2005

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Recommended Citation
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Keywords
Terrorism, War on drugs, Puerto Rico, Examining Board of Engineers, Architects and Surveyors v. de Otero, Harris v. Rosario
OUR FORGOTTEN COLONY: PUERTO RICO AND THE WAR ON DRUGS

By LeeAnn O’Neill and Jennifer Gumbrewicz, Esq.*

Inter arma silent leges—in time of war, the laws are silent

In a time where the war in Iraq and the war on terrorism dominates the front page news, the War on Drugs has been relegated to a second class position. However, for decades, the War on Drugs has silently “hunted” minorities, sending them to jails in disproportionate numbers and infringing on their constitutional rights. Despite the nation’s new focus in the Middle East, the effects of the War on Drugs are still as devastating as when it began. A “country of minorities,” Puerto Rico is not only a prime target of the War on Drugs, it is also a key drug portal to the U.S. and the Caribbean and the rates of crime and drug addiction are among the highest in the world. The War on Drugs in Puerto Rico has created an inner city ghetto in a beautiful tropical paradise.

HISTORICAL BACKGROUND OF PUERTO RICO

The contentious relationship between the United States and Puerto Rico creates a complicated background for the War on Drugs. The United States acquired Puerto Rico as a colony from Spain through the Treaty of Paris in 1899. In 1900, the Foraker Act allowed Puerto Rico to establish a civil government. The Jones Act followed in 1917, wherein Congress granted Puerto Ricans “statutory citizenship.” Although this technically granted U.S. citizenship to Puerto Ricans, the rights of a statutory citizen are different than those of a constitutional citizen. In 1950, Public Law 600 gave Puerto Rico the right to adopt its own constitution and establish a relationship with the United States via a compact. Just two years later, the Commonwealth of Puerto Rico was established under its own constitution. Despite several status referendums, Puerto Rico still has a nebulous position as an unincorporated U.S. territory – somewhere in between a colony and a state. The status debate alone is fraught with constitutional and self-determination issues that cannot even begin to be explored in this article.

This quasi-state, quasi-territory status creates tensions between Puerto Rico and the federal government. Congress and the Supreme Court wield the ultimate authority as to which constitutional provisions apply to Puerto Rico and whether or not federal law preempts local law on the island. This treatment, however, has been extremely inconsistent. For example, in *Examining Board of Engineers, Architects and Surveyors v. de Otero*, the Supreme Court held that the District Court of Puerto Rico was obligated to enforce the federal civil rights statute to protect rights secured by the Constitution. Just a year later, in *Harris v. Rosario*, the Court held that rights invoked under the Equal Protection Clause did not have to be protected because “Congress, which is empowered under the Territory Clause of the Constitution… may treat Puerto Rico differently from States so long as there is a rational basis for its actions.” Equally controversial is the Puerto Rican Federal Relations Act, which states that the statutory laws of the United States apply equally in Puerto Rico as in the rest of the United States unless “locally inapplicable.” The Act also provides the Supreme Court with discretion to determine what the U.S. government deems “locally inapplicable.”

THE WAR ON DRUGS

In the early half of the 20th century, a number of federal drug laws passed through Congress criminalizing drug use. The Nixon administration first coined the phrase “War on Drugs.” The Comprehensive Drug Abuse Prevention and Control Act of 1970 centralized the piecemeal federal legislation involving the prohibition and regulation of illicit drugs. The Act “classifies substances… into five categories of controlled substances… [and]… criminalizes manufacturing, distributing, dispensing, and possessing controlled substances in violation of the Act’s comprehensive regulatory scheme.” The Reagan administration escalated the War on Drugs by passing the Anti-Drug Abuse Act of 1986. The Act “increased penalties and instituted mandatory minimum sentences for most drug offenses.” The 1980s brought a massive increase in the number of drug cases brought to federal courts. “While the overall rate of criminal cases filed in the United States district courts rose sixty-nine percent [from 1980 to 1990], the number of drug cases increased nearly three hundred percent.”

The War on Drugs is primarily adjudicated in the federal criminal justice system. Given the transient nature of drug smuggling, which crosses not only national but international borders, only the federal government has the proper jurisdiction and enough resources to combat this problem.

The main U.S. suppliers of cocaine are South and Central American countries. Texas, Florida, California, Puerto Rico and New York consistently lead the country in total cocaine seizures. Their positions as border states make them ideal for drug trafficking due to access via numerous waterways and infrastructures designed to distribute drugs to large markets.

THE WAR ON DRUGS—DRUG EXCEPTIONALISM

The courts tend to view the War on Drugs in a favorable manner, often giving more leeway to law enforcement officers investigating drug related crimes, and analyzing drug cases using more flexible standards, such as “reasonableness.” This concept of viewing the War on Drugs favorably is best described as
“drug exceptionalism” and is explained by Erik Luna in his article entitled, “Symposium: New Voices on the War on Drugs: Drug Exceptionalism.”23 His argument introduces the proposition that constitutional criminal procedure should be applied the same no matter the crime.24 However, many legal scholars note that, in reality, courts make exceptions in drug cases.25 Primarily in the context of Fourth Amendment cases, the U.S. Supreme Court has found that probable cause is not always necessary in a number of drug related seizures.26 Additionally, in light of the so-called “border exception,” the Supreme Court has decreased the legal protections normally applied for searches, seizures, and detentions that occur near the U.S. borders.27

THE WAR ON MINORITIES

The escalation in drug enforcement dramatically affects minority communities, particularly the African American and Latino communities. The rates of incarceration for minorities are significantly higher than those for Caucasians.28 Consequently, minorities are overrepresented in the federal prison system in relation to their representation in the overall population.

Two major reasons for higher rates of incarceration for minorities involved in drug related offenses are the drug laws themselves and the nature of their enforcement. First, the laws are more likely to be enforced against minorities. Presumably, in an effort to catch more drug offenders, the police are more likely to patrol inner city streets where people are outside in plain view rather than the suburban neighborhoods where much of the drug activity occurs behind closed doors. Not only are there higher rates of patrol in areas where drug use is concentrated, but race is also considered one of a list of legal and acceptable factors law enforcement uses in routine traffic stops and drug courier profiles.29 Most drug courier profiles from various law enforcement agencies include characteristics such as the destination or city of origin, nervousness, at what point a person deplanes, and minority population.30

Second, the laws target the minority population. While on their face the laws seem to be racially neutral, they are not racially neutral in their application. (See Table I below). For example, the Federal Sentencing Guidelines have the same sentence for 500 grams of powder cocaine and 5 grams of crack cocaine.31 On its face, this crack/cocaine disparity in sentencing does not seem to be a racial issue; however, powder cocaine is generally used by a predominantly suburban, upper class, white population and crack cocaine is used predominately by an urban and minority population.32

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<th>Table I – All Offenders Sentenced in 1989</th>
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DRUG TRAFFICKING IN PUERTO RICO

Central and South American drug traffickers have used Puerto Rico as a portal to the U.S. because of the diminished border scrutiny in that area, allowing for an easier exchange of people and goods from Puerto Rico to the United States.34 “An important incentive for the traffickers in reaching Puerto Rico is the possibility that illicit drugs can be transported to the continental United States in cargo that is not subject to further inspection by [Customs and Border Patrol]. Puerto Rico also is an attractive sea and air transportation site in the Caribbean because the island has one of the busiest seaports in North America, and an abundance of commercial flights to the United States.”35 In 1995, Puerto Rico was designated as a High Intensity Drug Trafficking Area (HIDTA), which prompted the Drug Enforcement Agency to direct more resources to Puerto Rico.36

THE WAR ON DRUGS AS A WAR ON PUERTO RICO

The Federal District Court of Puerto Rico plays a central role in the War on Drugs because approximately 68% of federally sentenced defendants in Puerto Rico are drug offenders.37 Unlike other high drug offense jurisdictions, Puerto Rico is the only one that is a “state” of minorities.38 Coupled with Puerto Rico’s tenuous status as a “commonwealth” with its citizen’s rights dictated by Congress and the Supreme Court and not by Puerto Rico grants a right to jury trial for felonies in lieu of the U.S. Constitution does not grant Puerto Rico the protection of the Sixth Amendment right to jury trial because it is not deemed to be a fundamental constitutional right.39 The implication is a devastating psychological injury to Puerto Rico. The logic of the court stigmatizes Puerto Ricans as second class U.S. citizens – they are not “good enough” to be afforded the right to jury trial, which was deemed a fundamental right in Duncan v. Louisiana40 and is twice guaranteed by the U.S. Constitution.41 However, the local constitution of Puerto Rico grants a right to jury trial for felons in lieu of the U.S.
To add insult to injury, federal courts in Puerto Rico require jurors to be proficient in English because the “overwhelming national interest served by the use of English in a United States court...justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language,” and therefore precludes alternatives like simultaneous translation. If the Sixth Amendment applied in Puerto Rico, the language qualification would clearly violate the Amendment because it guarantees the right of the accused to have a jury composed from a cross section of his community. It is nearly impossible to find such a jury that meets the language proficiency because 71.9% of Puerto Ricans are not proficient in English. Consequently, juries consist of an English-speaking elite and thus systematically excludes the Spanish-speaking population.

The federal government has also preempted local law with federal statutes to facilitate the War on Drugs. For example, the First Circuit Court of Appeals in United States v. Quinones held that the Omnibus Crime Control Act, which regulates the use of wiretap evidence, preempts the Puerto Rican constitutional ban against such evidence. Authorizing wiretapped evidence, despite a local constitutional ban against it, violates the rights of Puerto Rico’s citizens. Considering that 78% of court-authorized wiretaps are used for narcotics-related crime investigations, it is clear that the local rights of Puerto Rico’s citizens are not taken very seriously by the federal government or by the judicial system. More grievous than the federal government’s preemption with regard to wiretapping is the federal government’s disregard of Puerto Rico’s constitutional ban against the death penalty.

U.S. District Judge of Puerto Rico Salvador Casellas expressed his indignation by asserting that “it shocks the conscience to impose the ultimate penalty, death, upon American citizens who are denied the right to participate directly or indirectly in the government that enacts and authorizes the imposition of such punishment.” In 1988, the Drug Kingpin Statute allowed federal prosecutors to seek the death penalty for murders that occur during the course of a drug-kingpin conspiracy. More notably, the Federal Death Penalty Act (FDPA) of 1994 allowed the death penalty to be sought for the running of a large-scale drug enterprise. The First Circuit Court of Appeals in United States v. Acosta-Martinez, a case where the U.S. Attorney pursued the death penalty for a murder committed during a drug offense, overturned a successful challenge to the enforcement of the death penalty in the district court of Puerto Rico. Many jurors were excluded from the Acosta-Martinez jury pool because of their anti-death penalty sentiments. Thus, it should come as no surprise then that the U.S. Attorneys in Puerto Rico have submitted the largest number of potential capital cases for review than any of the other 94 federal judicial districts, making Puerto Ricans subject to more federal prosecutions than other jurisdictions.

**CONCLUSION**

As second-class citizens with diminished constitutional rights, Puerto Ricans have been further disenfranchised by the War on Drugs. We have seen that in times of war, including the War on Drugs, certain fundamental rights are pushed to the side. In the case of Puerto Rico, the War on Drugs has affected certain fundamental rights with regards to life, fair trials and privacy. The U.S. government has become the distant slumlord of the fundamental rights of Puerto Rico’s citizens. The U.S. should learn a valuable lesson with regards to the way it has treated Puerto Rico: “treat a nation like a ghetto and it will behave like a ghetto.”

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**ENDNOTES**

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4. Id.
5. Id.
6. The Insular Cases establish the framework for applying the U.S. Constitution to the acquisitions of the Philippines, Cuba, Puerto Rico, and Guam. The doctrine of incorporation asserts that only territories with the express promise of statehood were guaranteed the same constitutional rights incorporated by the Fourteenth Amendment. Territories, such as Puerto Rico, which do not have the promise of statehood are subjected to a different constitutional standard. See De Lima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Balzac v. Porto Rico, 258 U.S. 298 (1922); Examining Bd. of Architects, Eng’rs & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) [hereinafter Examining Bd. of Architects].
7. See Berrios Martinez, supra note 2.
11. U.S. CONST. art. IV, § 3, cl. 2.
13. Various drugs were criminalized at different times. One of the first laws passed to eradicate drug trafficking was the Harrison Narcotic Drug Act. Passed in 1914, the Act regulated the production and use of opium and coca leaves and...
their derivatives. See Kathleen Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 HASTINGS L.J. 1135, 1148-1149 (1995) [hereinafter Brickey] (citing Ch. 1, 38 STAT. 785 (1914)).


15 See Brickey, supra note 13, at 1149.

16 See id.


18 See id. at 1149-1150.


20 See id. at 1143 (“[I]f crossing the state line, the [criminal offender] could defy hot pursuit by local authorities. But it was precisely at the border that federal jurisdiction began.”).


22 See Erik Luna, Symposium: New Voices on the War on Drugs: Drug Exceptionalism, 47 VILL. L. REV. 753, 759 (2002) [hereinafter Luna].

23 See Luna, supra note 22, at 763 (Racial profiling can best be defined as “the use of race as a proxy for crime, alleged by justified by a propensity toward crime which, in turn justifies the detention and search of individuals in public spaces—standing or walking on the streets, driving on the highways, commuting on buses or trains, flying on airplanes and engaging in other activities of modern life. Under this definition, statistical data, high-profile cases and anecdotal evidence all seem to point toward a pervasive problem in America today.”).

24 See Irene Dey, Drug Courier Profiles: An Infringement on Fourth Amendment Rights, 28 U. BALTIMORE L. F. 3, 4 (1998); see Stephen E. Hall, A Balancing Approach to the Constitutionalization of Drug Courier Proffes, 193 U. ILL. L. REV. 1007, 1011 (1993) (A source city is defined as “those cities from which drugs are shipped to other points for sale or further distribution and those cities that receive the drugs”).


26 See Whitebread, supra note 14, at 247.

27 John Lewis and Robert Wilkins, Fix Sentencing Guidelines; Move to End Disparity Along Racial Lines Hasn’t Worked, ATLANTA JOURNAL-CONSTITUTION, (Dec. 16, 2004) at 19A.


30 See Whitebread, supra note 14, at 247.

31 See id.

32 Office of Drug Control Policy, Drug Policy Information Clearinghouse, Puerto Rico Profile of Drug Indicators, Mar. 2004, at p. 2; see U.S. CENSUS BUREAU, CENSUS 2000 (Puerto Rico is 98.8% Hispanic/Latino according to the 2000 Census).

33 See supra note 6.

34 The other fundamental right denied Puerto Rico is the right to vote for president and representation in Congress. Trias Monge, supra note 3, at 161-163.

35 Mora v. Mejias, 206 F.2d 377, 182 (1st Cir. 1953).


38 U.S. CONST. art. III, § 2 and U.S. CONST. amend.VI. Furthermore, U.S. courts recognize that a right to jury trial extends to misdemeanors with a possible sentence of imprisonment for at least six months, whereas the constitution of Puerto Rico only grants trials for felonies, which creates a gap between the two documents. See Baldwin v. New York, 399 U.S. 66 (1970).

39 P.R. CONST. art. II, § 11; Figueroa v. People of Puerto Rico, 232 F.2d 615, 617 (1st Cir. 1956).

40 United States v. Flores-Rivera, 56 F.2d 319, 326 (1st Cir. 1995), quoting United States v. Aponte-Suarez, 905 F.2d 483, 492 (1st Cir. 1990).


43 P.R. CONST. art. II, § 10; United States v. Quinones, 758 F.2d 40 (1st Cir. 1985).


45 P.R. CONST. art. II, § 7.


47 See the Federal Death Penalty Information Center website at www.deathpenaltyinfo.org.


53 See Berrios Martinez, supra note 2.

ENDNOTES CONTINUED