

What Happened

By Hillary Rodham Clinton

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Reviewed by Christopher C. Faille

On Election Day 2016, the Democratic Party's nominee, Hillary Clinton, a former first lady, former New York senator, and former secretary of state, lost key battleground states crucial to the unforgiving arithmetic of the Electoral College. Significantly, the politically seasoned Clinton lost the election to a political novice, Donald Trump, who is now President Trump.

Trump's electoral victory resulted in another round of scrutiny for the institution of the Electoral College, both of its arithmetic and of the office of the elector. In fact, Ron Faucheux wrote a perceptive article for *The Hill*, in August 2016, with the headline, "Trump's Electoral College path is difficult, but not impossible."

The Electoral College

Clinton briefly mentions this important issue in the book and suggests that she does not want to put forward the answer "freakish arithmetic," in response to her book's titular question: What happened? (A question mark is not displayed in the title, but it seems implicit.)

The populations of large states equate to less electoral power in the Electoral College than perhaps they "should" in a pure popular-vote system. But, of course Clinton knew that going in to the campaign. This was not Clinton's first experience with national politics; she almost won the Democratic nomination in 2008, and she either planned her campaign with that thought in mind or she was woefully negligent about planning for the Electoral College's voting system.

The closest Clinton comes to considering such a question in her book is a comment near the end. She writes, "In a cruel twist of Fate, the Founders had also created [the Electoral College] as a bulwark against foreign interference in our democracy ... and now it was handing victory to Vladimir Putin's preferred candidate."

It is worth mentioning that there was some discussion, after election day, about the *office* of the electors. What if the Electoral College wasn't just an arithmetical trick, but a real deliberative body? Could it play a positive role, if the electors felt entitled to be "faithless" to their original commission?

Senator Sanders

While the Electoral College is the subject of a sidelong shot, the role of Bernie Sanders is a major theme of this book. A better short approximation of Clinton's answer to the title's posited question, is "Bernie Sanders happened." Clinton plainly believes that the Sanders primary campaign against her weakened her with what ought to have been her base. This is the essence of the Sanders section of her book, which she titles "Idealism and Realism." Clinton clearly views herself as the realist in the primary campaign and the candidate concerned (as she puts it) with "sweating the details." Whereas, in her view, an unfortunate chunk of her party was attracted to that idealism-without-sweat guy, Sen. Sanders.

Clinton does not mention Henry Kissinger, in the context of her primary election struggle against Sanders. Obviously, it is Clinton's prerogative to stress whatever issues she thinks are important in her book

however, Kissinger played a memorable part in her efforts to defeat Sanders. In her role as secretary of state, Clinton had been publicly chummy with Kissinger, and that fact enraged Sanders. In one of the Clinton-Sanders debates, Sanders asserted that, "I am proud to say that Henry Kissinger is not my friend. I will not take advice from Henry Kissinger." When Clinton asked Sanders to name foreign policy experts, from whom he would take advice, Sanders stayed on course: "Well it ain't Henry Kissinger, that's for sure."

I expected some detail regarding that debate exchange in this book, however, Kissinger only receives one mention, and in a very different context. Kissinger goes unmentioned, until a chapter entitled "Those Damn Emails." In this passage, Clinton laments the fact that documents can be retroactively classified and discusses how arbitrary such classification methods can be.

Greece, Cyprus, Turkey

Clinton argues that "something similar happened to Henry Kissinger around the same time [in 2016]. The State Department released the transcript of a 1974 conversation about Cyprus between then Secretary of State Kissinger and the director of the CIA, but much of the text was blacked out because it was now considered classified. This puzzled historians because State [Department] had published the full, unredacted transcript eight years before in an official history book—and on the department's website!"

Clinton clearly does not wish to author a foray into the history of Cyprus, but I am less focused than she, so I propose to do exactly that. The Republic of Cyprus came into being in 1960 through an uneasy truce between the Greek and Turkish communities on that island. Turkey and Greece signed a "Treaty of Guarantee," recognizing the independence and territorial integrity of the new republic. In effect, each of the larger countries gave up its own claims to Cyprus.

In 1967 (with at least tacit approval from Lyndon Johnson's administration), a military junta took over in Greece, and this junta had

no commitment to the Treaty of Guarantee. It aimed at annexation of Cyprus from the start of its existence. Flash forward seven years and in July 1974, Greece installed a figurehead as the new president of Cyprus. President Nikos Sampson had one job, in the view of his puppet masters in Athens: to approve of the union of that island with Greece.

It was amid the chaos after Turkey's invasion—as the junta in Athens was collapsing and as the Sampson government disintegrated, that Kissinger spoke to CIA Director James Schlesinger. Sampson held power for only eight days—just long enough to provoke Turkey's invasion of the island, which in turn provoked Sampson's resignation. He would eventually serve time in a prison cell.

These events occurred during the finale of the lengthy Watergate scandal in the Nixon administration. Nixon was near the term of his presidency, and most of his hangers-on understood this. Kissinger and Schlesinger actually could do very little to fix the situation in Cyprus, which played its way toward an eventual bifurcation of the island. Further, Kissinger and Schlesinger both appeared to have been chiefly concerned about the security of U.S. military bases in the affected countries. Kissinger in particular, took a pro-Turkey view of the crisis, not due to any attachment to the rule of law as embodied in the Treaty of Guarantee, but because Turkey was the frontline state, vis-à-vis the Soviet Union.

The Uses of Sweat

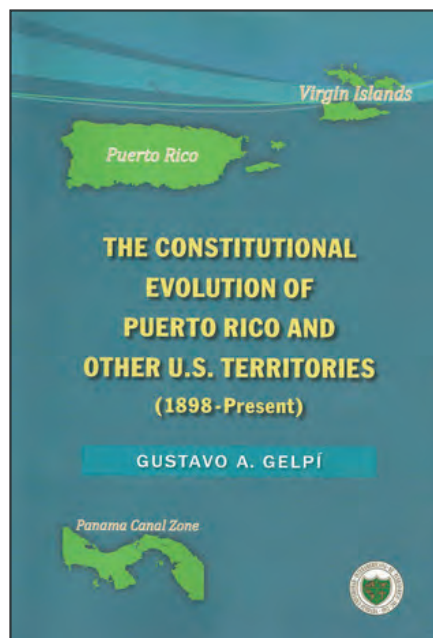
Clinton appears oddly abstracted from such matters, even though as a former secretary of state, the times during which she played that role were as tumultuous in their own way (and tumultuous in the eastern Mediterranean in particular) as were the times when Kissinger did so, and the fact that she served as such in the Obama administration was, in the eyes of many of her supporters in the fall, one of her chief qualifications for the presidency.

If Clinton had honestly said what she thinks it is about Kissinger and his long involvement with U.S. foreign policy that makes him a worthy adviser to Democratic administrations, it might have helped us better understand her campaign. Further, the content of a conversation about Cyprus might have inspired such reflections. All we receive from Clinton, is a picture of Kissinger and Clinton as fellow sufferers from the

oddsities of retroactive classification. Her mention of Cyprus, like her brief allusions to the Electoral College, are a lost opportunity for deeper reflection. Clinton sweats the details but she doesn't sweat the depth. She doesn't sweat the history.

This book is, on some points, less edifying than it could be. However, it is surely worth a read for Clinton's admirers, who still seem to be quite numerous. They will want her perspective of the campaign, at a gut level, and this book delivers on that. ☺

Christopher C. Faille is a member of the Connecticut Bar and the author of Gambling with Borrowed Chips, a heretical account of the Global Financial Crisis of 2007-08. He regularly writes for AllAboutAlpha.com, a website devoted to the analysis of alternative investment vehicles, and for InsidetheNation.com, part of the OneQube network.



The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898—Present)

By Hon. Gustavo A. Gelpí

Reviewed by José R. Cot

Amid renewed interest and focus on the legal relationship between Puerto Rico and the United States, as a result of the debt crisis facing the island and the 2017 plebiscite regarding Puerto Rico's political future, the so-called *Insular Cases*—in which the U.S. Supreme Court articulated the “doctrine

of territorial incorporation” and reaffirmed the plenary power of Congress over U.S. territories under the Territorial Clause of the Constitution—are again at the forefront of constitutional analysis regarding the extent to which the *Constitution does not follow the flag* to Puerto Rico and other U.S. territories.

Two recent U.S. Supreme Court cases—*Commonwealth of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016), and *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016)—illustrate the inherent inequities visited on American citizens residing in Puerto Rico and other U.S. territories. These citizens are denied fundamental civil rights, including full participation in the democratic representation process, and are also excluded from equal protection of the law under critical socioeconomic programs and other statutory protections. Congressional enactment of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), a federal oversight board possessing substantial authority over Puerto Rico's finances, also illuminates the extent of congressional encroachment in territorial self-governance, further underscoring the unique contours and injustices of the federal-territory relationship in American constitutional doctrine.

The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898—Present), a collection of essays and other writings by Hon. Gustavo A. Gelpí, U.S. district judge for the District of Puerto Rico, provides the reader a thoughtful, analytical and elegantly articulated discussion of the historical background and unique legal relationship between Puerto Rico and the United States. Gelpí eloquently guides the reader through the U.S. acquisition of Puerto Rico, following the Spanish-American War in 1898, the congressional grant of U.S. citizenship to the residents of Puerto Rico in 1917, the enactment of Public Law 600 authorizing the people of Puerto Rico to organize a government pursuant to a constitution of their own adoption, and congressional approval of the Constitution of the Commonwealth of Puerto Rico in 1952.

Relying on his commanding knowledge of the subject matter, extensive research and vast legal experience as Puerto Rico's solicitor general and U.S. district judge, Judge Gelpí frames his analysis in the unequal and unjust treatment that face American citizens currently residing in U.S. territories.

Although the book emphasizes the case of Puerto Rico, the discussion is greatly enriched by comparative analysis of the relationships between the United States and its other territories—the U.S. manifestation of sovereignty over the Philippines, Hawaii, and other possessions in the Pacific, the district in the area of the Panama Canal, and the comparison between the Native American tribes and territories outside of the United States. As Congress exercises plenary power over peoples deprived of sovereignty, a constitutional enigma remains: Can the legal status of U.S. territories be reconciled with America's fundamental principles of self-determination, government by consent, and popular democracy?

Although Judge Gelpí declares that this is not a book about politics, he concedes that for those seeking a political solution to territorial status—either by becoming a state or attaining an alternative form of sovereign status—the book provides a starting point for what he hopes will be an intellectually honest discussion.

With particularly noteworthy forewords by former Puerto Rico Govs. Pedro J. Roselló Gonzalez and Rafael Hernandez Colón, this book is organized into nine chapters, which includes a primer on the constitutional status of the U.S. territories and its citizens, the development and evolution of the *Insular Cases*, a comparative historical study of Puerto Rico, Hawaii, and the Philippines, territorial governance in the District of the Panama Canal Zone, and the constitutional status of the Indian tribes.

A chapter devoted to the U.S. District Court for the District of Puerto Rico traces the congressional transformation of the federal territorial court in Puerto Rico to a constitutional court in 1966, which Judge Gelpí views as further evidence that, over the years, Congress has “chiseled Puerto Rico into a *de facto* state.”

As a maritime law practitioner for almost 30 years, I found the chapter on maritime law in Puerto Rico particularly compelling. It contains a thorough discussion of maritime law in Puerto Rico from Spanish rule and the First and Second Organic Acts of 1900 and 1917, commonly known as the *Foraker Act* and the *Jones Act*, respectively, through the Puerto Rico Federal Relations Act of 1950. The discussion includes key decisions by the U.S. District Court for the First Circuit (which has appellate jurisdiction over the federal district of Puerto Rico)

and the Supreme Court of Puerto Rico, regarding application of federal maritime law in Puerto Rico. The analysis points to the ongoing controversy regarding the extent to which—by virtue of the authority bestowed by Congress upon the legislature of Puerto Rico—local laws may supersede federal maritime law, resulting in what Judge Gelpí aptly describes as “an anomaly in a sea of federal uniformity.” The constitutional grant of federal admiralty jurisdiction in Article III evinces the nation's strong interest in establishing a uniform body of federal substantive maritime law, as developed from decisions by federal judges and by congressional statutory enactments. In Puerto Rico, however, the displacement of federal maritime law by local legislation goes against the very quintessence of a federal uniform system of maritime law. Although this anomaly exists in the context of Puerto Rico's unique historical and political background, it is further evidence of the uneven application of laws that afford protections and remedies to the island.

A chapter entitled *Consent of the Governed*, centers on the fundamental principle of the American democratic system, absent in the U.S. territories, where U.S. citizens are constitutionally impeded from voting for their own nation's leaders. This lack of representation further results in federal laws being enacted and enforced without their consent. Judge Gelpí decries this undemocratic predicament, which relegates U.S. citizens residing in the territories to “an inferior form of citizenship, deprived of essential democratic rights that their brethren in the States consistently exercise.”

Following in the intellectual trail of his mentor, U.S. First Circuit appellate Judge Juan R. Torruella, and analogizing to the Supreme Court's rejection of the *Plessy v. Ferguson* doctrine of “separate but equal,” Judge Gelpí sets forth the argument for judicial intervention to force the political branches to act regarding the inequities inherent in the status of Puerto Rico. If that now abhorrent doctrine was eradicated through the judicial process that led to the Supreme Court's decision in *Brown v. Board of Education*, then a similar approach may be warranted to overcome the “separate and unequal” doctrine of the *Insular Cases*.

In the *Concluding Thoughts*, Judge Gelpí reiterates the ways in which the power of Congress “to dispose of and make all

needful rules and regulations,” respecting U.S. territories has resulted in significant integration of Puerto Rico into the nation, but has also allowed Congress to inflict discrimination against the territory. Judge Gelpí rightfully questions whether this predicament should continue to persist in the United States and, foreseeing the answer, he posits that the time is ripe for all U.S. citizens to ask for and ultimately attain equality and participation in their own governance.

The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898–Present) is an invaluable contribution to the learned study of the status of Puerto Rico—and other U.S. territories—in the American constitutional system. By including important court decisions, legal citations and related materials, the book has a practical focus, which is particularly useful in an area where the tendency is to emphasize partisan political undercurrents that dominate virtually all discussions about the Puerto Rico-U.S. relationship. An additional dimension is the inclusion of historical photographs of key figures, places and memorabilia, as well as biographical stills of the author. The book is a serious and intellectually stimulating “must-read” for anyone interested in gaining a fuller and more nuanced understanding of this particularly timely and unique topic. ☉

José R. Cot is a Puerto Rican-born New Orleans attorney and a board member of the Federal Bar Association—New Orleans Chapter. He is a partner at Hurley & Cot, APLC, where he specializes in maritime and insurance defense litigation and coverage disputes.