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IN THE SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF PUERTO :

RICO, :

Petitioner : No. 15-108

v. :

LUIS M. SANCHEZ VALLE, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, January 13, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

CHRISTOPHER LANDAU, ESQ., Washington, D.C.; on behalf of Petitioner.

ADAM G. UNIKOWSKY, ESQ., Washington, D.C.; on behalf of Respondents.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-1808, the Commonwealth of Puerto Rico v. Valle.

Mr. Landau.

ORAL ARGUMENT OF CHRISTOPHER LANDAU
ON BEHALF OF THE PETITIONER

MR. LANDAU: Thank you, Mr. Chief Justice, and may it please the Court:

This case turns on the straightforward point that the people of Puerto Rico are the source of authority for the laws of Puerto Rico. That means that a prior Federal conviction has no Double Jeopardy implications for the enforcement of the Commonwealth's criminal laws because Commonwealth law and Federal law emanate from different sources of authority: The people of Puerto Rico on the one hand and Congress on the other.

JUSTICE GINSBURG: Mr. Landau, could Congress amend 48 U.S.C. 1704, which covers Guam, the Virgin Islands, American Samoa? Could it amend that statute and put Puerto Rico in there as well?

MR. LANDAU: It could certainly amend that statute, Your Honor, with respect to Federal

1 prosecutions in Puerto Rico pursuant to its authority
2 over Federal prosecutors.

3 Your question, Your Honor, raises a very
4 intricate question with -- with --

5 JUSTICE GINSBURG: In -- in the statute
6 is -- it works both ways.

7 MR. LANDAU: In the statute, Your Honor, it
8 does because there's no question Puerto Rico is in a
9 unique status different than Guam, the Virgin Islands,
10 and American Samoa precisely because those are all
11 territories governed, as traditionally, by organic acts
12 of Congress.

13 JUSTICE GINSBURG: But is there -- is
14 there --

15 JUSTICE KENNEDY: What -- what about the
16 Northern Marianas?

17 MR. LANDAU: Your Honor, they are in an
18 interesting position that is generally more analogous to
19 Puerto Rico in the sense that they are a Commonwealth of
20 the Northern Marianas with a compact of their own that
21 was very much modeled on Puerto Rico, although it's
22 somewhat different than the Puerto Rico model. But
23 there's a profound distinction that goes to the heart of
24 this case between the home rule territories, were
25 Congress, to be sure, has delegated a measure of

1 self-government to those particular territories, but
2 each of them, Guam, the Virgin Islands, and American
3 Samoa are still governed by organic acts of Congress, as
4 was Puerto Rico prior to 1952.

5 JUSTICE GINSBURG: Mr. Landau, could you
6 finish your answer to my question? You said yes, as far
7 as what the federal Congress can deal with, what the
8 federal prosecutors do, but the statute works both ways.

9 Are you saying it couldn't -- Congress has
10 no power to do that with respect to Puerto Rico?

11 MR. LANDAU: I would say, Your Honor, that
12 that raises a very interesting and tricky issue with
13 respect to the compact that the 1950 Public Law 600
14 offered the people of Puerto Rico that was accepted. As
15 this Court said in the Flores de Otero case in the
16 1970s --

17 JUSTICE GINSBURG: You're saying it's a hard
18 question, but you haven't given me --

19 MR. LANDAU: Well, I -- I -- I think the
20 answer is probably not, insofar as this Court said --
21 and I'm not saying this myself. I'm quoting this Court.
22 Congress relinquished control over the organization of
23 the internal affairs of the Island.

24 Now, one point to make very, very clear:
25 Our position today on the double jeopardy issue does not

1 turn on that relinquishing issue. But to answer your
2 hypothetical specifically, if Congress started to tell
3 the Puerto Rico prosecutors what cases they may
4 prosecute, that might raise some serious questions
5 under --

6 JUSTICE GINSBURG: Just take the statute as
7 it is. Just add Puerto Rico --

8 MR. LANDAU: Right --

9 JUSTICE GINSBURG: -- not telling
10 prosecutors what to do in a particular case.

11 MR. LANDAU: Well, and -- and, again, Your
12 Honor, I think the critical point here, and I think what
13 is most telling going back to some of the colloquy that
14 just happened in the other case, Congress since 1952 has
15 never attempted to do anything like that, to tell the
16 people -- to exercise control over what the government
17 officials in Puerto Rico --

18 JUSTICE SCALIA: That doesn't mean it
19 couldn't. That doesn't mean it couldn't change the law.

20 Is it essential to your case that we
21 recognize Puerto Rico as a sovereign?

22 MR. LANDAU: It is not essential that you
23 recognize Puerto Rico as a sovereign with a capital "S,"
24 because if you get 12 political --

25 JUSTICE SCALIA: That's our usual double

1 jeopardy law, isn't it?

2 MR. LANDAU: It -- it is --

3 JUSTICE SCALIA: -- two sovereigns, it's a
4 different matter.

5 MR. LANDAU: It is the shorthand that this
6 Court has typically used, the dual sovereignty doctrine.
7 But the court made clear this is the lesson of the
8 Wheeler case where the court was -- the Ninth Circuit
9 said, gee, these Indian tribes don't look like
10 sovereigns to us, because they are subject to the
11 plenary control of Congress. That's not what we
12 typically think of as sovereigns.

13 And this Court says you're missing the
14 point, Ninth Circuit. What we mean in the context of
15 double jeopardy, the language we are construing is the
16 same offense. Laws -- offences created by two different
17 entities are not the same offense if they flow from
18 different sources of court.

19 JUSTICE KAGAN: Well, I don't understand how
20 that helps you, Mr. Landau. You're saying that the test
21 is what the source of authority is, and you're saying
22 that the source of authority here is the Puerto Rican
23 people.

24 MR. LANDAU: Correct.

25 JUSTICE KAGAN: But that seems to be just --

1 you're not taking another step back. What's the source
2 of authority of Puerto Rican people? The source of
3 authority of Puerto Rican people was a Congressional
4 act. If you go back, the ultimate source of authority
5 is Congress.

6 MR. LANDAU: That, Your Honor, is the crux
7 of the case. And with all respect, I disagree with the
8 suggestion that the ultimate source here is Congress.
9 Congress could be -- what Your Honor just described is
10 very much like a home rule jurisdiction, where, let's
11 say, you have the Virgin Islands legislature that passes
12 a Virgin Islands law. But that government of the Virgin
13 Islands is itself a creature of Congress, as was the
14 government of the Philippines in the early 1900s, and
15 Puerto Rico in '30s at the time of the Shell case.

16 What made all the difference in the world,
17 Your Honor, was in 1950 to '52 Congress said, we
18 recognize and fully endorse the government -- the
19 concept of government by consent. So we are not
20 delegating authority to --

21 JUSTICE KAGAN: Well, but Congress today, if
22 it felt like it -- and of course it won't. But if it
23 felt like it, could Congress go back on that decision?

24 MR. LANDAU: Well, this then goes to the
25 relinquishment issue, Your Honor, in terms of what is

1 the nature of the compact. This has been a very
2 emotional and hot-button issue in Puerto Rico. As Chief
3 Judge McGruder noted in his article in 1953 already,
4 there were divergent views at the time from the very
5 outset on whether --

6 JUSTICE KENNEDY: Well, suppose we assume
7 that Congress could rescind the existing compact.

8 MR. LANDAU: Right.

9 JUSTICE KENNEDY: Do you then lose your
10 case?

11 MR. LANDAU: Absolutely not, Your Honor. And
12 that is --

13 JUSTICE KENNEDY: Why?

14 MR. LANDAU: Because this is, again, the
15 lesson of Wheeler. It was uncontested in Wheeler that
16 plenary congressional control over the Indians -- over
17 the Indian tribes meant that Congress could abrogate
18 Indian sovereign immunity with the stroke of a pen, and
19 even abrogate the tribes and derecognize the tribes.
20 But that didn't mean that the existing tribal laws at
21 the time were not considered the laws of the separate
22 tribes --

23 JUSTICE KENNEDY: Are there -- you know,
24 "sovereignty" is a slippery word. That's why the
25 framers didn't use it in the constitution.

1 Are you suggesting there's kind of a second
2 class sovereignty and a first class sovereignty?

3 MR. LANDAU: Well, Your Honor, I -- I
4 couldn't agree more with your insight, that
5 "sovereignty" is a slippery word. If you got 12
6 political philosophers, they would all give you a
7 different answer as to what "sovereignty" means. And I
8 think that is precisely why Wheeler said we can't have
9 judges and courts trying to decide double jeopardy
10 questions by asking abstract questions of sovereignty,
11 because, you know, even the State sovereignty is
12 different than the sovereignty of the independent
13 nations. They don't have ambassadors, et cetera. So
14 what this Court has made clear is that the test in the
15 double jeopardy context is all about the source of
16 authority for the laws.

17 And going back to Justice Kagan's question,
18 which I think cuts to the heart of the case, in this
19 particular case Congress said, we -- and this is
20 pursuant to demands for -- by the people of Puerto Rico
21 for government by consent. The people of Puerto Rico
22 said, we are tired of being a colony. We want to create
23 our own government. And so the Constitution of Puerto
24 Rico could not be more explicit on this score, that it
25 says, "The political power of the Commonwealth emanates

1 from the people." That document was submitted to the
2 Puerto Rico voters. So you're a Puerto Rico voter and
3 you say this is what I'm voting for. It was submitted
4 to the President of the United States and Congress, who
5 approved that particular --

6 JUSTICE GINSBURG: Mr. Landau, we have a
7 situation as a result of the decision of the Supreme
8 Court of Puerto Rico. I think it was two of the
9 justices who said we're not going to get into this
10 business about the Constitution. We think, interpreting
11 our own double jeopardy provision, somebody should not
12 be tried a second time. So that's going to be the law
13 of Puerto Rico. That's -- if the Puerto Rico Supreme
14 Court said that, then we would have the situation that
15 has led us to grant cert in this case. That is, if you
16 have a prosecution first in the Federal government, then
17 Puerto Rico will not have a second prosecution. You
18 have it first in Puerto Rico. The Federal government is
19 free to institute a second prosecution.

20 MR. LANDAU: You're absolutely -- you're
21 absolutely right, Your Honor. And that was the position
22 of two of the nine justices on the Supreme Court of
23 Puerto Rico. That position did not command a majority,
24 which is why there's no adequate and independent State
25 ground here. The majority was very explicit --

1 JUSTICE GINSBURG: And they could. They
2 could. If -- if the -- if we told the majority you're
3 wrong, nothing would prevent them from agreeing with
4 those two justices, right?

5 MR. LANDAU: No, that's absolutely right.
6 And -- and about 21 --

7 JUSTICE GINSBURG: Then there's no way you
8 could break that situation of having -- it depends on
9 which -- which jurisdiction goes first.

10 MR. LANDAU: That's correct, Your Honor.
11 And that -- that is true in about 21 states, that as a
12 matter of State law, either statutory or constitutional,
13 do not allow a subsequent prosecution.

14 But again, that doesn't change the point.
15 What -- what made a cert grant appropriate and
16 intolerable was that the Federal -- was the difference
17 between the Federal and State courts in Puerto Rico on
18 the federal constitutional question. It was not if one
19 were Federal and one were State.

20 JUSTICE SOTOMAYOR: Mr. Landau, there's
21 something you said that resonates with me, 'cause I've
22 been trying to find a definition of "sovereignty." And
23 one has been created in the briefing by saying that
24 states are sovereign; yet if you look at international
25 usage, they wouldn't consider states necessarily

1 sovereign because they can't order their foreign
2 affairs. They can't print money. They can't do lots of
3 things that others would consider them sovereign for.

4 So I guess the Constitution does something
5 else with that word. What is it -- what are the
6 elements of sovereignty with respect to the Double
7 Jeopardy Clause that you think are commanded by our case
8 law? There -- there's more than just the Puerto Rican
9 people say.

10 MR. LANDAU: Absolutely.

11 JUSTICE SOTOMAYOR: And it can't be that
12 it's the compact alone. So what is it? What are the
13 principles --

14 MR. LANDAU: Absolutely.

15 JUSTICE SOTOMAYOR: -- that you meet that
16 would create sovereignty in the Double Jeopardy sense?

17 MR. LANDAU: To -- to take your -- your
18 question in turn, Your Honor, this Court has made it
19 clear in a series of cases starting in Wheeler in 1978
20 that really tries to synthesize what the Court has been
21 saying with respect to the dual sovereignty doctrine
22 over a century.

23 And what the Court said is, in the Double
24 Jeopardy context, we are trying to decide whether two
25 offenses from different entities are the same offense.

1 That has traditionally been called "dual sovereignty."

2 But what we mean by "dual sovereignty" in
3 this context doesn't require this broader -- let's
4 say -- I'll call it "sovereignty with a capital S"
5 inquiry. It is a much more targeted and narrow inquiry
6 into -- is the -- the source of authority for each
7 offense.

8 JUSTICE SOTOMAYOR: Now, I'm looking at
9 Lanza, and it says -- I think Lanza says, and it's a
10 Double Jeopardy --

11 JUSTICE KAGAN: Right.

12 JUSTICE SOTOMAYOR: -- Clause, that for
13 Double Jeopardy Clause purposes, sovereignty means, one,
14 that the separate entity possesses the authority to
15 determine what shall be an -- an offense against their
16 peace and dignity; two, can enact laws without the
17 interference of the other; and, three, draws authorities
18 to punish the offender -- and this is the one that
19 you've been arguing -- from a distinct source of power
20 from the other sovereign.

21 MR. LANDAU: Right.

22 JUSTICE SOTOMAYOR: And -- and you keep
23 saying it's the Constitution. It's the "We the People."
24 It sounds a -- a bit histrionic to me. It -- there's
25 something else. What is meant --

1 MR. LANDAU: It is, Your Honor. And I --
2 and I --

3 JUSTICE SOTOMAYOR: -- by this distinct
4 source of power?

5 MR. LANDAU: If -- if could just say -- make
6 two quick points in response to that.

7 First, Lanza is not the last word on this
8 because Wheeler, in the '70s, clarified what Lanza meant
9 because, for instance, the Ninth Circuit in Wheeler
10 said, well, the Indian Tribes don't fit the Lanza
11 definition because Congress has plenary authority to
12 overrule at any time. So that goes to the first part of
13 your question.

14 To the second part of your question, it is
15 Congress acting in tandem with the people of Puerto Rico
16 that's critical. In other words, it is certainly not
17 the people of Puerto Rico that could unilaterally and
18 without reference to Congress just say, guess what? We
19 are the source of authority of our own laws. And -- and
20 that would be the end of the story.

21 JUSTICE GINSBURG: Mr. Landau, I thought
22 that, in the -- in the case of the Indian Tribes,
23 what -- what the Court said is they were once sovereign
24 before we got here and we took some of that sovereignty
25 away.

1 That's not the case with Puerto Rico.

2 MR. LANDAU: Yes. We are certainly not
3 saying that we are absolutely on all fours with the
4 Indian Tribes. There are -- what Your Honor said is
5 true. Although one thing to keep in mind, of course, is
6 that not all tribes proceeded the -- the -- the creation
7 of the United States. In fact, if Congress can
8 recognize Indian Tribes to this day, the standard is
9 under 25 C.F.R. 83.7. And an entity that existed as
10 recently at 1900 can still be considered an Indian
11 tribe. So --

12 JUSTICE GINSBURG: But the rationale was
13 that the tribes had this sovereignty, and that's what
14 was being respected.

15 MR. LANDAU: That -- that -- that is
16 correct, Your Honor. The -- the -- the tribes had an
17 inherent sovereignty. But I think the point for Double
18 Jeopardy purposes doesn't require the inherency. It
19 just requires a -- a recognition by Congress of an
20 exercise of sovereignty. And that goes, I think --

21 JUSTICE BREYER: Well, what is it? That is,
22 look. If we simply write an opinion and it says, Puerto
23 Rico is sovereign, that has enormous implications.

24 MR. LANDAU: It does.

25 JUSTICE BREYER: The insular cases are

1 totally changed in their applications.

2 MR. LANDAU: Right.

3 JUSTICE BREYER: The political implications
4 I'll just stay away from.

5 On the other hand, if we write an opinion
6 that says it's just a territory, that has tremendous
7 implications.

8 MR. LANDAU: Correct.

9 JUSTICE BREYER: How did we tell the UN it
10 wasn't a colony? Why are we not reporting on this
11 colony every year?

12 MR. LANDAU: Correct.

13 JUSTICE BREYER: So either way, between
14 those two, the implications in law and in politics and
15 everything else are overwhelming.

16 Therefore, you argue a third and middle
17 position. Your position pointing to four cases in this
18 Court, so you have very good authority. It's for Double
19 Jeopardy purposes. There is a different question. The
20 question is what are the sources of the law? And then I
21 find four cases that say just what you said. Okay?

22 Now, you say the sources of the law, the
23 sources of criminal law here are different. Okay. What
24 I think Justice Sotomayor wanted you to say is explain
25 that.

1 MR. LANDAU: Yes.

2 JUSTICE BREYER: Take a little time, if you
3 like. In what way are they different?

4 MR. LANDAU: Absolutely, Your Honor.

5 They are different, Your Honor, because
6 Congress invited -- in Public Law 600, Congress said, we
7 recognize the principle of government by consent. That
8 is something that we, as Congress rightly --

9 JUSTICE SOTOMAYOR: Going back to the
10 political issues. And -- and -- and that's what I think
11 Justice Breyer is trying to stay away from.

12 This is a very simple question.

13 MR. LANDAU: Okay.

14 JUSTICE SOTOMAYOR: All right? Can the
15 Federal government override a Puerto Rican law?

16 MR. LANDAU: Your Honor --

17 JUSTICE SOTOMAYOR: Can they --

18 MR. LANDAU: This goes to --

19 JUSTICE SOTOMAYOR: Can they veto a Puerto
20 Rican law?

21 MR. LANDAU: No, absolutely not.

22 JUSTICE SOTOMAYOR: All right.

23 MR. LANDAU: They cannot.

24 JUSTICE SOTOMAYOR: Who makes these laws?

25 MR. LANDAU: The people of Puerto Rico --

1 well, the legislative assembly, the -- the -- the
2 legislative powers of which were vested by the people of
3 Puerto Rico in the legislative assembly. In other
4 words, the Puerto Rico Constitution could not be more
5 specific in saying "We, the people of Puerto Rico, in
6 exercise of our" --

7 JUSTICE SOTOMAYOR: The laws were made by
8 Puerto Rico's comparable Congress.

9 MR. LANDAU: That is correct, Your Honor.
10 And -- and this is the -- I think the point I'd really
11 like to underscore, because I think it's critical here,
12 is this arrangement was not something that Puerto Rico
13 did as a rogue usurpation of authority. This was
14 pursuant to the invitation of Congress and with the
15 blessing of Congress. That was submitted to the
16 Congress. The Congress saw that language.

17 JUSTICE KAGAN: Even in saying that,
18 Mr. Landau, you're putting Congress in the driver's seat
19 here: It was done at the invitation of Congress.
20 Congress approved it. Presumably Congress can unapprove
21 it if Congress ever wished to.

22 So if Congress is in the driver's seat, why
23 isn't Congress the source of authority for the purposes
24 of our Double Jeopardy jurisprudence --

25 MR. LANDAU: Because --

1 JUSTICE KAGAN: -- which seems to make that
2 the issue? I mean, you can imagine a different Double
3 Jeopardy jurisprudence where the issue was who just
4 exercises authority in the real world? But that seems
5 not to be what we ask.

6 MR. LANDAU: That's -- that's correct.
7 That's correct. And I think that -- that the key point
8 that I'd like to make, Your Honor, is that you have to
9 look at -- Congress has plenary authority over the
10 territories under the Territorial Clause. Our position
11 is that Congress is not the prisoner of its plenary
12 authority; it is the master of plenary authority.

13 And therefore, when Congress can decide
14 that, for the long-term future of Puerto Rico, it does
15 not think it is appropriate or good for -- for Puerto
16 Rico or the United States to have direct or delegated
17 Federal power in Puerto Rico. It says we accede to
18 the -- the request of the Puerto Rican people to create
19 their own government and to be the source of authority
20 of their own law.

21 So that's what Congress invites. The people
22 of Puerto Rico accept the invitation. They enact a
23 Constitution that is entirely explicit saying the
24 political power of the Commonwealth creates the
25 structure, creates a legislative authority, vests the

1 courts of Puerto Rico with judicial authority --

2 JUSTICE KENNEDY: Let -- let's call this --
3 this theory of yours interim sovereignty. Are there any
4 examples in international law of interim sovereignty?

5 Are there any examples in international law
6 or in the United States' experience of a dichotomy such
7 as you suggest?

8 MR. LANDAU: Your Honor, again, I think --

9 JUSTICE KENNEDY: I -- I -- I just don't
10 know the answer to that.

11 MR. LANDAU: I think that -- that -- that,
12 in a sense, the danger of that is that's already going
13 back to asking about concepts of sovereignty. And I
14 think the more one asks those more abstract questions,
15 it gets away from what is a much simpler question, which
16 is -- I think this goes back to Justice Sotomayor's
17 point, which is what is -- we have before us here --
18 we -- this is a specific case or controversy.

19 Nobody's asking the Court to make a broad
20 political statement. All we want to know is may Puerto
21 Rico, may the Commonwealth prosecutors prosecute these
22 particular Puerto Rico Commonwealth gun charges or --
23 and ammunition charges? Okay?

24 The -- the source of authority for these
25 particular laws is the legislature of Puerto Rico, and

1 that legislative authority does not come from delegated
2 power from Congress.

3 CHIEF JUSTICE ROBERTS: Why does that --

4 MR. LANDAU: That's what distinguishes this
5 from municipalities -- I'm sorry.

6 CHIEF JUSTICE ROBERTS: Why does -- why does
7 the Commonwealth of Puerto Rico have that authority?
8 Where did it come from?

9 MR. LANDAU: The -- Congress can recognize
10 and invite an exercise of sovereignty, just like this
11 Court recognized in Lara.

12 CHIEF JUSTICE ROBERTS: But it had complete
13 authority under the Territorial Clause whether to do
14 that or not, right?

15 MR. LANDAU: That's correct. And that is
16 exactly --

17 CHIEF JUSTICE ROBERTS: So that would --
18 I -- it would seem to me, then, that the authority to do
19 it came from Congress when they passed the --

20 MR. LANDAU: But --

21 CHIEF JUSTICE ROBERTS: -- the law
22 authorizing Puerto Rico to adopt a Constitution of its
23 own.

24 MR. LANDAU: But -- but this -- you just
25 said authorizing. I think the key point is it invited

1 Puerto Rico. And -- and what it did is the Constitution
2 that Puerto Rico adopted and that Congress then accepted
3 specifically says political power emanates from the
4 people. So Your Honor, I think --

5 CHIEF JUSTICE ROBERTS: Why is -- I mean,
6 you seem to fix on invited as somehow different than
7 authorized.

8 MR. LANDAU: Well, even if you said -- I
9 guess the point is authorized sounds like a delegation
10 of authority.

11 I think the point is Congress said, look,
12 you go adopt your own constitution. That in and of
13 itself doesn't necessarily answer the question of where
14 the authority from that constitution comes from. But
15 again, when it says fully recognizing the principal of
16 government by consent, this is what the people of
17 Puerto Rico wanted. They wanted to -- to create their
18 own government. They didn't want to have another
19 Organic Act.

20 JUSTICE SCALIA: Aren't there territorial
21 legislatures?

22 MR. LANDAU: There are indeed, Your Honor.
23 In -- in --

24 JUSTICE SCALIA: What's the difference?

25 MR. LANDAU: The difference is --

1 JUSTICE SCALIA: Why -- why can't you say
2 the laws they enact have as their source the -- the
3 people of the territory?

4 MR. LANDAU: You could. And in fact, that
5 was the tradition in the 19th century. We cited a
6 number of cases -- of course there weren't a lot of
7 these kind of cases in the 19th century because the
8 Federal government had very, very limited criminal
9 power. So these come up in things like counterfeiting
10 money and selling liquor to the Indians.

11 But -- but so -- so the --

12 JUSTICE GINSBURG: May I just ask you a
13 question about that? I don't quite understand because
14 this -- this whole issue is a result of a five-to-four
15 decision of this Court in the 1950s, right? *Bartkus*.

16 JUSTICE SCALIA: *Bartkus*.

17 MR. LANDAU: But yeah, I mean, certainly --

18 JUSTICE GINSBURG: So -- so talking about
19 cases before that, there was just -- there was no issue
20 before that.

21 MR. LANDAU: Well, Your Honor, certainly
22 the -- the principle of dual sovereignty had been
23 recognized by this Court as early as the 1840s; in other
24 words, that -- that two offenses for Double Jeopardy
25 purposes were not the same if -- if they were created by

1 different entities with something that this Court had
2 recognized, albeit in --

3 JUSTICE GINSBURG: Recognized how, because
4 this was -- it was a very close case, as you know.

5 MR. LANDAU: Absolutely. Absolutely. And
6 again --

7 JUSTICE GINSBURG: And so I don't think it
8 was settled before then.

9 MR. LANDAU: Well, but it -- it was
10 something that -- it has been an issue that had divided
11 people in the Court. In the more recent cases since the
12 1950s, it has not been a particularly divisive issue.
13 And just to be clear in this case, there is no call by
14 the other side to overrule --

15 JUSTICE GINSBURG: I'm questioning you
16 looking back before the Bartkus case, for precedent.

17 MR. LANDAU: Right. But Bartkus didn't come
18 out of the blue, Your Honor. Bartkus has antecedents.

19 Lanza was the first case in 1922 when
20 prohibition is what really suddenly had federal criminal
21 laws that were quite widespread throughout the country.
22 And Lanza is, I think, the first case you can
23 characterize as a square holding of this case on the
24 dual sovereignty doctrine.

25 It continued to be a somewhat controversial

1 doctrine up until the 1950s, and then it's been, I
2 think, settled since then. And it's not been challenged
3 in this case.

4 JUSTICE SCALIA: Mr. Landau, I'm not sure
5 you answered my question about why territorial
6 legislatures are different.

7 MR. LANDAU: They are different because
8 those -- the other ones are Home Rule legislatures. In
9 other words, there's a Virgin Islands Organic Act,
10 there's a Guam Organic Act. So Congress -- and a D.C.
11 Home Rule Act.

12 Congress created that government structure
13 and endowed it with authority. Pursuant to what
14 Congress did, the people have a certain degree of
15 autonomy. They elect their legislators. D.C. has D.C.
16 laws. The Virgin Islands has Virgin Islands law. You
17 know, to some extent or other those can be vetoed,
18 maybe, by Congress.

19 JUSTICE SCALIA: If you say that the issue
20 is the source of the law in question, it seems to me
21 that the territorial legislature is as much the source
22 of a law as is the legislature of Puerto Rico.

23 MR. LANDAU: The question, Your Honor, is
24 the ultimate source of authority for the law. So when
25 you have a Home Rule jurisdiction -- again, this is --

1 I'm not saying that this is what this Court has held,
2 that when you have a Home Rule jurisdiction -- this is
3 the Waller case, for instance, where it's a
4 municipality, was clearly -- the city council was the
5 source of the law. But the ultimate source of the law
6 was delegated power from the State.

7 The critical point here is that the
8 Commonwealth of Puerto Rico, the legislative assembly of
9 Puerto Rico -- this goes back to Justice Sotomayor's
10 point and Justice Kagan's point -- is not exercising
11 power delegated by Congress --

12 JUSTICE KENNEDY: I see your -- I see your
13 time is getting up. It seemed to me that in a way, if
14 you answered Justice Scalia's question, well, yes, it
15 is -- it is true that local legislature is the source of
16 the law, and there is Double Jeopardy there too. Yes.

17 MR. LANDAU: Well, you -- again, that would
18 be another way of looking at the -- at the issue. And
19 that, frankly, was the historical way of looking at it.
20 If you go back to the 1850s cases, they said
21 territories, which at that time were creatures of
22 Congress, that was considered to be a separate sovereign
23 for Double Jeopardy. That's the historical antecedent.
24 But in the 20th century, particularly in Wheeler and the
25 more recent cases, the Court has said the question is

1 the ultimate source of authority.

2 The ultimate source of authority for the
3 laws of Puerto Rico, unlike the ultimate source of
4 authority for the laws of the Virgin Islands, is the
5 people of Puerto Rico, not Congress.

6 I'd like to reserve the balance of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Unikowsky.

9 ORAL ARGUMENT OF ADAM G. UNIKOWSKY

10 ON BEHALF OF THE RESPONDENTS

11 MR. UNIKOWSKY: Mr. Chief Justice, and may
12 it please the Court:

13 Under our Constitution, States are sovereign
14 and territories are not.

15 Although Puerto Rico has indisputedly
16 achieved a historic degree of autonomy, it remains a
17 territory under Article IV. As such, it cannot be
18 considered sovereign for Double Jeopardy purposes.

19 An unbroken line of this Court's Double
20 Jeopardy cases has stated, both before and after the
21 enactment of the 1952 constitution of Puerto Rico, that
22 territories are not sovereign for Double Jeopardy
23 purposes.

24 JUSTICE KAGAN: It does seem, Mr. Unikowsky,
25 as if Congress has given Puerto Rico as much authority

1 as it possibly could have short of making it a State
2 itself. Do you disagree with that?

3 MR. UNIKOWSKY: Well, two responses. One,
4 yes, I disagree with that. And two, even if I agreed
5 with that, we do think that there is a sharp dividing
6 line between States and territories for constitutional
7 purposes.

8 JUSTICE BREYER: What kind of territory is
9 it?

10 MR. UNIKOWSKY: It is a -- we think there's
11 only one type of territory --

12 JUSTICE BREYER: There is. The -- the
13 insular cases have at least two.

14 MR. UNIKOWSKY: Well, yes. The insular
15 cases that hold that it is considered an unincorporated
16 territory. That is true.

17 JUSTICE BREYER: Okay. So it's that kind.

18 MR. UNIKOWSKY: Yes.

19 JUSTICE BREYER: Now, what is Estado Libre
20 Asociado?

21 MR. UNIKOWSKY: Your Honor, I believe that's
22 a case that just construed a Federal statute to hold --

23 JUSTICE BREYER: No, no. I just wonder as
24 it appears in the Constitution of Puerto Rico.

25 MR. UNIKOWSKY: Well --

1 JUSTICE BREYER: The alternative of the word
2 Commonwealth.

3 MR. UNIKOWSKY: Well, Your Honor --

4 JUSTICE BREYER: I just wonder what it is.

5 MR. UNIKOWSKY: We believe that the
6 Constitution does not include that as a constitutional
7 category, just as it doesn't --

8 JUSTICE BREYER: Where does it say in the
9 Constitution that Congress cannot? After all, Congress
10 can admit a State. It says that specifically.

11 MR. UNIKOWSKY: It certainly does --

12 JUSTICE BREYER: Talks about territories.
13 So you're saying Congress and the President too do not
14 have the authority to associate with some other entity
15 under the form of Estado Libre Asociado?

16 MR. UNIKOWSKY: That is correct, Your Honor.

17 JUSTICE BREYER: Where does it say that in
18 any of our cases?

19 MR. UNIKOWSKY: Well, I think the Yankton
20 case very clearly says that if a portion of land is not
21 in a State, then it has to be under a territory.

22 JUSTICE BREYER: And what are the Indians?

23 MR. UNIKOWSKY: Your Honor, the Indian
24 tribes are a sui generis category explicitly recognized
25 in the Constitution --

1 JUSTICE BREYER: Because -- because we do
2 not recognize explicitly in the Constitution
3 "Commonwealth," therefore there is no Commonwealth? Is
4 that what you want us to say?

5 MR. UNIKOWSKY: I want you to say that this
6 Court has already held in the Harris case that
7 Puerto Rico is a territory. And not only that, that --

8 JUSTICE BREYER: With some purposes. But
9 the -- the issue here, as I see it -- which maybe will
10 take a second -- is there are four cases that say we
11 don't have to reach these grand questions. All we have
12 to do is decide what the source of power is.

13 Now their argument is that even if you go
14 back to the Foraker Act, which indeed did have the
15 people of Puerto Rico making laws, and if you then add
16 the Resolution 600 which delegated the authority to make
17 the Constitution, the Constitution itself which speaks
18 of "We the People" of Puerto Rico making a law, the fact
19 that later Congress and the President said Puerto Rico
20 has a Republican form of government, the fact that
21 subsequent to that we went to the United Nations and had
22 them withdraw the requirement to report on a colony
23 because Puerto Rico is not a colony -- - and you know
24 the words as well as I, and they sure sound like
25 "sovereign."

1 And in Valle, which no one mentions,
2 Trias Monge wrote that in fact all these laws -- and he
3 was talking about civil, but I suppose it applies to
4 Commonwealth too -- are to be interpreted in light of
5 the civil code tradition of Europe, which was the
6 tradition that applied prior to 1900, and not the common
7 law.

8 I don't see, when you put all those things
9 together, if you're looking at the facts of what the law
10 of Puerto Rico is in the area, it sounds to me like it's
11 civil code coming out of a constitution which I grant
12 you was given by authority of Congress. So there we
13 are.

14 Now five things they've listed there that
15 make it different, not only from anything you can think
16 of but from anything I can think of. So why don't you
17 reply to those five things, if you want.

18 MR. UNIKOWSKY: Your Honor, those five
19 things established --

20 JUSTICE SCALIA: Take your time.

21 (Laughter.)

22 MR. UNIKOWSKY: I think those features of
23 Puerto Rico and others established that Puerto Rico has
24 undoubtedly achieved a significant degree of autonomy,
25 but those characteristics are not the characteristics

1 that matter for sovereignty purposes or for Double
2 Jeopardy purposes. The question is the ultimate source
3 of power, and here the ultimate source of power is
4 Congress, which delegated the authority to enact the
5 Puerto Rican Constitution.

6 And I'd also point out that if one
7 looks at the characteristics of sovereignty as defined
8 in the Constitution and this Court's cases, Puerto Rico
9 doesn't have them.

10 For instance, in the Alden cases, this Court
11 explained one of the reasons we call States sovereign is
12 that one cannot frame their generally -- general police
13 power as the delegation of Federal power because the
14 Federal government doesn't have a general police power
15 in the States, so there's nothing to delegate. That's
16 just not true in Puerto Rico where --

17 JUSTICE SOTOMAYOR: But that was not true of
18 many of the territories that were admitted as States.
19 They came in to Statehood and were conferred by a -- the
20 sovereignty was conferred by a -- agreement with the
21 Federal government. And States were admitted by
22 agreement, and sovereignty were confirmed on them by
23 agreement.

24 And so are you telling me that if -- let's
25 say one of the islands in the Caribbean. I'll make one

1 up. Okay?

2 Atlantis has been -- never kicked out its
3 foreign colonial status 200 years ago, but it really
4 doesn't have many resources. And it comes to the
5 United States and it says, I want a treaty. You'll take
6 care of all of our external affairs. We'll follow
7 whatever you say with respect to external affairs.
8 We're even going to use the American dollar 'cause it's
9 convenient, but you can't touch our internal affairs.
10 And Congress approves that treaty. Would that, for
11 Double Jeopardy purposes, not be a sovereign?

12 MR. UNIKOWSKY: I think it wouldn't be a
13 sovereign if that was not part of the United States, not
14 subject --

15 JUSTICE KENNEDY: I couldn't hear. Would or
16 wouldn't?

17 MR. UNIKOWSKY: It wouldn't. So for
18 instance, we can see that Micronesia and Palau, which
19 are not independent countries, I believe in the
20 United Nations, are -- are genuinely sovereign, even
21 though there are defense agreements with the
22 United States because the United States has foreign
23 allies with whom they have many treaties and
24 relationships, and those foreign allies may be
25 sovereign, but those aren't territories. They're not --

1 the American flag doesn't fly over them, they're not
2 subject to plenary power of Congress and Federal law.

3 That's the distinction in Puerto Rico, which
4 is, indisputably, a territory --

5 JUSTICE SOTOMAYOR: But if Congress has that
6 treaty power, why does it have similar power under its
7 Rule and Regulation Clause of the Constitution? There's
8 no limiting principle of what rules and regulations
9 Congress can make.

10 MR. UNIKOWSKY: Well, let me refer, Your
11 Honor, both to --

12 JUSTICE SOTOMAYOR: Under that --

13 MR. UNIKOWSKY: I apologize.

14 JUSTICE SOTOMAYOR -- under that
15 constitutional clause, there's no suggestion of how or
16 even what kinds of treaties -- perhaps not in violation
17 of the Constitution, but what kind of treaties Congress
18 can make. And it makes an awful large number of them.

19 MR. UNIKOWSKY: It does, Your Honor. But
20 let me refer to both the constitutional text and
21 structure as the basis of our argument. Beginning with
22 the text, Article IV characterizes territories as,
23 quote, "belonging to the United States." And we believe
24 that is antithetical to the concept of sovereignty.

25 Congress has the ultimate power to enact a

1 wide variety of the governmental forms in the
2 territories, but the sine qua non of a territory is
3 that, in fact, Congress does possess that power.

4 And I'd also refer to the constitutional
5 structure. The framers of our Constitution split the
6 atom of sovereignty between the Federal government and
7 the States. And I think that presupposes that the
8 question of what types of sovereigns would exist in the
9 United States is a question of constitutional --

10 JUSTICE BREYER: The Indians. What about
11 the Indians?

12 JUSTICE KAGAN: Mr. Unikowsky, it sure seems
13 as though in the early 1950s, Congress with respect to
14 Puerto Rico, said we want to give it some sovereign
15 authority. We want to give it an enormous amount of
16 Home Rule authority, basically everything, and we also
17 have some idea in our heads that Puerto Rico ought to be
18 a sovereign with all the things sovereigns have like a
19 Constitution and a "We the People" clause.

20 And -- and why isn't that something --
21 it's -- it's an unusual idea, to be sure, a -- a
22 sovereign territory. But Congress seems to have wanted
23 to do exactly that.

24 MR. UNIKOWSKY: Well, I'd first push back on
25 your premise. I don't think that's what Congress wanted

1 to do. I think that the history, the legislative
2 history, and the -- the events, the historical record,
3 show that Congress wanted to delegate autonomy, which is
4 different from creating a sovereign.

5 So first I'd -- I'd turn to the issue of
6 Section 20 in which Congress just unceremoniously
7 stripped a portion of the Puerto Rican Constitution and
8 permanently barred Puerto Ricans from enacting --
9 reenacting it. That is not consistent with what I think
10 we ordinarily consider a sovereign.

11 And I'd also point to the legislative
12 history and record. I mean, there's testimony from the
13 Secretary of the Interior, from The Resident
14 Commissioner of Puerto Rico, from the Governor of
15 Puerto Rico, in the House report, in the Senate report.
16 All of that seemed to contemplate that the political
17 status of Puerto Rico wouldn't change and this was just
18 a delegation.

19 I mean, there was actually a hearing we
20 quote on page 30 of our brief where the chairman of the
21 relevant Senate committee basically tells everybody
22 that, in fact, Congress's powers over Puerto Rico
23 wouldn't be altered at all; that ultimately this was a
24 delegation of power that one -- that was revoked and
25 wouldn't change Congress's ultimate power over

1 Puerto Rico.

2 So I actually think it's Petitioner's
3 position that really is fundamentally inconsistent with
4 the historical record as it existed at the time.

5 We don't dispute that there's -- this is
6 historic legislation. I mean, it's true. Petitioner's
7 brief characterizes the 1950 to '52 legislation as,
8 quote, "path marking." And we actually agree with that,
9 it was path marking. It was historic legislation that
10 delegated a significant amount of power to the people of
11 Puerto Rico, and it was very historically important, and
12 remains important today.

13 But there is a difference, a meaningful
14 constitutional difference between the delegation of
15 power and the conferral of sovereignty. The former
16 occurred in Puerto Rico, as it has occurred in other
17 territories. The latter can only apply to States within
18 our union.

19 JUSTICE KENNEDY: And is -- is our argument
20 so abstract that it doesn't acknowledge real
21 practicalities of multiple prosecutions? Of -- of
22 course Mr. Landau couldn't come up and say, please
23 forget Heath and Wheeler and Walter and Grafton. Let's
24 do something other than sovereignty.

25 Has there been any suggestion by

1 commentators and so forth that this whole inquiry of
2 sovereignty and source of power is a little bit
3 misplaced?

4 Of course, you have the problem with the
5 cities within its -- within separate -- within one
6 State, which is, it seems, ought to be subject to a
7 single rule. But have there been any commentaries that
8 lead us to another approach altogether? I don't think
9 we're going to overrule four cases, but --

10 MR. UNIKOWSKY: I will acknowledge that
11 there has been some larger articles suggesting that this
12 whole line of cases is wrong and the Court should look
13 to something else, to autonomy. But certainly this
14 Court's cases, going back a century, haven't followed
15 that approach at all.

16 And I actually think the municipality
17 example is a very good one for us because cities
18 regularly enact Home Rule charters through a very
19 similar type of Democratic process that Petitioner
20 describes for Puerto Rico.

21 The fundamental principle of Petitioner's
22 position here is that the enactment of a -- of a charter
23 of local self-government setting forth the parameters
24 for local self-government in and of itself leads to
25 sovereignty. That's how they distinguish the Shell

1 case. But if that's true, the -- there's no limiting
2 principal because municipalities do that all the time.

3 I didn't fully understand --

4 JUSTICE KAGAN: Mr. Unikowsky, you -- you
5 said before that Congress didn't mean to confer
6 sovereignty here. Do you think Congress could do that?

7 MR. UNIKOWSKY: No, Your Honor, it could
8 not. We think that the Constitution prohibits that, and
9 Congress's exercise of its powers was fully consistent
10 with that constitutional requirement.

11 JUSTICE SOTOMAYOR: I'm sorry. You --
12 you're saying to me that Congress can't make Puerto Rico
13 independent?

14 MR. UNIKOWSKY: Of course it could, Your
15 Honor.

16 JUSTICE SOTOMAYOR: So if it can do that,
17 why can't it have other arrangements with Puerto Rico
18 the way it has with everybody else? Why are we saying
19 that with respect to territories they don't have that
20 power?

21 MR. UNIKOWSKY: Your Honor, I think if
22 Congress -- if Puerto Rico is to remain a territory,
23 which it is under Article IV, as this Court has held,
24 then Congress must retain the ultimate power. I think
25 that follows from the constitutional structure in which

1 the framers contemplated splitting the assets up --

2 JUSTICE BREYER: We need to. I mean, we
3 told the UN, this doesn't sound like we said it was a
4 municipality.

5 MR. UNIKOWSKY: Your Honor --

6 JUSTICE BREYER: UN said that Puerto Rico
7 has been invested with the attributes of political
8 sovereignty, which clearly identify the status of
9 self-government attained by the Puerto Rican people.

10 JUSTICE SCALIA: Who said this? This is the
11 UN?

12 JUSTICE BREYER: This is what we told the
13 UN. We told the UN that --

14 (Laughter.)

15 JUSTICE BREYER: And on the basis of that --

16 JUSTICE SCALIA: Who -- who is "we"?

17 (Laughter.)

18 JUSTICE BREYER: It's -- what it says
19 here --

20 JUSTICE SCALIA: Who's we?

21 JUSTICE BREYER: It consists of the
22 President of the United States.

23 JUSTICE SCALIA: The President said that?

24 JUSTICE BREYER: Or his delegate. His
25 delegate.

1 CHIEF JUSTICE ROBERTS: We need to involve
2 counsel in the dialogue.

3 (Laughter.)

4 JUSTICE BREYER: I -- I have. You've read
5 the same thing. There are about ten words such as
6 "republic," "not a colony," "attributes of political
7 sovereignty," repeated in five or six key documents.

8 I do -- not everyone does -- happen to think
9 that what we tell the UN to get it removed from the
10 colony status bears some consideration. I grant you not
11 everyone agrees with that, but that's my view of it.

12 Laughter.

13 JUSTICE BREYER: All right. And I guess
14 I -- all right. Forget it.

15 (Laughter.)

16 MR. UNIKOWSKY: Your Honor, we don't see any
17 inconsistency between what the State Department said and
18 our position today --

19 JUSTICE BREYER: You said it was like a
20 municipality. I just think that having the attributes
21 of political sovereignty, and being a republic, and
22 saying that the Constitution of Puerto Rico is the basic
23 document, whatever the language was there, don't sound
24 like a municipality.

25 MR. UNIKOWSKY: Your Honor, there are

1 differences between a municipality and Puerto Rico, such
2 as Puerto Rico has a much more delegated power than the
3 typical municipality. That is undoubtedly true.

4 But the -- there's no --

5 JUSTICE SOTOMAYOR: You think that doesn't
6 have meaning? In most municipalities, their offenses
7 are treated as criminal offenses and not criminal
8 infractions. They can only pass laws with respect to a
9 very limited amount of issues.

10 The States have control over many, many
11 other things. They are substantially different. Why
12 would we have bothered talking about the structure of
13 Florida's system with municipalities in Waller? We went
14 through how the State controlled all of the -- most of
15 the internal affairs of municipalities, and we said they
16 are not separate sovereigns because of this control.
17 All we could have said is what you want us to say now,
18 which is municipalities' ultimate source is the State
19 government.

20 But we did something very different in that
21 case.

22 MR. UNIKOWSKY: Your Honor, may I answer?

23 CHIEF JUSTICE ROBERTS: Briefly.

24 MR. UNIKOWSKY: Yes, Your Honor.

25 I think that, already as of Shell, Puerto

1 Rico enjoyed that broad police power. That's why
2 Petitioner's argument turns entirely on the existence of
3 the Constitution of Puerto Rico. And our point is that
4 the act of Constitution making, we don't think, can
5 confer sovereignty.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Saharsky.

8 ORAL ARGUMENT OF NICOLE A. SAHARSKY

9 FOR UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE RESPONDENTS

11 MS. SAHARSKY: Mr. Chief Justice, and may it
12 please the Court:

13 I think to respond to some of the questions
14 that have come up, I'd like to go back and address what
15 the Court has said this test is, for dual sovereignty in
16 the Double Jeopardy context, and why it's been using
17 that test.

18 And the test that the Court has consistently
19 used for the past 100 years is by looking to the
20 ultimate source of the authority, the laws for
21 prosecuting and the authority to prosecute. And the
22 reason that the Court has said that it's looked to that
23 ultimate source is because the dual sovereignty doctrine
24 rests on the basic structure of our Federal system.
25 That's what the Court said in Wheeler. And the Court

1 has been very careful to guard who is a sovereign under
2 the Constitution and who is not, because, after all,
3 we're talking about a weighty power here, which is the
4 ability of two sovereigns to prosecute a person for an
5 offense with the same elements.

6 So if you trace the history of what this
7 Court has done, it started with Lanza and Grafton.
8 Lanza was a case about the Federal government as opposed
9 to the States. And the Court said should they have this
10 power to dual prosecute? Well, we look to the
11 Constitution, and the unique structure that was put in
12 place: The splitting the atom of sovereignty. And we
13 are in a circumstance where both the States and the
14 Federal government have this sovereign power. They
15 should both be able to prosecute.

16 But then the case -- the Court turned to
17 cases about the territories, which was the Shell case
18 about Puerto Rico, but then also the Grafton case about
19 the Philippines, and it said, no, the territories derive
20 their ultimate power from Congress. That's true by
21 virtue of the Territory Clause.

22 Now, one thing that the Court has considered
23 in the course of those cases as they've evolved, I
24 think, is the suggestion that Justice Kennedy made,
25 which is maybe we should focus on something else like

1 autonomy and the ability to prosecute, and what it looks
2 like practically, or on the ground.

3 And the Court has consistently rejected a
4 test along those lines, and I think that we have three
5 data points for that.

6 JUSTICE SOTOMAYOR: I'm sorry. They haven't
7 issued that.

8 In all of those cases, Grafton and all of
9 the ones pre-1952, the Court pointed to the fact that,
10 when these islands pass laws, they could be vetoed by
11 Congress or -- or were -- that was the Organic Act.

12 In all of these places, Congress was
13 appointing their legislature, in part, or they were
14 appointing colonial governors. And we went through, in
15 each one of them, very carefully, what the issues of
16 control that remained, that didn't make them sovereign
17 in any way, that made them classic territories.

18 So it's not that we didn't -- we eschewed
19 looking at that.

20 MS. SAHARSKY: I don't think that's right.
21 And I'd like to just look at the specific example of
22 Puerto Rico that the Court considered in the Shell case.

23 As you say, by that point, Puerto Rico -- or
24 as you suggested, there had already been significant
25 self-government in Puerto Rico. There were two houses

1 of the legislature elected. And the Court, when asking
2 this question about whether there could be both Puerto
3 Rico antitrust defenses and Federal antitrust defenses,
4 went through the situation in Puerto Rico and said there
5 is significant self-government in here now. It defined
6 Puerto Rico as having an autonomy similar to that of the
7 States -- that's in 1937 -- and said that Congress had
8 given it a sweeping grant of legislative authority.

9 But the Court nonetheless said that under
10 our constitutional system, as a territory of the United
11 States subject to Congress's authority, that Puerto Rico
12 was not a separate sovereign.

13 JUSTICE SOTOMAYOR: But you forget that
14 Congress could veto those laws.

15 MR. SAHARSKY: It --

16 JUSTICE SOTOMAYOR: Before 1952, Congress
17 could veto Puerto Rico's laws. It has relinquished that
18 right.

19 MR. SAHARSKY: I don't think that that's
20 right. I don't think that that's right, and to the
21 extent the Petitioner suggests it, it's just not
22 consistent with the Territory Clause of the
23 Constitution, which, after all --

24 JUSTICE BREYER: Well, now, this is --

25 JUSTICE KENNEDY: -- gives plenary power to

1 Congress.

2 JUSTICE BREYER: This is -- it's very
3 interesting what you're saying.

4 Remember, though, one of the provisions of
5 the Puerto Rico Constitution, which Congress approved
6 and said it was a Republican form of government, is that
7 criminal actions shall be conducted in the name and by
8 the authority of the people of Puerto Rico.

9 Now, that sounds like a delegation of
10 authority as to source, to go back to the Spanish system
11 if they want.

12 Now, if I take your view, then I guess you
13 have to say -- and it has considerable implication --
14 that that doesn't matter because Congress can take back
15 what they gave.

16 Now, is that the position of the government
17 or the executive branch? Because that has tremendous
18 implication.

19 MR. SAHARSKY: Right.

20 JUSTICE BREYER: Because obviously, there is
21 an argument as to whether what Congress and the
22 President gave in Resolution 600, followed by the
23 Constitution, followed by what happened at the UN, under
24 the authority -- and looking to Felix Frankfurter for
25 guidance, who said that the Constitution provides us

1 with many forms of possible relationship. That's what
2 his view was.

3 And now, is the position of the executive
4 branch -- I mean, you want to take a position on this?
5 That -- that -- that Congress, if it wishes, can take
6 all of that back and Puerto Rico has no more
7 independence than -- in principle, than any of the other
8 places that were territories?

9 Now, that's -- that's a big question. But
10 do -- do you -- do you see it's an important question?

11 And I want to know if the government's
12 position rests upon it, because that's -- that's an
13 important statement for the executive, in my opinion.

14 MS. SAHARSKY: Well, two -- two responses to
15 that question.

16 The first, I think, is the first part of
17 your question, this statement in the Puerto Rico
18 Constitution that the authority to prosecute comes from
19 the people of Puerto Rico and that it's in the name of
20 the people of Puerto Rico. That's been true since 1900.
21 That was in the 1900 Organic Act; that was true in 1917.
22 Puerto Rico is not claiming that it was a sovereign
23 then. So I -- I would not rely on that.

24 But the second and, obviously, more weighty
25 question you raised is the question of could -- could

1 Congress revise the arrangements it has with Puerto
2 Rico? And we think the answer is yes, and that that
3 follows from the structure of the Constitution and its
4 history.

5 I want to explain why that's why, but first,
6 I think it's very important for us to say that
7 Congress's position towards Puerto Rico, starting in
8 1900 through 1917 with the elected legislature --
9 elected legislators; 1947, the elected governor; and
10 then this act in 1950, has been one of increasing
11 self-government, recognizing the benefits of that to the
12 people of Puerto Rico. That's why Congress authorized
13 the enactment of the Constitution. We think that that's
14 a good thing. We have no reason to believe that
15 Congress would revisit that. And we think it's had many
16 benefits for the people of Puerto Rico and the United
17 States.

18 But asking the constitutional question,
19 which is what the Court has asked in its double jeopardy
20 cases, about whether Congress could revise the
21 arrangement with Puerto Rico, the answer is yes. And we
22 think that that follows from its status as a United
23 States territory because of two parts of the Territory
24 Clause.

25 The first is that territories belong to the

1 United States, meaning that they are under the
2 sovereignty of the United States.

3 And then second, that Congress is the one
4 who makes the rules.

5 And if I could just make one more point,
6 which is historically, the fact that Congress was --
7 that the United States was the sovereign and the only
8 sovereign in the territories was very important at the
9 time that the Constitution was put together.

10 You may recall that the United States had
11 land there through the Northwest Ordinance, but it was
12 trying to figure out what to do with, and there were
13 questions with the States, what would happen. And so
14 that this provision needed to be added to the
15 Constitution to make clear that Congress was the one who
16 was going to make rules for the territories, and that it
17 would be under the sovereignty of the United States.

18 JUSTICE BREYER: But there are some
19 things --

20 MR. SAHARSKY: -- and in this --

21 JUSTICE BREYER: Let's go back to the
22 insular cases right there.

23 There are different kinds of territories.
24 It's because of that that Frankfurter says that the
25 Constitution has left the field of invention open. The

1 decisions in the insular cases mean this, if they mean
2 anything: That there's nothing in the Constitution to
3 hamper the responsibility of Congress in working out
4 arrangements.

5 Now, if that's so, why couldn't Congress
6 delegate, without the power to take it back, the
7 authority to Puerto Rico to work out its own criminal
8 code subject to the constraints of the Bill of Rights,
9 et cetera? Why couldn't it? I mean, if Frankfurter is
10 right. Or do you take the opposite position, that it
11 couldn't?

12 MS. SAHARSKY: The insular cases were
13 talking about something different and narrower, which is
14 whether all the protections of the Bill of Rights apply
15 to the territories by their own force. But to answer
16 the broader question that you answered, or asked, we
17 think that it's inconsistent with the grant of authority
18 to Congress in the Constitution for a territory to be a
19 territory but no longer be sovereign, because the
20 Territory Clause defines territories of the United
21 States as subject to the authority of the United States.

22 JUSTICE KAGAN: Do you think it's not
23 possible, Ms. Saharsky -- I mean, putting aside whether
24 Congress has done it here, but you think it's simply not
25 possible for Congress to confer sovereignty in the sense

1 that would matter for the Double Jeopardy Clause?

2 MS. SAHARSKY: Well, it certainly could be by
3 making it a State --

4 JUSTICE KAGAN: Yes.

5 MS. SAHARSKY: -- or by making it
6 independent.

7 JUSTICE KAGAN: But -- but -- but not short
8 of that.

9 MS. SAHARSKY: We think that that would just
10 be fundamentally inconsistent with the constitutional
11 design. And if I could just maybe give the -- the last
12 part of my historical answer, because I think it's very
13 important, is: When this provision was put into the
14 Constitution, it was coupled with the New States Clause,
15 and it was understood that the options for sovereignty
16 were statehood. It was not that if this was a
17 territory, that the territory was controlled by the
18 United States, and I think it would have been very
19 surprising to the States in the constitutional
20 conventions to think that when States were defined as
21 such important things in the Constitution, sharing the
22 sovereignty with the United States, that Congress could
23 somehow create a sovereign territory. We just don't
24 think that's correct.

25 JUSTICE SCALIA: Suppose Congress could also

1 say, could it not, that -- in its criminal code, that if
2 a crime has been prosecuted and under Puerto Rican law
3 it will not be -- the same -- the same crime will not be
4 prosecuted under Federal law?

5 MS. SAHARSKY: Well, I think there --

6 JUSTICE SCALIA: Couldn't it say that if it
7 wanted to?

8 MS. SAHARSKY: I think there are two
9 different options. Congress can define what crimes are
10 and whether they are crimes in Puerto Rico, as opposed
11 to somewhere else. So if that's what you're suggesting,
12 yes, I think that's what Congress could do. What we
13 don't think that Congress could do is change the meaning
14 of the Fifth Amendment and the Double Jeopardy Clause,
15 because that's something for this Court.

16 JUSTICE SCALIA: No -- well, but -- no,
17 certainly Congress cannot -- cannot deny double jeopardy
18 effect to something that would be double jeopardy, but
19 I'm talking about a statute that says, even though it
20 might have double jeopardy effect, we say -- we say no.

21 MS. SAHARSKY: Well -- right, and what I'm
22 saying is I think Congress' ability is to define crimes
23 and to set out what -- what they are and where they are,
24 but if the question is what the Fifth Amendment permits
25 and doesn't permit, we really think that's up to this

1 Court.

2 JUSTICE SCALIA: Well, it's not a matter of
3 what the Fifth Amendment permits. Congress just says,
4 we will -- the Justice Department will not prosecute a
5 crime that has already been prosecuted in -- in Puerto
6 Rico.

7 MS. SAHARSKY: Right. And the Justice
8 Department can work with Puerto Rico to decide who will
9 prosecute what crimes. In fact, we do that as a general
10 matter so that there's usually not any overlap of the
11 kind that occurred in this case. But I think that's
12 just a very different thing from suggesting that Puerto
13 Rico is a sovereign under the Double Jeopardy Clause.

14 JUSTICE SCALIA: No, no, I understand that.

15 MS. SAHARSKY: But they're looking at it --

16 JUSTICE SCALIA: I'm just saying, if you
17 like that result, it can be done by the statute.

18 MS. SAHARSKY: Right -- I'm sorry if I
19 misunderstood the question. I'm just trying to be extra
20 careful, because --

21 JUSTICE SCALIA: I'm trying to be helpful.

22 (Laughter.)

23 MS. SAHARSKY: I know. I know. I -- I do
24 understand that now. I just want to make sure that --

25 (Laughter.)

1 MS. SAHARSKY: I just want to make sure that
2 I'm being clear, because I think this case does raise a
3 lot of important questions, and I do think that this
4 Court's jurisprudence over the past 100 years has been
5 very careful about what it means to be a double jeopardy
6 sovereign --

7 JUSTICE GINSBURG: Could you explain before
8 you sit down when and why the United States changed its
9 position on this question? Because as I understand it,
10 in -- in more than one brief, took the position that
11 Puerto Rico, for double jeopardy cases, is -- for the
12 Double Jeopardy Clause is -- is treated like a State.

13 MS. SAHARSKY: That's right. The government
14 took that position in two courts of appeals and defended
15 it in a brief in opposition to this Court, where we also
16 said the issue didn't matter. But since that time, we
17 have revisited this issue, given substantial attention
18 to it, both within the Department of Justice and within
19 many agencies of the Federal government, and our
20 position as set out in our brief is that it is not a
21 separate sovereign. And we think that that's entirely
22 consistent with the other things we've learned and the
23 testimony that DOJ and others have given to Congress
24 about Puerto Rico's current status and options for the
25 future.

1 The end of our brief talks about the task
2 force that the President has put in place, that has
3 issued reports three times over the past decade and a
4 half, which have said this is the constitutional status
5 Puerto Rico has now. To the extent the people of Puerto
6 Rico want to change it, here are the options that are
7 consistent with the Constitution. Tell us what you
8 want, and then Congress will decide where to go from
9 there.

10 So I would not want to suggest that as a
11 result of this case, that Puerto Rico's options are set
12 in stone. We don't think that they are set in stone.
13 We just think that right now Puerto Rico is a territory
14 of the United States, and as a result it's not a
15 separate sovereign under the Double Jeopardy Clause.

16 And just to give the court the three data
17 points where the Court has said we're going to focus on
18 sovereignty under the Constitution and we're not going
19 to focus on autonomy or level of control, you have the
20 Puerto Rico v. Shell case which was where the Court said
21 Puerto Rico already has autonomy, but they're still not
22 a double jeopardy sovereign. You have Waller, which is
23 about municipalities and the State of Florida trying to
24 basically treat its municipalities as a sovereign, and
25 the Court said, no, no, no, you are not in the same

1 relationship to your municipalities as the States are to
2 the Federal government; the municipalities are more like
3 the territories, there's a different ultimate source of
4 authority. And then the Court, with respect to the
5 Indian tribes, said even though Congress has the ability
6 to legislate for the tribes, they still have this
7 inherent source of authority that predated the
8 Constitution and was recognized in the Constitution.

9 So for the Court to turn away from that, we
10 think, would really upend that precedent, and not for a
11 good reason, because -- I think I'd like to conclude, if
12 I can, where I started, which is: This power, this dual
13 sovereignty power, is a weighty power the Court has
14 reserved for those entities that have the ultimate power
15 under our Constitution, defined in our Constitution.
16 And for that reason, Puerto Rico, despite its
17 significant self-government, is not a sovereign under
18 the Constitution.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Four minutes, Mr. Landau.

21 REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU
22 ON BEHALF OF THE PETITIONER

23 MR. LANDAU: Thank you, Mr. Chief Justice.

24 If I could very briefly just say that
25 there's two real questions here, as the questioning has

1 brought out. First, what happened in 1950 to '52? And
2 B, if so, is that constitutional?

3 There's no question, if you look at the
4 documents of 1950 to '52, that Congress required Puerto
5 Rico to have a Republican form of government, which is a
6 government by the people, of the people. This was
7 understood at the time to be a new experiment. This was
8 not just another organic act. And the Constitution of
9 Puerto Rico, which was approved by Congress and the
10 President, says the power, the political power of the
11 Commonwealth emanates from the people. And Congress
12 recognized that. Okay. So that goes to the what
13 happened.

14 Then you go to the real meat of the case,
15 which is the constitutional argument. It is shocking
16 that the Respondents and the United States government in
17 this case are using the Territorial Clause as a
18 restriction on power, a limitation on power of
19 government. This is so ironic, for exactly what Justice
20 Breyer was saying: That the insular cases, if they
21 stand for anything, mean that Congress has plenary
22 control over the territories. That means that Congress
23 can come up with inventive solutions which are broader
24 than the only menu that they give, which is a colony
25 governed pursuant to direct or delegated Federal power,

1 statehood, or independence. Where do they get this view
2 that you can't come up with something inventive like the
3 Commonwealth, or the estado libre asociado, as Justice
4 Breyer said? This is the genius of our system, that it
5 allows us to have these unincorporated territories --

6 JUSTICE SOTOMAYOR: Mr. Landau, would you
7 explain what "estado libre asociado" means in Spanish?

8 MR. LANDAU: It means "free associated
9 state," literally, and again, I think --

10 JUSTICE SOTOMAYOR: Literally.

11 MR. LANDAU: -- it has the concept of free
12 and it has the concept of associated, and state, in
13 estado.

14 JUSTICE SOTOMAYOR: Do you know why they
15 didn't use that phrase in the compact with the United
16 States?

17 MR. LANDAU: I think they thought that --
18 that Commonwealth was the more natural English word.
19 I'm not sure, Your Honor.

20 JUSTICE SOTOMAYOR: I believe, because I've
21 seen the Act, that they didn't because States have a
22 different meaning in the United States.

23 MR. LANDAU: And again, we are certainly not
24 saying that we are a State. Again, that was the whole
25 genius of the Commonwealth. It allows flexibility by

1 Congress to come up with these kind of creative
2 solutions. So --

3 JUSTICE SOTOMAYOR: The Solicitor General's
4 office claims that Grafton says that when we're looking
5 at double jeopardy, we're looking at something
6 different. We're looking at territory versus state. Do
7 you agree with that reading of the Shell case and of
8 Grafton?

9 MR. LANDAU: Absolutely do not agree that
10 Grafton said that in any and all contexts, that
11 regardless of any kind of territory, it is invariably
12 going to have that political relationship. Grafton was
13 describing the particular relationship there, where the
14 Governor of Puerto -- of the Philippines was appointed
15 by the President. He --

16 JUSTICE SOTOMAYOR: And how about Shell?

17 MR. LANDAU: Just to finish that one point,
18 Your Honor, Grafton -- it was called Grafton v.
19 United States because the Phillipine prosecution was
20 brought in the name of the United States.

21 Shell is exactly the same thing. The Shell
22 case said that was pursuant to an Organic Act, but
23 things changed in the 50s fundamentally.

24 I'm not just saying this. This court
25 recognized in the whole series of decisions in the '70s

1 that there was a fundamental transformation and that
2 Puerto Rico represents a very unique constitutional
3 experiment in our history, about how we have an
4 unincorporated territory that exists in long-term
5 association with the United States, but being the
6 creator of its own government, which is very important
7 to the people of -- of the -- of the government.

8 If there's one thing you read, please, in
9 our reply brief, read that Frankfurter memo because he,
10 as the law officer in the Department of War, addressed
11 exactly this issue. And please do not take the
12 Constitution of Puerto Rico away from the people of
13 Puerto Rico.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 The case is submitted.

16 (Whereupon, at 12:08 p.m., the case in the
17 above-entitled matter was submitted.)

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