

**TESTIMONY OF SENATOR EDUARDO BHATIA
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BEFORE THE COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES**



“PROMESA: Discussion Draft”

October 22, 2019

Good morning, Chairman Grijalva, Ranking Member Bishop, and Members of the Committee.

Thank you for the invitation to participate in today’s hearing to discuss potential amendments to the *Puerto Rico Oversight, Management and Economic Stability Act of 2016* (“PROMESA”).¹ My name is Eduardo Bhatia Gautier. I am a former president of the Senate of Puerto Rico (2013-2016), and currently serve as the minority leader for the Popular Democratic Party. On behalf of the people of Puerto Rico, we welcome the opportunity to have a constructive dialogue with you and your colleagues on PROMESA.

From the outset, it is important to underscore that I have always been opposed to the imposition by Congress of an undemocratic fiscal control board for the Government of Puerto Rico.² As the former president of the Senate of Puerto Rico, I advocated for a comprehensive framework that would give Puerto Rico the tools it needed to reach a resolution with creditors and adjust its debts to a sustainable level. Recognizing that debt restructuring alone would be an insufficient path to Puerto Rico’s recovery from its long-standing fiscal and economic crisis, together with multiple experts, I also encouraged Congress to address Puerto Rico’s inequitable health care financing structure and adopt legislative measures promoting sustained economic growth. Regrettably, Congress did not heed such advice. It opted for a colonial and paternalistic approach that focused exclusively on fiscal adjustment, and by doing so, effectively stripped the people of Puerto Rico from the limited autonomy recognized pursuant to Public Act 600 of 1950 and Public Act 447 of 1952.³

My testimony today will first provide you with a general overview of the principal mistakes of PROMESA and then proceed to demonstrate why they are at the root of your concerns in proposing these amendments. A key aspiration today is for me to show how these amendments fall short and fail to properly address these concerns and, in some cases, generate new issues. Lastly, I will provide you with some of my recommendations for fixing PROMESA consistent with the stated goals behind its adoption. To be crystal clear: any amendments that do not return home rule to the people of Puerto Rico would constitute nothing more than putting a band-aid in a bullet wound.

¹ Pub. L. No. 114-187, 130 Stat. 549 (2016), codified at 48 U.S.C. §§ 2101-2241.

² See e.g., *Bhatia: La imposición de una junta de control fiscal no electa*, Foro Noticioso, May 24, 2016, available at <https://www.foronoticioso.com/fn/bhatia-la-imposicion-de-una-junta-de-control-fiscal-no-electa-con-enormes-poderes-administrativos-y-financieros-sobre-puerto-rico-atenta-contra-los-valores-democraticos-que-hemos-aspirado-desde-tiempo/>

³ Pub. L. No. 81-600, 64 Stat. 319 (1950) and Pub. L. No. 82-447, 66 Stat. 827 (1952), codified at 48 U.S.C. § 731 *et seq.*

PROMESA's Principal Mistakes

As you are aware, Congress enacted PROMESA after finding that a “comprehensive approach to fiscal, management, and structural problems and adjustments that exempts no part of the Government of Puerto Rico [was] necessary, involving independent oversight and a Federal statutory authority for the Government of Puerto Rico to restructure debts in a fair and orderly process.”⁴ While it generally succeeded in providing a fair and orderly -albeit imperfect- debt restructuring process, PROMESA transcended the stated objective of providing oversight of the Government of Puerto Rico. Rather than serving as a *mechanism* for fiscal oversight,⁵ the Puerto Rico Financial Oversight and Management Board (the “Oversight Board”) has effectively become a supra-political entity governing the people of Puerto Rico in a naked colonial mode.

Regrettably, Congress opted to treat disparately the people of Puerto Rico when it also exempted the Oversight Board from the customary federal supervision provided to governmental officers acting with commensurate duties and responsibilities. Federal oversight of the Oversight Board is limited to removal of its members by the President only “for cause.”⁶ As Supreme Court Justice Sotomayor recently indicated, it has effectively become “an entity that no one can control.”⁷ Notably, if the United States assumes the cost of the Oversight Board as proposed in these amendments, there is a change of course regarding federal oversight. Congress would not be providing the same blank check it deemed acceptable with respect to the financial resources of the Government of Puerto Rico.

The current powers of the Oversight Board are not only an affront to core democratic values, but also to their utilitarian benefits. Rather than overthrowing a democratic form of self-government, PROMESA should instead promote the consented adoption of local policies based on an understanding that they are achievable and are in Puerto Rico’s own interest.⁸ First, there is the failure of autocratic pronouncements in promoting policies arising from dialogue and participation.⁹ As such, local ownership of fiscal, management, and structural adjustments is

⁴ 48 U.S. Code § 2194(m)(4).

⁵ 48 U.S. Code § 2121(a).

⁶ *Id* at § 2121(e)(5)(B).

⁷ Transcript at pg. 8 of oral argument held on October 15, 2019 before the United States Supreme Court in docket no. 18-1334, *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, et al.*, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1334_dc8f.pdf.

⁸ *See, e.g.*, S. Nuri Erbaş, IMF Working Paper, WP/03/98, *IMF Conditionality and Program Ownership: A Case for Streamlined Conditionality* (May 2003) (“A fundamental reason why such failures occur is the inability to engender explicit and implicit program ownership in a country”).

⁹ While it is true that each of Section 201 (as to fiscal plans) and Section 202 (as to budgets) seeks to encourage some formal dialogue between the Government of Puerto Rico and the Oversight Board, nothing in PROMESA actually requires that the Oversight Board seriously consider the fiscal plans and budgets submitted to it by the Government of Puerto Rico. The result is that there is little incentive for a productive exchange. As currently in effect, *any* uncorrected violation, as determined by the Oversight Board in its “sole discretion,” serves as a pretext for the Oversight Board to adopt an entirely different fiscal plan or budget. This has arguably been the practice followed by it for the last couple of fiscal plans and budgets. PROMESA therefore needs to be amended to permit the Oversight Board to revise proposed fiscal plans and budgets *exclusively* to correct notified violations. unaddressed by the Government of Puerto Rico. Only if no fiscal plan or budget has been timely submitted for its approval could the Oversight Board proceed to adopt its entirely own fiscal plan or budget.

lacking, making them less likely to be successful.¹⁰ Second, autocratic actions also adversely affect execution levels. In assuming *de facto* control over the Government of Puerto Rico, the Oversight Board has created a parallel governmental structure led by expensive third-party consultants.¹¹ Rather than cultivating a new class of career public servants for the Government of Puerto Rico, the Oversight Board has spent hundreds of millions of dollars further developing the skills of state-side consultants that will move on to other matters after completing their work.¹² Institutional memory will be lost.

Full Control over Puerto Rico's Affairs- Essential Services as Priorities

The identified need for amendments defining essential services as spending priorities reiterates the Oversight Board's displacement of the Government of Puerto Rico's substantive policy-making functions. Such amendments to Section 201(b) would not be necessary if the Government of Puerto Rico had not been stripped of these.

Democratic processes are the best safeguards to ensure that essential services are delivered. As economist Amartya Sen has argued, democracies do not suffer from famines: "If the government is vulnerable to public opinion, then famines are a dreadfully bad thing to have. You can't win many elections after a famine."¹³ To substitute the Oversight Board for Congress fails to provide the local level democratic accountability essential services protection requires as a backdrop. Furthermore, and at a fundamental political level, the imposition of value judgments in such an egregious undemocratic manner is the very essence of colonialism and should be "intolerable in any country where freedom prevails."¹⁴

The imposition of further limitations on the Oversight Board is imperative. Rather than having Congress merely *suggest* essential services to the Oversight Board, PROMESA must be amended to limit its authority to the imposition of achievable *numerical targets* for budget and fiscal plans. Such an approach is practical and consistent with governmental practices. Balanced budget and debt limitation requirements are rules under which governments routinely operate, many of which are inscribed in constitutions. In the case of the Government of Puerto Rico, such limitations would also generally be consistent with its own Constitution.¹⁵

¹⁰ See, e.g., International Monetary Fund, Strengthening Country Ownership of Fund Supported Programs (July 17, 2001).

¹¹ Chutchian, Maria (2019), A Reasonable Proposal: How US Law Allows Puerto Rico's Legal Bills to Flourish, available at <http://investigations.debtwire.com/a-reasonable-proposal-how-us-law-allows-puerto-ricos-legal-bills-to-flourish/>.

¹² Balmaceda, Javier (2018), *Puerto Rico Should Invest In Its Own, Not Just In Outsiders*, available at <https://www.forbes.com/sites/debtwire/2018/07/09/puerto-rico-should-invest-in-its-own-not-just-in-outsiders/#1e52ae064ab2>.

¹³ Ebersole, Phil (2015) & Amartya Sen *On Democracy and Famine*. Phil Ebersole's Blog: *Thoughts about Politics and the Passing Scene*, at <https://philebersole.wordpress.com/2015/06/02/amartya-sen-on-democracy-and-famine/> (last accessed Oct. 17, 2019).

¹⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁵ See e.g., P.R. CONST art. IV, § 7 and art. VI, § 2.

Economic Growth Policies

The absence of provisions promoting economic growth under PROMESA is also proposed to be addressed by amending Section 201(b). Setting aside the fact that vesting the Oversight Board with such responsibilities is no substitute for real congressional measures promoting economic growth, anything found in this Section is essentially dead letter because *only* the Oversight Board can determine whether a fiscal plan complies with such requirements. Specifically, not only does Section 201(c)(3) of PROMESA provides the Oversight Board with “sole discretion” to determine whether a proposed fiscal plan satisfies the requirements of its Section 201(b), but Section 106(e) further bars any claim that challenges such a decision itself and any implicit judicial challenges for violating these requirements.¹⁶ Stated another way: irrespective of what Congress writes into Section 201(b), the Oversight Board has the last word. Adding requirements or specificity to the already fourteen specific objectives and requirements that a fiscal plan must meet is, quite frankly, meaningless.

If Congress is to take seriously its responsibility to support Puerto Rico’s fiscal and economic recovery, the time has come to adopt a broader program for Puerto Rico. The debt restructuring proposal recently submitted by the Oversight Board in Title III, if approved, may “not go far enough to reduce the island’s debt burden” and certainly “leaves no room for error.”¹⁷ Congress must therefore finally enact a permanent fix to Puerto Rico’s inequitable health care financing structure and adopt the other recommendations by the Congressional Task Force on Economic Growth in Puerto Rico. These offer a sound starting point and have bipartisan support.¹⁸ But more is necessary. The recommendations are primarily directed at eliminating certain aspects of federal law and programs that hinder Puerto Rico’s development. Congress must also pursue *affirmative* policies specifically *tailored to Puerto Rico*. Rethinking federal tax policy regarding Puerto Rico to encourage a private-sector-investment driven recovery is indispensable. Without congressional action addressing these areas, Puerto Rico will not reach a sustainable forward path.

Lack of Accountability, Access to Information and Ethical Requirements

While I welcome the amendments’ incorporation of the disclosure provisions for third-party professionals, designed to identify potential conflicts of interest, Congress must also address the absence of safeguards to ensure that the Oversight Board itself is not “influenced by the thought of later reaping a benefit from a private individual.”¹⁹ Specifically, pursuant to PROMESA,

¹⁶ See *Ambac Assurance Corp. v. Commonwealth of P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 297 F. Supp. 3d 269, 284 (D.P.R. 2018).

¹⁷ Lachman, Desmond, Brad W. Sester and Antonio Weiss (2019), *Puerto Rico’s Debt Deal Leaves No Room for Error*, available at <https://www.bloomberg.com/opinion/articles/2019-10-15/puerto-rico-s-debt-deal-leaves-no-room-for-error>.

¹⁸ Congressional Task Force on Economic Growth for Puerto Rico, “Report to House and Senate, 114th Congress,” December 20, 2016; available at <https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Task%20Force%20on%20Economic%20Growth%20in%20Puerto%20Rico%20Releases%20Final%20Report.pdf>.

¹⁹ See *cf.*, *Brown v. District of Columbia Board of Zoning*, 423 A.2d 1276, 1282 (D.C. App. 1980); *General Motors Corporation v. City of New York*, 501 F.2d 639, 648-652 (2d Cir. 1974).

there are no ethical legal requirements that would be applicable to the current members of the Oversight Board upon ceasing to serve in such capacities.²⁰

Because Congress deems the Oversight Board part of the Government of Puerto Rico, its members and officers should be subject to the same cooling-off periods required by the *Puerto Rico Government Ethics Act of 2011*.²¹ Such ethical requirements (applicable for a period of one-year after ceasing in their positions) would guarantee that they would generally not be permitted to accept employment, have an economic interest or enter into a contractual relationship, directly or indirectly, with any person over which they took any official action in the preceding year. Considering that one of their primary duties and responsibilities is the allocation of resources to private parties -whether it be to creditors or third-party consultants- such post-tenure limitations are reasonable.²²

I also strongly support the amendments regarding access to information. In fact, lack of transparency regarding budget proposals by the Government of Puerto Rico to the Oversight Board forced me to successfully sue former Governor Ricardo Rosselló in 2017.²³ I would, however, be remiss not to mention that PROMESA does not establish a clear system of record keeping of documents for the Oversight Board, an essential element of transparency. Such an oversight is important given the inapplicability of both federal and local regulation in this matter. As an entity purportedly part of the Government of Puerto Rico, the *Federal Records Act of 1950* is inapplicable; and because PROMESA also arguably preempts local document retention law, there are no legal requirements mandating policies and procedures for creating, maintaining, and disposing of its records. Congress should act to ensure that all these records are properly maintained, including those that while confidential today, will not necessarily be so in the future.

Office of the Reconstruction Coordinator

The proposed amendments would create the Office of the Reconstruction Coordinator to “collaborate with local agencies to ensure effective coordination among key stakeholders, public participation, and transparency in the recovery process.” They seek to address the very real concern that the people of Puerto Rico are not receiving federal reconstruction aid at a pace commensurate with their needs because of the deep – and mutual – distrust that currently exists between the Government of Puerto Rico and the federal government.

²⁰ To the extent the members are officers of the Government of Puerto Rico, they claim that federal preemption nevertheless exempts from the requirements found in the *Puerto Rico Government Ethics Act of 2011*. On the other hand, if they were to be deemed officers of the United States, given the language found in Section 109 of PROMESA, it would nevertheless be uncertain whether any restrictions would apply to them beyond those imposed by the federal conflict of interest requirements described in section 208 of title 18, United States Code.

²¹ Puerto Rico Act. No. 1-2012.

²² While federal law is generally more lenient (senior federal officers are perceived to address nationwide concerns, rather than case-specific matters, and unlike the members of the Oversight Board, are first required to satisfy any potential concerns to the satisfaction of U.S. Senate as part of their confirmation process), under certain appropriate circumstances, it imposes post-employment restrictions exceeding those found in Section 203 and 207 of title 18, United States Code. *See e.g.*, 41 U.S.C. § 423(d)(1) (procurement officers); 12 U.S.C. 1820(k)(2)(A) (senior bank examiners).

²³ *See e.g.*, *Bhatia-Gautier v. Roselló-Nevarés*, Civil No. SJ2017CV00271 (P.R. Super. Ct. Mar. 16, 2018) (relying on *Bhatia-Gautier v. Roselló-Nevarés*, 2017 TSPR 173, 2017 WL 4975587 (P.R. 2017)).

The current administration of Puerto Rico – now headed by its third governor in three years – has been characterized by both lack of transparency and corruption at its highest levels. By way of example, during the summer of 2019, each of the Secretary of the Department of Education and the Executive Director of Puerto Rico Health Insurance Administration were indicted on corruption charges involving the use of federal funds. These two entities manage almost half of all federal funds customarily received by the Government of Puerto Rico on an annual basis. On the other hand, the Trump Administration has become the poster child for bureaucratic stalemate and it too has not escaped corruption charges. Recently, the former deputy regional administrator of Federal Emergency Management Agency (FEMA) was indicted for allegedly taking bribes from an energy company that landed \$1.8 billion in federal contracts to repair our electric grid. Apprehension from both sides is warranted.

Provided that strict mechanisms are also adopted to ensure that the role of the Office of the Reconstruction Coordinator is strictly **limited** to the role of a facilitator, I could support this concept but only if it can also be guaranteed that it will lead to the speedier receipt of federal reconstruction aid by Puerto Rico. Nothing in the proposed amendments, however, provides this guaranty.

Revitalization Coordinator for PREPA

For years this Committee has been discussing the bureaucracy, patronage, corruption, and political intervention that are primarily responsible for Puerto Rico having an antiquated, pollutive and expensive electric system. I have previously testified before your Committee to express my own similar concerns regarding the state-owned monopoly that is PREPA. But I have also maintained that a federal takeover of PREPA is not the answer.²⁴ The Revitalization Coordinator proposed by the amendments is unacceptable because it is tantamount to placing PREPA under a federal receivership.²⁵

I have been a leader in the effort to carefully craft and promulgate the current energy policy for Puerto Rico. We recently enacted Act 17-2019, a bipartisan measure that builds on the changes introduced by me as president of the Senate of Puerto Rico pursuant to Act 57-2014, to reform the energy sector in Puerto Rico. Taken together, Puerto Rico is on a path -driven by free market forces- to achieve cheap, clean and reliable energy. Our independent energy regulator has also been strengthened to ensure that the public interest continues to be served.

We are for the first time seeing tangible results. As a result of this new energy policy, the transmission and distribution assets are scheduled to be transferred to a private operator pursuant to a public private partnership. All generation (100%) will eventually come from renewable

²⁴ Please see my July 25th, 2018, testimony before this Committee, “Management Crisis at the Puerto Rico Electric Power Authority and Implications for Recovery”, available at https://naturalresources.house.gov/imo/media/doc/bhatia_testimony.pdf.

²⁵ Pursuant to the draft amendments, the Revitalization Coordinator would “exercise supervision, **control**, and oversight of the operations” of PREPA and to “**direct** the reconstruction of the electric grid of Puerto Rico that is necessary as a result of Hurricane Maria.”

sources. New opportunities are available to community organizations, electric coops, and the commercial and industrial sectors.²⁶

The necessary transition to cheap, clean and reliable energy should nevertheless come faster. The primary obstacle has become the failure to receive federal reconstruction aid appropriated by Congress to “build back better” the electric system post-hurricane. These funds are still not available for such use. The lack of a clear roadmap for their deployment prevents proper planning and causes uncertainty to private operators and investors interested in fully participating in the process. However, the proposed Office of Reconstruction- not a Revitalization Coordinator unique to PREPA- would be the proper vehicle to assuage any concerns regarding the use of federal funds. Inserting a Revitalization Coordinator to the equation would only serve to disrupt the on-going efforts. The transition will only be successful if there is local “ownership” of the process.

In lieu of a federal takeover of PREPA, I would suggest the following measures: (a) continued Congressional oversight regarding the reconstruction of the electrical system and its transition to cheap, clean and reliable energy; (b) the inclusion of amendments to PROMESA prohibiting any debt restructuring for PREPA that would be inconsistent with existing energy policy, including, without limitation, eliminating the existing restructuring supporting agreement’s requirement of a securitization charge on energy produced by consumers behind-the-meter for their own consumption; and (c) that Congress adopts legislation requiring that nearly all of the CDBG-DR monies for community based energy projects (\$436 million under the current Action Plan) be transferred to the new Green Energy Trust Fund created under Act 17-2019 – a private trust which will operate separate from the government of Puerto Rico. Supporting this Green Energy Trust Fund is key to furthering the transition to renewable energy.

Alternative Debt Restructuring Mechanism

The amendments currently under consideration also incorporate many of the provisions of the proposed *U.S. Territorial Relief Act* originally introduced by Senators Elizabeth Warren and Bernie Sanders.²⁷ They would grant Puerto Rico’s governor and legislature the option to terminate its public, unsecured financial debt if two of these three criteria are satisfied: (1) population has decreased 5% over 10 years; (2) has received major federal disaster assistance; and (3) per capita debt exceeds \$15,000. To avoid constitutional concerns, provisions are included to provide protection for secured creditors and create a judicial process for them to contest the extent and perfection of their security interests. It does not exempt (other than to reiterate that its provisions are inapplicable to trade payables) any debt that has been restructured or is pending restructuring under Title III. Taken together, the primary objective of these amendments is to streamline and simplify a debt adjustment process during emergency periods for Puerto Rico.

²⁶ In April, this Committee witnessed firsthand Puerto Rico’s first community solar project in Toro Negro Ciales – 28 families operating their own solar microgrids. This project has been certified in accordance with regulations adopted by the Energy Bureau for the development of microgrids – the first of its kind in the United States. Also, under Act 258-2018, which I cosponsored, electric coops are beginning to organize.

²⁷ Joining them as cosponsors were Senators Kirsten Gillibrand, Edward J. Markey, and Kamala Harris. Representative Nydia M. Velázquez also introduced companion legislation in the House of Representatives. The bill was reintroduced in 2019.

While well-intentioned, any perceived benefits from these amendments may be outweighed by the resulting costs. The principal issues under Title III have been, and continue to be, determining the extent and perfection of creditor security interests. Such litigation would not be avoided by the proposed alternative mechanism. Moreover, creditors will likely demand higher returns for future debt issuances by Puerto Rico and other territories. While Title III is comparable to Chapter 9 of the Bankruptcy Code, the amendments result in less creditor rights than those afforded to the creditors of state municipal issuers. To compensate for lesser bankruptcy protections, creditors will also simply demand stronger security interests. The result may very well be that, rather than facilitating restructurings as intended, new issuances will be exempted debt from these provisions and harder to adjust in Title III.

Puerto Rico Public Credit Comprehensive Audit Commission

I fully support the proposed amendments establishing the Puerto Rico Public Credit Comprehensive Audit Commission and further requiring a comprehensive audit of the public debt of the Government of Puerto Rico. In 2015, when I was president of the Senate of Puerto Rico, we passed Act 97-2015, which is almost identical to that now proposed by the amendments under consideration. I provided funding for the operations of the commission from the Senate's own budget, and even hosted their meetings. Regrettably, the local commission to audit the public debt regrettably was eliminated early in 2017 by the now deposed governor of Puerto Rico.

My position remains the same as in 2015: the public debt must be audited, illegal debt rejected, and the rest restructured.

Conclusion

Finally, Congress must acknowledge that it cannot continue to govern Puerto Rico indefinitely pursuant to the Property Clause (Article IV, Section 3, Clause 2) of the Constitution. This is the same source of authority used to regulate grazing on the federal public lands. Such treatment is the result of a series of decisions -now known as the *Insular Cases*- issued by a fractured Supreme Court in the early 1900s. Invigorated by the same racial animus found in *Plessy v. Ferguson* that led to the legal doctrine of "separate but equal," they sanctioned American colonialism under the guise of manifest destiny. Only because many in Congress continue to view Puerto Rico through this proprietary lens is that it was even conceivable to submit the people of Puerto Rico to the supra-political entity that is the Oversight Board.

Thank you once again for having invited me here today. It is my sincere hope that you will continue this discussion and move to promptly address these matters.

I am ready to answer your questions.
