

Supreme Court Upholds The Appointments Of The Members Of The Puerto Rico Financial Oversight And Management Board

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Decided June 1, 2020

Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521

Today, the Supreme Court held that the appointments of the members of the Financial Oversight and Management Board for Puerto Rico did not violate the Appointments Clause of the United States Constitution.

Background:

The Appointments Clause of the United States Constitution enables the president to appoint principal “Officers of the United States” only with the “Advice and Consent of the Senate.” U.S. Const. art. II, § 2, cl. 2. But in the Puerto Rico Oversight, Management, and Economic Stability Act, Congress allowed the President to appoint members of the Financial Oversight and Management Board for Puerto Rico *without* Senate confirmation. The statute, enacted in 2016 to address Puerto Rico’s fiscal emergency, empowered Board members to initiate and oversee a massive restructuring of Puerto Rico’s public debt. The statute created the Board within the government of Puerto Rico pursuant to Congress’s Article IV power to “make all needful Rules and Regulations respecting the Territory ... belonging to the United States,” U.S. Const. art. IV, § 3, cl. 2, and provided that the Board was not part of the federal government.

Creditors moved to dismiss certain restructuring proceedings on the ground that the Board’s members were unconstitutionally appointed. The district court denied the motions, but the First Circuit reversed, holding that Board members are Officers of the United States because they exercise significant authority traced exclusively to federal law.

Issue:

Did the appointments of the members of the Financial Oversight and Management Board for Puerto Rico violate the Appointments Clause?

Court's Holding:

No. Because the Board members’ statutory duties are primarily local in nature and exercised under the Territories Clause, they are not “Officers of the United States.”

The Appointments Clause “has never been understood to cover those whose powers and duties are primarily local in nature and derive from the [Territories Clause].”

Justice Breyer, writing for the Court

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Gibson Dunn Represented Respondents/Cross-Petitioners: Aurelius Investment, LLC and Assured Guaranty Corp.

What It Means:

- The Court first concluded that the Appointments Clause applies to all Officers of the United States, including those who exercise power in or related to Puerto Rico. The Appointments Clause, the Court observed, contains “no Article IV exception.”
- The Court ultimately determined, however, that Board members are not Officers of the United States because they exercise “primarily local powers and duties” under Article IV. The Court emphasized the long history of territorial officials with primarily local responsibilities being selected via methods that would not satisfy the Appointments Clause’s requirements.
- The Court acknowledged that the Board has “broad investigatory powers,” but determined that these powers are backed by Puerto Rican law, not federal law. The Court also acknowledged that some Board actions “may have nationwide consequences,” but reasoned that the same is true of many actions taken by Governors or other local officials. In short, the Court summarized, the Board possesses “considerable power,” but that power primarily concerns local matters.
- The decision leaves many questions unanswered about the degree and kind of federal responsibility necessary to make a nominally “territorial” official an Officer of the United States. It also is uncertain how courts will determine whether the duties exercised by an official with both federal and local responsibilities are “primarily local.”

The Court’s opinion is available [here](#).

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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