

ORIGINAL In the
Supreme Court of the United States

JESUS RIVERA-RODRIGUEZ ET AL.,

Appellants,

v.

POPULAR DEMOCRATIC PARTY ET AL

:
:
:
: NO. 81-328
:
:
:

Washington, D. C.

Monday, March 22, 1982

Pages 1 - 41

ALDERSON



REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
PHILIP A. LACOVARA, ESQ.,	
on behalf of the Appellants	3
ABE FORTAS, ESQ.,	
on behalf of the Appellees	23
PHILIP A. LACOVARA, ESQ.,	
on behalf of the Appellants - rebuttal	39

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first today in 81-328, Rodriguez against Popular Democratic Party.

Mr. Lacovara.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. LACOVARA: Mr. Chief Justice, and may it please the Court, in a series of decisions going back at least a century, this Court has recognized the basic principles that we believe control the case here this morning.

For example, in 1875, the Court stated in Minor against Happersett, "Necessarily, the members of the legislature are elected by the voters of the state." In 1964, in the landmark case of Reynolds against Sims, the Court said, "Representative government is in essence self-government through the medium of elected representatives of the people." And then, in one of the many, many cases applying the Reynolds versus Sims principle, the Court said in 1969 in Kramer versus the Union Free School District, "The right to vote establishes the legitimacy of representative government."

QUESTION: Well, counsel, are you suggesting that those cases stand for any more than the proposition

1 that where once a right to vote is accorded, it has to
2 be afforded in a non-discriminatory manner?

3 MR. LACOVARA: I think they do stand for more
4 than that, Justice Rehnquist, although since Puerto Rico
5 has recognized the right to vote for its legislature, it
6 might be necessary for the Court to go no further than
7 to apply those principles, but we contend that the
8 principles that this Court has already recognized
9 demonstrate that there is an absolute obligation on the
10 part of the states and by virtue of the compact between
11 Puerto Rico and the United States on people of Puerto
12 Rico to provide for an elected legislature.

13 QUESTION: What provision of the Constitution
14 gives rise to that duty?

15 MR. LACOVARA: As we have tried to explain in
16 our brief, Justice Rehnquist, the obligation to provide
17 for an elected state legislature appears from at least
18 two provisions of the Constitution. One, of course, is
19 Article I, Section 2, which necessarily assumes that
20 state legislatures are elected, since it provides that
21 the electors for the United States House of
22 Representatives must be the same as those who are the
23 electors for the state legislature.

24 In explaining that clause and other similar
25 assumptions underlying the union of states that was

1 forged in the Constitution, James Madison and the other
2 authors of the Federalist Papers treated it as a
3 fundamental given that the union being established under
4 the Constitution was a union of states with a republican
5 form of government, and that a republican form of
6 government included elected legislatures.

7 QUESTION: How do you explain that in many
8 instances when a Senator, United States Senator dies or
9 leaves office by resignation, the governor is empowered
10 in many instances to appoint his successor until the
11 next election? Now, he is not elected by the people,
12 then, is he?

13 MR. LACOVARA: Well, originally, Mr. Chief
14 Justice, the provisions of Article I, Section 3, called
15 for the appointment of all United States Senators by the
16 legislatures. There was no popular election.

17 QUESTION: That has changed. That has changed.

18 MR. LACOVARA: That has changed. And the
19 Seventeenth Amendment provides for direct election of
20 Senators, but recognizing the historical tradition of
21 having appointed legislators, the Seventeenth Amendment
22 provides that governors may make temporary appointments,
23 but the Seventeenth Amendment, quite consistent with the
24 tradition on which we are relying, insists that the
25 temporary appointment by the governor may last only

1 until the people, as the Amendment says, have the power,
2 the opportunity to elect a successor.

3 QUESTION: That might be as much as two years,
4 or lacking a day or two, two years, wouldn't it?

5 MR. LACOVARA: There is one case in which the
6 -- a lower court found that a delay of over two years
7 was temporary, but the court emphasized that the
8 Amendment recognizes the right of the people to elect
9 the Senator, and the court specifically said it would
10 not be able to sustain a statute like the one here by
11 which the governor was authorized to appoint a
12 substitute Senator for the full balance of the term.

13 Of course, what we have here before the Court
14 is a statute similar to the one adopted in a minority of
15 states that permits appointment to fill the balance of a
16 legislative term. We think that that approach is
17 fundamentally at odds with the right of representative
18 government, which is recognized in Article I, is
19 specifically enforced in Article IV, the republican form
20 of government clause, and if further support would be
21 needed, several other courts have suggested that the
22 right to vote at least for state legislative office, and
23 that is all this case involves, can also be inferred
24 from the provisions of the First Amendment, from the due
25 process clause of the --

1 QUESTION: Haven't we held that Article IV is
2 a political question?

3 MR. LACOVARA: Going back 150 years, in Luther
4 against Borden, the Court suggested that in some
5 circumstances a guarantee clause claim might be
6 non-justiciable, but as Justice Brennan's opinion for
7 the Court in Baker against Carr explained in
8 considerable detail, the fact that certain claims under
9 the republican form of government clause might not be
10 justiciable does not mean that any claim under that
11 clause is non-justiciable, particularly when the
12 fundamental core of the republican form of government is
13 at issue, and I submit that is what we have here, or
14 when other provisions of the Constitution give explicit
15 guidance to the Court on the content of the republican
16 form of government, and here, both the text of the
17 Constitution and the history before, during, and after
18 the debates on the ratification of the Constitution
19 leave, I submit, no room to doubt that the bedrock
20 organization established by the Constitution of the
21 United States is a union of states governed by elected
22 legislatures.

23 QUESTION: Must you win on this basic
24 proposition to prevail in this case?

25 MR. LACOVARA: No. As I was suggesting a

1 moment ago to Justice Rehnquist, since Puerto Rico has
2 in fact extended the right to vote for its legislature,
3 we suggest that that was not a free choice, but a matter
4 of Constitutional obligation, one that Congress, of
5 course, specifically enforced in the compact. One could
6 approach this case as a simple equal protection clause
7 case.

8 QUESTION: Well, must you win on this narrow
9 proposition to prevail?

10 MR. LACOVARA: One can go back still another
11 step, Justice White. The system that Puerto Rico has
12 actually chosen for filling vacancies is one in which
13 the political party makes the direct selection. That
14 system, we believe, is invalid on First Amendment
15 freedom of association grounds.

16 QUESTION: Well, if it were, wouldn't
17 ordinarily we take the narrowest possible resolution,
18 and not reach some of these broader questions you are
19 arguing?

20 MR. LACOVARA: You could certainly do that in
21 the exercise --

22 QUESTION: Wouldn't it be more proper for us
23 to do that?

24 MR. LACOVARA: Normally you would, Justice
25 White. We thought it appropriate to sketch the full

1 context of this case in order to place it in historical
2 perspective. The party appointment system we think is
3 facially invalid under the First Amendment as well as
4 the Fifth and Fourteenth Amendments, but that
5 conclusion, I believe, becomes all the more compelling
6 when the Court appreciates that what we are talking
7 about here is not just a discriminatory system in
8 handling some political venture or some governmental
9 function. We are talking about a discriminatory system
10 that goes to the heart of representative government
11 under the Constitution.

12 The survey that I tried to outline in our
13 brief to explain why the Constitution requires an
14 elected legislature I think implies that when vacancies
15 occur in the legislatures exercising general statewide
16 lawmaking power, the people have a continuing right to
17 have their voice heard in selecting the legislators who
18 will make the policies that will govern their lives.

19 That seems to me to be implicit in the text of
20 the Constitution, but this is another of those examples
21 in which a page of history may be worth more than a
22 volume of logic. As we have outlined in our brief, at
23 the time the Constitution was adopted, it had been for
24 centuries the British tradition to replace vacancies in
25 the House of Commons through a bi-election. It beggars

1 the imagination, I suggest, to conclude that the
2 colonists who fought and made a revolution were
3 intending to establish a form of government where the
4 people would have fewer electoral rights than did their
5 cousins in England.

6 At the time the Constitution was adopted,
7 every one of the states that provided for filling
8 vacancies in their state legislatures, even at a time
9 when elections were held annually, provided for filling
10 those vacancies through a bi-election.

11 QUESTION: With respect to the United States
12 Senate vacancies that occur during the term, what
13 provision of the Constitution governs the method by
14 which the successor is to be selected?

15 MR. LACOVARA: The Seventeenth Amendment is
16 explicit on that, Mr. Chief Justice.

17 QUESTION: Now, is it possible that one of the
18 considerations also is that to hold a bi-election for a
19 Senator on the part of the state -- I am talking now
20 about the considerations that went into that provision,
21 that it would cost a great deal more money to hold a
22 statewide election, bi-election, than a district
23 election? Is that a factor that perhaps entered into it?

24 MR. LACOVARA: I think it was. The court that
25 upheld the 29-month vacancy in the New York -- the

1 appointment of a Senator from New York noted that one of
2 the reasons for giving the governor power to make a
3 temporary appointment pending the holding of an election
4 was that holding statewide elections for the United
5 States Senate would be costly, but what I want to
6 emphasize is that the Seventeenth Amendment is of a
7 piece with Article I in providing that there must be a
8 bi-election for members of the United States Senate,
9 just as for members of the House of Representatives.

10 All the Seventeenth Amendment does is
11 authorize the governor to make a temporary appointment
12 until the machinery for setting up a bi-election can be
13 put into place, and that same court was quite explicit
14 in saying that the court would not sustain under the
15 Seventeenth Amendment a statute that authorized the
16 governor to appoint a substitute Senator for the full
17 balance of the term. So, the tradition that both
18 Article I and the Seventeenth Amendment codified is the
19 tradition, what I would consider a basic constitutional
20 presumption of our form of government, that the people
21 have the right to select their legislative
22 representatives even though there might be some cost or
23 burden involved.

24 Of course, as I will explain in a few moments,
25 the cost, the burden, the inconvenience that can be

1 talked about in this case are miniscule in comparison
2 with the burden that the Seventeenth Amendment expressly
3 requires the states to shoulder in electing substitute
4 Senators. We are talking here only about a single
5 district vacancy, a vacancy that arises, as this record
6 shows, quite infrequently.

7 The implication in the Constitution that the
8 people have the right to select their legislators is, I
9 think, fundamental. That carries us through, I submit,
10 the right of the people to select their legislators even
11 when a vacancy occurs. This is a continuing right,
12 something that is not lost simply because of the
13 happenstance occurrence of death or resignation.
14 Legislators are, after all, elected by the people to be
15 their spokesmen, their representatives in making
16 government policy.

17 For these reasons, we submit that any system
18 that at least in the absence of compelling justification
19 authorizes the appointment of a substitute legislator
20 fails to comply with various provisions, explicit and
21 implicit, of the United States Constitution.

22 QUESTION: Do you think that prior to the
23 enactment of the Seventeenth Amendment, a state could
24 have provided in a bicameral legislature for an upper
25 house whose members were each appointed, say, by the

1 supervisors of one county of the state?

2 MR. LACOVARA: Well, the Seventeenth Amendment
3 would not affect the provisions of state legislatures.

4 QUESTION: No.

5 MR. LACOVARA: That applies only, of course,
6 to the federal legislature. The powers of the state to
7 provide for an appointed state senate today or
8 originally, I think, are outside the contours of this
9 case.

10 QUESTION: Do you have any answer to the
11 question?

12 MR. LACOVARA: I think historically, Justice
13 Rehnquist, the states did provide for appointed upper
14 houses. They were more in the nature of executive
15 councils, rather than popular chambers, and since in
16 Minor against Happersett this Court said that the
17 situation as of the time of the adoption of the
18 Constitution gives us the best glimpse of what the
19 Framers meant when they spoke about a republican form of
20 government, my answer would be, apart from later
21 Constitutional Amendments, a state at that time could
22 have provided for an appointed upper house, but had to
23 provide, as it still must provide, for an elected, a
24 popularly elected lower house.

25 That was the common pattern of all of the

1 states at the time the Constitution was ratified. If
2 you will, that was a parallel reflecting the dichotomy
3 between the House of Lords and the House of Commons.
4 But what we have here today is a state lower legislative
5 house that is made by statute and Constitutional
6 provision a popularly elected chamber. We believe that
7 is a Constitutional imperative that Puerto Rico has
8 recognized, and that vacancies in it must be filled by
9 the same electoral process.

10 Justice White a few moments ago asked about
11 alternate grounds for the relief being sought in this
12 case. The First Amendment is a clear one. Puerto Rico,
13 like a small minority of states, has adopted a theory of
14 party ownership which was expressly upheld against
15 federal constitutional challenge by the Supreme Court of
16 Puerto Rico. Under this notion, the seat in the
17 legislature belongs not to the people, indeed perhaps
18 not even to the candidate whom the people elected, but
19 to the party on whose ticket the candidate won.

20 That concept seems facially inconsistent with
21 our notions of representative government, both as a
22 matter of practice as well as a matter of Constitutional
23 theory. Legislators are elected by the people, not by
24 parties. They represent people, the voters of their
25 districts, not parties. A system of this sort is --

1 QUESTION: Counsel, I am not sure I understood
2 your suggestion that the seat would not even be owned by
3 the candidate.

4 MR. LACOVARA: The logic --

5 QUESTION: While he is occupying it, he surely
6 is the only one who has title to it, isn't he?

7 MR. LACOVARA: Well, that is a difficulty that
8 I have had with the justifications for the party
9 ownership system, Justice Stevens. The Supreme Court of
10 Puerto Rico said that there are several -- it termed
11 them compelling justifications for this party ownership
12 system. One was that the party be able to preserve its
13 electoral balance.

14 QUESTION: But does the "party ownership"
15 rationale apply to anything except filling the vacancy?

16 MR. LACOVARA: The rationale does. It has not
17 been applied in its most extreme form. Indeed, this is
18 one of the points that I wanted to make. If this
19 rationale justified the party's ownership of the seat
20 when a vacancy arises, because it is necessary for the
21 party to retain a particular level of balance in the
22 legislature, or to carry out its electoral mandate, the
23 party ownership rationale would similarly be offended if
24 a legislator decided he wanted to break ranks with his
25 party and vote against its platform, or decided, as one

1 of the appendices to our brief shows, if the legislator
2 actually decided to change parties after election, these
3 perfectly --

4 QUESTION: Well, it seems to me one could say
5 in a state where a governor can fill a vacancy, one
6 could say, well, the governor owns the seat in the same
7 sense, but that would not mean that the legislator while
8 he is in office is owned by the governor, would it?

9 MR. LACOVARA: Well, I think I wouldn't frame
10 the alternative to party appointment as governor
11 ownership either.

12 QUESTION: Well, isn't that just a question of
13 language, whether you call it party ownership where a
14 party has the right to fill the vacancy? It is just --
15 may be unfortunate language, but does it really mean
16 anything?

17 MR. LACOVARA: The premises that were given,
18 Justice Stevens, for party ownership I think suggest
19 that the Supreme Court of Puerto Rico takes this
20 principle seriously. This is not just a label
21 attached. The reasons for giving the party rather than
22 some elected official the power to fill the vacancy or
23 that the party has a right to a certain quantum of
24 political support in the legislature, regardless of
25 whether the people or anyone else would choose someone

1 of the same party to fill that vacancy, so there is not
2 a necessary overlap between the label and the
3 consequences, but the rationale that was given by the
4 Supreme Court of Puerto Rico seems to me to carry us to
5 that point.

6 QUESTION: You seem to be arguing that there
7 is something inherently un-American, undemocratic about
8 this idea. Is that not balanced by what the
9 Constitutional, the Seventeenth Amendment expressly
10 authorized with reference to United States Senators?
11 There is nothing un-American about that, is there?

12 MR. LACOVARA: Well, on the contrary, Mr.
13 Chief Justice, I think the Seventeenth Amendment
14 supports our position for two reasons. One, it
15 recognizes the basic proposition that we are arguing,
16 that is, that there must be an election to fill a
17 vacancy even in the Senate. There can be a temporary
18 appointment, but ultimately there has to be a
19 bi-election. The Puerto Rico statute makes no such
20 provsion. The appointment here is for the full balance.

21 QUESTION: Does the Seventeenth Amendment
22 apply to any person other than a Senator or any office
23 other than the U.S. Senate?

24 MR. LACOVARA: Absolutely not.

25 QUESTION: Well, what does it have to do with

1 this case? You keep bringing it up.

2 MR. LACOVARA: Well, I am trying to respond,
3 Justice Marshal, to some questions about the Seventeenth
4 Amendment. To the extent that one of the assumptions of
5 the Seventeenth Amendment is applicable here at all is
6 the assumption that there has to be a bi-election, but
7 by its terms it applies only to selecting replacement
8 members of the United States Senate. That is not one of
9 the principal Constitutional provisions on which we rely.

10 QUESTION: But if your basic theory was
11 correct, we probably didn't even need the Seventeenth
12 Amendment.

13 MR. LACOVARA: No -- well, the Seventeenth
14 Amendment was necessary, Justice Stevens, because
15 Article I, Section 3, of the Constitution provides for
16 -- provided for direct legislative appointments of
17 Senators. The state legislatures appointed Senators.
18 There was no popular involvement at all.

19 QUESTION: Right. Perhaps I should say, we
20 didn't need the -- well, I understand your point. Yes.

21 QUESTION: Well, there were direct elections
22 of Senators long before the Seventeenth Amendment. It
23 was up to the states, wasn't it?

24 MR. LACOVARA: Some states -- some states had
25 provided that they would abide by the judgment of the

1 electorate, but the Constitutional power to appoint, up
2 until the Seventeenth Amendment, remained vested in the
3 legislatures, and the official act that brought a
4 Senator to Washington was not the choice of the people,
5 but the action of the legislature.

6 QUESTION: But if they had passed a statute
7 saying that we are going to abide by the result of an
8 election, presumably the consequences were the same as
9 if they simply provided for an election in the first
10 place.

11 MR. LACOVARA: Yes, many of them did, and the
12 purpose of the Seventeenth Amendment was to make sure
13 that all the states recognized the importance of popular
14 sovereignty. Again, that legislative history is traced
15 briefly in our opening brief, and its relevance, Justice
16 Marshal, is simply that it reflects the latest in what
17 we think is correctly unbroken recognition that at the
18 federal level as well as at the state level legislatures
19 must be popularly elected. That is their basic
20 function, to serve as the representative branch of
21 government.

22 QUESTION: That is the way you read it. The
23 way I read it is that they decided that as for the
24 Senate, this is the way it is to be done, in the
25 Senate. That is the way I read the Seventeenth

1 Amendment.

2 MR. LACOVARA: Yes. That's correct. It
3 parallels what Article I, Section 2, provides for the
4 House of Representatives.

5 QUESTION: It didn't say so.

6 MR. LACOVARA: Well, the Seventeenth Amendment
7 has its own text, but the procedure for popular election
8 is essentially the same as for selection of replacement
9 members of the House of Representatives. Article I,
10 Section 2, provides that in the event of a vacancy in
11 the House, the executive, the governor, must issue writs
12 of election, regardless of how short a time remains.

13 The First Amendment points are outlined in our
14 brief. The basic question that I think this case comes
15 down to is whether there are any compelling
16 justifications for the party appointment system that
17 Puerto Rico and a few other states have adopted. The
18 PDP suggests in its brief before this Court that this
19 system is necessary to preserve Puerto Rico's system for
20 minority representation.

21 I submit that the Court should brush aside
22 that argument summarily. It was not argued below, for
23 the simple reason that as the text of the Puerto Rico
24 constitution and its supporting legislative history
25 makes clear, Puerto Rico's protection of minority

1 representation comes about through its rather complex
2 provisions for at-large seats. The seat here in
3 question is a district seat that belongs to the
4 candidate who is elected by the majority of the members
5 of that district, the majority of the voters.

6 The Supreme Court of Puerto Rico did not say a
7 word in justifying the party appointment system about
8 any connection between it and minority representation,
9 so I suggest that that issue is not one that the Court
10 need look to in examining the justifications for this
11 statute.

12 The basic justifications offered by the court
13 below were that party ownership avoids the necessity for
14 quadrennial elections by allowing appointment to fill
15 vacancies. That argument, I suggest, is equally
16 inconsistent with the notion that a seat belongs to the
17 members of the public, to the voters. This hostility
18 toward electoral campaigning is out of phase with this
19 Court's own decisions on the First Amendment.

20 If the people of a district feel strongly
21 enough about the political issues that are before their
22 legislature, to want to campaign, to want to discuss
23 intensely, far from providing a justification for
24 suppressing an electoral opportunity, that seems to me
25 to provide a very dramatic reason for giving the people

1 an opportunity to expres their preference through the
2 ballot box.

3 If the concern here is about cost, the Chief
4 Justice's opinion for the Court in Bullock against
5 Carter seems to be a full answer. There, the Court
6 struck down a system in which candidates in primary
7 elections were required to finance those primaries in
8 order to save the state money. The opinion for the
9 Court pointed out quite soundly, in all the programs in
10 which governments spend money, any sensible ordering of
11 Constitutional priorities has to put the funding of the
12 electoral process at the very top of the list of
13 priorities. That rationale applies here.

14 Moreover, what we are concerned with here is
15 an episodic, an infrequent event. In the last 30 years
16 since 1952, the record shows that there have been only
17 eight opportunities for vacancies to be filled in
18 district seats in the Puerto Rico House and Senate,
19 approximately one every four years, and these are seats
20 in narrowly defined territories with only a few thousand
21 voters, perhaps one-tenth the number of voters here in
22 the District of Columbia, for example.

23 It is, I submit, inconsistent with the sound
24 notion of Constitutional principle and representative
25 government to dispense with the holding of a bi-election

1 on any of the grounds asserted by the Supreme Court of
2 Puerto Rico.

3 Thank you.

4 CHIEF JUSTICE BURGER: Mr. Fortas.

5 ORAL ARGUMENT OF ABE FORTAS, ESQ.,

6 ON BEHALF OF THE APPELLEES

7 MR. FORTAS: Mr. Chief Justice, and may it
8 please the Court, I confess to a certain degree of
9 astonishment in this case, that the proposition is urged
10 that there is a Federal Constitutional right or a
11 Federal Constitutional obligation imposed upon the
12 states or upon Puerto Rico to provide for the election
13 of state or Puerto Rican legislatures. If there is any
14 fundamental proposition involved in this case that has
15 been thoroughly refuted by this Court time and time
16 again, beginning with Minor against Happensett, it is
17 that proposition.

18 On Pages 19 and 20 of our brief, we refer to
19 some of the cases and some of the statements of this
20 Court to the contrary. For example, in addition to
21 Minor against Happensett, for example, in the San
22 Antonio Independent School District case, this Court,
23 through Justice Powell, said that the right to vote per
24 se is not a Constitutionally protected right. Justice
25 Marshal, in his dissent, stated it this way: "The right

1 to vote in state elections has itself never been
2 accorded the stature of an independent Constitutional
3 guarantee."

4 The law is as stated by Justice Rehnquist
5 earlier this morning. That is to say that the Federal
6 Constitution does not impose upon the states, and
7 therefore upon Puerto Rico, the requirement of providing
8 for elected legislatures, although the Federal
9 Constitution does, as this Court has constantly
10 reiterated, the Federal Constitution imposes a good many
11 obligations upon the state as to how that franchise must
12 be administered and governed once the state has decided
13 that the particular officials will be elected.

14 That is the law, and you are today invited by
15 my able friend to reverse that provision of
16 Constitutional law which is so deeply embedded in the
17 decisions of this Court.

18 Now, there is nothing in the Federal
19 Constitution that would support such an assertion. The
20 Federal Constitution is based upon the principle that
21 the states will provide their own form of government,
22 that the states will provide how their government shall
23 be organized and how it shall be conducted, subject,
24 however, subject, however, to very strict and rigorous
25 provisions of the Federal Constitution embodied

1 particularly and most practically in the equal
2 protection clause, as to how the elections will be
3 administered and how the election rights will be
4 allocated.

5 That is the basic framework of our
6 government. It is the basic concept of our government.
7 There has never been, in Minor against Happensett or any
8 other case, any challenge to that principle as the basic
9 governing principle of our Constitution.

10 Now, let me say, if Your Honors please, that
11 so far as Puerto Rico is concerned, I respectfully
12 suggest that the observance of that principle is of even
13 greater importance than it is in the states. The equal
14 protection clause, the basic fundamental guarantees of
15 the Constitution apply to the people of Puerto Rico as
16 they do to the people of the states.

17 Puerto Rico, as this Court has had occasion to
18 remark in different contexts, however, does have a
19 special and unique status in the American system.
20 Puerto Rico is an unincorporated territory, that is to
21 say, and has always been, that is to say, there is no
22 decision by the Congress or the people of Puerto Rico as
23 to whether it will ever be assimilated into the state
24 framework of the United States. There are those who
25 contend it should be independent, and there are those,

1 as represented by the Popular Democratic Party, who have
2 long advocated that Puerto Rico should be what its
3 Spanish name in Spanish indicates, the free and
4 associated state of Puerto Rico, the relations of which
5 to the United States are governed by a compact entered
6 into between the Congress and the people of Puerto Rico.

7 We have respectfully suggested to the Court
8 that in considering the present problem, it is
9 appropriate, it is necessary, it would be most
10 constructive for the future constitutional development
11 of Puerto Rico and for the international problems that
12 have clustered around the unique status of Puerto Rico
13 and which are a source of constant debate in the United
14 Nations, in which some nations have attacked the bona
15 fides of the United States' position in Puerto Rico and
16 the United States' assertion that Puerto Rico has
17 autonomy, that Puerto Rico has the right to provide for
18 its own government, and that the people of Puerto Rico
19 have chosen, freely chosen to associate with the United
20 States, so we have suggested to the Court that it would
21 be highly advantageous and highly desirable, highly
22 appropriate to recognize that Puerto Rico has not only
23 the autonomy to provide how its representatives will be
24 elected, subject to the basic Constitutional guarantees,
25 not only to provide that it has -- not only does it have

1 the same jurisdiction and power and authority as the
2 states, but that in considering problems as to the
3 Constitutionality or the propriety of what Puerto Rico
4 does in providing its local government, that there
5 should be a deference given, deference paid to its
6 unique status, to its cultural background, to its
7 history, to its differences.

8 Now, let me briefly address myself to that in
9 the context of the problem before Your Honors. This
10 system of filling vacancies in Puerto Rico goes back to
11 1906. That is to say, the system that when a vacancy
12 occurs in various offices, it will be filled by
13 appointment, by appointment in effect by the political
14 party, goes back to 1906, when Puerto Rico was a
15 colony. There is no point in mincing words about it.
16 It was a colony. It had -- under the Folacher Act,
17 which was adopted in 1900, two years after the United
18 States obtained Puerto Rico from Spain.

19 In 1906, Puerto Rico provided that in the
20 event of a vacancy in the office of a mayor or a
21 municipal council, that vacancy would be filled until
22 the next general election by appointment or on
23 designation by the political parties. Now, at that time
24 Puerto Rico did not elect its legislature. The
25 legislative authority was exercised by the United States

1 and by designees of the United States. But it did have
2 authority over -- The appointment of mayors and
3 municipal councils was governed by Puerto Rican law, and
4 it was so provided.

5 And that party designation, Your Honors, is
6 deeply embedded in Puerto Rican history, much more so
7 than we are accustomed to in the states. Even when
8 Puerto Rico was a colony of Spain, and before the
9 Autonomy Act enacted by Spain, which was in 1897 or
10 eight, even when Puerto Rico was a colony of Spain,
11 party organization existed in Puerto Rico and it was
12 very powerful indeed, and it is interesting to note that
13 the party organization then was focused on the same
14 issues that dominate party organization today, namely,
15 whether Puerto Rico should be assimilated to Spain,
16 which is the counterpart of the Statehood Party now, and
17 the MPP with which the Appellants here are affiliated,
18 whether Puerto Rico should be autonomous within the
19 Spanish framework of government, which is now sort of
20 the general counterpart of the position taken by the
21 Popular Democratic Party, the Appellees whom I
22 represent, or third, whether there should be separatism,
23 independence from Spain, those divisions have continued
24 through all these years, and through the permutations
25 and combinations, and they are reflected by the various

1 political parties in Puerto Rico.

2 And from Spanish times to the present, the
3 party organization has been a part, an essential part of
4 Puerto Rican life. For example, I am advised that there
5 has never been elected to the Puerto Rican legislature
6 an independent, a candidate who ran as an independent,
7 although the Puerto Rican law contains very liberal and
8 generous provisions permitting that. I am also advised
9 that on all issues of controversy in the Puerto Rican
10 legislature, party loyalty, party discipline is a fact
11 of life. The allegiance to these three competing ideas
12 of status is a dominant factor in Puerto Rican life.

13 QUESTION: Counsel, your history makes me
14 wonder, what if there were an independent elected and a
15 vacancy occurred?

16 MR. FORTAS: The law provides specifically for
17 that. Then you have to have a general -- a special
18 election.

19 QUESTION: Then you must have a general
20 election.

21 MR. FORTAS: There is no alternative to it.
22 But the point here is that in 1906, this same provision
23 for special election of mayors and municipal councils
24 was in the law. It has persisted in the law today. In
25 1917, Congress adopted the first Organic Act for Puerto

1 Rico. Puerto Rico was then a colony. The Jones Act.
2 The Jones Act provided for special elections to fill
3 vacancies in the legislature. Puerto Rico was given the
4 right to elect a legislature then.

5 In 1938, that provision in the Jones Act was
6 changed by the Congress, and it is very interesting to
7 note, as we have set forth in our brief, it was changed
8 on recommendation of the non-voting delegate in the
9 Congress, which is all that Puerto Rico now has. He
10 said that between 1917 and 1938, there have been
11 vacancies in the Puerto Rican legislature, but those
12 vacancies have not been filled, because special election
13 was required.

14 And he therefore recommended that the
15 vacancies be filled, that Congress provide that
16 vacancies in the Puerto Rican legislature be filled by
17 appointment on recommendation of the political party to
18 which the previous incumbent had belonged, and it was so
19 done. Congress changed the Organic Act of Puerto Rico
20 to provide -- to make that provision which in essence
21 and in principle is the same provision that we are
22 talking about here today.

23 Now, the next event in this history is 1952.
24 In 1952, the people of Puerto Rico adopted their own
25 constitution. That was pursuant to a compact in Public

1 Law 600 that was entered into between the Congress and
2 the people of Puerto Rico. As the Court knows, Puerto
3 Rico was still subject to the territorial clause of the
4 Constitution of the United States. Congress had in
5 theory complete power to dispose of Puerto Rico, make
6 rules for it, and in Public Law 600 there was this
7 compact entered into, which was a historic document that
8 had great influence throughout the world. It provided a
9 model on which some other nations revised their
10 arrangements with their erstwhile territories.

11 And it is that constitution that various
12 members of this Court have had occasion to write about
13 in opinions of this Court in different contexts. It was
14 that constitution that provided that Puerto Rico shall
15 have control in effect of its own destiny, its own
16 government, subject to two things. One is the
17 fundamental protections of the United States
18 Constitution, more or less as stated in the old insular
19 cases, and two, subject to the specific arrangements
20 with the federal government, such as free trade and
21 various types of specific provisions.

22 That was a great Act. It was an Act that
23 affirmed the uniqueness, as this Court has stated it, of
24 the system of Puerto Rico, and it allowed them to
25 organize their own government, which they did in their

1 constitution.

2 Now, it is very interesting to note that in
3 the Puerto Rican constitution as it was originally
4 drafted, there were two types of provisions that related
5 to legislative vacancies. One related to the at-large
6 posts. The Puerto Rican legislature is and has been
7 composed of two houses, of course. The Senate has 27
8 members. Eleven of them are at-large, and 16 are
9 selected in Senatorial districts. The House of
10 Representatives is composed of 51 members. Forty are
11 from the districts; eleven are at-large.

12 Now, with respect to vacancies, the
13 constitution in 1952 provided that vacancies in the
14 at-large seats would be filled in the historic manner,
15 namely on recommendation of the political party to which
16 the incumbent -- with which the incumbent had been
17 affiliated. With respect to district Representatives
18 and Senators, the constitution originally provided for
19 an election of a successor.

20 Now, that represented -- if Your Honors
21 please, I hope I am not speaking out of turn here -- it
22 represented the profound view that most everybody has,
23 most everybody steeped in the American tradition has of
24 the remarkable men who were responsible for the drafting
25 of that Constitution. Everybody, I suppose,

1 instinctively would prefer to have elections than
2 appointments. And that reflected their view. But it
3 didn't last. It didn't work in Puerto Rico, and the
4 result was that just as it didn't work under the Jones
5 Act, the first Organic Act, and had to be changed in
6 1938 by the Congress, so this didn't work either for
7 Puerto Rico, and in 1964, the people of Puerto Rico
8 adopted an amendment to their constitution which
9 provided that the selection -- that the filling of
10 vacancies for district representatives, which is the
11 specific thing involved here, would be governed by laws
12 enacted by the Puerto Rican legislature.

13 QUESTION: What didn't work, counsel?

14 MR. FORTAS: The special election.

15 QUESTION: Well, I know, but why didn't it
16 work? What was their judgment? What was wrong with it?

17 MR. FORTAS: It didn't work because of the
18 mechanism of the election, because of the particular
19 quality of the controversies that occur in Puerto Rico,
20 and I will have to take a minute to describe that, if I
21 may, Justice White.

22 In Puerto Rico, from the beginning of
23 elections, elections are held once every four years.
24 Once every four years there is an election for all
25 offices, local and legislative, mayors, councils, and

1 the legislature. Until the last -- until 1977, I think
2 it was, the way they ran the election was this. All
3 Puerto Rican voters assembled in a particular place, at
4 particular polling places, at or before the appointed
5 hour. The doors were then closed. Nobody could enter
6 the polling places after the appointed hour. Nobody
7 could leave until all the voting was over.

8 It was a wonderful system to prevent
9 repetition. Then it turned out it was a great fiesta.
10 At the same time, at the same time, in the Puerto Rican
11 elections, this question of status, this question of
12 status is a highly emotional, disruptive thing. I don't
13 have to tell the Court about what happens, what has been
14 happening and has happened with respect to the
15 nationalist movement in Puerto Rico, which is the
16 advocates of independence through violence, and passions
17 about this question of status there are unimaginable to
18 anyone who hasn't been down there and seen it, and those
19 appeared in the election.

20 The next thing is, Puerto Rico is a poor
21 place. There is no question about it. It is not just
22 whether the government can afford this. It is a
23 question of campaigning. They have television down
24 there, too, and it costs money. Puerto Rico is a poor
25 place. Puerto Rico is a place that has its very special

1 kind of folk ways, and the special election system just
2 didn't work, and as you read the Puerto Rican election
3 laws now, there is practically nothing that relates to a
4 special election. It just does not fit.

5 And the question here, if Your Honors please,
6 the basic question here is whether this Court will say
7 to the people of Puerto Rico that because of something
8 that I can't find in the Constitution of the United
9 States, you must do it our way.

10 QUESTION: Counsel, how did the failure of
11 this elective system to work from 1952 to 1964 manifest
12 itself?

13 MR. FORTAS: It manifested itself in the fact
14 that there were some positions that were just allowed to
15 remain vacant, and were not filled, particularly the
16 district representatives. Well, the at-large people --
17 I should have made clear, if I didn't, that the
18 provision for filling at-large vacancies remained the
19 same throughout. That is to say, in the 1952
20 constitution the at-large seats, when they became
21 vacant, were filled by appointment on the designation of
22 the political party, just as they are today.

23 And the failure to work was manifested, as I
24 said, by the fact that some vacancies were not filled,
25 and next by the fact that when special elections were

1 held, they were not satisfactory. They were not
2 orderly. You had the passions of the election that
3 occurred on more than a four-year basis. Now, we may
4 like that or not like it, but it is nevertheless true
5 that the people of Puerto Rico would prefer to have the
6 passions every four years instead of once in a while,
7 instead of occasionally.

8 QUESTION: Was there any element in the
9 unworkability in this sense that if there is going to be
10 an election, an open election, it may be that the other
11 party would win the election, and the balance in the
12 existing legislature would be upset --

13 MR. FORTAS: No, the --

14 QUESTION: -- or did they just prefer to have,
15 every four years, they wanted to -- once you had an
16 election, you were going to maintain that particular
17 balance or proportion for the full four years?

18 MR. FORTAS: I think there was more of the
19 latter, but you have here a situation where people are
20 accustomed to an election fiesta every four years, and I
21 may say, Justice White, that there are -- that the
22 results in Puerto Rico are fantastic. There is about 90
23 percent registration of eligible voters; about 80
24 percent of the eligible voters vote, more than 80
25 percent of them. It is a record that is unequalled

1 anywhere else. And it's a record that they prefer, and
2 I see nothing in the Federal Constitution that impacts
3 upon this.

4 May I hurriedly get to this question of
5 appointment or designation by political parties? There
6 are in the -- in the states there are 22 states -- 21
7 states of the union plus the District of Columbia that
8 fill vacancies in legislative office by appointment in
9 their legislatures, 21, almost half of the states, and
10 of those, 16 -- 16 of the states fill those vacancies by
11 appointment upon designation by a political party or
12 they have to be filled by a member of the same political
13 party, 16 of them. This is not a peculiar Puerto Rican
14 situation. It is prevalent throughout the states.

15 My friend would ask this Court to outlaw, to
16 require special elections, to outlaw election in the
17 event of any vacancy. I don't know how that can be
18 confined to district representatives in Puerto Rico, and
19 not to at-large representatives. I don't know how on a
20 principle basis that principle can be applied to avoid
21 its application to appointment of someone to fill a
22 vacancy pending a special election. I don't know how
23 you can devise any principle that, as my friend asked
24 you to, that would permit appointment to fill a
25 short-term vacancy before the special election.

1 Puerto Rico, if the vacancy occurs within 15
2 months prior to a special election, it has always been
3 provided that the vacancy is filled by appointments, and
4 frankly, I don't know, as we have elaborated in our
5 brief, how you can confine the principle for which my
6 friend contests to legislative offices. As this Court
7 has said, an elected office, when the state decides that
8 an office is to be elected, then federal consequences
9 apply, whether it is a legislative office or any other
10 office that has general governmenta powers. I exclude,
11 as this Court has done, of course, boards and what-not
12 that have very restricted powers.

13 So that the principle that my friend advocates
14 here would apply in all of these situations in a totally
15 impractical way. It would apply to all legislative
16 situations, to all appointed situations. Now, I want to
17 hasten -- my time has expired. May I have one moment,
18 if Your Honor please?

19 On this political party, the question of
20 whether the appointments can be made by the political
21 party, political parties, as this Court has reiterated
22 time and time again, are part of the warp and woof and
23 the essence of our official elective system.
24 Appointment by a political party is not like appointment
25 by the Chamber of Commerce or a labor union. It is an

1 appointment on designation of the political -- of a
2 mechanism that is highly regulated and that is part of
3 our system.

4 As to the reasons for Puerto Rico's adoption
5 -- justifying Puerto Rico's adoption in this system, I
6 regret I can only refer Your Honors to our brief, but
7 the preservation, the preservation of the independent
8 party system to which this is essential, the appointment
9 system is essential, the assurance of representation of
10 independent parties in Puerto Rico is fundamental not
11 only to Puerto Rico but to this very special situation
12 that has resulted because of the independence movement
13 in Puerto Rico. I regret that I must respectfully refer
14 you to the brief for that.

15 Thank you very much. It has been a great
16 pleasure and an honor to be here.

17 CHIEF JUSTICE BURGER: Mr. Lacovara, do you
18 have anything further?

19 ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

20 ON BEHALF OF THE APPELLANTS - REBUTTAL

21 MR. LACOVARA: I have just a few brief
22 comments by way of reply to my learned colleagues's
23 arguments.

24 First, with respect to the argument that
25 Puerto Rico's political status, its affiliation with the

1 United States, means that the Constitutional principles
2 that apply to the states do not apply to Puerto Rico to
3 the same extent is a proposition that this Court has
4 rejected three times in the last six terms by
5 overwhelming majorities of the Court. The cases are
6 cited in our brief. Whatever the Court decides today
7 necessarily affects not only Puerto Rico but those
8 states that have systems comparable to Puerto Rico's.

9 Secondly, with respect to the history, Puerto
10 Rico has provided for an elected legislature since the
11 Organic, the Jeforacher Act of 1900, and since 1902
12 there was provision for holding popular bi-elections to
13 fill vacancies in the legislature. The system of party
14 appointment in other offices other than the House of
15 Delegates of Puerto Rico was not adopted until 1938.
16 So, for almost all of the period from the acquisition of
17 Puerto Rico from Spain up until the present, Congress
18 and the legislature of Puerto Rico recognize the
19 importance of popular bi-elections.

20 Finally, with respect to party appointment, I
21 agree with my learned colleague that political parties
22 are important, in Puerto Rico as elsewhere. They have
23 Constitutional status. But as this Court's decisions
24 shown, political parties have Constitutional status
25 because they are private associations. That is why they

1 are protected against government interference by the
2 First Amendment. It stands those principles on their
3 heads, I submit, to say that a kind of institution that
4 has Constitutional status because of its private nature
5 may be given the ownership of public office, the
6 legislative office.

7 The judgement below should be reversed.

8 Thank you.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted.

11 (Whereupon, at 11:02 o'clock a.m., the case in
12 the above-entitled matter was submitted.)

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Jesus Rivera-Rodriguez Et Al., Appellants, v. Popular Democratic Party Et Al. No. 81-328

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Deene Hammond

RECEIVED
SUPREME COURT U.S.
MARSHAL'S OFFICE

1982 MAR 29 PM 1 39