions of the Attorney General of Puerto Rico*, 106, 107 (1913). The Puerto Rico Supreme Court also assumed that the imperatives of federalism extended the Commerce Clause to Puerto Rico. *Ponce Lighter Co. v Municipality of Ponce*, 19 P.R.R. 725 (1915).



eignty and wide powers.¹⁵⁷ Armed with this position, it would assert in future litigation that constitutional separation equated to constitutional empowerment, allowing Puerto Rico the necessary constitutional latitude to enact bold legislation over cross-border commerce that would fail, if enacted by a state.¹⁵⁸ With the advent of Commonwealth in 1952, the Puerto Rico Supreme Court expounded such position in oft-quoted dicta.¹⁵⁹ However, the US Supreme Court and federal appellate case law have ruled otherwise.¹⁶⁰

V. Tariffs under the Foraker Act

The Foraker Act abolished Puerto Rico's authority for enacting tariffs¹⁶¹ on US and foreign exports entering the island, that initially had been enforced by the military provisional governor, and subsequently exercised locally on the authority of the President as his Commander in Chief.¹⁶² Section 2 of the Act extended

¹⁵⁷ For an analysis of this view see Fuster, J. B., *The Origins of the Doctrine of Territorial Incorporation and its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce*, 43 Rev. Jur. U.P.R. 258 (1974).

¹⁵⁸ This proposition was pressed by Puerto Rico's counsel in briefs before the Supreme Court of the United States in *Bacardi Corporation of America v Domenech*, 311 US 150 (1940), It was articulated in the following terms:

"Direct regulation of interstate commerce is a field of legislative jurisdiction barred to the States of the Union by the commerce clause of the federal Constitution. It is a field into which they cannot enter... On the other hand, in the case of the Legislature of Puerto Rico, the situation is exactly reversed. In the latter case, the Congress having extended a general grant of all of its own local legislative power to the Puerto Rican Legislature, subject only to specified statutory exceptions and limitations, the Legislature can enter into and occupy any part of the field from which it is not excluded by some express provisions of the Organic Act, or by some other act of Congress." Respondent's brief at p. 62. (Emphasis added).

¹⁵⁹ *R.C.A. v Gobierno de la Capital*, 91 DPR 416 (1964) ("El Estado Libre Asociado puede ejercer hoy en cuanto al comercio interestatal se refiere, en forma que tal vez a un Estado cubierto por las disposiciones de la Constitución Federal no le sería permisible.")

¹⁶⁰ Prior to the establishment of the Commonwealth of Puerto Rico in 1952, the US Supreme Court had indicated that "legislative powers were conferred [to Puerto Rico] nearly, if not quite as extensive as those exercised by the state legislatures.", *Puerto Rico v Shell Co*, 302 US 253, 253, 261-262 (1937). With the establishment of the Commonwealth, the legislative powers increased but only incrementally and certainly not as dramatically as RCA inferred; from those "nearly" but not quite as extensive as those of a state, to those normally associated with the states. *Examining Bd. Of Eng'rs v Flores de Otero*, 426 US 572, 595 ("the purpose of Congress in the 1950 and 1952 legislation [establishing the Commonwealth of Puerto Rico] was to accord to Puerto Rico the degree of autonomy and independence normally associated with States." *Trailer Marine Transport Corp. v Rivera Vázquez*, 977 F2d 1, 7-8 (1st Cir., 1992) held the Dormant Commerce clause applicable in Puerto Rico. *Starlight Sugar, Inc. v Soto*, 253 F 3d 137, 142-144 (1st Cir., 2001)(The dicta in RCA was sidestepped as just "an amorphous statement that eludes concrete interpretation.")

¹⁶¹ Unlike the case of Puerto Rico, Congress enacted the Tariff Act of 1909 that called for the Philippines to impose and collect import duties for the benefit of its local fisc. When Congress legislated the Philippine Organic Act of 1916, it allowed the Philippines to alter, amend or repeal the Philippine Tariff Act of 1909 with the approval of the President of the United States and, by so doing, granted explicit autonomy to impose such import duties. *Asiatic P. Co. v Insular Collector of Customs*, 297 US 666 (1935).

¹⁶² Although the President chose to supersede the Spanish colonial tariffs and issue under his authority as Commander-in-Chief the provisional tariff regulations, the provisional military governor could have done the same, as General Miles once did, on behalf of Puerto Rico.

to foreign exports entering Puerto Rico the “same” tariffs that would be collected in the “United States” on the same exports, had they originated in “foreign countries”.¹⁶³ The proceeds of such collections would continue to benefit the Island’s fisc, as during military administration. This was just another instance where the Act extended transitional continuity to decrees and practices initiated by the Island’s military provisional government.¹⁶⁴ It was also a recommendation made by Governor Davis,¹⁶⁵ that Congress adopted, when enacting the Foraker Act.¹⁶⁶ Additionally, the U.S. Collector of Customs, not the new civil administration on the Island, was to administer and collect all tariffs, including those provisionally enforced on exports from the mainland. Thus, under both the military provisional administration and the Foraker Act, all tariffs on foreign imports collected locally were earmarked exclusively for the benefit of the insular fisc.¹⁶⁷ However,

Foraker Act’s (31 Stat. 77, ch. 191 (1900)) withdrawal of Puerto Rico’s existing authority to impose customs duties was in sharp contrast with Congress consent in 1916 to allow the Philippines to amend the customs rates it could impose on U.S. and foreign exports, and, in 1917, for the U.S. Virgin Islands, upon acquisition, to maintain and continue to enforce the Danish custom rules on U.S. and foreign trade. The plan for the Philippines was independence. For Puerto Rico, it would remain undefined for the long-term.

¹⁶³ Fines, penalties and forfeitures were held to not constitute “duties” and thus the proceeds were to be transferred to the US fisc, not to Puerto Rico’s Treasury. 24 *Opinions of the Attorneys General* 621 (1903). An immigration head tax was equally held not subject to transfer to the Puerto Rico fisc, as not within the term duties. 24 *Opinions of the Attorney General* 86 (1902). The act providing for a temporary government for the newly-acquired Danish West Indies (U.S. Virgin Islands) in 1917, maintained the duties collected under Danish laws, (Section 4) except when the imported articles originated in the US. Exports from the former Danish West Indies to the US were to be subject to US duties and internal revenue taxes, upon entering the US mainland, except when the articles contained less than twenty percent in value of foreign materials. P.L. 389, of March 3, 1917, 39 Stat at L. ch. 171, 1132, Section 4 at page 1133 and Section 3 at page 1133 respectively.

¹⁶⁴ General Order No. 87, of June 16, 1899.

¹⁶⁵ “...it is recommended...that ..customs revenues collected here be left to the island, temporarily, as an income for local expenditure. As soon as a new local internal-revenue tax law can be framed and put into operation, the custom-house collections would inure to the [U.S.] General Treasury, but, for a few years, it will be very difficult to balance the budget without this aid.” *Report of Brigadier-General George W. Davis* at 81.

¹⁶⁶ Section 4 of the Foraker Act. 31 Stat. 77, ch. 191 (1900). It will be recalled that, in *Dooley v United States*, 182 US 222, 230-231 (1901), the Court held that tariffs collected by the military administration were illegal after the ratification of the Treaty of Paris. However, *Dooley v United States*, 182 US 222, 230 (1901) was handed down after military administration of the island had ended by virtue of the Foraker Act.

¹⁶⁷ General Order No. 87, par. 1, of June 16, 1899 directed that “[a]ll revenues collected and received under the United States military government of Puerto Rico, excepting those collected for the support of the municipalities, are required to be paid in full to the treasurer of Puerto Rico, at San Juan, without any deduction.” This order encompassed collections of duties and internal revenues and kept the authority to set, administer, collect and expend all revenues collected pursuant to this general order in the military provisional government. Although the Foraker Act maintained continuity with the policy of reserving for the island government’s local use all collections of customs duties on foreign imports, it reserved to the U.S. the tariff-setting authority and the administration of its collection. Puerto Rico’s late Resident Commissioner, A. Fernós Isern, espoused the view that the Foraker Act could have been interpreted to have



as trade with the United States expanded and intensified this source of revenue decreased markedly.

The eventual establishment of free trade - the most contentious hallmark of the Foraker Act - was conditioned upon transitioning first through a similar reciprocal short-term tariff scheme that existed under military administration. It was done for protectionist and political reasons,¹⁶⁸ using an unprecedented constitutional principle directed at excluding the Philippines from the Constitution's shadow, at the expense of Puerto Rico.¹⁶⁹ As before the Foraker Act, Puerto Rico exports to the mainland continued subject to the existing tariffs and rules applicable to foreign imports entering the United States under the Dingley Tariff Act of 1897,¹⁷⁰ but at fifteen percent of their former rates.¹⁷¹ Similarly, as during the

transferred the responsibilities for administering and collecting customs duties in Puerto Rico to the local government. A. Fernós Isern, *El Estado Libre Asociado*, Vol. I, pg. 26, Editorial Universitaria, Universidad de Puerto Rico (1974). Both the Puerto Rico government and the United States did not share this view when, contemporaneously with the implementation of the Foraker Act, these responsibilities were transferred to the federal government. See *Opinions of the Attorneys General*, Vol. 24, at 621, Government Printing Office (1903). A careful reading of the Foraker Act supports the latter view. Section 2 of the Foraker Act evidences Congress' intent not to transfer or relinquish the authority of the United States for imposing, setting tariff rates and *collecting* them at designated ports of entry in Puerto Rico. Particularly, Section 4 provided, *inter alia*, that "the Secretary of the Treasury shall designate the several ports and sub-ports of entry in Puerto Rico and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected and paid in Puerto Rico."

¹⁶⁸ When Senator Payne substituted his ill-considered and poorly-coordinated HR 6883 with HR 8245, it was done only after it created a major furor raised by industry over the lack of protection from cheap labor and competing exports from Puerto Rico, but, principally, from the Philippines. Democrat Congressman Henry from Texas observed that the change was driven by "...representatives of the sugar interests and the tobacco interests [in the South] hovered and swarmed around the Committee and said [HR 6883] would be disastrous to their interests." 33 Cong. Rec. - House 2045 (February 21, 1900). The South, just after Reconstruction, felt vulnerable to cheap labor offshore. Governor Davis also criticized HR 6883 from another flank; this time, as having the potential for destroying local industry in Puerto Rico, if the internal revenue laws were extended to the Island.

¹⁶⁹ South Carolina Democrat Senator Tillman caustically noted: "Hawaii was annexed in June of 1898. We had possession of Puerto Rico shortly afterwards, in August, and ...while we have not hesitated to give Hawaii the most liberal government that is possible [i.e. incorporation]...here is another island [Puerto Rico], almost similarly situated, and if we are not treating it like a stepdaughter or like an outcast, then I know nothing about the meaning of these words." 33 Cong. Rec. - Senate 2974 (March 16, 1900). Senator Foraker made this plain as well, but in a more diplomatic way, when he indicated that "...We fear no competition from Puerto Rico: that has nothing to do with it; but in the contingency, I have pointed out there may and would come a competition which would be prejudicial; and if we are wise, we will now legislate to prepare for protection when trouble comes." 33 Cong. Rec. - Senate, March 8, 1900, pgs. 2651-52. This comment about competition was clearly disingenuous. The Foraker Act of 1900, as we shall discuss, contained important anti-discrimination and tax-equalization rules that reflected competitive concerns, although, naturally, comparatively speaking, the Philippines, with its larger population, represented the bigger threat to US sugar, beet and tobacco companies in the South and the precedent was necessary to support protectionist provisions against the Philippines as well.

¹⁷⁰ Tennessee Democrat Senator Bate was unsparingly cynical about the motives behind the tariffs: "...I believe...that there is something behind Puerto Rico which is mightier than the Puerto Rican question....There is evidently behind it a political dagger in the shape of the

military administration, Puerto Rico was also required to collect tariffs; in this case, a mirror image tariff on US exports entering the island. As with the fifteen percent tariff applicable to Puerto Rico's exports entering the mainland,¹⁷² all tariffs collected in Puerto Rico on foreign and US shipments alike entering the island, were to be transferred to Puerto Rico's fisc after collection by federal customs officials.¹⁷³

The reciprocal tariffs constituted a significant reduction, when compared to the existing Dingley tariffs that had applied to Puerto Rico exports until the Foraker Act's enactment.¹⁷⁴ It was hoped that the savings arising from the spread would provide an immediate stimulus for Puerto Rico exports that formerly it did not have while under military administration and previous Spanish sovereignty.¹⁷⁵

After the Insular cases, Congress enacted a similar but harsher mirror image tariff for trade with the Philippines, in the Philippine bill of 1902. The more

Philippines." 33 Cong. Rec. – Senate 3608 (April 2, 1900). There was precedent for such duty. Congress had temporarily maintained special duties on exports from the Louisiana territory entering the U.S. between the time of the ratification of the treaty with France for the Louisiana Purchase on October 21, 1803 and March 25, 1804, when the act incorporating Louisiana into the U.S. customs union took effect. See 2 Stat at L. 251, chap. 13. The McKinley Administration unsuccessfully cited this precedent to uphold the legality of all collections of Dingley Tariffs on Puerto Rico exports to the mainland, subsequent to the ratification of the Treaty of Paris, in *De Lima v Bidwell*, 182 U.S. 1 (1901). *Dooley v United States*, 182 US 222 (1901) upheld such tariff.

¹⁷¹ Subsequent to the Foraker Act's (31 Stat. 77, ch. 191 (1900)) enactment, *Dooley v United States*, 183 US 151 (1901) upheld the constitutionality of the temporary fifteen percent duties.

¹⁷² Five weeks before the Foraker Act, 31 Stat. 77, ch. 191 (1900) took effect, Congress enacted legislation transferring all Dingley tariffs collected in the U.S. on Puerto Rico exports. 31 Stat. at L. 51 (1900). Section 4 of the Foraker Act incorporated this provision and provided transitional continuity.

¹⁷³ Section 4 of the Foraker Act. 31 Stat. 77, ch. 191 (1900). The Treasurer of Puerto Rico summarized this as follows: "... the insular government was relieved after May 1, 1900, of the financial responsibility attending the administration of customs service in Porto Rico, this being assumed by the Federal Government, and the net receipts deposited, at intervals, to the credit of the treasurer by the collector of customs for Porto Rico." *Report of the Treasurer of Puerto Rico to Governor Charles H. Allen, included in the Annual Report of Governor Charles H. Allen, May 1, 1900 to May 1, 1901*, at 131. Section 4 of the Act entitled "An Act Temporarily to Provide Revenue for the Philippine Islands" enacted on March 8, 1902, also known as the Philippine Bill of 1902 included a similar provision. 57th Cong. Sess. I, Ch. 140, Section 4., 32 U.S. Stat. at L. 140. The Foraker Act provisions that directed the Secretary of the Treasury to designate ports of entry and administer the customs in Puerto Rico was implemented through a directive published in 3 Treasury Decisions 22305, Circular No. 94, dated June 22, 1900, constituting Puerto Rico as a customs collections district and designating ports of entry.

¹⁷⁴ Jessup and, without a doubt, Republicans in Congress, perceived this provision as a major tariff concession. Payne's initial tariff rate in HR 8245 was 25 percent. "By the Foraker Act...85% of the duties were removed at once, and the other 15% was to be applied to Puerto Rico until the revenues of the island should make it self-supporting but, in any case, not after the expiration of two years. Jessup pg. 375.

¹⁷⁵ Congress could have and did not, under the Foraker Act, extend its consent to allow the island's legislature the option of *enacting* this mirror-image tariff. Instead, Congress established the tariff and allowed the island's legislature to determine only when to *end* its effectiveness in advance of its normal expiration date.



protectionist stance was fairly evident when the tariff rate used was 75 percent, rather than the 15 percent for Puerto Rico, of those existing under the Dingley Tariff Act of 1897 on all Philippine shipments entering the US. The rates to be applied to shipments entering the Philippines from the United States were those set by the Philippine Commission on September 17, 1901. Free trade with the US, albeit subject to strict quotas on sugar, wrapped and filler tobacco and cigars, was not to be extended to the Philippines until the enactment of the Tariff Act of 1909.¹⁷⁶

Puerto Rico's provisional mirror-image fifteen-percent tariff scheme had a sunset provision. Congress conditioned its advanced expiration upon the completion of one of Secretary Root's pet projects: the adoption of comprehensive tax reform for Puerto Rico.¹⁷⁷ Thus, free commerce was to be established between the mainland and the Island¹⁷⁸ only when, either Puerto Rico enacted a comprehensive internal revenue act of its own,¹⁷⁹ or the tariff was left to expire on March

¹⁷⁶ "The bill provides for reciprocal free trade with the Philippine Islands on all articles, but limiting the sugar to be imported free of duty to 300,000 tons, wrapper tobacco to 300,000 pounds and 3,000,000 pounds of filler tobacco, and 150,000,000 cigars in any one fiscal year." Report on H.R. 1438, 61st Cong., 1st Sess, H.R. Rep. 1, at 17-18. This provision accommodating the Philippines prompted the Democratic minority to note caustically: "The tariff arrangement between us and the Philippines Islands has no proper place in a general tariff bill. The legitimate function of a tariff bill is to set forth our trade relations with foreign nations; but foreign nations have absolutely nothing to do with our relations to the Philippines, which relations should be most carefully and prayerfully considered by us in a separate bill." Minority report submitted by Congressman Clark from Missouri on H.R. 1438. 61st Cong., 1st Sess. H.R. Rep. 1, Part 2, at 8.

¹⁷⁷ The Foraker Act's (31 Stat. 77, ch. 191 (1900) phrasing implied that Puerto Rico, at the time, did not have a comprehensive set of internal revenue laws. Naturally, it did, but, as we shall discuss, what Congress was really driving at was the need to substitute these rules with tax reform patterned to state-taxation principles. Governor Davis could have simply done so by decree, and very nearly did. However, the process of drawing up reform was not completed by the time of the Foraker Act's effective date.

¹⁷⁸ Section 3, of the Foraker Act, 31 Stat. 77, ch. 191 (1900). Although the Foraker Act established free trade between Puerto Rico and the US, Congress would eventually impose and maintain quotas on sugar imports from Puerto Rico under the Jones Costigan Sugar Act, 7 USC 608-11 and other federal acts. See Díaz Olivo, C. E., *The Fiscal Relationship between Puerto Rico and the United States: A Historical Analysis*, Revista del Colegio de Abogados, Vol. 51, Num. 2-3 at 20 fn. 53. Sugar quotas were upheld in *Secretary of Agriculture v. Central Roig*, 338 US 604, 616 (1950). A commentator has singled out the Jones Costigan Act of 1934 as the blow that "dealt the coup de grace to the [island's] sugar economy", worsened the unemployment picture in Puerto Rico during the Depression years and hastened the "questioning of the colonial regime and the breakdown of political" and economic order. Pantojas, García, *Puerto Rico Populism Revisited: The P.P.D. During the 1940s*, Journal of Latin American Studies, Vol. 21, 520, 525 (1989).

¹⁷⁹ Section 4 of the Act was effective "as soon as the civil government for Porto Rico shall have been organized in accordance with this Act and notice thereof shall have been given to the President". Section 40 of the Foraker Act directed the President of the United States to appoint a commission to "compile and revise the laws of Puerto Rico", make a report to the Congress no later than a year after passage of the Act. The Commission charter included to "equalize and simplify taxation and all the methods of raising revenue..." An incisive study of the history, members and work of this Commission is found in, Torres, E. A, *The Puerto Rico Penal Code of 1902-1975: A Case Study of American Legal Imperialism*, 45 Rev. Jur. UPR Nums. 3-4, at 1 (1976).



1, 1902, whatever occurred first.¹⁸⁰

However, free trade with the US market would continue to have an important exception. As a protective measure, coffee introduced to the Island was to be subject to a 5-cent per pound special duty.¹⁸¹

Naturally, the devil is always in the details. While political and protectionist trade concerns, armed with constitutional muscle, played a significant part in the Beltway's conventional wisdom for these temporary tariffs, practical considerations also had a very important role. Puerto Rico needed new markets, trade stimulus and added tax revenues. It had just suffered two economic wallops in short succession. First, the sealing off of its traditional markets in Spain and Cuba, followed by Hurricane San Ciriaco,¹⁸² that took their toll.¹⁸³ The hurricane left a path of devastation that reduced significantly Puerto Rico's agricultural exports. This prompted the military administration to issue decrees staying and, in many cases, in practice, abating outright tax debts,¹⁸⁴ depressing further the

¹⁸⁰ Section 3 of the Foraker Act, 31 Stat. 77, 191 (1900) required that the President of the US be formally advised through a resolution of the passage of such Act and that a presidential proclamation be issued noting such passage. See the discussion of the phase-out provisions and procedures of the fifteen percent in 24 *Opinions of the Attorneys General* 55, Washington, Government Printing Office (1903). The special duty on coffee on shipments originating from the U.S. was construed by the Attorney General of the United States to be linked with the phase-out of the mirror-image tariffs that included the special five percent per pound-tariff on coffee. He also concluded that the enactment of the tariff acts of 1909 and 1913 (36 Stat. at L. 11, ch 6; 38 Stat at L. 114 ch 16) repealed the five-cent import duty on foreign imports of coffee, since Puerto Rico was not exempted from the free list where coffee was included. *Opinions of the Attorneys General*, Vol. 30, at 275, Government Printing Office (1919).

¹⁸¹ This was an easy concession to make to Puerto Rico's coffee sector, damaged by hurricane San Ciriaco on August 8, 1899, because the U.S. did not have a domestic coffee industry and the Dingley Tariff Act included coffee in the customs free list. 30 Stat. at L. 197, item 529.

¹⁸² The wounds of the Civil War had not yet healed and while mostly in the background it bubbled at times to the surface at different junctures during the debate of the Foraker Act. Southern Senators like Democrat Senator Tillman from South Carolina were less sympathetic, particularly when they measured the response to what the South's treatment was during Reconstruction: "The hurricane occurred last August. In that island, you can plant vegetables any month of the year, and there is no doubt about it that any Puerto Rican who was not too lazy to get a hoe and scratch the ground a little somewhere and plant something has had his wants relieved long before now, or else he has gone to join his fathers because he was too lazy to tickle the earth that a harvest might follow his labor. Their huts are mere ramshackle affairs...anyone who was industrious could have built another hut." 33 Cong. Rec. -Senate 2976-7 (March 16, 1900).

¹⁸³ The third was the adoption of the replacement of the peso with US currency, which wreaked havoc in the local economy. Governor Allen candidly reported that the currency exchange of sixty cents to the Spanish peso had caused "friction" in the community, "disarrangement of prices" that, in his view, would take time to "regulate itself", since the exchange amounted to "the contraction of the circulating medium to the extent of 40 percent." Moreover, "coming, as it did, about one year after the hurricane [San Ciriaco], it proved to be a hardship upon the people." *First Annual Report of Charles H. Allen, Governor of Porto Rico, [to the Hon. William McKinley, Hon. John Hay, Secretary of State]*, May 1, 1901, Washington, Government Printing Office, 1901 at ps. 65-66.

¹⁸⁴ General Orders, No. 125 suspended the collection of taxes as well as foreclosures for arrears of taxes, when evidence of destruction of property or serious damage was made. General Orders, No. 138, of September 6, 1899, that required an investigation of the



island's shaky finances. Immediate free trade was not going to rebuild the island's finances in short order, since what little infrastructure was in place had been devastated. Moreover, issuance of public debt as a stopgap measure was ruled out at the outset of civil government because of a lack of a strong revenue source to back such issuances.¹⁸⁵ The new civil administration needed not only to stabilize the Island's finances, it already had major plans that would require a new role and expansion of government to levels hitherto unseen in Puerto Rico, particularly in establishing a public school system. These goals were known in Congress, and encompassed matters such as hiring civil servants and law enforcement officers to replace military personnel paid by the federal government, and the establishment of a public school system, a new penitentiary and infrastructure.¹⁸⁶ Further, there was not much sentiment in Congress for simply sending grants and aid without structural tax and legal reform.

This naturally led to J. H. Hollander, Puerto Rico's first Treasurer under the Foraker Act, to view the temporary tariffs as what they purported to be all along, a necessary but temporary means to address pressing revenue needs¹⁸⁷ Similarly, Congressman Graff described the arrangement as follows: "...it was believed that [trade with Puerto Rico] would be as near free as we could make it and, at the same time, provide the most unobjectionable methods of raising revenue for

applications for abatements, followed this. The amount of requests for abatements soared and the military government was inefficient in processing them, and, in the end, overwhelmed by such number of requests. Governor Allen reported that: "The devastation of the island by the hurricane impaired or destroyed the taxpaying capacity of many property owners. A general effort to secure remission of taxes followed, and the tendency was heightened by the favorable attitude of the insular government to the grant of this form of relief." By the end of military administration, Governor Allen reported that 2,000 abatement claims were granted, 3,000 more were favorably reported to the military governor for his approval, while 8,000 other claims remained in various stages of review. Further, under the saving clauses of the Foraker Act that allowed for these military decrees to continue in place until repealed or amended, more claims poured in after the civil government took over. *First Annual Report of Charles H. Allen, Governor of Porto Rico, [to the Hon. William McKinley, Hon. John Hay, Secretary of State], May 1, 1901, Washington: Government Printing Office, 1901, pg. 161-162.*

¹⁸⁵ "For the civil government in the first year of its existence with a temporary, and later an untried, revenue system, to have attempted to utilize its public credit in the markets of the United States or elsewhere would have been premature and unwise. The financial stability of the island has become an accomplished fact and its revenue policy has won recognition in the financial centers of the world for soundness and conservatism, then, and not before will the use of insular credit in moderate amount and for legitimate purposes represent wise financial administration in Porto Rico." *Report of the Treasurer of Porto Rico to the Governor of Porto Rico, Covering Operations of the Office of the Treasurer from May 1, 1900, to March 31, 1901, at pg. 198, included as part of The First Annual Report of Charles H. Allen, Governor of Porto Rico, [to the Hon. William McKinley, Hon. John Hay, Secretary of State], May 1, 1901, Washington, Government Printing Office, 1901.*

¹⁸⁶ 33 Cong. Rec. –Senate 2971 (March 16, 1900) (Remarks of Senator Fairbanks and quotes from General Davis' testimony before Committee). See also 33 Cong. Rec. –Senate 2647-8 (March 8, 1900) (Remarks of Senator Foraker).

¹⁸⁷ Governor Allen echoed those sentiments: "Had it not been for the 15% tariff provided for in the organic act, there would have been a lack of sufficient funds to meet the most ordinary requirements of the government. The expenses of the civil government must, of necessity, be in



th[e]...island, which was much needed.”¹⁸⁸ Mr. Hollander even engaged in cautious criticism of President McKinley, Secretary Root, Governor Davis’¹⁸⁹ and others past calls for immediate free trade. He noted that without the local administration having first had the opportunity to organize and transition into the new civil government with an elected House of Delegates and transition out of the revenue dependency of the temporary tariffs through new revenue measures that were still on the drawing board, free trade would not have been of much immediate help:

“A scrutiny of the actual course of insular finances during the period of civil government is a striking vindication of the wisdom of Congress in providing customs collections on trade between the United States and Porto Rico as a source of insular revenue until such time as an adequate system of local taxation should have been established. The absence of this revenue would have meant paralysis in every line of insular development, a[nd a] depleted treasury ...”¹⁹⁰

The Foraker Act was one more example of patchwork compromise in Congress. First and foremost, for protectionist purposes,¹⁹¹ tariffs barriers were extended beyond the tenure of military administration, to cement with the new civil government an untested principle of constitutional separation aimed principally at reserving Congress’ flexibility with the Philippines; revenues would continue to flow to the island’s treasury when it most needed it; and finally, the President’s goal of eventual full free trade would be achieved, as soon as the island govern-

some respects greater than those of the military. The salaries of the military officers who filled civil positions were, of course, paid out of the funds appropriated for that purpose by the General Government. Then, the public schools must necessarily be multiplied and schoolhouses constructed; the insular police must be increased in numbers, to take, to some extent, the place of soldiers who had been withdrawn...public roads had to be constructed and repaired and all debts of former administrations had to be provided for.” *First Annual Report of Charles H. Allen, Governor of Porto Rico, May, 1901*, Washington, Government Printing Office, 1901, at p. 56.

¹⁸⁸ 33 Cong. Rec. House –Feb. 28, 1900, p. 2404.

¹⁸⁹ On the floor of the Senate, Senator Foraker was asked to explain why his proposal was at odds with Governor Davis’ strong and persistent call for free trade. He pointedly reminded the Senators that Governor Davis’ views and interests lay only with Puerto Rico, while the Senate had a larger and long-term view to address: “We are here to legislate not only with Puerto Rico in view, but with the interests of other possessions than Puerto Rico in view and with our obligations to other possessions of the United States than Puerto Rico in view”. 33 Cong. Rec. Senate, March 8, 1900, pg. 2646. In other words, the Philippines.

¹⁹⁰ *Report of the Treasurer of Porto Rico to the Governor of Porto Rico, Covering Operations of the Office of the Treasurer from May 1, 1900, to March 31, 1901, at page 192, included as Chapter III, pg. 137 et seq., of the First Annual Report of Charles H Allen, Governor of Porto Rico, May 1, 1901*, Washington, Government Printing Office, 1901.

¹⁹¹ Senator Foraker would explain this as follows: “in the passing of this bill...we would assert the right to discriminate between Puerto Rico and the Philippine Islands and the United States. Thus we would establish a precedent which, if followed, would enable us to protect the cigar makers and the growers of tobacco as well as our beet –sugar factories in the United States from the products and cheap labor of the Philippines, where the condition is much important and the menace much greater.” 33 Cong. Rec. – Senate, March 8, 1900, pg. 2647-8.



ment enacted and put in place its own version of tax reform. The key to deactivating the tariffs before their expiration was in the hands of the Island's government and, in particular, in J. H. Hollander's of whom we have more to say.

VI. The Foraker Act's equalization tax and antidiscrimination rules: more protectionist provisions

The Foraker Act tariff framework was complemented by the exclusion of the island from federal internal revenue laws. This perpetuated a policy that had been in place throughout the military provisional government's administration of the Island and was a result that Governor Davis actively and successfully sought to extend in the Foraker Act.¹⁹² The exemption was a result of the policy of constitutional and statutory quarantine that the McKinley Administration had instituted for Puerto Rico and the Philippines while under military administration.¹⁹³

The rationale for carving out the internal revenue laws changed with the Foraker Act, namely, to one aimed at relieving the Island from tax burdens as a short-term economic reconstruction stimulus and a means to protect local industries. Sixteen years later, the rationale would underpin congressional legislation that allowed the Island to collect and keep the proceeds from the federal income tax (also detached from federal administration and amendment). This development, along with the exemption from federal excises, would transform what was initially simply relief practice and legislative grace to what some consider, since 1952, Puerto Rico's constitutionally-protected right to "fiscal autonomy"¹⁹⁴ un-

¹⁹² House Republican Majority leader, Congressman Payne's initial bill for Puerto Rico, HR 6883, introduced on January 19, 1900, called for the extension of the federal internal revenue laws to Puerto Rico. The bill, in his words, had been introduced "without consultation with anyone [in the Administration], on my individual motion..." 33 Cong. Rec. -House 1942 (February 19, 1900). As a result of hearings and lobbying by Governor Davis, who asked that the island be spared from the high excises, Payne reversed course and, in his second bill, HR 8245, deleted any reference to the extension of the internal revenue laws. He would explain his reversal as simply one that would allow local industries to not be undermined by such excises: "We could not extend the internal-revenue laws to that island, for the reason that it would destroy other industries." 33 Cong. Rec. -House 1944 (February 19, 1900).

¹⁹³ 3 *Treasury Decisions* Number 22018-G.A. 4658 at 182, 198, February 14, (1900). The express exclusion in the Foraker Act of the internal revenue laws of the U.S. may have been deemed necessary, in light of the fact that Section 14 of the Act extended all "statutory laws of the United States not locally inapplicable". The term "not locally inapplicable" may have been too unclear and ambiguous to rely on. Indeed, the Attorney General of the United States suggested that the extension of US tariffs to foreign imports entering the island of Puerto Rico under Section 2 of the Foraker Act "indicates that section 14 [of the Foraker Act] was not regarded as operating in and of itself to extend to Porto Rico the tariff laws of the US." *Opinions of the Attorneys General* 488, 491 (1923). See also 24 *Opinions of the Attorneys General* 120 (1902); (Philippine cigar exports to the US not subject to federal internal revenue tax. The conclusion rested on the fact that US law did not automatically apply in the Philippines under the act of July 1, 1902.

¹⁹⁴ The Foraker Act's exemption from federal internal revenue laws was intended and meant to cover only excise tax laws, then the largest source of *internal* revenues of the federal government during the first decade of the 20th century, outside of customs duties. Capers, J. G. *The Federal*

der the Commonwealth, meaning an inherent and sovereign right to frame revenue laws, while excluded from all federal internal revenue laws. This is certainly not clear in the legislative record and case law and at best an arguable but consistent proposition advocated with conviction since 1952 by Commonwealth theoreticians, but one beyond the ken of this article.

As in the case of free trade, the exemption from federal internal-revenue taxes also came tied with a price. Another of Congress' response to protectionist's concerns took the form of a federal equalization excise tax on "like articles"¹⁹⁵ of Puerto Rico manufacture exported to the mainland that, if manufactured in the U.S.,¹⁹⁶ would have been subject to federal excises.¹⁹⁷ Protectionist elements had

Internal Revenues, 23 Yale L. J. 602-603. Chommie, J. C., *The Internal Revenue Service*, Praeger Publishers (1970) at 18. When the federal Corporation Excise Tax Act of 1909 was enacted, (the forerunner of the federal corporation income tax), it applied to Puerto Rico, notwithstanding the provisions in the Foraker Act exempting the Island from federal internal revenue taxes. 36 Stat. at L. 11, ch. 6, Sec. 38, Public Law No. 5, 61st Congress, 1st Sess., August 5, 1909. The Act was later repealed and substituted by the Revenue Act of 1913 that established an income tax that was similarly extended to Puerto Rico, again, notwithstanding the exemptions from internal revenue taxes in the Foraker Act. These legislative actions confirmed and were entirely consistent with what Congress intended all along, only to exempt Puerto Rico from the application of federal excise taxes. This exemption provision which was carried over to the Second Organic Act, known as the Jones Act of 1917, 39 Stat. 951, ch. 145 (1917) and now survives in the Federal Relations Act, 48 USC 734 (2002), does not constitute the source for Puerto Rico's residents' current exemption from the federal income tax. There are those who argue that Puerto Rico's fiscal autonomy, that is, its exemption from both federal excise and the income tax is intertwined with the emergence of the Commonwealth of Puerto Rico and the compact. The source of the exemption is neither constitutionally mandated nor bolstered by the emergence of Commonwealth status in Puerto Rico in 1952. It rests on thinner reeds, simply legislative grace from Congress. 26 USC 933 (2002).

¹⁹⁵ Section 3 of the Foraker Act. 31 Stat. 77, ch. 191 (1900). In *Jordán Roche*, 228 U.S. 436 (1913), the Court held that the Act's reference to "like articles" did not require matching end products by commercial name but to the general character of the articles' manufacture. The Court rejected the contention that Puerto Rico bay rum, an aromatic alcohol, was exempt from the internal revenue taxes in the U.S., under the view that the aromatic rubbing alcohol was not a "distilled spirit" within such laws. The claim for refund arose for shipments made prior to 1909, the year when Congress enacted specific legislation to make bay rum taxable. There had been case law supporting this view. Although the *Jordán Roche* court conceded that this was a "close question", at 441, it held that the definition of distilled spirits in the federal internal revenue laws was broad enough to encompass bay rum.

¹⁹⁶ See *Comm. of Puerto Rico v Blumenthal*, 642 F.2d. 622 (D.C. Cir. 1980), for an examination of the scope and intent of the equalization tax provisions, where it was held that the tax was mainly directed at tobacco and distilled spirits, not products that were taxed on the mainland upon sale, such as gasoline. See also Section 3 of the Foraker Act and IRC Section 7652(a); the latter being a mirror image of the former provision of the Foraker Act. US excise taxes are not levied on products, upon their manufacture in Puerto Rico, since the Foraker Act excepted the application of U.S. internal revenue laws in Puerto Rico. Section 14 of the Foraker Act: "That the statutory laws of the United States not locally inapplicable, except as herein before otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of Section 3, shall not have force and effect in Porto Rico." (Emphasis added).

¹⁹⁷ In 1906, Congress allowed for exporters to purchase, pay and affix the federal internal revenue stamps in Puerto Rico on the exports to the mainland subject to the equalization tax. P. L. 359 of June 29 of 1906, 34 Stat. at L. ch. 3613, at page 620. Congress in the Jones Act of 1917, 39 Stat. 951, ch. 145 (1917), would return or "cover over" to the Puerto Rico fisc the proceeds of the equalization tax.



prevailed upon Congress to counterbalance what they perceived were significant cost advantages¹⁹⁸ that would arise from not extending the federal internal revenue laws to Puerto Rico.¹⁹⁹ The concern was, that the Island's manufactured goods, then mainly distilled spirits and tobacco, already enjoyed significant advantages from decidedly lower labor costs. Further dismaying protectionists was the added costs resulting from the broadening of the scope and the increase of rates of federal excises under the War Revenue Act of 1898,²⁰⁰ enacted to finance the increase in defense costs associated with the conduct of the Spanish-American War.²⁰¹

Protection against trade barriers also found expression in the Foraker Act, in the form of a non-discrimination clause²⁰² aimed at curbing territorial zealotness or legislation targeted against U.S.-manufactured products from being assessed higher Puerto Rico "internal revenue tax[es]", than would be imposed in Puerto Rico on "like articles"²⁰³ of local manufacture.²⁰⁴ This anti-discrimination clause was specific and precluded Puerto Rico from applying formulas or arbi-

¹⁹⁸ 33 Cong. Rec. – House 1944 (See remarks of House majority leader Sereno Payne upon the introduction of the substitute HR 8245 on Feb. 19, 1900).

¹⁹⁹ *Id.*

²⁰⁰ Capers, J. G., *The Federal Internal Revenues*, 23 Yale L. J. 602-603.

²⁰¹ The cost advantage was eventually neutralized in some respects through Section 9 of the Foraker Act, 31 Stat. 82 (1900), that nationalized all vessels owned by local residents and extended the laws of cabotage to Puerto Rico maritime trade with the mainland. Section 9 of the Foraker Act. This left the island with no other choice but the US Merchant Marine for the transport of its goods to the mainland, considered presently by many observers as constituting the most expensive merchant marine in the world.

²⁰² In certain respects, when the Foraker Act, 31 Stat. 77, ch. 191 (1900), created a separate citizenship for Puerto Rico, commercial antidiscrimination rules and a delegate to be accredited before the departments of the US government, resembling a diminished version of an ambassadorial role, it reflected the elements of the will of Congress to maintain Puerto Rico constitutionally isolated and, in a way, it also resembled some elements of a treaty of commerce, navigation and friendship or FCN. For example, Arts. I & VII of the US-Honduras FCN extend similar anti-discrimination protection to American products, companies and citizens. By 1900, the US had FCNs with Costa Rica (1851) and Paraguay (1859). See Kees Van Raad, *A Survey of US FCN Treaties*, Tax Notes Intl. Twenty-two years after the enactment of the Foraker Act, Chief Justice Taft, speaking for the Court, concluded that the second Organic Act, Jones Act of 1917, 39 Stat 951, ch. 145, had not changed Puerto Rico's status from an un-incorporated to an incorporated territory. Curiously, in its analysis, the Court used the term "treaty status" to refer to Puerto Rico. *Balzac v People of Porto Rico*, 258 US 298, 306 (1922) ("Had Congress intended to chan[ge]...the treaty status of Porto Rico") (Emphasis added.)

²⁰³ Presumably the *Jordán v Roche*, *supra*, test for likeness would apply.

²⁰⁴ Unlike the mirror-image duties and tariffs collected in Puerto Rico on foreign imports, the equalization taxes collected in the United States were not to be transferred to Puerto Rico's fisc. This treatment was changed in the Jones Act of 1917 after Congress in 1915 had already authorized drawbacks and refunds on internal revenue taxes paid on the U.S. manufactured merchandise shipped to the Philippines and Puerto Rico. Undoubtedly, the assumption for the latter was consistent with the view that Puerto Rico and the Philippines were foreign for U.S. internal revenue purposes, and mainland manufacturers were to remain competitive within those markets.

trary classifications that would result in the levying of higher effective tax rates on mainland-manufactured items²⁰⁵ entering the island.²⁰⁶ These provisions survive in the US Internal Revenue Code.²⁰⁷

The Foraker Act provided no insight on the question of at which point in the process of incorporating goods into Puerto Rico's market could local internal revenue taxes commence to apply without running afoul of Congress' plenary power over interstate and foreign commerce of the territory.²⁰⁸ Curiously, in the Foraker Act, foreign exports were not extended explicit protection against discriminatory internal revenue taxes or regulatory provisions weighted on such commerce. Presumably, Congress believed that explicit language was not needed. Protection against territorial regulatory power and tax discrimination was implicit from the wide reserve made in the Foraker Act for Congress to determine tariff rules over foreign commerce.²⁰⁹ Similarly, the extension of federal laws included commercial legislation and even trade treaties.²¹⁰ Furthermore, the Foraker Act did not grant Puerto Rico any role in defense or in conducting its foreign affairs. In light of this, it was not surprising, then, that Puerto Rico's Attorney General assumed early on, that the Commerce Clause had similar restraining effect in Puerto Rico as in the States.²¹¹

²⁰⁵ As we shall see, Puerto Rico's first revenue Act passed under the Foraker Act provided for taxes that openly discriminated against items manufactured in the United States.

²⁰⁶ This seemed to explain the use, in Section 3 of the Foraker Act, 31 Stat. 77, ch. 191 (1900), of the terms "equal in *rate and amount*."

²⁰⁷ 26 USC Sections 7652(a)(1) & 7653 respectively. Section 7652(a)(1) is a provision that extends the application of the federal excise taxes to Puerto Rico-manufactured products entering the United States, and they can be subject to interdiction, for the purposes of imposing and collecting such taxes by the federal government, pursuant to the federal government's extensive constitutional authority to do so. Section 7653 is an antidiscrimination provision that is mostly surplusage, since a similar protection is afforded by the Commerce Clause. See also *UPS v Hon. Juan Antonio Flores-Galarza*, 318 F3d 323 (1st Cir., February 4, 2003) (Neither of these provisions constitute "a blanket authorization for Puerto Rico to regulate the delivery of goods", by requiring the transport company to either enforce and collect excises on consignees as a condition for release and delivery of packages or pre-payment of the excises on behalf of the consignees.).

²⁰⁸ Read literally, although this did not appear to be Congress' intent, the anti-discrimination clause of the Foraker Act prohibited the imposition of facially-neutral "internal revenue tax[es]" that reached only U.S. manufactured items that Puerto Rico did not manufacture.

²⁰⁹ Coffee was considered a special case, for which Congress had made an exception in the Foraker Act, providing for a 5-cent-per-pound-duty effective, at least until it was sub-silent repealed in 1909.

²¹⁰ *Bacardi Corporation of America v Domenech*, 311 US 150 (1940), held that Puerto Rico, under the U.S.-Cuba treaty, was barred from discriminating against foreign rum through regulatory labeling requirements that were geared to exclude sales of foreign rum.

²¹¹ *Opinions of the Attorney General of Porto Rico*, Vol. I, 24, 107, issued on July 1, 1901, and March 17, 1902.



VII. Puerto Rico's First Tax Reformer under the Foraker Act: Dr. J. H. Hollander

Advancing the expiration date of the Foraker Act's provisional fifteen-percent tariffs provided an additional incentive for Puerto Rico to adopt comprehensive tax reform. Not that it needed it. Comprehensive tax reform had already been on the agenda of the McKinley Administration since the commencement of the provisional military government's administration. But past efforts had not progressed beyond theorizing and tinkering with piecemeal reform.²¹² The new effort underway during deliberations of the bills leading to the enactment of the Foraker Act envisioned the repeal of the Spanish colonial system of internal revenue. For this task, Secretary Root, early in 1900, appointed Johns Hopkins University Professor Jacob Harry Hollander as special commissioner to revise the tax laws in Puerto Rico.²¹³

During the first decade of the 20th century, Johns Hopkins University had distinguished alumnus, such as Thomas Sewall Adams and J. H. Hollander, that were already established as authorities and leaders in the fields of economics and tax policy.²¹⁴ In particular, J. H. Hollander would have a profound influence on

²¹² During the course of the Military Administration in Puerto Rico, several presidential commissions were sent to the Island to review all aspects of Puerto Rico's economic condition and body of laws, including tax laws. The Spanish tariffs were first reviewed by a presidential commission which rendered a preliminary report on December of 1898. President McKinley adopted many of the recommendations of this commission, and revised tariffs were promulgated by Executive Order signed on January 20, 1899. Díaz Olivo, at p. 6. Fashioning tax reform locally was one of the goals implicit on the agenda of Puerto Rico's Attorney General, by the Military Governor, as part of General Order 16 of February 10, 1899. The order entrusted the Attorney General to draft "laws and systems in accordance with those in vogue in the United States." This General Order was saved by Section 8 of the Foraker Act, although it was never fully implemented by Puerto Rico's Attorney General before or after the enactment of the Foraker Act. Puerto Rico's Attorney General was to explain that "during the past year, this department has had no opportunity of recommending amendments of laws to the legislature, it has had occasion and has not hesitated to declare certain laws ...to be no longer in force, on the ground of their general inconsistency with the form of government now established in this island...The department has, however, been relieved of this duty by the appointment of a Code Commission which has now under consideration a general revision of the whole body of laws." *Annual Report to the Attorney-General of the United States, Oct. 1, 1900-Sept. 30, 1901, included in Opinions of the Attorney General of Porto Rico, Vol. 1, 237, 239.*

²¹³ Before the enactment of the Foraker Act, Secretary Root had asked President Gilman of Johns Hopkins University, to allow Dr. J. H. Hollander, then Associate Professor of Finance, a leave of absence, in order to assist in the study of a new and comprehensive tax system for Puerto Rico. Secretary Root stated, in a February 6, 1900 letter to Dr. Gilman, that "the system which was in force at the time of American occupation was so peculiar to the Spanish methods of administration, and so inapplicable to the new conditions under which the people of the islands are to live, and to the ideas which we entertain for promoting their welfare, that a practically new system must be adopted." Jessup, Vol. 1, at 377-378.

²¹⁴ Dr. Thomas Sewall Adams, co-authored with professor Richard T. Ely and two others, *Outlines of Economics*, hailed as a leading economics textbook in the pre-World War I era. While teaching at the University of Wisconsin from 1901-1915, he participated in the shaping of the Wisconsin Income Tax Law, that served as a model for other states and the 1913 federal income tax law. He was also co-author of the New York income tax law of 1917 and served in various capacities in the US Treasury Department, where his contributions in areas such as tax treaties and principles of international income taxation were significant and lasting. Graetz,

Puerto Rico's tax system, while Thomas Sewall Adams would be Hollander's intellectual mentor.

Jacob Harry Hollander was born in Baltimore, Maryland, the son of German immigrants. A graduate of Johns Hopkins University in 1891, he earned his Ph.D. also in Johns Hopkins, in 1894, with a thesis entitled "The Cincinnati Southern Railway", demonstrating a strong interest in transportation economics and development. He was known as a fastidious dresser, with a strict upright posture, and harbored conservative attitudes nurtured, no doubt, from his one year at the Pennsylvania Military Academy. A prolific writer, he authored many books and articles on economic history throughout his career in public service and academia. However, two works, one that he authored and a second that he edited, influenced significantly his future thinking on tax reform for Puerto Rico: "The Financial History of Baltimore", published in 1899, and "Studies in State Taxation with Particular Reference to the Southern States" in 1900, respectively.

President McKinley appointed him in 1897, to the American Bimetallic Commission that was entrusted with the charge of seeking international consensus for a gold and silver standard. Impressed with his contribution to this effort, the President then appointed Professor Hollander as his special commissioner to reform the tax laws in Puerto Rico and, subsequently, as its first Treasurer under the Foraker Act of 1900. Hollander had a strong mandate from the President to put Puerto Rico's finances on firm footing and effect the needed structural tax reforms to keep the government's finances in order.²¹⁵ In many respects, he wielded more Presidential political clout than Governor Allen did.

Professor Hollander was the pivotal figure behind the effort that resulted in the irrevocable shift of Puerto Rico's tax system toward US concepts and methods of tax administration. He authored a tax-reform law, colloquially known as the Hollander bill,²¹⁶ that adopted modified excise laws patterned to the federal experience and a broad property tax. The former set the groundwork for these excises to evolve into Puerto Rico's broad-based excise tax system in existence

Michael J., O'Hear, Michael M., *The Original Intent of US International Taxation*, 46 Duke L.J. 1021, March, 1997, at p. 1027-1029

²¹⁵ 11 *American National Biography*, Oxford University Press, NY, 1999, pgs. 53-55. In 1905, Professor Hollander was later sent by President Roosevelt to assist the Dominican Republic with its foreign debt problems that threatened intervention by European countries on behalf of creditors. His work led to a treaty with the Dominican Republic and a noted essay entitled *Dominican Republic: Railroad and Commercial Development Projected by Virtue of a Treaty with the United States* (1907). After his stint in Puerto Rico, his public service career included serving as chair of the Tax Survey of Maryland, a committee that produced a significant report on tax matters and reform for the state of Maryland. He also authored reports on banking matters to Congress, such as the one entitled "Bank Loans and Stock Exchange Speculation" (1911), served in a committee that advised the Federal Reserve Bank of New York. Professor Hollander's long and distinguished career ended with his passing in 1940. 11 *American National Biography*, Oxford University Press, NY, 1999, pgs. 53-55.

²¹⁶ *Aguilar v Vazquez*, 6 DPR 1, 10 (1904); *Guerra v El Tesorero de Puerto Rico*, 8 DPR 292, 294 (1905).



today.²¹⁷

As part of the reform efforts, his focus ran on two tracks, improving and professionalizing the administration and efficiency of revenue collection - his biggest success - while adopting revenue provisions that increased the equitable distribution of the tax burden. All of this, while apparently paying considerably less attention to how the proposals would fit within the McKinley Administration's view of Puerto Rico's unique place within the federal constitutional system. His contribution to Puerto Rico tax laws, the so-called Hollander law, amply demonstrates that he was not an innovator, either in the excise tax or property tax area, but simply borrowed significantly from known legislation such as the Maryland Property Tax and the federal excise tax laws. In particular, for the latter, the evolution and broadening of the excise tax in Puerto Rico, while case law moved the island closer and closer to the Commerce Clause's orbit, would eventually lock Puerto Rico's legislation on a collision course with mainland and local businesses.²¹⁸ The controversies surrounding its collection at the water's edge has clearly not abated.²¹⁹

²¹⁷ By now, Secretary Root was working against time. H.R. 6883 a bill "to extend the laws relating to customs and internal revenue over the island of Porto Rico ceded to the United States" had been introduced on January 19, 1900 and subsequently substituted by House bill H. R. 8245 also presented by Rep. Sereno Payne, Chairman of the House Ways and Means Committee, which did not provide for the extension of the internal revenue laws to Puerto Rico. H.R. 8245 was adopted by the Senate, with changes, but left intact the exemption from the internal revenue laws. Secretary Root's views must have had a significant influence on Payne, even though John Hollander, Puerto Rico's first Treasurer, claimed, apparently unjustifiably, significant credit for influencing, through Governor Davis, on the adoption of the exemption. It seems that Hollander did play a part in influencing the Senate to keep the exemption provided in H. R. 8245. The chronology of events seems to bear this out. Two days after Secretary Root's February 6 letter to President Gilman, the House Committee on Ways and Means reported Rep. Payne's bill favorably, and debate on the bill was scheduled to commence on February 19, 1900. Hollander was appointed on February 26, 1900, by Secretary Root, special commissioner to revise the laws relating to taxation in Puerto - two days before debate on the H.R. 8245 concluded. Hollander's role on influencing the fashioning and later passing in the House of H.R. 8245, by sheer force of this chronology, must have been minimal. But, Hollander was boastful when, as Puerto Rico's first Treasurer under the Foraker Act, he reported to the Governor that:

"[i]n the normal course of events, Congress would probably have extended the body of internal-revenue laws of the U.S., or a fixed percentage of the rates of taxation prevailing thereunder, to Porto Rico in the act establishing civil government. One of the earliest and most specific recommendations, however, made to the military governor [Davis] by the special commissioner [Hollander]...was that this course should not be pursued....These views were adopted by General Davis, transmitted to the Secretary of War, and were *instrumental* in securing the insertion in the act of Congress approved April 12, 1900.", *Report of the Treasurer to the Governor of Porto Rico included in Annual Report of Governor Charles H. Allen, May 1, 1900-May 1, 1901 at 153-154.* (hereinafter "Report") (Emphasis added).

²¹⁸ For example, *Bouret v Benedicto*, 11 P.R. Fed. Rep. 249 (1920); *Universal Film Company Case*, 11 P.R. Fed. Rep. 437 (1920), *Texas Co. v Benedicto*, 12 P.R. Fed. Rep. 330 (1920). In *Texas Co.*, a temporary restraining order was issued to stop collection of a two cent-per-gallon import excise tax on gasoline before the fuel left the custody of the agent of the vessel. Puerto Rico's Treasurer filed an affidavit with the court that clarified that Treasury's policy was not to collect until the goods had been "confused with the property in commerce in Porto (sic) Rico"

²¹⁹ *United Parcel Service, Inc. v Hon. Juan Antonio Flores-Galarza*, 318 F3d 323 (1st Cir., 2003) (Requirements that cargo carriers comply with collection of excises as a condition for delivery of packages to Puerto Rico residents was not consented by Congress under the Butler

VIII. The Tax-Reform Work Plan and Timing for Enactment

Professor Hollander's work plan, apparently called for his proposals to be enacted by Governor Davis through decree, prior to Congress concluding its deliberations on the bills on civil government for Puerto Rico.²²⁰ Professor Hollander assumed, as it turned out, quite correctly, that any upcoming Organic Act would include a saving clause for existing law and decrees, that would provide continuity to his reform effort. The Foraker Act was passed on April 12, 1900, barely six weeks after his appointment. But, the initial review process which Professor Hollander stated included interviews of specialists in public finance in the United States²²¹, had not been completed when his appointment as special commissioner expired on the date of effectiveness of the new Act.

This prompted the McKinley Administration to react with dispatch. Professor Hollander was immediately re-appointed, as Puerto Rico's first treasurer under the Foraker Act provisions. This allowed the tax reform effort to continue in earnest. At this stage of the process, Hollander explained his methodology for gathering the relevant information, as follows: "Local conditions were studied, representative persons were interviewed, typical requirements examined, and departmental experience incorporated."²²²

A preliminary memorandum proposing a revision of the island tax system was immediately drafted. By October, 1900 a draft of a bill was in the works, submitted to the Executive Council in November of that year,²²³ and approved by January 31, 1901 by both legislative chambers, with some debate and amendments introduced in both chambers.²²⁴ Hollander's tax legislation was later com-

Act, codified in the Federal Relations Act, 48 USC 741a and constitutes a burden on price, routes and operations of airlines, preempted under the FAA Authorization Act. 49 USC 41713(b)(4)(A)).

²²⁰ *Report*, p. 168 ("It thus became clear that the work of the commissioner, instead of resulting in a new fiscal system to be established by military orders with the beginning of the fiscal year, July 1, 1900, must be in the nature of recommendations to the civil government for enactment either by the Congress of the United States, or by the insular legislature") We will see that he opted for local enactment.

²²¹ *Report*, p. 167. No doubt one of the specialists was Thomas Sewall Adams, his colleague at Johns Hopkins University.

²²² *Report*, p. 170.

²²³ 31 Stat. 77, ch. 191 (1900). At the time, the House of Delegates, as the lower popularly-elected body was called under the Foraker Act, had not yet been formally constituted. This was not to occur until elections were held and the delegates sworn in. The latter did not occur until December 10, 1900.

²²⁴ *First Annual Report of Charles H. Allen, Governor of Porto Rico*, May, 1, (1901), Washington, Government Printing Office, 1901, p. 59. With regard to the records, the Puerto Rican Legislature did not adopt a system to record legislative debates *verbatim* until 1951. There was a system of "Actas" or summaries of debates and motions that was in use since late 1900. Rigual, Néstor, *El Poder Legislativo de Puerto Rico*, Ediciones de la Universidad de Puerto Rico, Rio Piedras, (1961), pgs. 115-117. The records of these minutes, now archived in the Archivo



piled and collected along with other proposals unrelated to internal revenue by a Code Commission and re-enacted by Puerto Rico's legislature on March 1, 1902 as the new "Political Code".²²⁵

Indeed, separately, Congress not only shared Secretary Root's concern for an overhaul of the Island tax laws, but also required that it would have a direct role in its design. Section 40 of the Foraker Act called for a Presidential Commission that was to be charged with the review of all local laws saved under the transitional rules of the Act, including recommendations for a new internal revenue system.²²⁶ As an interim measure, save for the duties collected on U.S. and foreign imports, the Foraker Act carried over the Spanish colonial tax system, as modified by military decrees. However, Hollander sidestepped the presidential commission entrusted to also look into tax reform. His tax reform bill was presented, and the newly-elected and sworn members of the local legislature passed it with some amendments.²²⁷ In the process, he upstaged the Act's intent before the commission was formally constituted.²²⁸ This was not to be the only instance in which Mr. Hollander's zeal undermined congressional intent in this area.

General de Puerto Rico, in Puerta de Tierra, San Juan, do not reflect any meaningful debate on this tax bill, although the Governor's Annual Report and Treasurer's Report indicates not only that there was one but that amendments were introduced and accepted. We suspect they impacted, principally, the property-tax provisions, since they were the ones that generated the most concern in the citizenry, as will be discussed further in this article. The Foraker Act, 31 Stat. 77, ch. 191 (1900), limited the legislative sessions to 60 days. As a matter of historical interest, the session commenced with the swearing-in ceremony and, subsequently, with a joint session held at the Tapia Theater in San Juan, where, before a full house of guests, dignitaries and legislators, Governor Allen read his first message to the Legislature. At the conclusion of the first session, Governor Charles H. Allen reported that a total of 133 bills were introduced in both chambers, 105 in the House of Delegates and 28 in the Executive Council. Fourteen bills from the House of Delegates and 22 from the Council were enacted. The session was conducted in an atmosphere "characterized by the utmost harmony and good feeling between the legislative and the executive departments. *First Annual Report of Charles H. Allen, Governor of Porto Rico*, May, 1, (1901), Washington, Government Printing Office, 1901, pgs. 23-25.

²²⁵ Inspired from a similar provision in California, See Rodríguez Ramos, *Breve Historia de los Códigos Puertorriqueños*, 19 Rev. Jur. U.P.R. 230, 233 (1950).

²²⁶ Section 40 of the Foraker Act.

²²⁷ The Puerto Rican Legislature did not adopt a system to record legislative debates *verbatim* until 1951. There was a system of "Actas" or summaries of debates and motions that was in use since late 1900, at times inadequate to fully understand the legislative debates and process. Rigual, Néstor, *El Poder Legislativo de Puerto Rico*, Ediciones de la Universidad de Puerto Rico, Río Piedras, (1961), pgs. 115-117. A very helpful source for any research on legislative history and intent from 1900-1950 are the annual reports made to the Congress and the Federal Executive branch by the governor and his cabinet of all the major administrative and legislative accomplishments.

²²⁸ The Commission members had been sworn in by July 4, 1900 and convened their first meeting in San Juan on September 8, 1900. The commission's report was rendered on April 12, 1901, almost two and a half months *after* the Hollander tax reform bill was passed. Prior to the Commission completing its report, the island newly-elected lower House of Delegates, annoyed by what it perceived was an impermissible encroachment on its legislative prerogatives, passed a bill establishing yet another Commission known as the Code Commission. It had a more limited but, in many instances, overlapping charter. To maintain control and continuity

IX. The Foraker Act's Reform Commission and Parameters for Tax Reform

The Foraker Act had parameters that were designed to guide Professor Hollander's efforts while fashioning tax reform, that were either ignored in part because of vagueness or not given their proper consideration. Section 40 of the Foraker Act, established the scope of the charter for the commission entrusted with the compilation of laws. It called for the compilation and revision of laws, among other things, to make a "simple, harmonious and economical government", and to "establish justice and secure its prompt and efficient administration".

In the field of taxation, the Foraker Act called on the Commission to "equalize" and "simplify" all methods of raising revenue.²²⁹ The term "equalize", generally used in the property tax field,²³⁰ as vague as it is, was left undefined. The true meaning and the context in which it was intended to be used elude us, since the congressional record renders no measurable assistance on this point.²³¹ However, the term may have been used to signal that the property-tax field valuations and assessments throughout the island had to be rational and uniform for similar classes of property and, failing this, some sort of review process would be avail-

over the newly- created Code Commission, Puerto Rico's second governor under the Foraker Act, Charles H. Hunt reacted by extending appointments to two of the three existing Commissioners and replaced the third. Washington's lack of reaction to the local legislature's effort to ignore the work of the first Congressionally-mandated Commission was rooted in practical considerations: "...American officials in Washington and in San Juan had probably come to the realization that the only way to make strong legal reforms palatable to the local population was through a commission responsible to the Insular Government.". Torres, E. A, *The Puerto Rico Penal Code of 1902-1975: A Case Study of American Legal Imperialism*, 45 Rev. Jur. U.P.R. Nums. 3-4, 1 (1976). The Code Commission commenced proceedings on the same date when the prior commission rendered its report, on April 12, 1901. The first Commission's report was forwarded to the Attorney General of the U.S., who, in turn, forwarded it to Congress eight months later, on December 31, 1901, with a copy to the local legislature. The report apparently did not elicit much interest in Congress. The Code Commission basically deferred to Hollander's work on tax laws and opted to include the now-approved Hollander's tax reform bill within the compilation and provisions of the new Political Code adopted in 1902.

²²⁹ This wording did not direct members of the Commission to steer the laws toward the Anglo-Saxon tradition, as they eventually did, but that seemed to be the unsaid but accepted assumption.

²³⁰ The administration of local property taxes engendered inequities triggered in no small part by assessors that were inclined to place the burdens on other counties not their own. Boards of "equalization" were organized to address these problems by establishing uniform rates or reviewing assessments. Friedman, at 567-568. We can only conjecture, since the Congressional record is silent on this particular point, that, perhaps, the reference in the Act to equalization related to this experience in the property tax area.

²³¹ The Commission was charged with a "...full and final report, in both the English and Spanish languages, of all its revisions, compilations, and recommendations, with explanatory notes as to the changes and the reasons therefor, to the Congress on or before one year after the passage of this Act." Section 40 of the Foraker Act, 31 Stat. 77, ch. 191 (1900). The report was to be completed within one year after passage of the Foraker Act. Although the report, nominally, was to be directed to the Congress, it was the local Legislature that was expected to consider and enact the proposals, as, in fact, it did. Nevertheless, the establishment of a presidential Commission to, in essence, perform what generally was considered a legislative function dampened any enthusiasm of the members of the only fully-elected chamber of Puerto Rico's first Legislature under the Act.



able to the taxpayer, in order to correct and “equalize” the treatment among taxpayers across the island.²³²

Professor Hollander also should have noted, when drafting tax reform, that the Foraker Act qualified the new Legislature’s authority in various but important ways. Use of phrases such as, “subject to the limitations imposed upon all its acts”,²³³ “matters of a legislative character not locally inapplicable”,²³⁴ and the constraints arising from federal statutory laws, again not “locally inapplicable”,²³⁵ although vague were some of the sources of statutory limitations. Coupled with these was the seeming narrowness of Section 38 of the Foraker Act, that suggested that the Legislature could only enact taxes within the following areas of well-known state taxation, “taxes and assessments on property, and license fees for franchises, privileges, and concessions.”²³⁶ Notably, there was no reference to import excise taxes. Further, capitation taxes were not included, although one had been instituted by the military administration²³⁷ and survived under the grandfather provisions of the Foraker Act until it expired on its own terms or was

²³² That is how Dr. Hollander construed this term. He touted the new tax reform that he authored as one that would do just that and banish the lack of uniformity and equity inherent in the decentralized Spanish system of territorial taxes that relied on “nearly two hundred separate boards appointed by the councils of the sixty-six municipal districts. There was no central control, no unity of administration, and no *uniformity* of valuation.” In contrast, under the tax reform act he authored, he observed that “[t]here [will be] perfect unity of control, and the division assessors, being in closest touch with both the supervisor and the district assessors, [will] secure an equality of valuation hitherto unknown. Tax appeals [will be] heard in the first instance by a selected group of division and district assessors sitting as boards of review, and, in the last instance, by the executive council sitting as the final board of *equalization* and appeal.” Subsequently, the Board of Equalization responsibilities were transferred to the Treasury Department through amendments made and recodified as articles 308, 309, 310 and 313 of the Political Code of 1902 and, with some further amendments made on March 10, 1904 and, subsequently, by Law Num. 46 of April 26, of 1928, this system remained in place until 1941, when the abolished Court of Tax Appeals (later renamed as Tax Court) assumed jurisdiction. For a history and description of the Tax Court’s jurisdiction, see Santos P. Amadeo, *El Tribunal de Contribuciones de Puerto Rico*, 16 Rev. Jur. de la UPR 3 (1946).

²³³ Section 13 of the Foraker Act, 31 Stat. 77, ch. 191 (1900).

²³⁴ Section 32 of the Foraker Act text, 31 Stat. 77, ch. 191 (1900), seems to be a tortured version of a recommendation made by Military Governor Davis’ - minus any reference to the Constitution. The fact that Congress in the Foraker Act implied, albeit in a cryptic way, that such authority had some limits, suggests that legislation over certain unnamed areas and items could be incompatible with the federal system of government and thus not be within the province of the island’s legislature. Governor Davis’ proposal was framed as follows: “[t]he legislative power [was] to extend to all rightful subjects of legislation, not inconsistent with the Constitution of the United States locally applicable.” *Report of Brig. Gen. George W. Davis on Industrial and Economic Conditions of Puerto Rico, as Affected by the Hurricane*, submitted on September 5, 1899, War Department, Division of Insular Affairs, 1899 at 79-80.

²³⁵ Section 14 of the Foraker Act, 31 Stat. 77, ch. 191 (1900).

²³⁶ (Emphasis ours). It was not until the Jones Act of 1917, 39 Stat. 951, that this latter provision was amended to include the term “internal revenue taxes”. Section 3 Jones Act of 1917, 39 Stat. 951.

²³⁷ *General Orders No 176*, series, 1899, of November 7, 1899, issued for school revenues but accounted for in the general fund.

replaced by the Hollander bill's provisions. Reference to property taxes, then the largest source of revenue for the States at the turn of the century,²³⁸ signaled that it was to become the prominent part of any upcoming tax reform in Puerto Rico, as indeed that was to be the case.²³⁹

Aside from property taxes, the influence of the state and local tax experience was also very evident in the Foraker Act's reference to taxation through license fees for franchises, privileges and concessions.²⁴⁰ These modes of taxation had gained immense popularity with the States in the latter part of the 19th century. They were used principally as a means to exert regulatory police powers over commerce and trade and also to raise revenues.²⁴¹ The federal government had resorted to them, albeit on a temporary basis, during the Civil War, and as part of the War Revenue Act of 1898 that helped fund the prosecution of the Spanish-American War.²⁴²

The directive to follow state tax models, the extension of federal law, the ban on duties on imports and exports and, particularly, Section 38 of the Foraker Act strongly implied that Puerto Rico was to adopt a tax system patterned to those typically used by the states. However, as we shall see, Professor Hollander either erroneously concluded otherwise or, out of a misguided sense of mission, proceeded on a path of his own-making, leaving as a legacy the Puerto Rico import excise tax.

X. Hollander Frames the Six Guiding Principles of Tax Reform

Hollander established that his tax reform effort would be framed within six broad guiding principles. First, "every citizen ought to contribute...to the support of insular and municipal governments, according to his economic faculty or abil-

²³⁸ L. M. Friedman, at p. 567.

²³⁹ L. M. Friedman, at 567-568.

²⁴⁰ *Opinions of the Attorney General of Porto Rico*, Vol. 1, 37, 38 (July 24, 1901) ("It therefore appears that all powers of taxation enjoyed by the states and territories of the United States are within the legislative competency of the government [of Puerto Rico] created by the act commonly known as the Foraker Act.")

²⁴¹ L. M. Friedman, at 454-463.

²⁴² Capers, J. G., *The Federal Internal Revenues*, 23 Yale L. J. 602-603. The influence of the state and local tax experience also left its mark, with the adoption of the inheritance tax even though Section 38, the tax-enabling clause of the Foraker Act, 31 Stat. 77, ch. 191 (1900), did not seem to imply that one could be enacted. By 1900, almost half of the states had adopted some form of an inheritance tax, under the social impetus against concentrations of capital and the fostering of dynasties. Although the federal government had tinkered temporarily with an inheritance tax during the Civil War, under the strong influence of the populist movement of the 1890s, it reintroduced one in 1898, ironically, to defray the costs of conducting the Spanish-American War. This tax was repealed in 1902. L. M. Friedman at 570-571. The constitutionality of the federal inheritance tax was upheld in *Knowlton v Moore*, 178 U.S. 41 (1900).



ity”, in other words, a progressive system of taxation.²⁴³ Second, the “introduction of novel or unaccustomed’ means of taxation should be avoided, and “[a] new spirit should be breathed, to the extent practicable, into old forms” of taxation, when designing the new revenue system; in other words, reform and continuity to the extent possible.²⁴⁴ Third, “the lesson should be taught early and impressively that American tax laws are to be enforced rigidly and precisely”²⁴⁵. Fourth, the laws should be evaluated constantly, for “gradual betterment and ultimate perfection”,²⁴⁶ Fifth, the revenue system should provide for both municipal and state needs and, for the sake of uniformity and control, that “definite correlation in fiscal matters exist between these bodies,” in other words, that the same taxable basis should be employed and that municipal autonomy allow only to change rates “subject to insular control”. Finally, that “a working tax system is as much a matter of men as measures” and that the administrative force be carefully chosen for integrity and professionalism.

As we shall discuss, Professor Hollander’s reform bill completely ignored his first two tax-reform principles. The property tax system as framed and introduced by Mr. Hollander was without a doubt a “novel” and clearly “unaccustomed” means of taxation in Puerto Rico. It taxed unrealized gains and as such was against the principle of ability or liquidity to pay the tax. For these reasons, the tax was much opposed by the tax paying public.

To summarize, Hollander called for a tax system that was to be administrable, equitable, tax wealth progressively and discourage consumption of liquor and other socially deleterious or luxury items. His reform bill would be anchored principally on 4 taxes, i.e., property taxes, the excise tax, the license tax and an inheritance tax²⁴⁷ and, to a lesser extent, license taxes. There was no attempt to explore seriously a broad-based net income or even a gross-receipt tax, principally because the Foraker Act did not suggest that one could be enacted, particularly, coming on the heels of *Pollock v Farmers Loan & Trust Co.*, 157 US 429 (1895). Since the Uniformity Clause of the Constitution did not bar Congress from approving the temporary tariffs on Puerto Rico trade, Pollock would have

²⁴³ *Report*, p. 169.

²⁴⁴ *Id.*, p. 169. (“This was tempered with the comment that [n]o respect should be paid to unworthy law simply because of its long existence, nor should hesitation be felt in introducing a new but desirable measure...” But, he also noted that “[a]ccount of friction should always be taken, of the friction that inefficiency which will result from the adoption of unfamiliar measures.”

²⁴⁵ *Id.*, p. 169.

²⁴⁶ *Id.*, p. 169-70.

²⁴⁷ We will simply mention that an inheritance tax was provided for in the Revenue Act, (Laws of 1900, Title II, Sections 94-110, pgs. 94-102) but will only discuss at length the property and excise tax.

equally been no bar to Congress authorizing Puerto Rico to adopt an income tax.²⁴⁸

XI. The Adoption of the Excise tax: Federal Excises Used as a Model

When reporting on his efforts at tax reform to Governor Allen, Dr. Hollander explained that the Island could and should draw inspiration from the extant federal excise and stamp-tax system.²⁴⁹ This notion may have been grounded on his reading of Section 3 of the Foraker Act, where reference was made to “internal revenue tax[es]” that would burden equally “in rate and amount” local and U.S.-manufactured items.²⁵⁰ The term internal revenue tax was generally understood as synonymous with federal excise taxes.²⁵¹ Excluding duties, until the federal income tax was adopted in 1913, excise taxes constituted the main source of revenues for the federal government and, undoubtedly, was considered by Professor Hollander a logical model for fiscal collection efficiency that would have been difficult to ignore.²⁵²

²⁴⁸ On January 3, 1900, Senator Butler introduced a Joint Resolution (S.R. 49), with the intent of seeking the amendment of the Constitution granting powers to Congress to lay and collect an income tax. 33 Cong. Rec. – Senate 631 (Jan 3, 1900).

²⁴⁹ Report, p. 153.

²⁵⁰ The distinction between internal revenue taxes and customs duties from a U.S. perspective was well known. Cooley described it as follows: “ ‘Internal revenue’, as that term is usually used, refers to taxes imposed by Congress, other than duties on imports or exports, in the nature of excise taxes on tobacco, liquor, etc.” T. M. Cooley, *The Law of Taxation*, Chicago, Callaghan and Company (1924), Vol. I, Section II, at 75.

²⁵¹ Britain’s southern colonies relied heavily on excise taxes on imports and exports, which were eliminated when the new Constitution was adopted, particularly in light of the prohibitions of the Import/Export clause. E.R.A. Seligman, *Essays in Taxation*, 16-17 (10th Ed. 1931).

²⁵² *History of the Internal Revenue Service 1791-1929*, United States Government Printing Office, Washington (1930) at 8-9. Until 1861, the federal government’s major sources of revenue were tariffs and proceeds from the sale of public lands, with the former taking preeminence. However, excise taxes had been used sporadically. Debt incurred during the Revolution triggered the enactment, in 1791, of the unpopular excise tax on distilled spirits (and the Whiskey Rebellion) and on other items that were subsequently repealed in 1802. They were revived in 1812, to support the War of 1812 with Great Britain, and repealed four years later. J. G. Capers, *The Federal Internal Revenues*, Yale L. J., Vol. 23, 602-603. The need to fund the Civil War led to the Revenue Act of July 1, 1862, which superseded a prior measure considered inadequate for the revenue needs. The new act called for a broad-based excise system on manufactured items, an inheritance tax and an income tax. From 1872-1898, most excise taxes had been eliminated, except those on liquor and tobacco. J. C. Chommie, *The Internal Revenue Service*, Praeger Publishers (1970) at 8. With the need to fund the Spanish-American War pressing, Congress again turned to stamp taxes, established excise taxes on certain occupations, an inheritance tax and raised excise taxes on tobacco and other spirits, in the War Revenue Act of 1898. The War Revenue Act of 1898 was extremely successful, resulting in an additional \$380 million dollars to the federal fisc, or \$280 million over the amount that was initially projected as needed. The special taxes in such Act were abolished in 1902, but excises on tobacco and distilled spirits remained. Capers, at 603. By the first decade of this century, tariffs had lost their clear preeminence as a source of revenue to the federal government. Excise taxes on distilled spirits and tobacco represented then approximately 90% of the federal government’s internal revenue and an amount equal to the revenue collected



But, the context in which the term “internal revenue tax[es]”²⁵³ was used in the Act, seemed more aligned with ensuring that anti-discrimination safeguards were put in place, rather than implying the particulars of a tax to be enacted. Presumably, the scope of the latter was defined in Section 38 of the Act.²⁵⁴ Nevertheless, Dr. Hollander may have reasoned that the success of the U.S. internal revenue system provided a logical model, from an administrative efficiency standpoint, and the Foraker Act’s exemption from federal internal revenue taxes, the constitutional breathing room, for Puerto Rico’s new government to design a system particularly suited for the Island’s needs. Dr. Hollander further concluded that Congress’ decision not to extend the federal internal revenue system at Governor Davis’ request,²⁵⁵ did not imply that Puerto Rico was barred from adopting a similar set of tax rules, albeit adapted to local realities.

To Hollander, the exemption was not a ban, but, actually, an invitation for Puerto Rico to enact its own excise tax system patterned to the federal excise experience. However, this assumption was arguable, at best, and not supported by the statutory language of the Foraker Act. In particular, the assumption was undermined by the Foraker Act’s complete silence on import excises and the fact that the Commission entrusted with tax reform was to initially make the initial determination on tax reform. In fact, although Congress could have done so, there was nothing in the Foraker Act or the congressional debates that suggested that Congress had intended to extend to Puerto Rico’s new legislative assembly taxing or, for that matter, any other powers that no other state constitutionally had. In particular, powers to interdict merchandise at the water’s edge and condition its

on tariffs. Chommie, at 18. A trend that was to continue and accelerate with the adoption of an income tax by the enactment of the Revenue Act of 1913. By fiscal year 1974, customs duties represented only 1.3% of all revenues of the federal government. *U.S. Office of Management and Budget, The Budget of the United States Government: Fiscal 1975-1976* at p.7.

²⁵³ *History of the Internal Revenue Service 1791-1929*, United States Government Printing Office, Washington (1930) at 9: (“For nearly half a century, the main sources of *internal revenue* had been distilled spirits and tobacco”). See also T. M. Cooley, *The Law of Taxation*, Chicago, Callaghan and Company, (1924), Vol I, Section II at 75.

²⁵⁴ Read in isolation, Section 32 of the Foraker Act, 31 Stat. 77, ch. 191 (1900) provided seemingly-wide legislative discretion to the new island government “[i]hat the legislative authority herein provided shall extend to all matters of a legislative character...”

²⁵⁵ *Report*, p. 153 (“In the ordinary course of events, Congress would probably have extended the body of internal-revenue laws of the United States, or a fixed percentage of the rates of taxation prevailing thereunder to Puerto Rico in the act establishing civil government. One of the earliest and most specific recommendations, however, made to the military governor by the special commissioner [Hollander]...was that this course should not be pursued. The system of internal-revenue taxation in the United States, it was presented, is the result of a gradual and long development and is adapted to the conditions prevailing in an economically-advanced community. To extend this system in any degree en bloc to Porto Rico, where social and economic conditions are radically different than those prevailing in the United States, would be a financial error that would result in economic embarrassment. Excise taxation should be an important part of the revenue system of Porto Rico, but it would be of a kind adapted to local conditions and to local needs.”)

release to a consignee on the payment of an excise tax modeled to the mode of administration and law of the federal excise tax. However, Governor Allen, no doubt prompted or encouraged by Secretary of the Treasury Hollander, echoed Dr. Hollander's views in his first message to the newly-elected Legislative Assembly under the Foraker Act:

"Under the provisions of the [Foraker] act of Congress, approved April 12, 1900, Porto Rico was specifically exempted from the operations of the internal-revenue laws of the United States.

The purpose of this generous exemption was to allow the adoption of an insular excise system based on local conditions and requirements. With this in view, it would be well to impose an excise-stamp tax on alcoholics, tobacco, and certain other articles, manufactured or imported in Porto Rico, together with a specific license tax on the sale of such articles. Moderate stamp taxes should also be imposed on notarial documents and bills of lading. The rates of taxation proposed in the bill perhaps need not be more than one-half in amount of those imposed by the internal-revenue laws of the United States."²⁵⁶

The myth was all but cast in stone nearly thirty years later, when the Brookings Institution parroted this message in its comprehensive report on Puerto Rico: "the Federal government has relieved the inhabitants of the Island from the payment into the Federal treasury of practically all Federal taxes. The Island's inhabitants are thus exempt from the Federal income, inheritance, and excise taxes. As a result of this exemption, the Island has been placed in a position where it can itself levy taxes of these kinds, the proceeds of which constitute Insular receipts."²⁵⁷ Professor Hollander expressed to Governor Allen that the McKinley Administration considered, but rejected, asking Congress to extend a similar excise-tax but with lower rates.²⁵⁸ This only raises the logical inference that Congress may have not intended to have Puerto Rico enact what it did not deliberately authorize in the Foraker Act and, for that matter, what many other states equally but significantly did not have authority to adopt.

Hollander relied on some local administrative precedents, which he hailed as the introduction by "the military government [of] a new principle [of taxation]"²⁵⁹

²⁵⁶ Message of the Governor to the Legislative Assembly, included in *Annual Report of Governor Charles H. Allen*, May 1, 1900-May 1, 1901, Chapter XIV, 420, 423.

²⁵⁷ *Porto Rico and its Problems*, The Brookings Institution, Washington D.C. 1930, at 145. (My emphasis).

²⁵⁸ *Report of the Treasurer*, included in *Annual Report of Governor Charles H. Allen*, May 1, 1900-May 1, 1901 at p. 153-154. (hereinafter "Report")

²⁵⁹ Report, p. 165: "An employee of the treasurer's office was also stationed at the San Juan customs-house and charged with the duty of affixing and canceling stamps to imported beers, wines, liquors, matches, oleomargarine, and playing cards, in payment of the internal revenue taxes, thereon. In the sub-ports, through the courtesy of the collector of customs for Porto Rico, the deputy collectors of customs were charged with the duty of affixing and canceling stamps on imported goods subject to the tax."



on which to base his decision to steer Puerto Rico toward adopting some version of an excise tax inspired on federal excise-tax laws. He noted, in the course of his review of Puerto Rico finances, that the military provisional government had established by decree (General Orders Nos. 176, 187, 196 and 232, series of 1899)²⁶⁰, excise taxes, presumably, inspired by federal excise-tax laws, since November of 1899. These included a three-cent-per-liter excise on alcoholic liquors manufactured in Puerto Rico, a one-tenth-of-a-cent excise on imported or locally-manufactured matches, a two-cent-per-pound excise on imported oleo-margarine and a twenty-cent on each pack of imported playing cards.

With regard to imported or introduced taxable items, the excises were to be paid before clearing the merchandise from the customs house, by the affixture of internal-revenue stamps, the latter constituting the mode for collecting payment of federal excise taxes.²⁶¹ Not surprisingly, because of its administrative convenience, this collection mechanism was later carried over and became an integral part of the import-excise-tax administrative regime adopted by Professor Hollander with the Revenue Act of 1901. Professor Hollander understood that, since Puerto Rico was empowered to adopt its own version of federal excise taxes, its collection mechanisms at the water's edge could also be enacted and enforced similarly. It was later tightened and formalized in the law, when this collection requirement was adopted in the Revenue Act of 1905.²⁶² A more stringent version of this excise tax collection mechanism was adopted in the 1956 Excise Tax Act²⁶³ and carried over to the 1987 Act and the Puerto Rico Internal Revenue Act

²⁶⁰ See Berbuse, op. cit. for the text of the orders.

²⁶¹ *Report*, p. 165.

²⁶² The Excise Tax Act of 1905 was explicit in this regard, when it required that the excise be paid "before such articles [were] removed from the custody of the owner or agent of the vessel". See also Section 29 of the Act of 1905. Aside from some authority over customs matters, the Philippines, while under US administration, also had a similar import-excise-tax regime (with its complementary internal tax) that was collected and enforced upon entry of taxable items in Philippine ports. *Wright v Inchausti & Company*, 272 US 640 (1928) (for a discussion of the history of the laws that granted and enlarged the Philippines authority over customs matters). For references to the workings of the Philippine import excise tax, see *Luzón Brokerage Co. v Posadas*, 51 Philippine Reports 305, 308 (1927); *Asiatic Petroleum Co. v Rafferty*, 38 Philippine Reports 475 (1918).

²⁶³ Speaker Polanco Abreu described this interdiction feature as the bill's "vertebral column". *Diario de Sesiones*, (1955), Vol. VIII, Num. 1, at 340. However, the minority, led by representative Luis A. Ferré, took a different view arguing that interdiction would only hamper commerce and saddle it with costs. *Id.* at p. 341. This clash of views generated acrimonious debate in the House, even prompting Representative Archilla Laugier to introduce, unsuccessfully, an amendment to eliminate the interdiction procedure. The suggestion of posting a bond in order to release and clear articles once introduced to Puerto Rico was dismissed by Representative Archilla Laugier as a burden and expense to small businesses. *Diario de Sesiones*, (1955), Vol. VIII, Num. 1, at 337-344. In the course of the House debate, Representative Ferré asked Speaker Polanco Abreu whether the majority could cite a state that had adopted a similar arrangement, to which the reply was: none. Speaker Polanco did refer to the federal excise tax experience and implied that Puerto Rico's status allowed for the federal tax experience to be adopted in some modified form in Puerto Rico. *Diario de Sesiones*, (1955), Vol. VIII, Num. 1, at 343. In the end, both the House and the Senate Finance Committee

of 1994.²⁶⁴ It continues to be used and constitutes the mainstay of the administrative collection methods of the current excise tax regime. It may even be carried over to enforce collection of use taxes, if and when a sales and use tax regime is adopted in Puerto Rico.

The military general orders decreeing these excises were still good law after the enactment of the Foraker Act, by virtue of Section 8's savings clause.²⁶⁵ Dr. Hollander was convinced that they had been poorly administered, and the items within their scope needed to be broadened:

“ [t]he law imposing the excise on matches directed the civil secretary to prescribe a time during which stamps must be affixed to all stock of matches. This notice was never given, and, in consequence, fraud was freely practiced... The tax on oleomargarine - being reasonable in amount, posed no serious difficulty, but yielded an inappreciable amount. The tax of 20 cents on each pack of playing cards was a fiscal impossibility. The cost price of playing cards, as used in Porto Rico, was about 5 cents per pack, and the excise simply destroyed all legitimate trade and put a premium on smuggling.”²⁶⁶

In the final analysis, Professor Hollander opted for adopting a modified version of federal excise taxes and summed up the policy reasons that impelled him to such decision as mainly efficiency and a favorable experience on the mainland:

“Excise taxation should play an important part in the revenue system of Porto Rico, but it should be of a kind adapted to local conditions and to local needs. The efficiency and integrity of the system prevailing in the U.S. should be reproduced, but the objects taxed, the rates imposed, and the methods of collection there should be in conformity with local conditions. These views were adopted by General Davis, transmitted to the Secretary of War [Root], and were instrumental in securing the insertion in the act of Congress approved April 12, 1900 [Foraker Act], of the provision that the internal revenue laws of the US should not be extended to Porto Rico, thus paving the way for the adoption of a [local]

Report recommending passage of the House bill 1390 concluded that the new interdiction procedures would not impede commerce “[e]l examen de estas disposiciones nos ha llevado al convencimiento de que con estas facilidades físicas y administrativas, incluyendo el establecimiento de oficinas de cobro y de consulta en los puntos de desembarco, no se producirán restricciones que entorpezcan en medida alguna ('in any way') las operaciones comerciales.” Senate Finance Committee report at 5.

²⁶⁴ 13 L.P.R.A. Sec. 9066. In *UPS v Hon. Juan Antonio Flores-Galarza, Secretary of the Treasury*, 318 F3d 323 (1st Cir, Feb. 4, 2002), this requirement in the law was held preempted by the FAA Authorization Act, that provides that states and Puerto Rico cannot interfere or burden the prices, routes and operations of air transport carriers.

²⁶⁵ Section 8 of the Foraker Act. 31 Stat. 77, ch. 191 (1900).

²⁶⁶ *Report of the Treasurer, included in the First Annual Report of Governor Charles H. Allen*, May 1, 1900 - May 1, 1901, Washington, Government Printing Office, (1901), p. 153.



system of insular excise taxes...”²⁶⁷

XII. The Hollander Excise Tax Violated the Anti-Discrimination Rules of the Foraker Act

Through Hollander’s efforts, Puerto Rico opted to protect certain industries through the deliberate establishment of discriminatory tax provisions. This amounted to an independent trade policy of protectionism that flouted one of the pillars of the Foraker Act, free and unimpeded trade, more specifically the Foraker Act’s anti discrimination provisions, the ban on tariff provisions of the Foraker Act and the mandate to conform the tax system to methods and principles allowed only to a state. With the Revenue Act of 1901, Puerto Rico commenced down a path of seeking inspiration for its taxes on the federal excise tax experience and protecting its local industries through this mode of taxation.

The provisions of the Revenue Act of 1901 dealing with excise taxes was not a complicated piece of legislation²⁶⁸ and was enacted before the Insular cases were decided. It extended to “distilled, vinous and fermented liquors, cigars, cigarettes, tobacco, proprietary medicinal preparations, playing cards, fire-arms, oleomargarine, matches, and other occupations, documents and instruments.”²⁶⁹ Generally, excises were imposed on all taxable items on a volumetric or weight basis, with the exception of arms and ammunition, medicines, perfumes and other toilet articles; the latter, subject to an excise measured as a percentage of the “invoice value.”²⁷⁰ The same excise-tax rate applied to products manufactured or distilled in Puerto Rico for local sale or consumption or when these same products were “imported for sale or consumption in Puerto Rico,” from the United States.

However, higher excises were to be imposed against foreign imports competing with locally-produced items such as cigars, cigarettes, snuff and chewing tobacco, rum and bay rum and matches.²⁷¹ Dr. Hollander was comfortable in boast-

²⁶⁷ (Emphasis added). *Report of the Treasurer, included in the First Annual Report of Governor Charles H. Allen, May 1, 1900-May 1, 1901*, Washington, Government Printing Office (1901), pgs. 153-154.

²⁶⁸ Laws of 1900, Title II, Sections 79-93

²⁶⁹ Laws of Puerto Rico (1900), Title II, Section 79 pg. 79

²⁷⁰ *Id.*, Section 79, Schedule A (11) and (13). The term “invoice value” was not defined in the law.

²⁷¹ *Id.*, Section 79, Schedule A. Section 3 of the Foraker Act only required that Puerto Rico’s tax laws not discriminate against “like articles” of U.S.-manufactured items imported for sale and use. No similar protection was statutorily extended for “like articles” of foreign manufacture. However, *Bacardi Corporation of America v Domenech*, 311 US 150 (1940), held that commerce treaties applied to Puerto Rico, as in the states, and limited any of its authority impinging Congress in this area.

ing, when reporting to Governor Allen, that the intent of the higher excises was no less than to discriminate against certain foreign imports. In reality, Hollander was under the impression that he could set something akin to a protectionist trade policy by the use of excise taxes to accomplish this goal. Hollander's report reflects this as follows:

"The domestic manufacture of all these articles is protected against Cuba, Jamaica, and other competing countries, by a rate of \$1 per gallon on rum, \$3.60 per 1,000 cigars, \$2 per 1,000 on cigarettes, and 10 cents per pound on manufactured tobacco imported into Porto Rico from countries other than the United States....

There are four match factories in Porto Rico, and this industry is also protected by a differential."²⁷²

The excise tax in the Revenue Act of 1901 was to be paid by "affixture and cancellation" of internal revenue stamps. The law was vague on what the taxable event consisted of, but, in practice, the act of introducing or importing was considered the taxable event. Section 83 of the Revenue Act of 1901 suggests that, for locally-produced items, the completion of the manufacturing process was the taxable event.

Schedule C of Section 79 of the Revenue Act of 1901 required the purchase and affixture of internal-revenue stamps on all bills of lading of shipments originating in Puerto Rico. It also required them on all "entries" in Puerto Rico of merchandise "imported from the United States and foreign countries, with the latter paying a higher rate."²⁷³

All manufacturers and importers of taxable items were required to post a bond with the Puerto Rico Treasurer.²⁷⁴ The law implied, although no express

²⁷² (Emphasis ours). *Report of the Treasurer included in Report of Governor Charles H. Allen, May 1, 1900 - May 1, 1901* at 170.

²⁷³ Laws of Puerto Rico (1900), Title II, Section 79, Schedule C (1) & (2) (3, pg. 87. Sections 3 & 38 of the Foraker Act prohibited duties on imports and on exports, respectively. What is surprising about this stamp tax is the fact that the Supreme Court had invalidated, just barely 6 weeks before Puerto Rico enacted this provision into its first revenue Act, a similar federal internal revenue stamp. *Fairbank v United States*, 181 U.S. 283 (1901). *Fairbank* held unconstitutional a federal internal revenue stamp on bills of lading on exports, as being, in substance and effect, equivalent to a duty on the exported item itself. Although the Court acknowledged that such a stamp tax had been in existence "[f]irst, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing in 1898" and had gone unchallenged, the tax, in the Court's view, plainly failed to pass constitutional muster. The Court was unpersuaded with the fact that the first stamp tax was enacted early in the Republic's existence, when, undoubtedly, the framers of the Constitution, many of whom later served as members of the first Congress, could have expressed some reason for pause. The rationale of the *Fairbank* case seems indisputably equally applicable to stamp taxes on the "entries" of merchandise. Inexplicably, Puerto Rico's first Revenue Act ignored this jurisprudence, perhaps out of haste in the process of enacting this first revenue package. Clearly, if Congress could not enact such a tax directly, the tax, presumably, failed as well under analogous reasons, as contrary to the Foraker Act's ban on duties when enacted by Puerto Rico's Legislature pursuant to a Congressional Organic Act. Equally surprising was the fact that this particular tax on bills of lading was not repealed until 1905.

²⁷⁴ Laws of Puerto Rico (1900), Title II, Section 81, pg. 87.



provision was made to that effect, that bonded warehouses would be allowed. Exports of locally-manufactured items were to be exempt from excise taxes. All taxes were self-assessed, with internal revenue agents empowered to subsequently audit books and records, to ascertain compliance with the law.

The import-excise tax evolved and expanded throughout the years and its offending provisions never annulled by Congress' plenary authority to do so. But, Congress' lack of action to remedy this overreach by Dr. Hollander and the local legislature was more a function of Congress' preference for aggrieved parties to challenge such issues through the court system rather than micromanage a territory. Courts have always been clear that congressional silence or inaction on territorial legislation that violated a basic precept of an Organic Act was not to ever be construed as acquiescence or ratification. In other words, the re-enactment doctrine would simply not apply.²⁷⁵

XIII. The Adoption of the Property Tax: Puerto Rico's Mainstay of Tax Revenues until Advent of the Income Tax

One of the notions that early on took hold in the new civil administration prompted principally by Dr. Hollander was that the landed wealthy in Puerto Rico were not contributing their fair share of taxes to the sustenance of the government.²⁷⁶ Dr. Hollander, no doubt, was impressed by his findings of tax evasion and uneven burdens, while working at tax reform at the Treasury. He concluded: "radical reform was necessary in the whole revenue system."²⁷⁷ His home state of Maryland had adopted the property tax as the principal source of tax revenue. In fact, the Maryland Constitution provided, in its Declaration of Rights, that every person ought to contribute his share of the public taxes, in proportion to his actual worth in real and personal property.²⁷⁸ Professor Hollander's version of radical tax reform was the adoption of the property tax.

²⁷⁵ *Springer v Philippine Islands*, 277 US 189, 208-209 (1928) (The effect of congressional inaction in the face of local legislation that allegedly infringed the Philippine Organic Act did not translate into approval by Congress under a congressional reporting and nullification provision in such Act) ("[t]o justify the conclusion that Congress has consented to the violation of one of its acts of such fundamental character will require something more than such inaction upon its part, as it really amounts to nothing more than a failure to affirmatively declare such violation by a formal act.")

²⁷⁶ Governor Allen reported, at Mr. Hollander's counsel, "that the revenue laws [in existence] had been tested and found inadequate to a fair apportionment of the burdens of government upon the inhabitants of the island. It was evident that many of the wealthy classes were escaping taxation, and those less able to pay were saddled with onerous taxes out of all proportion to their means." *First Annual Report of Charles H. Allen, Governor of Porto Rico*, May 1, 1901, Washington, Government Printing Office 1901, p. 56.

²⁷⁷ *Report*, at page 56. (My Emphasis).

²⁷⁸ Vol. XVIII *Studies in State Taxation*, Thomas Sewall Adams, *Taxation in Maryland*, Johns Hopkins University Studies, (1900) edited by J. H. Hollander, pg. 13, 33 (hereinafter referred to as *Studies in State Taxation*).

Hollander had examined and rejected forms of taxation used under Spanish rule, which rested principally on customs duties, a consumption tax, a license tax that he denominated the Industry and Commerce tax, and a territorial tax.²⁷⁹ He had noted that the customs and consumption tax were regressive, to the extent that essential staples and foodstuff had hit the poor the hardest. An effort to mitigate them during the military administration was attempted through the adoption of new customs tariff rates decreed by President McKinley on Dec. 1899. The Industry and Commerce tax rates varied according to the nature of the occupation. Dr. Hollander's perception was, that the tax rates were skewed against retailers and manufacturers who were engaged principally by locals, and that trades and professions that were typically controlled by Peninsular Spaniards, such as banking, exporting and importing businesses, had lower rates. He further scored the administration of the tax, which occurred at the municipal level, where local politics and influence from a tight circle of influential and wealthy families also involved in the municipal counsel governance would lead to uneven compliance throughout the Island.²⁸⁰

Some aspects of the Spanish territorial tax's structure - but not its administration earned some grudging praise from Dr. Hollander. The tax was a percentage of the income derived from activities associated with agricultural, timber, pasturelands and rentals of urban property. In his view, it broadly resembled the English income tax and, as a whole, "embodied certain elements of equitable and scientific taxation,"²⁸¹ but he quickly pointed out that such tax was poorly administered. He noted that the system was abolished by General Henry under General Orders, No. 6, Series, 1899, and replaced by a land tax on a "per cuerda basis", with rates that varied according to the quality and use of the land and not its resulting income or its valuation.

He rejected the continuance of such a land tax system devised by R. Cayetano Coll y Toste, when serving as civil secretary to Gov. Henry as "...a crude and primitive device discarded by every civilized country on its emergence from financial infancy."²⁸² In reality, this system had the benefit of simplicity and administrability, but equated size with productivity rather than a better measure, which was the income derived from the property, as the old Spanish territorial tax did.

Once word got out, that the adoption of a property tax was directed not only at correcting such notion of evasion but was going to be the principal means of

²⁷⁹ There were other sundry taxes, such as stamp taxes on documents, that will not be examined in this article.

²⁸⁰ *Report*, pg. 150-151 ("These defects were everywhere aggravated by the interference, in specific instances, by political and personal considerations.").

²⁸¹ *Id.*

²⁸² *Id.*



revenue for the government, the tax generated strong and wide opposition. The landowners were concerned with how, in practice, in Puerto Rico's charged political community, such tax would be administered by powerful assessors or collectors. Hollander admitted this much, when he reported to Governor Allen that "[t]he property tax has probably been the feature of the revenue law most exposed to criticism."²⁸³ The press also weighed in. All of the main features of the property tax were attacked vociferously in the press: "[t]he rate of taxation, the plan of assessment, and the manner of collection have been successively assailed."²⁸⁴ The apprehension was understandable for a sector of the population, since the Federal Party had withdrawn from the electoral process and the spoils and appointments had gone exclusively to the members of the opposing party. Dr. Hollander admitted that implementing a new tax under such a politically charged atmosphere was, to say so charitably, not going to be an easy task.²⁸⁵ In fact, there was more than just rebuke by some sectors; there were even credible threats to personal safety:

"The bureau of internal-revenue agents was organized under a storm of criticism and abuse. Warning communications were received, that any system of inspection was impracticable in Porto Rico, as the Spanish Government had found out to its cost. Agents under that regime, it was asserted, had invariably assumed autocratic powers and lived handsomely on bribes accepted for connivance at frauds and by a general system of extortion. The bureau, however, continued along the line projected, profiting by experience, but persisting in its main endeavor."²⁸⁶

Hollander was determined to instill confidence in the system, by not tolerating fraud or even any appearance of partisan abuse by agents:

"[w]hen it was ascertained that native agents were handicapped and their efficiency largely impaired because of past participation in the unfortunate personal politics obtaining on the Island, the native members of the force were weeded out and their [positions] filled by nonpartisan, Spanish-speaking Americans familiar with the local conditions."²⁸⁷

Separately, the adoption of a property tax, although explicitly sanctioned in the Foraker Act, was a surprise development for locals.²⁸⁸ This tax was not based

²⁸³ *Report*, p. 186.

²⁸⁴ *Id.*

²⁸⁵ "Appointments were made largely from one of the two political parties of the island, largely because the other party was in uncompromising opposition to the measure and because the overthrow of the revenue act had become the principal element in the programme of that party" *Report*, p. 187.

²⁸⁶ *Report*, p. 167.

²⁸⁷ *Report*, p. 167.

²⁸⁸ During the debates leading to the enactment of the Foraker Act, Senator Foraker had remarked that a tax on property would have been unduly burdensome to island residents, since the

on the ability to pay but on unrealized wealth and was designed to extract revenue from families with substantial realty and even on personal assets. The notion of progressivity, which suggests an ability to pay and liquidity, touted by Dr. Hollander as one of his guiding principles, was completely ignored. All of this on the heels of the hardships caused by Hurricane San Ciriaco in 1899 and the exchange of the dollar for the peso was enough reason for alarm, later anger and protest.

Under Section 1 of the new property-tax regime,²⁸⁹ all real and personal property owned by natural persons, not expressly exempted, was to be assessed and taxed annually at one half-percent of “its actual market value, without looking to a forced sale”²⁹⁰ and another one-half percent to the municipalities. The latter was also a key feature of the Maryland property-tax law. As Thomas Sewall Adams would note in his seminal essay on taxation in Maryland: “[o]ne of the salutary provisions of the Maryland law is the levy of local and state taxation upon the same basis.”²⁹¹ The system adopted was very common in the states and denominated the so-called listing method, whereby the taxpayer was required to file annually a return answering a long list of questions and listing and valuing all realty and personal property.²⁹²

Dr. Hollander admitted, in his first annual report to Governor Allen, that he had borrowed from the state experience, since Governor Allen noted that much.²⁹³ He failed to elaborate that, in fact, he drew more than significant inspiration from Thomas Sewall Adams’ seminal essay;²⁹⁴ he practically copied key provisions of the Maryland property tax law almost down to the last letter.²⁹⁵ These included the operative sections of the tax, such as Section 1 & 2 of the law, and the exemp-

economic crisis had forced many owners to mortgage heavily their properties. 33 Cong. Record-Senate, March 8, 1900, p. 2646.

²⁸⁹ *Laws of Puerto Rico 1900*, p. 43.

²⁹⁰ *Id.*, Section 8, p. 47.

²⁹¹ *Studies in State Taxation*, p. 14-75.

²⁹² *Laws of Puerto Rico 1900*, Sections 16 & 17, pg. 51-2. At the time, the state of Georgia, from which Hollander drew some inspiration for his property tax, used the listing system, which was described as “consist[ing of] the distribution of printed blanks to the taxpayers, who answer under oath the questions thereon” *Studies in State Taxation*, (Laurence Frederick Schmeckebier, *Taxation in Georgia*), p. 227.

²⁹³ Governor Allen noted that “the property tax is not noticeably different from the more advanced forms of the property tax as known in the United States.” *First Annual Report of Charles H. Allen, Governor of Porto Rico*, May 1, 1901, Washington, Government Printing Office, 1901, p. 59.

²⁹⁴ *Studies in State Taxation*, pg. 14-75.

²⁹⁵ Governor Allen did understand that a fair amount of copying and borrowing had taken place, since he noted in his annual report that: “the [property] tax itself is not noticeably different from the more advanced forms of the property tax as known in the United States.”



tions in Section 3.296 Maryland property tax law exempted persons with assessed values of less than \$100. Not coincidentally, Puerto Rico's law would have a similar exemption threshold.²⁹⁷

Dr. Hollander's bill exempted buildings of worship and schools, so long as the land in which they were located did not exceed "five cuerdas". Maryland's property tax law was nearly identical, but the limit of the exemption was 40 acres.²⁹⁸

On the administrative side, Hollander had a better claim to collection improvement - the law divided the enforcement of the property tax into three separate divisions; assessments, collections and review. Each division had their own administrative districts and professional staff paid on salary and not on commissions.²⁹⁹ The purpose was to centralize the administration, avoid elective assessors that could be influenced by local municipal politics, avoid, as much as possible, corruption and seek, as much as possible, the uniformity of valuation and enforcement of the law throughout the island. Again, Professor Hollander took his cue from Maryland's experience and Thomas Sewall Adams' approval of such system: "[assessors'] office [are] not elective, and these provisions tend to prevent much of the inequality between county and county which might result if separate assessments were made for state and local purposes, or if the assessors were elected by popular vote."³⁰⁰

Once the list or tax return was filed, the assessor was required to review and adjust the valuation of the property listed, either real or personal, if, in his judgment assisted by guidelines issued by the Treasury Department, the listing failed to reflect fair market value.³⁰¹

In the real property area, this was a controversial area, as Dr. Hollander would candidly admit, and one that would trigger many disputes and appeals. The problem was, that there was no precedent or valuation rolls, from which to build upon the property tax system. Further, not all real property had been recorded in the Property Registry, which dated only since 1880. Notarial records kept by the notaries throughout the Island, were also inadequate to conduct a search. Finally, Dr. Hollander noted that most real property was transferred by descent rather than by sale, which did not generate extrinsic information on which to base a valuation.³⁰² So, Dr. Hollander faced the daunting task of creating reliable and

²⁹⁶ *Studies in State Taxation*, p. 32.

²⁹⁷ *Id.*, p. 32.

²⁹⁸ *Id.*, pg. 32-33. See *Laws of Puerto Rico 1900*, Section 3(e), p. 44

²⁹⁹ For example, for assessors, see *Laws of Puerto Rico 1900*, Section 5, pg. 45-46.

³⁰⁰ *Studies in State Taxation*, p. 31.

³⁰¹ *Laws of Puerto Rico, 1900*, Section 19, pg. 52-3.

³⁰² *Report*, p. 183.

scientific tax-valuation rolls, and the listing method, which was considered intrusive, was his means to obtain such a data-base.

The tax was also to be imposed on personal property, such as cash, insurance policies and jewelry and other personal effects, except home, furniture, books, pictures and wearing apparel. As in the states,³⁰³ taxation of personal property generated in Puerto Rico an enormous amount of friction and resistance to this form of taxation. Similarly, the personal property was a failed effort in many states, including Maryland. In fact, Thomas Sewall Adams had warned of this in his essay: “the most serious defect of the property tax is the escape of personalty. Tax officials assert that there is no mode of reaching private securities and that intangible wealth in general is not listed.” However, he was of the opinion that the notion of evasion was overblown. In his view, since most of the property a person owned was realty, which was already taxed, and furniture and, perhaps, US securities that were generally exempt, the small amount of collections generated for this tax was just a function of how people invested their savings and the generous exemptions given in the law.³⁰⁴

Years after leaving Puerto Rico, William Hunt, Puerto Rico’s second governor to serve under the Foraker Act, expressed misgivings on the wisdom of having adopted the personal property tax for the Island:” I am not satisfied that we were wise in taxing personal property and realty separately under ad valorem taxes. The difficulties of obtaining correct statements of the personal property of people became as great as elsewhere [in the States]...”³⁰⁵

The law provided for appeals of assessments before a regional assessors’ board³⁰⁶ that, ultimately, were reviewable before the Executive Council acting as a Board of Equalization.³⁰⁷ This arrangement was another attempt by Dr. Hollander to ensure equity and uniformity, by “equalizing” the tax treatment accorded to the valuations of property.

Finally, one of the new features introduced by the law was the right of redemption of property, which allowed a taxpayer whose property was sold at auction for unpaid taxes to buy back the property, if the right was exercised within

³⁰³ For example, a commentator at the time observed that, in Georgia, “[p]ersonal property of all kinds escapes its just share of taxation. All the watches, rings, diamonds, precious stones, plate, etc, in Fulton County, containing the city of Atlanta with a population of over sixty-five thousand, was valued at \$108,083 in 1898. As regards merchandise, the returns are far worse. In 1896, Tatnall County returned only \$500 of merchandise, while Campbell County returned nothing at all.” *Studies in State Taxation*, p. 232 (Georgia). Hollander knew this at the time, since he edited these essays on state taxation prior to his assignment to Puerto Rico.

³⁰⁴ *Id.*, p. 41.

³⁰⁵ W. H. Hunt, *The Establishment of Civil Government in Porto Rico*, 5 Calif. L. Rev. 361, 371-373 (1917). (My emphasis).

³⁰⁶ *Laws of Puerto Rico* (1900), Title I, Sections 25-279, pg. 54-55.

³⁰⁷ *Id.*, Section 31-35, pgs. 56-57.



a statutory period, for the amount paid by the buyer, unless the property was unlisted. As other provisions of the law, this was a common feature in property tax laws in the States, that was unknown in the “apremio” process under Spanish rule. This certainly was a welcome feature in the law.

The law also imposed a tax on the net worth of corporations, in lieu of a property tax, which was meant to reach a similar result, since liabilities qualified as reductions against the valuations of the encumbered property, particularly when book values of the assets approximated the market value of the assets.

Without a doubt, the introduction of the property tax was a painful one for many landholders accustomed to taxes that were proportional to the income such property produced or under the laxer regime enacted subsequently under the military governorship of General Henry, on a per cuerda basis. It tended to tax unrealized wealth annually, placing a significant strain on such owners, particularly at the time that such taxpayers had experienced a significant drop in wealth by Hurricane San Ciriaco and the “canje” or exchange of pesos to dollars under the dollarization regime of the Foraker Act.

The advent of the federal Franchise Tax in 1909, the precursor of the federal income tax, and later the income tax, would eventually eclipse the property tax as the principal source of tax revenues, particularly when property tax valuations were later frozen under the Luis Muñoz Marín Administration to levels held in 1956-7. The property tax is today one of the principal means of revenue for municipalities and one that is being administered more aggressively, as municipalities in need for revenues, have sought and obtained rate increases to offset the erosion by inflation of the tax base through the valuation freeze.

Conclusions

The period of military administration in Puerto Rico served as a testing ground and established many features of Puerto Rico’s current fiscal structure. First, the McKinley Administration tested its constitutional theories of separation, that led to the doctrine of un-incorporated territories that was blessed by the Foraker Act and, subsequently, the *Insular Cases*.³⁰⁸ Further, during this same period of military administration, customs duties collected were treated as revenues of the lo-

³⁰⁸ Until the Supreme Court declares so – and it has not seen fit or expedient to do so - it is yet unclear whether the establishment of the Commonwealth of Puerto Rico in 1952 caused a fundamental and permanent change in constitutional status. Beyond the evident optics of simply replacing the framework for adopting municipal laws within the territory concept, the practice of the three branches of government of the US seems to suggest otherwise. After the advent of Commonwealth, Congress has continued to legislate consistent with the wide powers the *Insular cases* granted. Politically, on occasion, hearings are held, bills are introduced to study Puerto Rico’s status but the process simply grinds to a halt due to politics and lack of Congressional will. Efforts at expanding Commonwealth under the Fernós-Murray bill in the late 1950s simply got nowhere. Presidents, with the exception of President Ford, that, in a surprise move, introduced a statehood bill in 1976, have simply been content to issue Executive Orders (Kennedy Administration) directing the Executive Departments to treat Puerto Rico as if it were a state or establish blue ribbon committees to study the status problem. Every now and

cal fisc. This was a feature that was kept in the Foraker Act and survives today intact under the Commonwealth, with respect to customs duties imposed by the federal government on foreign imports that are covered over to the Puerto Rico government. The equalization tax that was one of the protectionist elements of the Foraker Act also survives and is currently law today.³⁰⁹

Import excises, which were instituted by the military administration, were

then, Presidents issue hollow declarations that, in reality, amount to no more than posturings of non-involvement declaring – but not urging - that Puerto Ricans can choose their future status in a referendum. No road map from there. Puerto Rico once did endorse handily a mandate to increase Commonwealth powers in a referendum held in 1967, but the plebiscite did not state what those specific changes would be. A change in 1969 to a pro-statehood Administration led by Luis A. Ferré muddled any mandate toward improvement of Commonwealth. A status commission to study the extension of the presidential vote was the only outcome. Other suggestions made to the Nixon Administration through a status commission under the Hernández Colón Administration were simply ignored. More status debate in the late 1980s in congressional committees ensued, but to no result. Commonwealthers won a second referendum in the 1990s, albeit with just a plurality and not a majority of votes. The end result was that it only signaled to Congress that a major shift, but not yet a majority, of voter sentiment toward statehood had occurred since 1967, weakening the Commonwealth movement. As a result, Congress, conveniently has, chosen not to take any major action, in light of the political impasse. The judicial side of this drama also shows unusual deference to the political departments of the United States. From 1952-1970, the Supreme Court routinely failed to grant certiorari to examine cases in which Puerto Rico was involved, perhaps to avoid the need to opine on the constitutional nature of the Commonwealth status. This long silence was broken in 1970, but the Court has simply followed Congress' lack of resolve, while purposely providing mutterings in case law that are vague enough to be read by both sides of the political divide as supporting their respective thesis for and against a change in status. This is very evident even after casting the most favorable light on the slippery, shallow and sometimes inconsistent exegesis handed down by the Supreme Court. The case law sometimes mentions that the Commonwealth constitutes a "unique" status, and indeed it is, as is the un-incorporated territory concept, but without indicating whether enacting municipal law within a locally-adopted constitutional framework changed the constitutional underpinnings of Puerto Rico's relationship with the US. Thus, individually and collectively, the case law as it now stands is inconclusive on this point. A sampling will illustrate this exercise in judicial two-step. Contrast *Calero-Toledo v Pearson Yacht Leasing Co.*, 416 US 663 (1974) and *Examining Board v Flores Otero*, 426 US 572 (1976) with *Harris v Rosario*, 446 US 651 (1980) [See in particular Justice Marshall's dissent]. However, any further examination of this issue is beyond the scope of this article and will be left to Congress and others for further study, debate and, if lucky, resolution. For a defense of the thesis that a new status was created under the Commonwealth see, Cancio, H., "The Power of the Congress to enter into a Compact with the People of Puerto Rico, *The Legal Status of the Compact*", *Revista del Colegio de Abogados*, Vol. XXII, Num. 3, pgs. 341-392 (May 1962). Commonwealthers also point to the fact that the United States, in 1953, removed Puerto Rico, with UN consent, from the applicable reporting requirements of dependencies and territories held under UN trusteeship by member states, and cite subsequent UN resolutions. However, the process leading up to the State Department's memorandum to the United Nations requesting and justifying such removal was anything but a smooth one; it even undermines the legitimacy of the compact concept. Senior Puerto Rico government officials clashed with State and Interior Department officials, with the former insisting on official recognition before the UN of the compact concept in such memorandum. The State Department rejected the request and did not include a reference to a compact between Puerto Rico and the United States. Kalman, L., *Abe Fortas, a Biography*, Yale University Press (1990), pgs. 171-2. For a contra view on the intent of Public Law 600 that led to the creation of the Commonwealth, see Helfeld, D., *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 Rev. Jur. UPR 255 (1952) and Cabranes, p. 100, fn. 484.

³⁰⁹ With some important exceptions, the federal excise taxes collected under this equalization arrangement are covered over to Puerto Rico. *Com. of Puerto Rico v Blumenthal*, 642 F2d 622 (D.C. Cir. 1980).



embraced by Dr. Hollander and formed part of Puerto Rico's first Revenue Act of 1901. The excise tax law, patterned against the federal model, even included protectionist elements inconsistent with free trade, the anti-discrimination provisions of the law and the mandate to mold tax reform to only models of taxation that states could adopt. Excises are very much part of Puerto Rico's fiscal instruments, although the modest approach initiated by Dr. Hollander was later expanded to make of the excise tax a broad-based tax that is one of the principal means of financing the Commonwealth of Puerto Rico. Some of its collection features may well end up in any future tax reform adopting a sales and use tax.

Hollander's revenue legislation attempted to keep in coexistence a modified version of the federal excise-tax laws, with traditional systems of state license and property taxation. However, with regard to the states, these two tax systems historically evolved under the aegis of separate provisions of the Constitution. Federal excises, as indirect taxes, were an outgrowth of Congress' extensive power to tax, and, unlike in the case of a state, this power is limited only by the rule of uniformity of Art. I Section 8 of the Constitution.³¹⁰ From inception, Puerto Rico's excises were enforced and collected at the water's edge, alongside customs duties in the customs houses, when taxable property was introduced or imported. The property tax, a traditional and major source of state revenue, had slowly evolved and was understood to be subject to federal constitutional limitations, such as the commerce clause, the substantive due process clause and the import/export clause.³¹¹

In the final analysis, Hollander paid less attention to the historical development of these taxes and more to their potential for increase in revenue to the fisc. The so-called Hollander bill was not all that Hollander touted it to be, principally, the adoption of an entire new excise-tax system carefully and methodically designed and "adapted to local conditions". Far from this, it turned out to be just an adaptation of the extant federal excise laws, with significant lower rates. As discussed, his tax reform included provisions that were blatant attempts at discrimination against mainland and foreign commerce.

Surprisingly, some of these provisions flouted the anti-discrimination clause of the Foraker Act and the mandate to integrate the island within the commercial orbit of the United States, precisely the purpose that the Act's reciprocal free-

³¹⁰ As Chief Justice Chase remarked in the *License Tax Cases*, 72 US 462, 471 (1866): "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity."

³¹¹ It has been estimated that, by 1890, property taxes produced 72 percent of state revenues and 92 percent of local revenues. It continued to be the mainstay of local governments, with states subsequently shifting toward income and sales and use taxes. Unlike the states, the federal government's main source of internal revenue was excise taxes on liquor and tobacco, that represented approximately 90 percent of the federal government's revenues exclusive of duties. Friedman, pgs. 565 and 567.

trade provisions were meant to advance.³¹²

The courts would later assume - and not unreasonably - that the Foraker Act aimed at establishing a territorial government with powers over tax and other matters as those generally associated with the states.³¹³ Presumably, the territorial government was not only constrained by express limitations arising from the Foraker Act ban on duties and other federal laws, but the courts would also assume that the restrictions flowed from the sheer presence of the constitutional imperative of federalism.

Despite Dr. Hollander's stray from the Foraker Act's mandate, jurisprudence construing the constitutional scope of a state power to tax would have profound influence over Puerto Rico. It ultimately, led to challenges against the interdiction and collection procedures of import excises at the water's edge. Intertwined with this development was the inexorable gravitational pull that free commerce with the US engendered. Further constitutional influence arised from the wholesale introduction of federal statutory and common law, the adoption of laws originating in the states, new traditions at odds with civil law thinking, such as *stare decisis*,³¹⁴ and the supervisory role of the federal courts, local courts and the U.S. Supreme Court.

Although never exercised, no less an influential factor was the ominous power flowing from the Foraker Act, that reserved in Congress the authority to amend and annul local laws.³¹⁵ All of this made it inevitable for Puerto Rico's legisla-

³¹² The Puerto Rican Republican Party controlled the fully-elected House of Delegates that approved the Hollander bill. The party's platform in 1899 had called for the "equalization of the burden of taxation" and that the revenue laws "be changed at once to American principles of taxation suitable to the conditions of Puerto Rico." *Par. 9 of the Puerto Rico Republican Party Platform of 1899 included as Appendix T of Report of Brigadier General George W. Davis*, at 290. The opposing Federal Party's platform had called for "insular industries to be effectively protected." *Id.* at 287. The devastation wrought by hurricane San Ciriaco and the need for protecting and expanding the island's revenue base may have influenced Hollander's attempts to balance both parties' views. In the end, Anglo-American tax principles were introduced and, as we shall see, a protectionist stance was taken in the excise-tax provisions.

³¹³ *Ponce v Roman Catholic Apostolic Church*, 210 US 296, 308-309 (1908). Subsequently, after passage of the Jones Act of 1917, Puerto Rico's Second Organic Act, the court observed that nothing really had changed with regard to the scope of legislative powers conferred to the Puerto Rico Legislative Assembly; it did not exceed that associated with states. *Puerto Rico v Shell Co.*, 302 U.S. 253, 261-262 (1937) ("...legislative powers were conferred nearly, if not quite as extensive as those exercised by the state legislatures.") (My emphasis.)

³¹⁴ Silving, Helen, "Stare Decisis" in the Civil and in the Common Law, 35 Rev. Jur. U.P.R. 195 (1966); Delgado Cintrón, C., *Las Escuelas de Derecho de Puerto Rico, 1790-1916 (Contribucion a la Historia de la Enseñanza del Derecho)*, 41 Rev. Jur. U.P.R. 7 (1972). The late and distinguished David Rivé Rivera opined that the adoption of *stare decisis* appears to constitute a nearly impassable barrier to reverting Puerto Rico to a civil-law tradition. Rivé Rivera, David, *La Doctrina de "Stare Decisis" y el Derecho Civil en Puerto Rico*, 63 Rev. Jur. U.P.R. Num. 1, 131, 134 (1994) ("La norma de *stare decisis* parece ser un obstáculo infranqueable al deseo de configurar el derecho (sic) de Puerto Rico como parte del sistema de derecho civil o romano-germánico, ya que, entre otras cosas, esta norma exige hasta un tipo de razonamiento jurídico diferente al que se conduce en un discurso civilista.").

³¹⁵ Section 31 of the Foraker Act. 31 Stat. 77, ch. 191 (1900).



ture, bar and bench to shift the island closer toward the Anglo-American legal system and U.S constitutional thought and practice.³¹⁶ But, this judicial evolution affirming the Foraker Act's mandate as not only consistent, but entirely in conformity with federalism principles, with its ever-growing limitations on state taxation,³¹⁷ was not matched by a corresponding reduction in Puerto Rico's ever-expanding effort at expanding and broadening the tax base of its excise-tax system. Eventually, in the mid-1920s, these opposing tendencies would collide and prompt the business community to challenge Puerto Rico's excise tax laws against the constitutional limitations that constrain any state's tax and regulatory powers over interstate and foreign commerce.³¹⁸ In 2002, history would repeat itself in the excise tax area, when a similar challenge succeeded.³¹⁹ This may prompt the Legislature to once again look to the states for a tax model, and Puerto Rico may very well end up with a sales tax.

The property tax is still important in Puerto Rico and is administered centrally by an autonomous agency called Centro de Recaudaciones de Ingresos Municipales or, by its acronym, CRIM. The tax has been extensively amended through the years, but the structure and philosophy introduced by Dr. Hollander are still there. Centralization of the collections and administration of the property tax was the hallmark of Dr. Hollander's reform and generally parts ways with how property taxes are administered in the states, which normally is administered through counties or municipalities. So, despite the initial opposition to its adoption, Dr. Hollander's legacy of excise and property taxes live on.

³¹⁶ The Puerto Rico Civil and Commerce Codes, both inspired by the Spanish Civil and Commerce Codes respectively, suffered extensive modifications but survived the revision of the Presidential Commission charged with the review of all local Codes and laws. However, a line of U.S. Supreme Court cases insisted that, on matters of purely local law, the civil law code and the Puerto Rico Supreme court interpretations were to be accorded great deference. *Garrozi v Dastas*, 204 US 64, 80 (1907). Despite this, the Puerto Rico Supreme Court initially took a different approach, holding that civil law had to be interpreted in light of the prevalent legal traditions in the US. *Marimón v Pelegrí*, 1 D.P.R. 225, 228-229 (1902); *Esbrí v Sucesión Serallés*, 1 D.P.R. 321, 336-337 (1902); *Chevremont v Pueblo*, 1 D.P.R. 431, 445 (1903).

³¹⁷ Early on, Puerto Rico's Attorney General's Office assumed that the Commerce Clause applied to Puerto Rico. 1 *Opinions of the Attorney General of Porto (sic) Rico*, 107, 111 (1902) and, in particular, to matters associated with collections of the import excise tax. 4 *Opinions of the Attorney General of Puerto Rico*, 106, 107 (1913). The Puerto Rico Supreme Court also assumed that the imperatives of federalism extended the Commerce Clause to Puerto Rico. *Ponce Lighter Co. v Municipality of Ponce*, 19 P.R.R. 725 (1915).

³¹⁸ For example, *Bouret v Benedicto*, 11 P.R. Fed. Rep. 249 (1920); *Universal Film Company Case*, 11 P.R. Fed. Rep. 437 (1920); *Texas Co. v Benedicto*, 12 P.R. Fed. Rep. 330 (1920). In *Texas Co.*, a temporary restraining order was issued to stop collection of a two-cent-per-gallon tax on gasoline before the fuel left the custody of the agent of the vessel. Puerto Rico's Treasurer filed an affidavit with the court, that clarified that Treasury's policy was not to collect until the goods had been "confused with the property in commerce in Porto Rico"

³¹⁹ *UPS v Hon. Juan Antonio Flores-Galarza*, 318 F3d 323 (1st Cir., Feb. 4, 2002)



In similar fashion, Puerto Rico's status is very much a creature of events that unfolded under the Insular cases and the Foraker Act.

So there it is. Puerto Rico's present is very much a product of the past, and, particularly, the history transpiring from 1898-1901 in the Congress, the Presidency and Puerto Rico. Without looking to this past, and to personalities such as President McKinley, Hollander, Governor Davis, Secretary Root, Senator Foraker and Congressman Payne, who played an enormous role in such developments, it would be nearly impossible to understand the hows and the whys of Puerto Rico's fiscal structure and its overarching constitutional status.