

**CHIEF JUSTICE OF PUERTO RICO'S SUPREME COURT: A
GUBERNATORIAL APPOINTMENT OR A COURT ELECTION?**

ARTICLE

LUIS RIVERA MÉNDEZ*

Introduction	1078
I. The Selection of the Chief Justice of the United States	1079
A. The President's Constitutional Power to Appoint Judges of the Supreme Court	1081
B. Differences between Associate Justices and the Chief Justice	1084
C. The President Has Not Been Afforded Power to Designate a Chief Justice	1086
II. The Selection of Chief Justices in the States of the Union and the District of Columbia	1087
A. Gubernatorial Appointment	1087
B. Partisan or Non-Partisan Election	1090
C. Seniority among Members of the Court	1091
D. Legislative Appointment	1091
E. Appointment through a Judicial Nominating Commission	1092
F. Court Election	1092
III. The Selection of the Chief Justice in Puerto Rico	1094
A. Development of Puerto Rico's Supreme Court and the Selection of the Chief Justice from 1898 to 1952	1095
B. The Selection of the Chief Justice under the Constitution of Puerto Rico from 1952 to 2014	1099
C. Questioning the Governor's Constitutional Power to Appoint the Chief Justice	1102
IV. Chief Justice of Puerto Rico's Supreme Court: A Gubernatorial Appointment or a Court Election?	1103
A. Power Has Been Afforded to the Governor to Appoint the Chief Justice	1104
B. The Constitution Does Not Afford Power to the Supreme Court to Elect the Chief Justice	1105
C. Judicial Independence and Separation of Powers	1106
Conclusion	1112

* Attorney at Law admitted to practice in Puerto Rico. LL.M. in Law and Government (2015) from American University Washington College of Law. I would like to thank the director of the Program on Law and Government, Professor Jamin Raskin, for his guidance and support while preparing this work.

INTRODUCTION

A CONSTITUTION REPRESENTS THE DEPARTURE FROM A GOVERNMENT OF individuals to a government of laws. It creates institutions to govern our society and establishes the boundaries to which those institutions must necessarily circumscribe. Men and women lead them, with an understanding that they are just part, temporarily, of a larger structure. Men and women perish, but institutions transcend time and live through history.

A constitution establishes important protections for the citizenry, provides political stability and prevents tyranny and arbitrariness from those who lead.¹ Most importantly, it protects our civil liberties, preserves our freedoms and endeavors to secure that we all receive an equal treatment under the law, not under the will of a few. As has been said, “[t]he Constitution is society’s attempt to protect itself from itself.”²

Those were some of the goals set to be accomplished by the Constitution of the United States, the constitutions of the states of the Union and the District of Columbia, and the Constitution of Puerto Rico. Through this work, we seek to analyze in particular one of the boundaries established by such constitutions on the exercise of power: the selection of the chief justice in courts of last resort.

For over a century the power to select the Chief Justice of the Supreme Court of Puerto Rico has been understood to reside in the executive branch. Recently, an informal debate has been sparked questioning if such power has been constitutionally afforded to the Governor or to the judges of the Supreme Court of Puerto Rico. This article seeks to answer such question.

In order to answer the title question, the analysis will encompass the relevant constitutional and statutory provisions through which chief justices are selected in the Federal Government, the states of the Union, the District of Columbia, and in Puerto Rico. Such analysis will facilitate a comparative study between the methods of selection followed in several jurisdictions of the United States and in Puerto Rico. This comparative study is justified based on the influence the American constitutional, legal and judiciary tradition has had in Puerto Rico for over a hundred years. The design of the Constitution of Puerto Rico was based upon the Constitution of the United States and other constitutions from several states of the Union.

Our analysis begins with an examination of the constitutional and statutory dispositions under which the composition of the Supreme Court of the United States has been determined. This will be followed by an examination of the origins, development and limitations to the President’s power to appoint judges to the Supreme Court. This analysis will focus on the process outlined by the Con-

¹ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 7 (4th ed. 2011).

² *Id.*

stitution of the United States for the appointment of judges to the United States Supreme Court, how such power has been exercised since 1789, and the constitutional and statutory dispositions that differentiate the Chief Justice from the Associate Justices. This will provide the basis that justifies and thus requires a subsequent process of nomination by the President, advice and consent by the Senate and then a formal appointment by the President in order for a sitting Associate Justice to become Chief Justice. The analysis will also provide the substantive grounds that sustain that the Chief Justice of the United States receives and holds a different office from that of the Associate Justice. Finally, we will provide the reasons as to why the office of Chief Justice of the United States can only be reached through presidential appointment, and not through any other method of selection.

The second part of this article will provide a description and analysis of the different methods of selection of chief justices in the courts of last resort in the states of the Union and the District of Columbia. The states in which the power to select the chief justice rests in the executive branch, and those in which the members of the court elect the chief justice will be examined to a greater extent. The preceding overview of the relevant methods of selection will allow a thorough comparison to the process followed in Puerto Rico.

While the third part will examine the selection of the chief justice of the Supreme Court of Puerto Rico. A comprehensive examination on how such power has been shaped, influenced, and developed, requires an analysis of two distinctive periods in which the authority to select the chief justice has resided in different institutions. The first period to be analyzed stretches from 1898 to 1952, during which, by virtue of Congress, the President was authorized to appoint the Supreme Court's chief justice. The second period to be analyzed will be from 1952 to 2014 during which, since the approval of the Constitution of Puerto Rico, the Governor has appointed the chief justice. Next, an examination of the relevant sections of the Constitution of Puerto Rico will set forth the arguments made in the cases in favor and against gubernatorial appointment of the Supreme Court's chief justice.

Finally, the fourth part will present the answers to the question set forth in this paper. Our arguments and conclusions will draw upon: (1) the controlling dispositions of the Constitution of Puerto Rico; (2) the legislative intent behind such dispositions, according to Puerto Rico's Constitutional Convention Committee on the Judiciary Report; (3) Puerto Rico's legal tradition regarding chief justice appointment; and, (4) through a comparative analysis of the different methods of selecting chief justices that have been sanctioned by the American legal system.

I. THE SELECTION OF THE CHIEF JUSTICE OF THE UNITED STATES

With the purpose of preserving state sovereignty, the Articles of Confederation created a weak national government with no federal judiciary or executive.³ This framework posed a problem because it did not stipulate means of ensuring compliance with the laws adopted by Congress.⁴ Consequently, the Constitutional Convention of 1787 aimed to address this and other issues by proposing the creation of a national government “consisting of a supreme legislative, judiciary and executive.”⁵

During the ratification process of the newly proposed Constitution for the United States, there was great opposition against the creation of a national government and a federal judiciary. Opposition was based on the concern that such ample jurisdiction would afford the Federal Government the ability to undermine state governments and their courts.⁶ As a result, the Constitution of the United States only provides a brief outline defining the federal judiciary in article III, and certain appointment provisions in article II.⁷

With the approval of the Constitution of the United States, a federal judiciary was established. On this regard, article III, section 1 states that “[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”⁸

As noted, the only court of constitutional creation in the Federal Government is the Supreme Court. However, this does not mean that it will be the only court within the federal judiciary. Power is afforded to Congress to create other courts that, according to the constitutional mandate, can only be inferior to the Supreme Court. Therefore, the Supreme Court was established as the court of last resort in the Federal Government and statutory courts created by Congress cannot supersede its power or jurisdiction. Even when article III creates the Supreme Court, it does not contain any reference regarding its composition nor makes any mention of a Chief Justice.⁹ Nonetheless, the Constitution presupposes the existence of the latter by way of article I, section 3, clause 6—which regards the process to be followed for impeachments— by establishing that “[w]hen the President of the United States is tried, the Chief Justice shall preside.”¹⁰ Besides the latter mention, no other reference to the Chief Justice can be found in the Constitution.

³ *Id.* at 9.

⁴ *Id.* at 10.

⁵ *Id.* (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 30 (Max Farrand ed., 1966)).

⁶ *Id.* at 11; 1 BRUCE A. RAGSDALE, DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY 1 (2013).

⁷ RAGSDALE, *supra* note 6.

⁸ U.S. CONST. art. III, § 1.

⁹ *Id.* art. III.

¹⁰ *Id.* art. I, § 3, cl. 6.

Interestingly enough, neither article III nor any other article of the Constitution mentions Associate Justices or the total number of Justices that will make up the Supreme Court. The composition of the Court has been deemed a matter to be statutorily determined by Congress. With the approval of the *Judiciary Act of 1789*, which was one of the first laws enacted by the first Congress, the composition of the Court was established for the first time: one Chief Justice and five Associate Justices.¹¹ Such legislation provided the title of Associate Justice to those Justices that would accompany the Chief Justice as members of the Supreme Court. Throughout the course of history, the size of the Court has been adjusted several times to raise or lower the number of Associate Justices.¹² The current number of nine Justices was set pursuant to the *Judiciary Act of 1869*, and has remained unaltered ever since.¹³

A. *The President's Constitutional Power to Appoint Judges of the Supreme Court*

The issue over the federal court's jurisdiction would not be the only highly contested matter within the Constitutional Convention of 1787. Significant debates were also held regarding judicial appointments. A great deal of concern surrounded the determination of upon whom should such power reside on. A faction, to which James Wilson belonged, favored the executive to make judicial appointments.¹⁴ Notwithstanding, significant opposition rose against affording such power to the executive. Some amongst the opposition believed that concen-

¹¹ Regarding the composition of the Supreme Court, section 1 of chapter XX of the *Judiciary Act of 1789* states "[t]hat the supreme court of the United States shall consist of a chief justice and five associate justices." Judiciary Act of 1789, ch. 20, §1, 1 Stat. 73 (1789).

¹² The following excerpt summarizes the changes that the Supreme Court's composition has undergone throughout history:

In the Judiciary Act of 1789 Congress set the number of justices, including the chief justice, at six. The Circuit Court Act of 1801, enacted one month before President John Adams's term expired, reduced the number to five to deny Jefferson, the newly elected president, the opportunity to fill a vacancy. In 1802 Congress repealed the 1801 law, bringing the number of Supreme Court justices back to six.

The Judiciary Act of 1807 increased the number to seven, primarily because of the growing judicial workload. In 1837 Congress added two more new seats, bringing the number to nine. During the Civil War, the Judiciary Act of 1863 increased the number of justices to ten, but in 1866 Congress cut the Court's size down to seven to prevent President Andrew Johnson from filling vacancies with appointees who would reflect his views about the unconstitutionality of Reconstruction legislation.

The last adjustment in Court size came with the Judiciary Act of 1869

² DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 1016 (5th ed. 2010).

¹³ Regarding the composition of the Supreme Court, the *Judiciary Act of 1869* chapter XXII states "[t]hat the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices." Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44 (1869).

¹⁴ RAGSDALE, *supra* note 6, at 9.

trating such power exclusively on the executive would lead to a monarchy.¹⁵ Another faction supported appointments by the legislature or by the Senate alone.¹⁶ James Madison was against the election of judges by the legislature or by any other political body composed of numerous individuals, as well as against referring the appointment to the executive.¹⁷ Finally, Nathaniel Gorham suggested the model sustained under the Constitution of Massachusetts, which consisted of a “nomination by the executive and approval by the smaller branch of the legislature.”¹⁸ It was not until the final two weeks of the Constitutional Convention that the delegates agreed that the President, with the advice and consent of the Senate, would appoint the Supreme Court Justices.¹⁹ Consequently, the Constitution of the United States established that “[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”²⁰

The Constitution affords the President such power without delineating any distinctions in terms of what judges of the Supreme Court he may or may not appoint. Such constitutional disposition has been interpreted to afford the presidency, with a sweeping mandate to appoint all judges of the Supreme Court. The relevant parts of this constitutional disposition hold both substantive and procedural mandates regarding the appointment of judges to the Supreme Court. In substantive terms, it establishes the most basic trait of such power: it is a power to be shared between the President and the Senate.²¹ Even when the power to appoint rests on the presidency, the President cannot exercise it unilaterally because it ultimately needs the concurrence of the Senate’s advice and consent. In procedural terms, it outlines the stages that necessarily have to be carried in order to exercise such power, which are: a nomination by the President, evaluation and confirmation of the President’s nominee by the Senate, and finally, the President’s appointment of the nominee to hold office.²² The powers contained in article II, section 2, clause 2 of the United States Constitution have

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 10-11.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10.

²⁰ U.S. CONST. art. II, § 2, cl. 2.

²¹ Denis Steven Rutkus, *Roles, Responsibilities, and Qualifications of the Chief Justice*, in SUPREME COURT APPOINTMENT PROCESS (UPDATE) 2 (Emilia S. Durand ed., 2010).

²² The Federal Government’s constitutional design provides for the appointment power as one to be shared by the President and the Senate. Nonetheless, the Founding Fathers entertained other methods through which such power could be afforded: “It will be agreed on all hands that the power of appointment, in ordinary cases, can be properly modified only in one of three ways. It ought either to be vested in a single man, or in a *select* assembly of a moderate number, or in a single man with the concurrence of such an assembly.” THE FEDERALIST NO. 76, at 437 (Alexander Hamilton) (Kathleen M. Sullivan ed., 2009).

been considered to be among the “chief powers” of the President as the head of the executive branch.²³

The Constitution grants ample power to the President to make appointments even when the Senate is in recess.²⁴ There is precedent for recess appointments to the Supreme Court, but such power has not been exercised during recent times.²⁵ Nonetheless, even when the Constitution allows the President to exercise such power when the Senate is in recess, this does not constitute an authorization to bypass or avoid the Senate’s advice and consent. On twelve occasions, Presidents have made recess appointments to the Supreme Court.²⁶ All of these appointments ultimately were subject to the constitutional requisite of advice and consent from the Senate.²⁷

The President may only make an appointment to the Supreme Court when a vacancy arises. A vacancy may occur due to death, retirement, impeachment or resignation of a Justice.²⁸ An appointment can also be made when a Justice announces his or her intent of retiring or resigning.²⁹ The process to be followed to appoint the Chief Justice or an Associate Justice is the same.³⁰ Nonetheless, it is important to point out that a “Chief Justice appointment may be made only when there is, or is scheduled to be, a vacancy in the position of Chief Justice; the President may not use the occasion of an Associate Justice vacancy to appoint someone to replace a sitting Chief Justice.”³¹

When a vacancy for Chief Justice occurs, the President may either nominate a sitting Associate Justice or someone who is not, at the time, a member of the Court to occupy the vacancy. When a sitting Justice is appointed Chief Justice, a vacancy for Associate Justice arises. Since 1789, the Supreme Court has had seventeen Chief Justices.³² Five sitting Justices have been nominated to become Chief Justice, and three of them have been appointed to serve as such.³³ All five sitting Justices had to, once again, undergo the constitutional mandated process

²³ 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 677 (3rd ed. 2000).

²⁴ U.S. CONST. art. II, § 2, cl. 3.

²⁵ The last recess appointments to the Supreme Court were made in the 1950s. Rutkus, *supra* note 21, at 2.

²⁶ *Id.* at 13.

²⁷ *Id.* at 2.

²⁸ *Id.* at 11.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> (last visited Apr. 7, 2015).

³³ *Id.* The sitting Associate Justices that were appointed Chief Justice are: (1) Edward Douglass White, appointed Chief Justice in 1910 by President Taft; (2) Harlan Fiske Stone, appointed Chief Justice in 1941 by President Roosevelt, and, (3) William H. Rehnquist, appointed Chief Justice in 1986 by President Reagan.

of nomination by the President, advice and consent from the Senate, and finally, a formal appointment by the President. The only difference was that the second time, the process was carried out specifically for appointment as Chief Justice.

It is clear that to become a member of the Supreme Court, the President's nomination, the Senate's advice and consent, and finally, a formal appointment by the President is required in order to hold such judicial office. However, when a sitting Associate Justice is nominated to become Chief Justice, a question may arise: why do sitting Associate Justices, who have already been subject to the process of nomination by the President, confirmation by the Senate, and appointment by the President, have to once again submit themselves to such process in order to become Chief Justice? The concise answer to this question would be that, because of their respective statutory and constitutional responsibilities, Associate Justices receive a different appointment and hold a different office to that held by Chief Justices. To hold any office in the Supreme Court, the candidate needs a specific appointment as Associate Justice or Chief Justice from the President to hold that particular office. The forthcoming elaboration of the statutory and constitutional responsibilities that support this answer will help validate this reasoning.

It must be noted that, in terms of their judicial powers, all members of the Court. This means that on deciding which cases will be considered by the Court, and the weight of their votes deciding over such cases, no distinction is drawn between them, neither by the Constitution nor by the Judiciary Act.³⁴ Regarding other matters, however, statutory and constitutional differences exist among them.³⁵

B. Differences between Associate Justices and the Chief Justice

Statutorily the Chief Justice has been afforded: (1) chairmanship of the Judicial Conference of the United States; (2) supervision of the Administrative Office of the United States Courts; (3) chairmanship of the board of the Federal Judiciary Center; (4) authority and responsibilities related to the circuit courts; (5) authority to temporarily designate and assign any circuit judge to act as such in another circuit; (6) authority to assign any retired Chief Justice of the United States or any Associate Justice of the Supreme Court to carry judicial duties on any circuit, and finally, (7) several other extra-judicial responsibilities.³⁶ In this regard, it has been stated that:

³⁴ U.S. CONST. art. III; Steven Rutkus & Lorraine H. Tong, *THE CHIEF JUSTICE OF THE UNITED STATES* 5-7 (2007).

³⁵ See SAVAGE, *supra* note 12, at 1009.

³⁶ Rutkus & Tong, *supra* note 34, at 5-7. Tradition has also provided the Chief Justice with a number of important ceremonial duties such as administering the Oath of Office to the President of the United States. *Id.* at 7.

The Chief Justice, like each of the Court's other eight justices, casts one vote when the Court rules on cases. However, the Chief Justice is also "first among equals" [primus inter pares] and exercises a unique leadership role as the presiding officer of the Court, as the manager of the Courts overall operations, and as head of the federal judicial branch of government.³⁷

Even when, statutorily, many differences have been established between the Chief Justice and Associate Justices, the most basic and important distinction between these posts was entrenched in the Constitution. The Chief Justice holds the constitutional duty of presiding a trial of impeachment of the President.³⁸ This is the only responsibility that the Constitution assigns to the Chief Justice. As prescribed by the Constitution, a trial of impeachment is to be held by the Senate, a political body presided by the Vice President of the United States—the person who is first in order in the line of presidential succession—. The duty of presiding over a President's trial of impeachment has been exclusively afforded to the Chief Justice because of the Founding Fathers' concern regarding the conflict of interest that would result in allowing the Vice President to preside over a trial that could have the outcome of granting him or her the presidency.³⁹

When an Associate Justice is nominated, confirmed, and appointed, he or she has been evaluated, and deemed fit and competent to perform only those responsibilities proper of an Associate Justice. The candidacy, notwithstanding, has not been evaluated and deemed fit to perform the additional responsibilities that the office of the Chief Justice carries. This makes necessary requiring a sitting Associate Justice to resubmit him or herself to the appointment process in order to hold the office of Chief Justice. Therefore, the office of Chief Justice can only be held by someone nominated by the President as Chief Justice, evaluated for the position of Chief Justice by the Senate, and finally appointed to this office by the President. The appointment of Chief Justice Roberts provides a recent precedent that supports such interpretation.

On July 29, 2005, President George W. Bush nominated John G. Roberts, Jr., to substitute retiring Associate Justice Sandra Day O'Connor.⁴⁰ At that time, this

³⁷ *Id.* at vii.

³⁸ "When the President of the United States is tried, the Chief Justice shall preside . . ." U.S. CONST. art. I, § 3, cl. 6.

³⁹ RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 130 (1999); Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 312 (1999); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 88 (1989). The Framers did consider the possibility of allowing the other members of the court participation in this process by entertaining the possibility of conferring to the Supreme Court the power to try impeachments. Such proposal was explicitly rejected during the Federalist Papers debate. The reason for this is that a trial of impeachment does not bar a later prosecution in the ordinary courts for that same set of facts. It was deemed improper to allow the same group of people to preside over two separate trials for the same offense against the same person. See THE FEDERALIST, *supra* note 22, No. 375 (James Madison).

⁴⁰ Justice Sandra Day O'Connor announced her intention to retire, but stated that she would hold her office until the confirmation of her successor. Rutkus & Tong, *supra* note 34, at 35.

was the only expected vacancy in the Supreme Court. Confirmation hearings for Roberts were scheduled to start on September 6, 2005. Unexpectedly on September 3, 2005, then Chief Justice William H. Rehnquist passed away. As a result, two vacancies emerged: a prospective vacancy for Associate Justice and an immediate vacancy for Chief Justice. President Bush withdrew Roberts's nomination for Associate Justice and nominated him to become the seventeenth Chief Justice of the United States.⁴¹

C. *The President Has Not Been Afforded Power to Designate a Chief Justice*

The President may not simply designate or elect a sitting Associate Justice to become Chief Justice because the Constitution does not afford the presidency either of those powers. As discussed, article II, section 2, clause 2 of the Constitution, affords the President power to appoint "Judges of the supreme Court,"⁴² but, to exercise such power the President necessarily requires intervention from the Senate. If the President single-handedly designates or elects a sitting Associate Justice to become Chief Justice, he would seize powers that the Constitution has not provided to the presidency, by this mean bypassing the constitutional requirement of senatorial *advice and consent*; consequently, the President would be infringing upon the Federal Government's separation of powers.

It is also important to note that Supreme Court Justices hold lifetime appointments to their offices.⁴³ Therefore, a vacancy to the Supreme Court may only occur under the previously discussed specific instances.⁴⁴ The Constitution does not afford the President power to vacate or remove from office appointed Justices. The President may withdraw a nomination or may decide not to appoint a Justice that has been confirmed by the Senate, but may not remove any Justice that has already been appointed by him or any other President. The power to remove a Justice from office has been exclusively afforded to Congress.⁴⁵ Such power is limited and has been narrowly construed; it may only be exercised through an impeachment process. Hence, if a vacancy for Chief Justice or Associate Justice does not exist, the President may not deliberately create one.

The method followed for the selection of the Chief Justice of the United States has also been implemented in some states of the Union, as well as in Puerto Rico. In the following section, we will review and discuss other methods for selecting the chief justice in courts of last resort that have been constitutionally

⁴¹ HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 316 (5th ed. 2008); Rutkus & Tong, *supra* note 34, at 35.

⁴² U.S. CONST. art. II, § 2, cl. 2.

⁴³ "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . ." *Id.* art. III, § 1.

⁴⁴ Rutkus, *supra* note 21, at 11.

⁴⁵ U.S. CONST. art. I, § 3, cl. 6. Only one Supreme Court Justice has ever been impeached. Rutkus, *supra* note 21, at 3.

sanctioned and implemented successfully among several states of the Union and the District of Columbia.

II. THE SELECTION OF CHIEF JUSTICES IN THE STATES OF THE UNION AND THE DISTRICT OF COLUMBIA

The states of the Union and the District of Columbia, through their Constitution or state statutes, have implemented equivalent or alternate methods to the one followed in the Federal Government for selecting the chief justice in their respective courts of last resort. The mechanisms used in the states of the Union and the District of Columbia for selecting the chief justice are the following: (1) a gubernatorial appointment; (2) a partisan or non-partisan election; (3) appointment pursuant to seniority among members of the court; (4) legislative appointment; (5) appointment through a judicial nominating commission, and, finally, (6) appointment through court election.⁴⁶ As we will see, the main differences among these mechanisms regard: (1) who holds the legal authority or power to choose the chief justice; (2) if such power is to be shared among different branches of government or separate entities, and, (3) the degree of detail and specificity under which the law assigns the power to appoint a chief justice.

Analysis will be provided for all the methods of selection mentioned above, but particular emphasis will be given to those states that select their chief justice in the same manner that is done at the federal level and in Puerto Rico, as well as to those states in which the members of the court elect the chief justice. This will help contextualize and further inform the debate currently taking place in the Puerto Rico, which this paper aims to address. We will begin analyzing the courts that select their chief justice through gubernatorial appointment.

A. *Gubernatorial Appointment*

Twelve states, following their respective state constitutions, select the chief justice of their court of last resort through gubernatorial appointment: California, Delaware, Maine, Maryland, Nebraska, New York, Connecticut, Hawaii, Vermont, Massachusetts, New Jersey, and Rhode Island. In all twelve of these states, the constitution explicitly mentions the governor as the person granted the power to appoint the chief justice of the state's court of last resort. Moreover, these twelve state constitutions establish that the appointment power will be shared amongst the governor and another branch of government or a separate judicial or executive entity, by this means, requiring that the governor's nominee be selected from a list submitted by a judicial or executive commission, or sub-

⁴⁶ The distribution of states within the following categories of methods selection of chief justices in courts of last resort follows the ordering of such made by the National Center for State Courts and the American Judicature Society.

jected to subsequent legislative confirmation, for the appointment to be effective.⁴⁷

In states like California, Maine, Maryland, Massachusetts and New Jersey, the governor is conferred complete discretion to make the initial selection of his or her nominee for chief justice.⁴⁸ The states of Delaware, Nebraska, New York, Connecticut, Hawaii, Vermont and Rhode Island, on the other hand, require that the governor's nominee must come from a list presented by a judicial nominating commission.⁴⁹ Ten of these state constitutions require confirmation of the governor's nominee by a separate legislative body, or judicial or executive entity.⁵⁰ Various constitutions —such as those of Delaware, Maine, New York, Hawaii, Vermont, and New Jersey— require confirmation by the state senate.⁵¹ The constitutions of Connecticut and Rhode Island require confirmation by both the state senate and house of representatives.⁵² Other states, like California,⁵³ require confirmation of the governor's nominee for chief justice by a separate judicial entity, such as a commission on judicial appointments or an executive entity (*e.g.*, the governor's council in Massachusetts).⁵⁴ On the other hand, the Constitution of Nebraska stipulates that the governor will appoint the chief justice from a list of candidates presented by a judicial nominating commission, and confirmation of such appointment will not be required.⁵⁵ Finally, the Constitution of Maryland establishes that the governor will appoint, and the senate will confirm, the justices of the state's Supreme Court.⁵⁶ But for selecting the chief justice, the governor will designate one of the members of the court as the chief

⁴⁷ CAL. CONST. art. VI, § 16(d)(2); DEL. CONST. art. IV, § 2; ME. CONST. art. V, § 8; MD. CONST. art. IV, pt. II, § 14; NEB. CONST. art. V, § 21; N.Y. CONST. art. VI, § 2(e); CONN. CONST. art. V, § 2, amend. XXV; HAW. CONST. art. VI, § 3; VT. CONST. ch. II, § 32; MASS. CONST. pt. II, ch. II, § 1, art. IX; N.J. CONST. art. VI, § 6; R.I. CONST. art. X, § 4.

⁴⁸ CAL. CONST. art. VI, § 16(d)(2); ME. CONST. art. V, § 8; MD. CONST. art. IV, pt. II, § 14; MASS. CONST. pt. II, ch. II, § 1, art. IX; N.J. CONST. art. VI, § 6; N.Y. CONST. art. VI, § 2(e).

⁴⁹ DEL. CONST. art. IV, § 2 & Executive Order No. 4, § 7; NEB. CONST. art. V, § 21; N.Y. CONST. art. VI, § 2(e); CONN. CONST. art. V, § 2, amend. XXV, CONN. GEN. STAT. ANN. § 51-44a(h)¹ (West 2011); HAW. CONST. art. VI, § 3; VT. CONST. ch. II, § 32; R.I. CONST. art. X, § 4.

⁵⁰ These states are: Delaware, Maine, New York, Hawaii, Vermont, New Jersey, Connecticut, Rhode Island, California and Massachusetts. The states of Nebraska and Maryland do not require a subsequent confirmation of the governor's appointment or designation for chief justice, respectively. NEB. CONST. art. V, § 21; MD. CONST. art. IV, pt. I, § 5A(b), art. IV, pt. II, § 14.

⁵¹ DEL. CONST. art. IV, § 2; ME. CONST. art. V, § 8; N.Y. CONST. art. VI, § 2(e); HAW. CONST. art. VI, § 3; VT. CONST. ch. II, § 32; N.J. CONST. art. VI, § 6.

⁵² CONN. CONST. art. V, § 2; R.I. CONST. art. X, § 4.

⁵³ CAL. CONST. art. VI, § 16(d)(2).

⁵⁴ MASS. CONST. pt. II, ch. II, § 1, art. IX.

⁵⁵ NEB. CONST. art. V, § 21.

⁵⁶ MD. CONST. art. IV, pt. I, § 5A(b).

justice.⁵⁷ Such designation will not require a subsequent confirmation by the legislative branch or by a judicial or executive entity.⁵⁸

An examination of the constitutions of the twelve states mentioned shows how the power to appoint the chief justice in this category has been provided in two different manners: (1) through a broad and general mandate, or (2) through a direct and explicit mandate. In six of these state constitutions, the power to appoint the chief justice is afforded to the governor in very broad and general terms. What this means is that these constitutions do not state explicitly that the governor will appoint the chief justice. They only provide the governor with a sweeping mandate that affords him power to appoint all judges of the supreme court, or even a broader mandate allowing him to appoint all judicial officers of the state. For example, the Constitution of Connecticut states “[t]he judges of the supreme court . . . shall, upon nomination by the governor, be appointed.”⁵⁹ The Nebraska Constitution reads as follows: “In the case of any vacancy in the Supreme Court . . . such vacancy shall be filled by the Governor;”⁶⁰ while the Constitution of Rhode Island, more broadly established that “[t]he governor shall fill any vacancy of any justice of the Rhode Island Supreme Court.”⁶¹ Furthermore, the Constitution of California states that “[t]he Governor shall fill vacancies in those courts [*i.e.*, the Supreme Court or a court of appeals] by appointment;”⁶² in Maine, “[t]he Governor shall nominate, and . . . appoint all judicial officers;”⁶³ and finally, in Massachusetts, “[a]ll judicial officers . . . shall be nominated and appointed by the governor.”⁶⁴ The design of the mandate contained in the Federal Constitution affording the President with the power to appoint judges of the Supreme Court is similar to the ones found in these constitutions.

In the remaining six state constitutions in which the chief justice is selected through a gubernatorial appointment, the governor has been afforded this power in a direct and explicit manner. For example, in Hawaii, “[t]he governor shall, . . . fill a vacancy in the office of the chief justice;”⁶⁵ in Vermont, “[t]he Governor . . . shall fill a vacancy in the office of the Chief justice;”⁶⁶ in New York, “[t]he governor shall appoint . . . a person to fill the office of chief judge;”⁶⁷ in New Jersey,

57 *Id.* art. IV, pt. II, § 14.

58 *Id.*

59 CONN. CONST. art. V, § 2.

60 NEB. CONST. art. V, § 21.

61 R.I. CONST. art. X, § 4.

62 CAL. CONST. art. VI, § 16(d)(2).

63 ME. CONST. art. V, § 8.

64 MASS. CONST. pt. II, ch. II, § 1, art. IX.

65 HAW. CONST. art. VI, § 3.

66 VT. CONST. ch. II, § 32.

67 N.Y. CONST. art. VI, § 2(e).

“[t]he Governor shall nominate and appoint . . . the Chief Justice and associate justices of the Supreme Court;”⁶⁸ in Maryland, “[o]ne of the Judges of the Court of Appeals shall be designated by the Governor as the Chief Judge;”⁶⁹ and, in Delaware, “[t]he Justices of the Supreme Court . . . shall be appointed by the Governor”⁷⁰ and “[o]ne of them shall be the Chief Justice who shall be designated as such by his or her appointment.”⁷¹

B. *Partisan or Non-Partisan Election*

A total of seven states of the Union hold a constitution or statute, which mandates that the selection of the chief justice of their court of last resort shall be made through a partisan or non-partisan election. These states are: Alabama, Arkansas, Montana, North Carolina, Minnesota, Ohio and Texas. The members of such courts are elected by the popular vote of qualified voters of their respective states as part of the general elections. In Arkansas,⁷² Montana,⁷³ North Carolina,⁷⁴ Minnesota⁷⁵ and Ohio,⁷⁶ the selection of chief justices is made through a non-partisan election. Interestingly, only two states hold partisan elections to select their chief justice: Alabama⁷⁷ and Texas.⁷⁸ Chief justices elected both under

⁶⁸ N.J. CONST. art. VI, § 6.

⁶⁹ MD. CONST. art. IV, pt. II, § 14.

⁷⁰ *Id.* § 3.

⁷¹ DEL. CONST. art. IV, § 2.

⁷² The Arkansas Constitution reads as follows:

(A) The Supreme Court shall be composed of seven Justices, one of whom shall serve as Chief Justice. The Justices of the Supreme Court shall be selected from the State at large.

(B) The Chief Justice shall be selected for that position in the same manner as the other Justices are selected.

ARK. CONST. amend. 80, § 2(A)(B).

⁷³ “The supreme court consists of one chief justice and four justices . . .” MONT. CONST. art. VII, § 3 (i); “Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.” *Id.* § 8 (i).

⁷⁴ “The Supreme Court shall consist of a Chief Justice and six Associate Justices . . .” N.C. CONST. art. IV, § 6 (i). “Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters . . .” *Id.* § 16. *See* N.C. GEN. STAT. ANN. §§ 163-335 (2009).

⁷⁵ “The supreme Court consists of one chief judge and not less than six nor more than eight associate judges as the legislature may establish.” MINN. CONST. art. VI, § 2. “The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.” *Id.* § 7.

⁷⁶ “The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.” OHIO CONST. art. IV, § 6(A)(i).

⁷⁷ “The supreme court shall be the highest court of the state and shall consist of one chief justice and such number of associate justices as may be prescribed by law.” ALA. CONST. art. VI, § 140(a). “All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts.” *Id.* § 152.

a partisan or non-partisan election are not required to receive a subsequent confirmation by the legislative branch or by a separate judicial or executive entity for their selection as chief justice to become effective.

C. Seniority among Members of the Court

In seven states of the Union, the chief justice is selected among the members of the court pursuant to seniority: Kansas,⁷⁹ Louisiana,⁸⁰ Mississippi, Nevada,⁸¹ New Hampshire,⁸² Pennsylvania⁸³ and Wisconsin.⁸⁴ These states' constitutions explicitly establish that the court's chief justice will be chosen among its members according to seniority. Seniority will be determined by the justice's *continuous* service in the court and not by his or her age or by the tallied amount of years in service on those instances in which a justice may have served various non-consecutive terms. For instance, in Mississippi, "[t]he judge of the supreme court who has been for the longest time continuously a member of the court shall be the chief justice."⁸⁵

D. Legislative Appointment

South Carolina is the only state in which the chief justice is selected, not by a gubernatorial or judicial commission appointment, but by a legislative appointment. Members of both the senate and house of the South Carolina General As-

⁷⁸ "The Supreme Court shall consist of the Chief Justice and eight Justices . . . [s]aid Justices shall be elected (three of them each two years) by the qualified voters of the state at a general election . . ." TEX. CONST. art. V, § 2(a) & (c). Texas is one of two states with two courts of last resort: the Supreme Court of Texas (which is the court of last resort on civil matters) and the Texas Court of Criminal Appeals. As to the Texas Court of Criminal Appeals, the Constitution of Texas states that "[t]he Presiding Judge and the Judges shall be elected by the qualified voters of the state at a general election and shall hold their offices for a term of six years." *Id.* § 4(a).

⁷⁹ "The justice who is senior in continuous term of service shall be chief justice, and in case two or more have continuously served during the same period the senior in age of these shall be chief justice." KAN. CONST. art. III, § 2.

⁸⁰ "The judge oldest in point of service on the supreme court shall be chief justice." LA. CONST. art. V, § 6.

⁸¹ "[T]he senior justice in commission shall be Chief Justice; and in case the commission of any two or more of said justices shall bear the same date, they shall determine by lot, who shall be Chief Justice." NEV. CONST. art. VI, § 3.

⁸² "On the effective date of this section, the administrative position of chief justice shall be held by the justice with the most seniority on the court for a period of up to 5 years." N.H. REV. STAT. ANN. § 490:1 (LexisNexis 2009).

⁸³ "The Chief Justice and president judges of all courts with seven or less judges shall be the justice or judge longest in continuous service on their respective courts . . ." PA. CONST. art. V, § 10(d).

⁸⁴ "The justice having been longest a continuous member of said court, or in case 2 or more such justices shall have served for the same length of time, the justice whose term first expires, shall be the chief justice." WIS. CONST. art. VII, § 4(2).

⁸⁵ MISS. CODE ANN. § 9-3-11 (West 1972).

sembly vote to select the state's Supreme Court chief justice. In this particular, the South Carolina constitution states: "The members of the Supreme Court shall be elected by a joint public vote of the General Assembly for a term of ten years."⁸⁶ The Supreme Court of South Carolina is composed of a chief justice and four associate justices.⁸⁷ No power is afforded to the Governor by the constitution as to the appointment of the state's Supreme Court justices.

E. Appointment through a Judicial Nominating Commission

The state of Indiana and the District of Columbia have a judicial nominating commission in charge of appointing the chief justice.⁸⁸ Both require that the judge to be appointed as chief justice be one of the sitting judges of the court. For example, in Indiana "[t]he Chief Justice of the State shall be selected by the judicial nominating commission from the members of the Supreme Court and he shall retain that office for a period of five years."⁸⁹

F. Court Election

The most common method for selecting chief justices throughout the states of the Union is through court election. Twenty-two states of the Union, through their constitution or statutes, afford the justices of their highest court the power to elect among themselves, the court's chief justice. These states are: Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Michigan, Missouri, New Mexico, North Dakota, Oklahoma,⁹⁰ Oregon, South Dakota, Tennessee, Utah, Virginia, Washington, Wyoming and West Virginia.

The constitution or statutes of all these twenty-two states share a common trait: they all contain a very clear and direct mandate that explicitly affords the members of the court, and only them, the power to elect their chief justice. The design of such legal mandates, endowing the members of the court with the power to elect their chief justice, presents the following common characteristics that are shared by these twenty-two state constitutions and statutes:

1. They all make an explicit reference to the supreme courts, as the exclusive recipient of the power to elect the chief justice.⁹¹ For example, in Illinois the "Su-

⁸⁶ S.C. CONST. art. V, § 3.

⁸⁷ *Id.* § 2.

⁸⁸ IND. CONST. art. VII, § 3; D.C. CODE § 1-204.31(b) (LexisNexis 2001).

⁸⁹ IND. CONST. art. VII, § 3.

⁹⁰ Oklahoma is the other state that has two courts of last resort: the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals.

⁹¹ The state of North Dakota presents an exception to this rule because the chief justice is elected jointly by the members of the Supreme Court and district courts. N.D. CENT. CODE. § 27-02-01 (2006) ("The judges of the supreme court and district courts shall appoint from the members of the supreme court a chief justice . . .").

preme Court Judges shall select a Chief Justice;⁹² in Iowa “[t]he justices of the supreme court shall select one justice as chief justice;”⁹³ in Missouri, “[t]he judges of the supreme court shall elect from their number a chief justice;”⁹⁴ in the Oklahoma Court of Criminal Appeals, “[t]he judges shall choose from among their members a Presiding Judge;”⁹⁵ in Arizona, “[t]he chief justice shall be elected by the justices of the Supreme Court;”⁹⁶ in Colorado, “[t]he supreme court shall select a chief justice;”⁹⁷ in Tennessee, “[t]he judges shall designate one of their own number who shall preside as Chief Justice;”⁹⁸ in Michigan, “[o]ne justice of the supreme court shall be selected by the court as its chief justice.”⁹⁹

2. They all mention explicitly the chief justice as the only official that can be elected by the justices of the supreme court. No power is afforded to elect new associate justices or any other judicial officials.

3. The election made by the members of the court does not require a subsequent confirmation by another branch of government or by a separate judicial or executive entity.

4. They all require that only members of the court be elected as chief justice. For example, in Alaska, “[t]he chief justice shall be selected from among the justices of the supreme court;”¹⁰⁰ in Georgia, “[t]he Supreme Court shall consist of not more than nine Justices who shall elect from among themselves a Chief Justice;”¹⁰¹ in Idaho, “[t]he chief justice shall be selected from among the justices of the Supreme Court;”¹⁰² in Kentucky, “[t]he Justices of the Supreme Court shall elect one of their number;”¹⁰³ in New Mexico, “justices of the supreme court shall, by a majority vote, designate one of their number, not appointed, to serve as chief justice;”¹⁰⁴ in the Oklahoma Supreme Court, “[t]he Justices shall choose from among their members a Chief Justice;”¹⁰⁵ in Washington, “[t]he supreme

92 ILL. CONST. art. VI, § 3.

93 IOWA CODE § 602.4103 (1996).

94 MO. CONST. art. V, § 8.

95 OKLA. STAT. ANN. 20, § 35 (West 2002).

96 ARIZ. CONST. art. VI, § 3.

97 COLO. CONST. art. VI, § 5 (2).

98 TENN. CONST. art. VI, § 2.

99 MICH. CONST. art. VI, § 3.

100 ALASKA CONST. art. IV, § 2(b).

101 GA. CONST. art. VI, § 6.

102 IDAHO CONST. art. V, § 6.

103 KY. CONST. § 110(5)(a).

104 N.M. STAT. ANN. § 34-2-1 (c) (1978).

105 OKLA. CONST. art. VII, § 2.

court shall select a chief justice from its own membership;¹⁰⁶ and, in Oregon, “[t]he Chief Justice of the Supreme Court shall be a judge of the court selected by vote of a majority of the judges of the court.”¹⁰⁷ As evinced from these examples, the requirement of selecting the chief justice from sitting justices is made explicit through either constitutional or statutory provisions. Furthermore, the requirement implies that no power to appoint *new* judges has been afforded to the members of the court.

5. Finally, all of these state constitutions and statutes utilize the following imperative languages to establish the legal foundation upon which power is afforded to the members of the court to elect their chief justice: “shall select,”¹⁰⁸ “shall be selected,”¹⁰⁹ “shall elect,”¹¹⁰ “shall be elected,”¹¹¹ “shall choose,”¹¹² “shall be chosen,”¹¹³ “shall designate,”¹¹⁴ and, “shall appoint from the members.”¹¹⁵

As we have seen, the design of the mandate regarding the election of the chief justice by the members of the court, under the constitution or statutes of all these twenty two states, leaves no room for any other interpretation affording such power to anyone other than the judges of the court.

III. THE SELECTION OF THE CHIEF JUSTICE IN PUERTO RICO

Even when Puerto Rico is not a state of the Union, its Constitution possesses a similar framework to that of the Federal Government and several states of the Union. The correlation comes from the fact that Puerto Rico’s constitutional design was greatly inspired by the Constitution of the United States, and modeled according to various particular provisions related to the judiciary branch of

¹⁰⁶ WASH. CONST. art. IV, § 3.

¹⁰⁷ OR. REV. STAT. § 2.045(1) (2009).

¹⁰⁸ Colorado (COLO. CONST. art. 6, § 5(2)); Washington (WASH. CONST. art. 4, § 30), and Iowa.

¹⁰⁹ See, e.g., ALASKA CONST. art. 4, § 2; IDAHO CONST. art. 5, § 6; W. VA. CONST. art. VIII, § 2; S.D. Codified Laws § 16-1-2.1 (1973).

¹¹⁰ Georgia, Kentucky, Missouri, Utah (“The justices of the supreme court shall elect a chief justice from among the members of the court by a majority vote” UTAH CODE ANN. § 78a-3-101 (3)(2008).), and Wyoming (“The justices of the court shall elect one of their number to serve as chief justice” WYO. CONST. art. V, § 4.).

¹¹¹ Arizona and Virginia (“The Chief Justice shall be elected by a majority vote of the justices of the Supreme Court” VA. CODE ANN. § 17.1-300 (1950).).

¹¹² Oklahoma Court of Criminal Appeals.

¹¹³ Florida (“The chief justice of the supreme court shall be chosen by a majority of the members of the court.” FLA. CONST. art. V, § 2 (b).).

¹¹⁴ New Mexico and Tennessee.

¹¹⁵ North Dakota.

twenty-two separate state constitutions.¹¹⁶ For that reason, legal scholars have said that Puerto Rico's judiciary branch and its Supreme Court—both under the organic acts and under the Constitution of Puerto Rico—were created “in likeness and image” to those of the states of the Union.¹¹⁷ Moreover, the Governor's constitutional power to make appointments has been deemed *analogous* to that of the President of the United States.¹¹⁸ This allows for a thorough and detailed comparison between them, in regards to the process followed for the selection of the chief justice.

A comprehensive examination of the process followed to select the chief justice of the Supreme Court of Puerto Rico requires an analysis of two distinctive periods of time, in which the authority to appoint Supreme Court justices has resided in different persons. First, by virtue of several congressional acts, such power resided in the President of the United States. Later, since the approval of the Constitution of Puerto Rico in 1952, such power was to be held by the Governor. Such examination will provide a clear explanation of how Puerto Rico's legal tradition in terms of the power to select the chief justice was shaped, influenced and developed.

*A. Development of Puerto Rico's Supreme Court and the Selection of the Chief Justice from 1898 to 1952*¹¹⁹

In 1898, centuries of Spanish colonial rule over Puerto Rico came to an end with the signing of the Treaty of Paris.¹²⁰ From 1898 to 1900, a military form of

116 The constitutions of the states of California, Colorado, Connecticut, Delaware, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, New Jersey, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Dakota, Virginia, West Virginia, and Wisconsin served as models for the design of different sections of article V of the Constitution of Puerto Rico, which establishes the Commonwealth's judicial branch. See 4 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE DE PUERTO RICO [DEBATES OF THE CONSTITUTIONAL CONVENTION OF PUERTO RICO] 2608-15 (Edición Conmemorativa, 2003). Also, it is important to point out that the process followed for the approval of the Constitution of Puerto Rico was the same as that followed by thirty-two states of the Union. Rafael Hernández-Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 REV. COL. ABOG. 207 (1959).

117 LUIS R. RIVERA, LA JUSTICIA EN SUS MANOS: LA HISTORIA DEL TRIBUNAL SUPREMO DE PUERTO RICO [JUSTICE IN THEIR HANDS: THE HISTORY OF THE SUPREME COURT OF PUERTO RICO] 56 (2007) (translation by the author).

118 *Op. Sec. Just.* [Op. Sec. Att'y.] Núm. 1985-3, Jan. 31, 1985.

119 This section does not aim to make a thorough and comprehensive historical recount of the political relations between Puerto Rico and the United States. Focus will only be given to the relevant events regarding the origin and development of the Supreme Court of Puerto Rico, its composition and the process followed to appoint its justices under federal organic acts and statutes applicable to Puerto Rico.

120 See JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 27 (1997). Through the Treaty of Paris, Spain ceded Puerto Rico to the United States. From 1493-1898, the Spanish Crown ruled all of the island's legislative, executive, military, commercial, ecclesiastical and judicial matters. All laws and appointments of colonial officials required the King's approval. The

government was established in Puerto Rico.¹²¹ During that period of time, the President appointed American military governors who exercised control over political and legal matters in Puerto Rico. Through a military order, Puerto Rico's first military governor, General John R. Brook, dissolved the *Real Audiencia*,¹²² and created Puerto Rico's Supreme Court.¹²³ Such court followed the design of the states that formed the Union and was originally comprised by six associate justices and a chief justice.¹²⁴ In 1899, the composition of the Court would be altered to decrease the number of judges to four associate justices and one chief justice.¹²⁵

The military government ended in 1900 when Congress approved *The Foraker Act*.¹²⁶ Being Puerto Rico's *first organic act*, it established a civil government on the island.¹²⁷ "The judicial power was vested in a Supreme Court of Puerto Rico . . . and in the courts created during the military government."¹²⁸ The members of the Supreme Court were appointed by the President, and by the advice and consent of the United States Senate.¹²⁹

In 1917, Congress enacted Puerto Rico's second organic act known as the *Jones Act*.¹³⁰ It granted U.S. citizenship to Puerto Ricans and contained other provisions regarding self-government.¹³¹ Under this law, just as with the *Foraker Act*, the President retained the power to appoint the chief justice and the associate justices of the Supreme Court of Puerto Rico with the advice and consent of

Governor, also known as Captain General, acted as the representative of the King, was the highest judicial officer on the island, and controlled the colonial government of Puerto Rico.

121 See *id.* at 31, 33.

122 PEDRO MALAVET VEGA, *EVOLUCIÓN DEL DERECHO CONSTITUCIONAL EN PUERTO RICO* [THE EVOLUTION OF CONSTITUTIONAL LAW IN PUERTO RICO] 34 (1998). The Governor's decisions were subject to appeal before the judicial entity known as the *Real Audiencia*. This was the highest colonial court, from which appeals could only be taken to the Council of the Indies on specific instances. In 1832, Puerto Rico obtained its own *Real Audiencia*, which became its first court of appeals in history.

123 See 1 RAUL SERRANO GEYLS, *DERECHO CONSTITUCIONAL DE PUERTO RICO Y ESTADOS UNIDOS* [PUERTO RICO AND UNITED STATES CONSTITUTIONAL LAW] 62 (1988).

124 *Id.* at 441; RIVERA, *supra* note 117, at 56.

125 RIVERA, *supra* note 117, at 50.

126 Foraker Act, 31 Stat. 77, 86 (1900); see also TRÍAS MONGE, *supra* note 120, at 31-33.

127 See TRÍAS MONGE, *supra* note 120, at 42.

128 *Id.* at 43. According to Trías Monge, under the Foraker Act, the Supreme Court of Puerto Rico was left in place "basically as constituted during the military regime." *Id.* at 57.

129 On this particular, section 33 of the Foraker Act stated: "[T]he chief justice and associate justices of the supreme court . . . shall be appointed by the President, by and with the advice and consent of the Senate." The Foraker Act 31 Stat. 77, 84 (1900). See TRÍAS MONGE, *supra* note 120, at 43. Such organic act stated that decisions of the Supreme Court of Puerto Rico could be appealed to the Supreme Court of the United States. *Id.* Under this legislation, the Governor had the power to appoint lower court judges "with the advice and consent of the Executive Council," which at that time functioned as a second legislative chamber. *Id.* at 42-43.

130 Jones Act, 39 Stat. 951-68 (1917). See also SERRANO GEYLS, *supra* note 123, at 467.

131 See TRÍAS MONGE, *supra* note 120, at 75.

the Federal Senate.¹³² The legislation also maintained the composition of the court at five judges.¹³³

In 1947, the *Elective Governor Act* was signed into law.¹³⁴ This act, which proposed amendments to the *Jones Act*, granted the residents of Puerto Rico the power to elect the Governor of Puerto Rico for the first time in history.¹³⁵ However, the *Elective Governor Act* did not alter Puerto Rico's political relationship with the United States and the President retained the power to appoint the justices of the Supreme Court of Puerto Rico.¹³⁶

Finally, in 1950, came the approval of *Public Law 600*.¹³⁷ This law served as the enabling act that authorized the people of Puerto Rico to frame their own constitution.¹³⁸ *Public Law 600* reiterated that the *Jones Act* would continue in force and effect, except all provisions expressly repealed by *Public Law 600*, and that hereinafter such law should be cited as the "Puerto Rico Federal Relations Act."¹³⁹ Among the repealed provisions, *Public Law 600* repealed the *Jones Act* provision that granted the President the power to appoint the justices of the Supreme Court of Puerto Rico.¹⁴⁰

¹³² On this particular, section 40 of the *Jones Act* stated that "the chief justice and associate justices of the supreme court shall be appointed by the President, by and with the advice and consent of the Senate of the United States . . ." *Jones Act*, 39 Stat. 951, 965 (1917). See also RIVERA, *supra* note 117, at 78.

¹³³ See RIVERA, *supra* note 117, at 78. The first decades of this political relationship would be branded by a great degree of authority and control exercised by the United States over all local government matters in Puerto Rico. Puerto Ricans were not only deprived from the right to vote for government officials, but were also not considered to hold such positions. Over the years, Puerto Rican political parties and leaders voiced their disapproval, through platforms and positions based on their particular preferences of political relationship to be held between Puerto Rico and the United States, demanding that a greater degree of autonomy and self-government be afforded to the residents of the island. With the approval of the different organic acts, very modest progress was made regarding the citizenry's ability to self-govern. The situation essentially remained unaltered and political power was kept highly centralized on the Federal Government since the President and Congress retained practical control over all legal and government matters of Puerto Rico. The power held by the President to appoint the Governor and Supreme Court justices —among other government officials— help to exemplify that fact. Nevertheless, after years of much complaint, the Federal Government would start to hand the reins over local government matters to Puerto Ricans in a greater degree by the end of the 1940s.

¹³⁴ See TRÍAS MONGE, *supra* note 120, at 106.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Public Law 600*, 64 Stat. 319-20 (1950). See also SERRANO GEYLS, *supra* note 123, at 489.

¹³⁸ See SERRANO GEYLS, *supra* note 123, at 489.

¹³⁹ *Id.* at 490.

¹⁴⁰ RIVERA, *supra* note 117, at 120. After the approval of *Public Law 600* in 1951, Puerto Ricans from all regions and various political ideologies were elected by popular vote to take part in a Constitutional Convention that would have the task of drafting a constitution for Puerto Rico. The Constitution drafted at the Convention was submitted via referendum to qualifying voters in Puerto Rico and was approved by an overwhelming majority of the voters (eighty percent of the votes). The Constitution was submitted to the President of the United States on April 1952, who then recommended it

As we have seen, from 1898 to 1952 the power to appoint Supreme Court justices in Puerto Rico resided exclusively on the President. Such power derived from the organic acts created to administer Puerto Rico's local government. If a vacancy for chief justice surfaced, the President would fill it by either nominating someone who at that time was not a member of the court,¹⁴¹ or by nominating a sitting associate justice to now become chief justice. Out of the sixteen chief justices that the Supreme Court of Puerto Rico has had since 1898, Presidents of the United States have appointed six of them.¹⁴² Out of those six, five were sitting associate justices before being appointed chief justice.¹⁴³ Regardless of whether it was a new member to the Court or a sitting associate justice who was nominated as chief justice, the candidacy would be sent to the Federal Senate for its advice and consent.¹⁴⁴ Such was the case under the Foraker, Jones and Elective Governor Acts.¹⁴⁵

favorably for congressional approval. Congress approved the Constitution of Puerto Rico on July 1, 1952 and President Truman signed it on July 3, 1952. For further discussion on the approval process of the Constitution of Puerto Rico see SERRANO GEYLS, *supra* note 123, at 487-96.

141 President McKinley appointed José Severo Quiñones as chief justice in 1900. Prior to his appointment as chief justice, he was not a member of the court. SERRANO GEYLS, *supra* note 123, at 758.

142 These are: José Severo Quiñones, José Conrado Hernández, Emilio del Toro Cuebas, Martín Travieso, Ángel R. de Jesús and Roberto H. Todd. *Id.*

143 The five sitting associate justices who were later appointed chief justice by Presidents of the United States were: José Conrado Hernández, appointed chief justice in 1909 by President Taft; Emilio del Toro Cuebas, appointed chief justice on 1922 by President Harding; Martín Travieso, appointed chief justice on 1944 by President Roosevelt; Ángel R. de Jesús, appointed chief justice on 1948 by President Truman; and, Roberto H. Todd, appointed chief justice on 1951 by President Truman. *Id.* An analysis of information provided by The Center for Legislative Records of the United States National Archives and Records Administration confirms that advice and consent from the Senate of the United States of America was required for the appointment of the five latter mentioned chief justices. Such information can be found on the relevant volumes from the Journal of the Executive Proceedings of the Senate of the United States of America, particularly: for José Conrado Hernández on Volume XL, 61st Congress, 1st Session, From March 15, 1909 to August 5, 1909, with Index, United States Government Printing Office, Washington, 1933 (Hernández on pages 17, 38, and 42); for Emilio del Toro Cuebas on Volume LIX, 67th Congress, 2nd Session, From December 5, 1921 to September 22, 1922, Part 1 (Journal), United States Government Printing Office, Washington, 1931 (del Toro on pages 123, 145, 186, and 200); for Martín Travieso on Volume LXXXVI, 78th Congress, 2nd Session, From January 10, 1944 to December 19, 1944, with Index, United States Government Printing Office, Washington, 1945 (Travieso on pages 38, 96, and 101); for Ángel R. de Jesús on Volume XCI, 81st Congress, 1st Session, From January 3, 1949 to October 19, 1949, Part 1 with Indexes through Geography, United States Government Printing Office, Washington, 1950 (de Jesús on pages 9, 729, and 751); and for Roberto H. Todd on Volume XCIII, 82nd Congress, 1st Session, From January 3, 1951 to October 20, 1951, Part 1 with Index up to Army Index, United States Government Printing Office, Washington, 1952 (Todd on pages 533, 624, and 625).

144 RIVERA, *supra* note 117, at 99.

145 See *supra* note 143.

B. The Selection of the Chief Justice under the Constitution of Puerto Rico from 1952 to 2014

On July 25, 1952, the Constitution of Puerto Rico was proclaimed effective.¹⁴⁶ Through it, a political entity, new and unprecedented to the United States constitutional system and political tradition, was created: the Commonwealth of Puerto Rico.¹⁴⁷ Even though not a state, such political entity was provided with a republican form of government which in design is very similar to the one proper of a state of the Union. The Constitution of Puerto Rico establishes its own bill of rights, and power is divided amongst the legislative, executive and judicial branches.¹⁴⁸

The judicial power is vested in a Supreme Court, and in other statutory courts as established by law.¹⁴⁹ The Supreme Court is Puerto Rico's court of last resort and the only constitutionally created one.¹⁵⁰ Nonetheless, the Constitution of Puerto Rico leaves the door open for the creation of statutory courts but does not command it. The exercise of such power rests on the discretion of the members of the legislative branch. The Supreme Court cannot be abolished, and the statutory courts cannot supplant its power.¹⁵¹ For that reason, whether the legislative branch exercises or not its power to create or abolish courts, at least one court will always exist: the Supreme Court of Puerto Rico. Regarding the appointment of judges, the constitution states that "[j]udges shall be appointed by the Governor with the advice and consent of the Senate. Justices of the Supreme Court shall not assume office until after confirmation by the Senate and shall hold their offices during good behavior."¹⁵²

¹⁴⁶ See SERRANO GEYLS, *supra* note 123, at 494.

¹⁴⁷ Before the approval of the Constitution of Puerto Rico, in a number of early twentieth century cases (commonly known as the *Insular Cases*), the Supreme Court of the United States determined Puerto Rico's political status to be that of an unincorporated territory. The Supreme Court of the United States has yet to decide how, if in any way, such political relationship was altered with the approval of the Constitution of Puerto Rico in 1952. Therefore, the *Insular Cases'* early twentieth century holding that Puerto Rico is an unincorporated territory of the United States remains controlling on the subject. Notwithstanding, this paper does not intend to address the political status question of Puerto Rico.

¹⁴⁸ The legislative power is vested in a legislative assembly, which consists of two chambers: a senate and a house of representatives. The members of the legislature are elected by direct vote during general elections, held every four years. Members will then elect among themselves a leader for each house. P.R. CONST. art. III, § 9 ("The Senate shall elect a President and the House of Representatives a Speaker from among their respective members."). The executive power is vested in a Governor who is elected during the same general elections. The Governor is responsible for the execution of laws and for the appointment of those officials that the Constitution authorizes him or her to appoint.

¹⁴⁹ *Id.* art. V, § 1.

¹⁵⁰ *Id.* § 3.

¹⁵¹ *Id.* § 2.

¹⁵² *Id.* § 8.

In a very clear and simple manner, the Constitution of Puerto Rico grants the Governor power to appoint judges.¹⁵³ No distinction or limitation is imposed in terms of what judges the Governor is allowed to appoint. No other provision of the Constitution of Puerto Rico affords power to any other figure or institution, but the Governor, to appoint judges. The Governor has been afforded with a sweeping mandate, therefore favoring a broad interpretation of such power to the effect that all judicial appointments —both to the supreme and statutory courts— are to be made by the Governor.

The second half of this relevant part of section 8 establishes the most distinctive and basic trait of the power to appoint judges under the Constitution of Puerto Rico: a power divided and to be shared between the executive and the legislative branches of government. Judicial appointments will always require advice and consent from the Senate of Puerto Rico. Thus, just as in the federal judiciary, the appointment of all judges in Puerto Rico has three unavoidable and necessary requisites: (1) nomination by the Governor to occupy a judicial bench; (2) advice and consent from the Senate of Puerto Rico as to the Governor's nominee, and, finally, (3) the formal appointment of the nominee by the Governor to hold a judicial office.¹⁵⁴ Only after the aforementioned requisites are fulfilled, is an appointment effective.

Section 8 does contain one very detailed limitation with regards to the Governor's power to appoint Supreme Court justices —it establishes that they may not assume office before being confirmed by the Senate of Puerto Rico—. ¹⁵⁵ This constitutes an explicit prohibition on making recess appointments to the Supreme Court. Such is not the case in the Federal Government where, as discussed, there exist precedent of recess appointments to the Supreme Court.¹⁵⁶ Also, the Governor has not been afforded the power to vacate or remove from their offices sitting Supreme Court justices. Therefore, appointments can only be made when a vacancy exists, which may arise due to death, retirement, resignation or impeachment of a sitting justice.

The Constitution of Puerto Rico, contrary to the Constitution of the United States, does make reference to the composition of its Supreme Court. Explicit mention is made regarding the number of members and the titles to be held among them by stating that “[t]he Supreme Court . . . shall be composed of a Chief Justice and four associate justices.”¹⁵⁷

The Constitution makes no distinction among the court's members regarding their judicial powers as Supreme Court justices. They share the same power as to deciding which cases will be considered by the court, and their votes have the same weigh in deciding such cases. But the constitutional disposition draws

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ P.R. CONST. art. V, § 8

¹⁵⁶ Rutkus, *supra* note 21, at 2.

¹⁵⁷ P.R. CONST. art. V § 3.

a basic distinction among them: all five justices are members of the court, but four will receive the title of associate justice and only one will hold the title of chief justice. However, distinction among the justices, not only lies in their titles but on their substantive responsibilities and powers. Contrary to the Federal Constitution, the Constitution of Puerto Rico explicitly outlines and assigns powers that will be carried out by the court as a whole or by the chief justice individually. The court, as a whole, has been assigned with the power to: (1) change the number of justices that will conform its membership;¹⁵⁸ (2) establish the rules under which the court will function;¹⁵⁹ (3) declare laws unconstitutional;¹⁶⁰ (4) adopt rules of evidence and of civil and criminal procedure;¹⁶¹ (5) adopt rules for the administration of the courts,¹⁶² and, (6) to remove judges from their posts in inferior statutory courts.¹⁶³ In all these constitutional dispositions, explicit reference is made to the *Supreme Court* as the *holder* of each of the aforementioned powers.¹⁶⁴

On the other hand, the chief justice has been exclusively afforded with the power to: (1) chair the board that revises senatorial and representative districts;¹⁶⁵ (2) preside over a trial of impeachment against the Governor,¹⁶⁶ and (3) direct the administration and appoint an administrative director of the courts.¹⁶⁷ In all these constitutional dispositions, explicit reference is made to the *chief justice* as the holder of such powers.¹⁶⁸

158 “The number of justices may be changed only by law upon request of the Supreme Court.” *Id.*

159 “The Supreme Court shall sit, in accordance with rules adopted by it, as a full court or in divisions composed of not less than three justices.” *Id.* § 4.

160 “No law shall be held unconstitutional except by a majority of the total number of justices of which the Court is composed . . .” *Id.*

161 “The Supreme Court shall adopt for the courts rules of evidence and of civil and criminal procedure . . .” *Id.* § 6.

162 “The Supreme Court shall adopt rules for the administration of the courts.” *Id.* § 7.

163 “Judges of the other courts may be removed by the Supreme Court for the causes and pursuant to the procedure provided by law.” *Id.* § 11.

164 *Id.* art. V (emphasis added).

165 Article III, section 4 of the Constitution of Puerto Rico states:

In the first and subsequent elections under this Constitution the division of senatorial and representative districts as provided in Article VIII shall be in effect. After each decennial census beginning with the year 1960, said division shall be revised by a Board composed of the Chief Justice of the Supreme Court as Chairman and of two additional members appointed by the Governor with the advice and consent of the Senate.

Id. art. III, § 4.

166 “The Chief Justice of the Supreme Court shall preside at the impeachment trial of the Governor.” *Id.* § 21.

167 “The Chief Justice shall direct the administration of the courts and shall appoint an administrative director who shall hold office at the will of the Chief Justice.” *Id.* art. V, § 7.

168 *Id.* art. III, §§ 4, 21, art. V, § 7 (emphasis added).

Since 1952, the Governor has been in charge of filling all chief justice vacancies. The Governor has filled most of these vacancies by nominating a sitting associate justice to become chief justice.¹⁶⁹ Since the approval of the Constitution of Puerto Rico, there have been ten chief justices of the Supreme Court of Puerto Rico.¹⁷⁰ Among those ten, eight were serving as sitting associate justices before being appointed chief justice.¹⁷¹ Regardless of the option the Governor finally decided on, these nominations have always been submitted to the Senate of Puerto Rico for its advice and consent.¹⁷²

C. Questioning the Governor's Constitutional Power to Appoint the Chief Justice

During recent times, several members of the legal profession in Puerto Rico have publicly questioned if the Constitution really affords the Governor the power to appoint the chief justice. This has sparked a public, yet informal, constitutional debate regarding upon whom resides the power to select the chief justice of the Supreme Court of Puerto Rico. In summary, the contrasting views and the legal arguments that sustain each side are the following: supporters of what has been the prevailing constitutional interpretation argue that the mandate contained in article V, section 8 of the Constitution of Puerto Rico, which affords the Governor power to appoint all judges, necessarily carries the power to appoint the chief justice of the Supreme Court; on the other hand, detractors

169 Under the Constitution of Puerto Rico only three chief justices have been appointed without being at that time a sitting associate justice; these were: Luis Negrón Fernández, appointed chief justice on 1971 by Governor Ferré; José Trías Monge, appointed chief justice in 1974 by Governor Hernández Colón; and, Victor M. Pons Nuñez, appointed chief justice in 1985 by Governor Hernández Colón. SERRANO GEYLS, *supra* note 123, 758-59. It is important to clarify that Luis Negrón Fernández served two separate terms as chief justice. Originally, in 1948, President Truman appointed Luis Negrón Fernández to hold office as associate justice of the Supreme Court of Puerto Rico. Later, in 1957, while serving as associate justice, Governor Muñoz Marín appointed him chief justice; Luis Negrón Fernández served as such until his retirement in January 1971. However, in June 1971, Governor Ferré once again appointed him chief justice of the Supreme Court of Puerto Rico.

170 These are: A. Cecyl Syder, Luis Negrón Fernández, Jaime Sifre, Pedro Pérez Pimentel, José Trías Monge, Victor M. Pons Nuñez, José Andreu García, Miriam Naveira Merly, Federico Hernández Denton and Liana Fiol Matta. *Biografías Jueces Presidentes [Biographies of Chief Justices]*, LA RAMA JUDICIAL DE PUERTO RICO, <http://ramajudicial.pr/sistema/supremo/presidentes/index.htm> (last visited Apr. 2, 2015).

171 The eight sitting associate justices who were later appointed chief justice by the Governor of Puerto Rico were: A. Cecil Snyder, appointed chief justice in 1953 by Governor Muñoz Marín; Luis Negrón Fernández, appointed chief justice in 1957 by Governor Muñoz Marín; Jaime Sifre, appointed chief justice in 1957 by Governor Muñoz Marín; Pedro Pérez Pimentel, appointed chief justice in 1973 by Governor Hernández Colón; José Andreu García, appointed chief justice in 1992 by Governor Hernández Colón; Miriam Naveira Merly, appointed chief justice in 2003 by Governor Calderón; Federico Hernández Denton, appointed chief justice in 2004 by Governor Calderón; and, Liana Fiol Matta, appointed chief justice in 2014 by Governor García Padilla. SERRANO GEYLS, *supra* note 123, 758-59; *Biografías Jueces Presidentes [Biographies of Chief Justices]*, LA RAMA JUDICIAL DE PUERTO RICO, <http://ramajudicial.pr/sistema/supremo/presidentes/index.htm> (last visited Apr. 2, 2015).

172 See *supra* notes 169-172.

of such view argue that the constitution does not explicitly afford the Governor the power to appoint the chief justice, that the power to select the chief justice resides upon the members of the court by virtue of article V, section 7 of the Constitution of Puerto Rico, which affords the court power to adopt rules for the administration of the courts and, finally, that the appointment of the chief justice by the Governor infringes upon judicial independence and the separation of powers.¹⁷³

Our previous analysis of the relevant constitutional and statutory provisions of the federal judiciary, the states of the Union, and the District of Columbia serves to illustrate the fact that numerous methods for the selection of chief justices exist and are fit within the American legal system. This analysis, however, does not seek to answer a hypothetical question aimed at evaluating if any of the alternate methods would be viable pursuant to the Constitution of Puerto Rico. The question this article seeks to answer is, what does the Constitution of Puerto Rico mandate in terms of the chief justice's selection process: a gubernatorial appointment or an election to be held among the members of the court? This controversy has never been formally raised by the court or been brought before it.

IV. CHIEF JUSTICE OF PUERTO RICO'S SUPREME COURT: A GUBERNATORIAL APPOINTMENT OR A COURT ELECTION?

A close examination of the relevant controlling dispositions of the Constitution of Puerto Rico, the intent of such dispositions according to the Constitutional Convention's Committee on the Judiciary Report, and the debates held within the Constitutional Convention, reveal that Puerto Rico's legal tradition regarding the appointment of Supreme Court justices has always been one favoring gubernatorial appointment. Our comparative analysis of the different methods for the selection of chief justices that exist within the American legal system necessarily leads us to the same conclusion. This conclusion is based on the following facts to be explained in detail. First, the plain text of the Constitution

¹⁷³ See Ramón L. Cortés Rosario, *Nombramiento del juez presidente, ¿facultad del Gobernador?*, EL VOCERO (Mar. 3, 2014, 4:00 AM), <http://elvocero.com/nombramiento-del-juez-presidente-facultad-del-gobernador/> (opinion column authored by the executive director of the Puerto Rico Lawyers Association questioning the Governor's power to appoint the chief justice); *Romero Barceló insta a jueces a escoger al presidente del Supremo*, EL NUEVO DÍA (Mar. 20, 2014, 5:10 PM), <http://www.elnuevodia.com/romerobarceloinstaajuecesaescoegeralpresidentedel-supremo-1735943.html> (article discussing a letter sent by former Governor Romero Barceló to current Supreme Court justices urging them to exercise what he believes is their constitutional power to elect among themselves the chief justice); *Quién escoge al juez presidente*, EL NUEVO DÍA (Mar. 28, 2014), <http://www.elnuevodia.com/columna-quienescogealjuezpresidente-1740873.html> (opinion column defending the Governor's power to appoint the chief justice); H.R. Res. 896 of March 20, 2014, 3rd Ord., Sess. 17th Legis. Assemb. (resolution filed by a minority member of the House of Representatives of Puerto Rico questioning if the Governor has been afforded constitutional power to appoint the chief justice and asking the House Judiciary Committee to analyze and evaluate upon whom such constitutional power resides).

affords the Governor power to appoint all judges, which necessarily carries the power to appoint the chief justice. This has been the prevailing legal interpretation for over sixty years.¹⁷⁴ The delegates to the Constitutional Convention intended to preserve what had been the legal tradition in Puerto Rico since the beginning of the twentieth century —affording the power to select the chief justice to the executive branch.¹⁷⁵ Secondly, the Constitution of Puerto Rico does not provide a mandate with the characteristics found in the constitutions or statutes of the states of the Union in which the members of the court elect the chief justice. In all twenty-two states of the Union in which the members of the court elect the chief justice, such power has been afforded through a direct, explicit, and unequivocal constitutional or statutory mandate to that effect. Not one of these courts has claimed or interpreted to hold such power by virtue of a constitutional mandate affording that court the power to adopt rules for the administration of courts. Thirdly, the framers of the Constitution of Puerto Rico pondered other alternate methods of selection that have been implemented in the states of the Union and decided not to adopt them.¹⁷⁶ Moreover, the selection of the chief justice through a gubernatorial appointment does not infringe upon judicial independence and the separation of powers, and was expressly deemed by the framers as the most suitable alternative to preserve judicial independence.

A. Power Has Been Afforded to the Governor to Appoint the Chief Justice

The Constitution of Puerto Rico provides the Governor with a sweeping mandate that can only be interpreted as affording him power to appoint all judges, both to the constitutionally-created Supreme Court of Puerto Rico and the inferior statutory courts. Since such power is to be shared with the Senate of Puerto Rico: no one —whether it is a new member of the Supreme Court or a sitting associate justice— can become chief justice unless he or she is nominated as such by the Governor, confirmed by the Senate of Puerto Rico, and finally formally appointed by the Governor as chief justice. The constitutional powers explicitly granted to the Supreme Court as a whole and to the chief justice individually, establish the substantive differences that sustain and validate the interpretation that the chief justice receives and holds a different appointment to that of the associate justices. Two former nominations for chief justice of the Supreme Court of Puerto Rico support and validate this reasoning.

In 2003, with the announcement of the retirement of then Chief Justice José A. Andreu Garcia, a vacancy for such office surfaced.¹⁷⁷ The then Governor, Sila M. Calderón, nominated Ferdinand Mercado Ramos as his successor.¹⁷⁸ Such

¹⁷⁴ See *supra* notes 169-173.

¹⁷⁵ See *supra* notes 129, 132, 136, 141-145.

¹⁷⁶ See *supra* notes 275-278.

¹⁷⁷ RIVERA, *supra* note 117, 254.

¹⁷⁸ *Id.* at 254-55.

nomination encountered great opposition from political leaders, elected officials, and the public.¹⁷⁹ The nomination did not have enough votes in the Senate to be confirmed.¹⁸⁰ The Governor decided to withdraw Mercado's nomination as chief justice, and to re-nominate him but now as associate justice.¹⁸¹ At that time, no vacancy for associate justice existed or was expected to exist, for which the Governor decided to once again withdraw the nomination and re-nominate Mercado as chief justice.¹⁸²

Another example that sheds light on the extent of the power to appointment judges that was desired to be provided to the Governor by the Constitution is the appointment of A. Cecil Snyder as chief justice. His appointment presented a very unique scenario: A. Cecil Snyder was appointed as associate justice by President Roosevelt in 1942 by virtue of the President's power to appoint Supreme Court justices pursuant to the organic acts.¹⁸³ Then, in 1953, Governor Luis Muñoz Marín, pursuant to the constitutional powers granted to the Governor by the newly enacted Constitution of Puerto Rico, appointed A. Cecil Snyder as chief justice.¹⁸⁴ A question arose, not in terms of whether the power to select the chief justice was held by the Governor, but whether the change of office was to be considered: (1) a mere promotion, with no additional requirements, or (2) a formal appointment, requiring a new gubernatorial nomination, senatorial confirmation, and, final formal appointment by the Governor.¹⁸⁵ It was decided that by virtue of article V, section 8 of the Constitution of Puerto Rico, senatorial confirmation was required and, therefore, a new appointment process was to be carried out.¹⁸⁶

B. The Constitution Does Not Afford Power to the Supreme Court to Elect the Chief Justice

The Constitution of Puerto Rico affords the Governor a sweeping mandate to appoint all judges and does not afford the members of the Supreme Court power to elect among them the chief justice. Even if the method of selecting the chief justice through a court election has been widely implemented by twenty-two states of the Union, it cannot be reasonably argued that the Constitution of Puerto Rico provides such method of selection. As established previously in the analysis, the most common trait shared by the constitutions or statutes of these

179 *Id.* at 255.

180 *See id.* at 256.

181 *Id.*

182 *Id.* Mercado was never appointed to the court. His second nomination as chief justice was withdrawn due to strong opposition.

183 SERRANO GEYLS, *supra* note 123, at 758.

184 RIVERA, *supra* note 117, at 134.

185 *Id.*

186 *Id.*

twenty-two states in which the chief justice is selected through a court election, is that they all contain a very clear and direct mandate that explicitly affords the members of the court the power to elect the chief justice. More specifically, their constitutions or statutes share the following characteristics: (1) specific reference to the state supreme court as the exclusive recipient of the power to elect the chief justice; (2) explicit mention of the chief justice as the only official that can be elected by the justices of the supreme court; (3) no post-selection confirmation requirement, another government branch's subsequent confirmation, following court election, is not required; (4) limitation of pool of candidates, only members of the court may be elected as chief justice, and lastly, (5) use of clear and imperative language, all of the twenty-two states' constitutions or statutes utilize imperative expressions (*e.g.*, *shall select*, *shall be selected*, *shall elect*, *shall be elected*, *shall choose*, *shall be chosen*, *shall designate*, *shall appoint from the members*) to provide a commanding and unequivocal mandate by virtue of which power is afforded exclusively to the members of the court to elect the chief justice.¹⁸⁷ Not one of these characteristics is found in the dispositions of the Constitution of Puerto Rico that address the appointment of judges.

Nonetheless, it is important to point out that such constitutional design, affording to the members of one branch of government the power to elect among themselves the leader of that branch, was not foreign or unknown to the framers of the Constitution of Puerto Rico. As a matter of fact, the members of both of Puerto Rico's legislative chambers are afforded the power to elect among themselves its leader (*i.e.*, President of the Senate of Puerto Rico, or Speaker of the House of Representatives of Puerto Rico). Such power has been afforded explicitly following a design almost identical to the one used within the states that select their chief justice through a court election. Specifically, article III of the Constitution of Puerto Rico states that "[t]he Senate shall elect a President and the House of Representatives a Speaker from among their respective members."¹⁸⁸ Not only is it undisputable that the Constitution of Puerto Rico does not provide an explicit mandate affording the Supreme Court power to elect among its members the chief justice, but, as we will see, such power was never intended to be provided pursuant to any other constitutional disposition.

C. *Judicial Independence and Separation of Powers*

Those who oppose the constitutional interpretation that affords the Governor with the power to appoint the chief justice, and favor the court election mechanism of selection, argue that the court election mechanism is necessary to preserve judicial independence and the separation of powers.

Despite the Constitution of Puerto Rico not containing an explicit reference to *judicial independence*, the concept is implicitly present throughout its text,

¹⁸⁷ See *supra* notes 64-71.

¹⁸⁸ P.R. CONST. art. III, § 9.

particularly within the relevant sections of article V, which establishes the Commonwealth's judiciary branch.¹⁸⁹ A close examination of the Constitutional Convention's Committee on the Judiciary Report, the debates held by the delegates to the convention regarding the judiciary, and the relevant sections of the Constitution of Puerto Rico, confirm the strong interest held by the Commonwealth's framers in creating a robust and independent judiciary which upheld the principle of judicial independence. In general, the Constitution of Puerto Rico achieved this objective by: (1) securing the continuance and stability of the court as an institution;¹⁹⁰ (2) affording the judicial branch with limited rule-making powers (*i.e.*, to regulate certain legal procedural matters and all of the Commonwealth courts' administrative and internal endeavors);¹⁹¹ (3) establishing safeguards for all judges, regarding their salaries, tenure and retirement plans,¹⁹² and finally, (4) by providing a method of selection of judges, which in accordance to what had been Puerto Rico's legal tradition, was determined by the framers to be the most suitable to preserve judicial independence.¹⁹³

Since the very conception of the Constitution of Puerto Rico, the matter of judicial independence was deemed one of utmost importance. During the Constitutional Convention's inaugural session, the chief justice of the Supreme Court of Puerto Rico, Roberto H. Todd—who served as Interim Secretary—was the first to address the recently elected delegates.¹⁹⁴ Chief Justice Todd seized this opportunity to urge the delegates of the Convention to uphold within the Constitution what he considered to be “the cornerstone of the American democratic system . . . the concept of judicial independence.”¹⁹⁵ He continued by stating that “such principle should be guaranteed by the Constitution in a manner that no one can question it.”¹⁹⁶ Todd emphasized that judicial independence was not synonymous to a complete separation between the three branches of government. Notwithstanding, he stressed that judicial independence was to coexist with the “interdependence among the three branches of government . . . by establishing what in our constitutional system is known as *checks and balances*.”¹⁹⁷

On December 3, 1951, the Report of the Committee on the Judiciary was the first committee report to be presented to the Convention's delegates.¹⁹⁸ The committee chairman, Ernesto Ramos Antonini, was the first to address the dele-

189 *Id.* art. V.

190 *Id.* art. V, §§ 1-3.

191 *Id.* art. V, §§ 3-4, 6-7.

192 *Id.* art. V, §§ 10 & 13, art. VI, §§ 10-11.

193 *Id.* art. V, § 8.

194 1 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 8 (translation by the author).

195 *Id.* (translation by the author).

196 *Id.* (translation by the author).

197 *Id.* (translation by the author).

198 *See id.* at 450, 456.

gates and provided a substantive overview of the proposal contained in the report.¹⁹⁹ He opened his remarks by stating that, in order to provide for the efficient organization and functioning of the judiciary branch, judicial independence had to be guaranteed by the constitution.²⁰⁰ He then explained the ten traits of the proposed article on the judiciary that sought to guarantee judicial independence.²⁰¹ These traits, which will be discussed below, pertained to different sections of the judiciary committee's proposed article, and today form part of the Constitution of Puerto Rico.

The establishment of the courts of Puerto Rico as a unified judicial system, in terms of jurisdiction, operation and administration, was the first trait mentioned by Ramos Antonini. On this matter, he stated that the purpose of such proposition was to provide an efficient organization and functioning of the judicial branch.²⁰² Before the ratification of the Constitution, the Supreme Court of Puerto Rico was a statutory court whose existence was guaranteed by virtue of a congressional act.²⁰³ Thus, its existence relied on the will and legislative discretion of Congress. By recommendation of the Convention's Committee on the Judiciary, the Supreme Court was not only granted constitutional standing, but was also deemed Puerto Rico's court of last resort and afforded powers as to the judicial branch's administration.²⁰⁴ As such, the Constitution assured that neither the legislative or executive branches undermined the role of the Supreme Court within the Commonwealth's republican government.

Safeguards for judges were also promoted as a means to preserve judicial independence. Before the approval of the Constitution, the law did not afford Supreme Court justices a fixed term of tenure and their appointment to office was held at the will and discretion of the President of the United States.²⁰⁵ The Committee on the Judiciary considered, and later rejected, the possibility of transferring such extensive power to the Governor.²⁰⁶ However, the members of the Committee recommended that life tenure should be afforded to Supreme Court justices as a means to assure judicial independence.²⁰⁷ Moreover, a prohibition against diminishing the compensation of all judges was proposed and accepted,²⁰⁸ and, furthermore, complemented with the establishment of a re-

199 See *id.* at 452.

200 See *id.*

201 See *id.* at 452-56.

202 See *id.* at 452.

203 Foraker Act, 31 Stat. 77, 76 § 33 (1900); Jones Act, 39 Stat. 951, 106 § 40 (1917).

204 See P.R. CONST. art. V, §§ 1, 3, 7.

205 See 1 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, 452.

206 See *id.*

207 Presently, Supreme Court justices are required to retire when they reach seventy years of age.

208 See 1 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 453.

tirement plan system for all judges.²⁰⁹ Another measure taken to preserve judicial independence is one related to removal —Supreme Court justices can only be removed from office through the process of impeachment as established by the Constitution of Puerto Rico—. ²¹⁰ On the other hand, lower court judges can only be removed by the Supreme Court, and not by the executive or legislative branches.²¹¹ In order to further secure judicial independence, judges are banned from participating in political activities while holding office.²¹²

In order to further strengthen judicial independence, the Constitution — based on the Committee on the Judiciary's recommendation— grants the Supreme Court of Puerto Rico, to a limited extent, with a power that usually belongs to the legislative branch: rule-making power. The rule-making power afforded to the Supreme Court of Puerto Rico, has been narrowly construed and can only be exercised in four very specific instances, which are explicitly laid out in the Constitution. First, the Supreme Court is afforded with the power to adopt rules for the administration of the courts.²¹³ Before the Constitution of Puerto Rico came into force, the solicitor general administered the courts, but the Committee on the Judiciary asserted that “[t]he executive branch should not intervene in something that is patently a judicial affair” and, therefore, such power should reside in the Supreme Court.²¹⁴ Second, the Supreme Court is granted the power to establish rules to determine if the court shall sit either *en banc* or in panels of no less than three justices.²¹⁵ Third, the Supreme Court of Puerto Rico has the power to adopt the rules of evidence, and of civil and criminal procedure that shall be applied.²¹⁶ Although before the approval of the Constitution the power to adopt the aforementioned rules had been statutorily conceded to the court, the Supreme Court was now given constitutional authority to do so pursuant to the Committee on the Judiciary's recommendation.²¹⁷ Finally, the Constitution of Puerto Rico provides the legislative branch with the power to alter the composition of the Supreme Court of Puerto Rico.²¹⁸ Nonetheless, the Constitution limits the legislature's discretion to exercise such power by estab-

²⁰⁹ *See id.*

²¹⁰ P.R. CONST. art. V, § 11.

²¹¹ *See* 1 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 454.

²¹² *Id.*

²¹³ *See* P.R. CONST. art. V, § 7.

²¹⁴ 4 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 2613 (translation by the author).

²¹⁵ *See* P.R. CONST. art. V, § 4.

²¹⁶ *Id.* § 6. Such procedural rules, “shall not abridge, enlarge or modify the substantive rights of the parties.” *Id.*

²¹⁷ *See* 4 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 2612.

²¹⁸ *See* P.R. CONST. art. V, § 3.

lishing that the legislative assembly can raise or lower the number of justices only upon the Supreme Court's request.²¹⁹ The Supreme Court is thereupon provided certain control over the alteration of its composition, so that neither the legislature nor the executive can raise or lower the court's composition in order to influence its decisions.²²⁰ This distribution of rule-making powers among the Supreme Court of Puerto Rico and the other branches serves as an example of the interdependence that Chief Justice Todd recommended the delegates of the Convention adopt as part of the Commonwealth's design.

Finally, in terms of the appointment of judges, the Committee on the Judiciary recommended that, the Constitution retain the method of selection that was traditionally used in Puerto Rico's judicial system —gubernatorial appointment—. ²²¹ The Committee's recommendation was issued after a careful evaluation of other different methods of judge selection such as, for example, the selection of judges through a general election. This particular selection method was discarded by the Committee because of what they considered to be the consensus opinion among authorities in that matter: that an election of this nature would expose judges to "undesirable political influences," instead of protecting judicial independence.²²² Likewise, different methods of appointment in which a judicial commission would intervene were also considered by the Committee, as well as the "the [merit-based] system which had been sponsored by the American Bar Association and adopted in Missouri."²²³

As discussed above, before the approval of the Constitution, the President would nominate a candidate to hold the office of chief justice, the U.S. Senate would evaluate and confirm the President's nominee, and only after that, would the President be authorized to formally appoint his nominee. This was the process followed regardless of whether the candidate for chief justice not a member of the court or a sitting associate justice.

The constitutions of Maine, Massachusetts, New Jersey, Delaware, and New Hampshire inspired the proposed section regarding the appointment of judges by the Governor.²²⁴ The first four of these constitutions provide that gubernatorial appointment was the method of selection of their respective chief justices.²²⁵ Among these four, the mandates contained in the constitutions of Massachusetts

219 *Id.*

220 See 1 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 455.

221 4 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 2610 (translation by the author).

222 *Id.* (translation by the author).

223 *Id.* (translation by the author). This system came to be known as the *Missouri Plan*. Under such system judges are selected based on merit, rather than on political affiliation, by a nonpartisan judicial commission that submits a list of candidates to the Governor from which nominees are picked.

224 *Id.* at 2611.

225 See *supra* notes 37-38.

and Maine have a design very similar to the one found in the Constitution of Puerto Rico.²²⁶ It is to note that the appointment method of Supreme Court Justices found on the Federal Constitution was modeled on that of the Constitution of Massachusetts, which provided for a nomination by the executive and confirmation by the senate.²²⁷ Under the Constitution of Massachusetts, the Governor is afforded with a sweeping mandate to appoint all judges in that jurisdiction.²²⁸

The Committee on the Judiciary concluded its discussion regarding the selection of judges reiterating that, since it has been “generally accepted that the method of selection through an appointment is the most suitable, the Committee finds no reason to alter the Puerto Rican tradition on the matter.”²²⁹

As presented before, both the Committee of the Judiciary and the delegates to the Convention expressed great concern about providing the judiciary branch with all the provisions necessary to guarantee judicial independence, and ultimately, ensure the separation of powers. Neither the Committee on the Judiciary’s report, the committee chairman in his remarks addressing the traits that the proposed design of the judiciary offered to preserve judicial independence, nor the delegates to the Convention, considered necessary to provide the members of the Supreme Court with the power to elect the chief justice as means to preserve judicial independence. If the clear intention was to preserve the Puerto Rican tradition on the matter, it can only be concluded that the appointment of the chief justice by the Governor was not considered a threat to judicial independence or the separation of powers. Even at the federal level, the minority that has questioned the President’s constitutional authority to appoint the Chief Justice has unequivocally expressed that:

[O]ne cannot say that the existing method of selecting a Chief Justice violates the constitutional doctrine of separation of powers. When faced with allegations that one branch has intruded too far into the domain of another, courts place great weight on whether the practice at issue has deep roots in the nation’s history—and the federal government has followed the same method of choosing chief justices for more than two centuries. Moreover, the Supreme Court has emphasized that the separation-of-powers doctrine does not require the three branches to remain totally distinct from one another. Rather, it demands that each branch refrain from interfering with the “constitutionally assigned functions” of its counterparts. History has demonstrated that allowing the President—acting with the advice and consent of the Senate—to choose the individual who will serve as Chief Justice does not hinder the Court’s ability to perform its core, adjudicatory functions.

226 See *supra* notes 42-43.

227 John Adams, *Architect of American Government*, MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/court-info/sjc/edu-res-center/jn-adams/john-adams-architect-of-american-government.html> (last visited May 5, 2015).

228 See *supra* notes 37, 47.

229 4 DIARIO DE LA CONVENCION CONSTITUYENTE [DEBATES OF THE CONSTITUTIONAL CONVENTION], *supra* note 116, at 2611 (translation by the author).

[T]he separation-of-powers doctrine does not forbid the existing method of selecting a Chief Justice²³⁰

The separation of powers, as established and guaranteed by the Constitution of Puerto Rico, does not require complete separation between the three branches of governments.²³¹ Moreover, the appointment of the chief justice by the executive branch has been embedded in Puerto Rican legal tradition for over 100 years. Initially, by virtue of three different congressional acts, enforced from 1898 to 1952, which afforded the President of the United States the power to appoint the chief justice of the Supreme Court of Puerto Rico. Later, by virtue of the Constitution of Puerto Rico, which has been consistently interpreted to afford such power to the Governor of Puerto Rico.

CONCLUSION

Within the American legal tradition the exercise of the power to select the chief justice in courts of last resort is limited and guided by the boundaries set forth in the United States Constitution. Different methods of selection have been sanctioned within the Federal Government, the states of the Union, the District of Columbia, and Puerto Rico. Throughout such jurisdictions, this power has been validly afforded either to: the leader of the executive branch; the members of one or more of the chambers that form the legislative branch; the justices of the court; independent judicial entities, such as a judicial nominating commission; and, the general public through a partisan or non-partisan election. All such methods carry distinctive characteristics that make them unique, but even so, they all share one common trait: such power is held only by the entity to which the constitution or a particular statute explicitly affords it. The mandates contained in these constitutional and statutory dispositions are carved out in a way that leaves no room for ambiguity or misunderstanding as to who holds the power to select the chief justice. This has the purpose of providing stability, preventing arbitrariness or improper influence from the political branches, and protecting society from *itself*.

When analyzing who holds power to name the Supreme Court of Puerto Rico's chief justice, emphasis must be given to the text of the Constitution, the intent of its framers, and the Puerto Rican legal tradition up until the Constitution's approval. Our analysis leads us to conclude that the Constitution of Puerto Rico grants the Governor the power to appoint the chief justice, and, furthermore, that there was never any interest in implementing any other chief justice selection method in Puerto Rico. The Constitution of Puerto Rico affords the Governor a sweeping mandate to appoint *all* judges, which necessarily includes

²³⁰ Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or Job for the Court?*, 22 J.L. & POL. 231, 266-67 (2006) (footnote omitted) (citation omitted).

²³¹ *Nieves Huertas v. ELA I*, 189 DPR 611, 619 (2013) (non-precedent establishing judgment); *Misión Ind. P.R. v. J.P.*, 146 DPR 64, 89. (1998).

the power to appoint the chief justice of the Supreme Court of Puerto Rico. Likewise, an examination of Committee on the Judiciary Report and the debates that took place in Puerto Rico's Constitutional Convention demonstrates that the delegates' intent was to preserve Puerto Rican legal tradition and afford such power to the Governor. Moreover, the examination reveals that the selection of the chief justice by a court election was never considered an indispensable or necessary safeguard to preserve judicial independence.

The delegates of the Constitutional Convention concluded that the previously discussed chief justice selection method, in conjunction to the other article V provisions, served as sufficient safeguards of judicial independence and separation of powers. The Committee on the Judiciary did not consider that a change in the selection process of the chief justice, from gubernatorial appointment to a court election, was a necessary safeguards. As a matter of fact, they decided not to adopt court election or other alternate methods for the selection of chief justice. Moreover, a review of the methods implemented in the states of the Union draws no reasonable inference that judicial independence may only be achieved if the selection of the chief justices is held through a court election.

The Constitution of Puerto Rico provides a method of selection of its chief justice through which a candidate requires gubernatorial nomination, the advice and consent of the Senate of Puerto Rico, and finally, a formal appointment by the Governor. A conclusion to the contrary, interpreting that the Constitution provides a different method of selecting the chief justice, would be contrary to its text and spirit, and would lead to a transgression of the boundaries set forth by the Constitution of Puerto Rico in regards to this matter.