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The Constitution Is a ‘Promesa’ to Keep

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The U.S. Supreme Court heard oral arguments Tuesday in cases that might not get as much attention as the culture-war smorgasbord on the docket this term, but that implicates billions of dollars and, even more important, the vitality of our system of government. That’s what’s ultimately at stake in the five cases consolidated under the technocratic name *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*.

The cases arose from the restructuring of Puerto Rico’s public debt under the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (“PROMESA,” the Spanish word for “promise”), which created a seven-member Financial Oversight and Management Board. PROMESA’s practical effect was to require the president to select the board’s members from non-public lists submitted to the president by House and Senate leaders, without subjecting those appointments to Senate confirmation. The president ultimately agreed to Congress’s directive and chose six board members from that secret list, plus one member himself. None of these appointees were ever subject to Senate confirmation.

The cases raise fundamental questions about government structure because the Appointments Clause of the U.S. Constitution (Article II: Section 2) requires all “officers of the United States” to be nominated by the president and confirmed by the Senate. After the board began restructuring Puerto Rico’s debt, certain investor-creditors, as well as the labor union that represents employees of the island’s electric utility, challenged the board appointment. As the name creditor, Aurelius Investment, would write in its response to the cert petition in the lead case, “The dubious constitutionality of this scheme was obvious from the beginning.”

The U.S. Court of Appeals for the First Circuit, in February, ruled for the challengers but declined to invalidate any of the board’s actions, invoking the *de facto* officer doctrine. In so doing, the court: (1) Effectively denied the challengers any meaningful remedy; (2) Improperly expanded the power of Congress at the expense of the president and (3) Disincentivized private parties from seeking recourse for violations of the Constitution’s structural protections.

The First Circuit’s erroneous application of the *de facto* officer doctrine is wholly out of line with Supreme Court precedent and undermines the separation of powers. As the Court explained way back in the 1886 case of *Norton v. Shelby County*, the doctrine is an ancient tool of equity that ratifies acts performed by a government officer acting under color of official title even though it is later discovered that the officer’s appointment is legally deficient. The doctrine cures minor statutory defects, not those that violate the Constitution’s structural provisions.

Given that the board members’ power is “pursuant to” federal law (all the power comes from PROMESA), they occupy “continuing positions” (appointments of three years or longer), and they exercise “significant authority” (power to prosecute and veto, rescind, and revise Puerto

Rico laws and fiscal plans), the First Circuit correctly concluded that board members were principal federal officers subject to the Appointments Clause.

At this point, the court should have stricken the unconstitutional grant of appointment authority, vacated the board's decisions, and corrected the constitutional defect by requiring new proceedings before a properly appointed board. Instead, the court fashioned its own judicial remedy under the archaic *de facto* officer doctrine. Ironically, in attempting to vindicate Congress's improper grant of appointment power to itself, the court made a policy judgment about how best to restructure Puerto Rico's debt, ignoring the constitutional violation and claiming for itself Congress's power to legislate.

The Supreme Court has held repeatedly that private parties have an implied right of action to assert claims for separation-of-powers violations. But this right means nothing unless those bringing successful challenges have access to meaningful remedies. As the Court put it in the 1995 case *Ryder v. United States*, "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and *whatever relief may be appropriate* if a violation indeed occurred." In applying the *de facto* officer doctrine to ratify the unconstitutional board's actions, the First Circuit denied the challengers the relief to which they're entitled.

Constitutional structure is important; it's what ultimately secures our liberties and ensures that we have the rule of law, rather than man—whether that be the president or the group of men and women in Congress, or both in collusion against our founding document. As the justices struggle with the important legal and practical considerations at issue in Puerto Rico's near-bankruptcy—they seemed mostly concerned at argument about whether the board exercised national or local power, which would be a curious way to interpret a federal law created by an act of Congress—they need to show that the judiciary will maintain our ever-fragile separation of powers even when the other branches fail to do so.

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