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SECOND CLASS CITIZENS: THE CASE AGAINST UNEQUAL MILITARY HEALTHCARE BENEFITS FOR PUERTO RICAN VETERANS

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In determining the rights and immunities of citizens and persons subject to the jurisdiction of the United States, the status of the land in which they are located should be of secondary importance to the status of those individuals as citizens or persons.¹

INTRODUCTION

Military service in Puerto Rico has a long and proud tradition. Aside from being a source of employment, service is one way to demonstrate loyalty and patriotism to the United States. In 1917, after the grant of American citizenship, about eight thousand Puerto Rican men were drafted into the United States army, and hundreds of thousands of dollars were donated by the Puerto Rican people to support the war effort during World War I.² Since then, many of the men and women residing in Puerto Rico have served, and some families have made the ultimate sacrifice. One such family is that of Jeffrey and Amanda Rada Morales. Mr. Rada Morales was killed in Iraq in 2008 and left behind his wife Amanda and their two young children.³ The Rada Morales family currently resides in the continental United States, but if they were to move back to Puerto Rico in order to be closer to their families in the aftermath of Mr. Rada Morales' death, then there would be certain realities they would face.⁴ One such reality is that they would lose their survivor medical benefits under TRICARE Prime—the gold standard of military healthcare—and be forced to enroll in a less comprehensive, more costly insurance plan, solely because they made a choice to live in Puerto Rico.⁵ Another

* J.D. Candidate, Benjamin N. Cardozo School of Law, 2010. The author would like to thank the editorial staff of the Cardozo Journal of Law and Gender for their enduring patience and support. This Note is dedicated to the people of Puerto Rico.

¹ JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 59 (Universidad de Puerto Rico 1985).

² HIMILCE NOVAS, *EVERYTHING YOU NEED TO KNOW ABOUT LATINO HISTORY* 145 (Plume 2d ed. 2007).

³ Robert Friedman, *Puerto Ricans Get Less Military Benefits Than Other U.S. Citizens*, SCRIPPS HOWARD NEWS SERVICE, July 11, 2008, available at <http://www.scrippsnews.com/node/34653>.

⁴ *Id.*

⁵ *Id.*

reality is that once back on the island of Puerto Rico (“Island”), they may not have the same access to healthcare.

United States citizenship is not based upon where an individual chooses to live within the United States and its territories.⁶ Puerto Rico has been a territory of the United States since 1898,⁷ and its residents have been granted U.S. citizenship by birth since 1917.⁸ With this citizenship, every American should hold equal rights and benefits as a privilege of their citizenship⁹ regardless of where they choose to reside within the United States. However, in contrast to this principle of equal treatment, those individuals who reside on the Island do not always receive equal treatment by the federal government. As a result, Puerto Rico’s one hundred and eleven year relationship with the United States as a territorial possession has developed in a way that negatively impacts the men, women and children who reside on the Island¹⁰ and creates a subgroup of second-class citizens who are not afforded the same benefits as their counterparts within the fifty states.

This Note will explore the link between the nativist attitudes prevalent in the United States at the time of Puerto Rico’s acquisition and the United States’ ensuing unequal treatment of Puerto Rico as a territorial possession as it has manifested in this instance through the ineligibility of certain groups residing in Puerto Rico to qualify for TRICARE Prime. Furthermore, this Note will argue against this policy and discuss ways that families may also have to pay the price for simply choosing to call the Island their home.

Part II of this Note will briefly introduce Puerto Rico’s colonial history with the United States beginning in 1898, when Puerto Rico was acquired as a spoil of war through the Treaty of Paris at the end of the Spanish-American war. At the time, prevalent nativist and racist attitudes encouraged the federal government to hold Puerto Rico as an unincorporated territory instead of either granting it independence or accepting it as a new state. As a result of Puerto Rico’s lengthy political limbo, Puerto Ricans remained second-class citizens, a reality that has overshadowed Puerto Rico’s relationship with the United States until the present day. Part III will review Puerto Rico’s contribution to America’s various armed conflicts post-1917. Part IV then looks at the military’s healthcare program TRICARE,¹¹ and discusses the differences between TRICARE Prime—the fully-paid program that all American and Puerto Rican active duty soldiers and their families, as well as retired servicemen and their families are eligible for provided

⁶ U.S. CONST. art. XIV (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

⁷ TORRUELLA, *supra* note 1, at 23.

⁸ TORRUELLA, *supra* note 1, at 92.

⁹ U.S. Citizenship and Immigration Services, Citizenship, <http://www.uscis.gov/citizenship> (last visited Jan. 12, 2010).

¹⁰ Throughout this Note, all references to “Puerto Ricans” refer solely to those who reside in Puerto Rico, as opposed to Puerto Ricans who reside in one of the fifty states.

¹¹ TRICARE is not an acronym. It stands for a Triple Option Benefit Program.

they reside in the continental United States—and TRICARE Standard, the program that Puerto Ricans soldiers are forced to enroll in once they are no longer on active duty. Part V introduces the cost discrepancy between the healthcare plans for non-active duty servicemen and women and their families in Puerto Rico and in the continental U.S. Part VI builds off of Part V and discusses in more detail the negative impact this policy has on Puerto Rican families. Finally, Part VII evaluates the Department of Defense's reasons for this policy and provides counterarguments in favor of expanding TRICARE Prime to Puerto Rican retired veterans.

I. PUERTO RICO'S INCLUSION INTO THE UNITED STATES

Puerto Rico is essentially a modern day colony that has passed through one country's hands to another. Originally inhabited by the Taino Indians, Puerto Rico was "discovered" by Christopher Columbus on November 19, 1493.¹² In 1508, after remaining uninhabited by European settlers for fifteen years, Juan Ponce de Leon invaded Puerto Rico and set up the Island's first settlement on behalf of Spain.¹³ Puerto Rico remained under Spanish control until July 25, 1898, when American forces invaded the Island shortly after the outbreak of the Spanish-American war.¹⁴ The United States gained possession of Puerto Rico on December 10, 1898, with the signing of the Treaty of Paris at the end of the war.¹⁵ With this signing, Puerto Rico became a territory of the United States, and for the next two years was ruled under the direct control of the United States military.¹⁶

A. Territorial Beginnings

The relationship between the United States, Puerto Rico and its citizens at this time was unclear.¹⁷ The Treaty of Paris had ceded all rights of native born Puerto Ricans to Congress,¹⁸ in addition to physical possession of the island to the United States.¹⁹ A national debate, however, took place regarding whether the rights of the Constitution "followed by the flag" extended to the United States'

¹² Magaly Rivera, History of Puerto Rico, <http://welcome.topuertorico.org/history.shtml> (last visited Jan. 12, 2010).

¹³ *Id.*

¹⁴ Magaly Rivera, History of Puerto Rico: 1851-1899, <http://welcome.topuertorico.org/history4.shtml> (last visited Jan. 12, 2010).

¹⁵ *Id.*

¹⁶ Marisabel Bras, The Library of Congress, The Changing of the Guard: Puerto Rico in 1898, <http://www.loc.gov/rr/hispanic/1898/bras.html> (last visited Jan. 12, 2010).

¹⁷ Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 24 (2000).

¹⁸ *Id.* Article IX of the Jones Act states: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." 48 U.S.C. § 737 (1917).

¹⁹ *Id.*

newly acquired territories Puerto Rico and the Philippines.²⁰ A Harvard Law Review article written by Professor James Bradley Thayer lay on one side of this debate.²¹ Thayer's position was that it was within Congress' total discretion to decide whether to extend rights to these new territories since the Constitution did not automatically apply to Puerto Ricans and Filipinos.²² Thayer argued that "[t]here is . . . little in the text of the Constitution itself . . . to prevent us from holding that the Constitution does not cover the territories [I]t may well be thought that the territories are subject to the absolute power of Congress."²³

The Foraker Act, which was the United States' first step in determining its relationship to Puerto Rico, was passed shortly after in 1900,²⁴ and appears to follow Thayer's views.²⁵ This act provided for the replacement of military rule in Puerto Rico by establishing a civil government similar to that of the United States: one that had a governor, an appointed Supreme Court and an elected legislature.²⁶ The Foraker Act however, established that the residents of Puerto Rico were "citizens of Puerto Rico."²⁷ At this time, Puerto Rico was a colony, not a sovereign nation. By declaring them "citizens of Puerto Rico," its people were in a "no man's land" as citizens of no legally recognized country. Thus, Congress demonstrated through the Foraker Act that the U.S. Constitution did not automatically extend to the territories. Instead of being recognized as a part of the United States—the country that had ruled over Puerto Rico for two years—Puerto Ricans were given a civil government while simultaneously becoming citizens of no sovereign nation. This is one of the first examples of the United States treating Puerto Ricans as second-class citizens by extending certain "rights and privileges" to them, but without completely including Puerto Ricans in the United States legal context. This practice of keeping Puerto Rico at arm's length regarding its status in relation to the United States was soon taken up by the Supreme Court.

B. The Doctrine of Incorporation

The Insular cases, a series of Supreme Court cases decided from 1901 to 1922, began to define Puerto Rico's status and the United States' obligations to

²⁰ TORUELLA, *supra* note 1, at 25-30.

²¹ *Id.*; see also James Bradley Thayer, *Our New Possession*, 12 HARV. L. REV. 404, 480 (1899).

²² Thayer, *supra* note 21, at 480.

²³ *Id.*

²⁴ Library of Congress, Foraker Act (Organic Act of 1900), <http://www.loc.gov/tr/hispanic/1898/foraker.html> (last visited Jan. 12, 2010).

²⁵ TORUELLA, *supra* note 1, at 36. In draft form, the Foraker Act had a provision for U.S. citizenship, which Senator Foraker believed would illustrate that "Puerto Rico belonged to the United States" but would not serve to "incorporate Puerto Rico into the United States or grant Puerto Ricans the same political and civil rights as citizens in the Mainland." *Id.*

²⁶ Library of Congress, Foraker Act, *supra* note 24; see also The Foraker Act, 56 Cong., 31 Stat. 77 (1900); S. REP. 56-249, at 1, 14-15 (1900).

²⁷ The Foraker Act, *supra* note 26.

Puerto Ricans,²⁸ although with each holding, Puerto Rico's political limbo became more apparent. Throughout the various holdings of the Insular cases, the Supreme Court crafted a distinct concept to describe Puerto Rico's constitutional status: the unincorporated territory. In the first two cases, decided on the same day, the Court rendered two decisions that seem contradictory to each other on similar issues, thereby beginning a trend of classifying Puerto Rico as both "belonging to" and "not part of" the United States.

In the first case, *De Lima v. Bidwell*, the Court was faced with the issue of whether the United States could collect customs duties on sugar that was shipped from Puerto Rico to other parts of the United States.²⁹ The Court—in a 5 to 4 split—held that Puerto Rico was an island territory, specifically "Puerto Rico was not a foreign country within the meaning of tariff laws but a territory of the United States"³⁰ Thus, because Puerto Rico was not a foreign country for the purposes of U.S. tariff laws, it did not have to pay the customs duties other countries paid when exporting goods to the United States.³¹ Furthermore, were the United States to classify Puerto Rico as a foreign country, it still would be unable to collect tariffs absent the enactment of congressional legislation.³²

The second case, *Downes v. Bidwell*,³³ also dealt with the issue of whether duties could be imposed on goods—this time oranges—shipped from Puerto Rico into the United States mainland.³⁴ The plaintiff argued that under Article I, Section 8 of the U.S. Constitution, all duties were to be uniform throughout the U.S. and since duties were not paid when shipping goods from one part of the U.S. to another, there should be no duties when shipping from Puerto Rico to New York.³⁵ The Court, however, held that Puerto Rico was not a part of the United States for the purposes of Article I, Section 8, and duties could be constitutionally imposed.³⁶ The Court stated that "the Island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution"³⁷ While these two cases may seem to be at odds with each other, together they illustrate the Supreme Court's attempts to

²⁸ Malavet, *supra* note 17, at 25-26. There is some debate regarding whether only the nine cases decided between 1901-02 or cases decided from 1901-22 can be labeled as the "Insular cases." See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225 (1996). This Note will only discuss a selection of the Insular cases for illustrative purposes.

²⁹ *De Lima v. Bidwell*, 182 U.S. 1 (1901).

³⁰ *Id.* at 200.

³¹ See David MacMeekin, *Island Law – The Insular Cases*, available at <http://www.macmeekin.com/Library/Insular%20Cases.htm> (last visited Jan. 12, 2010); see also TORRUELLA, *supra* note 1, at 40.

³² MacMeekin, *supra* note 31.

³³ *Downes v. Bidwell*, 182 U.S. 244 (1901).

³⁴ *Id.* at 247.

³⁵ *Id.* at 248-49.

³⁶ *Id.* at 287.

³⁷ *Id.*

characterize Puerto Rico as a part of the United States at some times, and not of the United States at other times. These decisions created justifications that allowed a relationship that benefited the United States, while classification as a “territory appurtenant” kept Puerto Rico as a possession of the United States, but did not provide for complete inclusion of Puerto Rico into the U.S. legal sphere.

Justice White’s concurring opinion in *Downes* formally established the doctrine of incorporation and the concept of an unincorporated territory.³⁸ An incorporated territory is one in which the territory is considered a part of the United States—and is often used as a condition precedent to statehood—within which the U.S. Constitution applies in its entirety.³⁹ An unincorporated territory, on the other hand, is more a possession of the United States, to which Congress can apply as many or as little of the protections of the Constitution as it desires.⁴⁰ Treaties, according to Justice White, either provided for incorporation or they simply ceded the rights of a nation to Congress.⁴¹ He believed that the Treaty of Paris did not incorporate Puerto Rico into the United States, making it “not a foreign country in the international sense . . . but foreign to the United States in a domestic sense” as an unincorporated territory.⁴²

Thus, Puerto Rico was foreign and domestic at the same time. By classifying Puerto Rico as an unincorporated territory, it appears as if the Supreme Court was trying to reap the benefits of the United States’ new possession without having to accept the “ignorant and lawless brigands that infest Puerto Rico”⁴³ as fellow Americans. Nevertheless, these motivations and attitudes shaped and dictated the development of rights and privileges extended to—or withheld from—Puerto Rico both upon and in the aftermath of the grant of U.S. citizenship.

³⁸ TORRUELLA, *supra* note 1, at 53-56.

³⁹ Department of Insular Affairs, Definitions of Insular Area Political Organizations, http://www.doi.gov/oia/Islandpages/political_types.htm (last visited Jan. 21, 2010).

⁴⁰ *Id.*; see also *Downes v. Bidwell*, 182 U.S. 244, 282 (1901). In *Downes*, Justice Brown illustrates the motivation for creating the “unincorporated territory” by stating:

[i]t is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race

⁴¹ *Downes*, 182 U.S. at 339; TORRUELLA, *supra* note 1, at 55.

⁴² See *Downes*, 182 U.S. at 341.

Whilst in an international sense Puerto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

Id.

⁴³ Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899).

C. U.S. Citizenship

In 1917, the United States took what appeared to be a step forward in incorporating Puerto Rico into the United States. Congress passed the Jones Act, which among other things, granted U.S. citizenship to all Puerto Ricans.⁴⁴ While there is nothing definitive in the Jones Act's legislative history, there are two schools of thought as to why Puerto Ricans were granted U.S. citizenship.⁴⁵ The first is that there was a growing desire among Puerto Ricans themselves for statehood, autonomy or independence after the Foraker Act was passed.⁴⁶ Indeed, even within Partido Union, one of the two major political parties on the Island at the time, up to four different platforms regarding the Island's status could be identified.⁴⁷ These platforms included opposing independence and supporting autonomy, supporting autonomy with the eventual goal of independence, favoring independence but willing to settle for autonomy if independence was not possible and finally, annexation.⁴⁸

The Foraker Act itself inspired the desire for some type of change in Puerto Rico's status. While the Act created a civilian government, the governor was appointed by the president and was American.⁴⁹ The Foraker Act also served American interests by imposing high tariffs on Puerto Rican exports to the United States, thus protecting the American sugar industry, among other industries.⁵⁰ Thus, the grant of U.S. citizenship without the promise of statehood or greater autonomy was viewed suspiciously by some as an attempt to block anti-independence movements and maintain colonial status on the Island.⁵¹ Others took the position that there was no great desire among the people for U.S. citizenship, and its extension was a strategic decision made for the purpose of enlisting men to fight on behalf of the United States during World War I.⁵² Either way, Puerto Ricans were granted U.S. citizenship, a move that solidified Puerto Rico's status as belonging to the United States, and perhaps realized as Puerto Rico's Governor Arthur D. Yager's view that "the American flag will never be lowered in Puerto Rico."⁵³

⁴⁴ Jones Act, 64th Cong., 39 Stat. 461 (1917); see also Library of Congress, Jones Act, <http://www.loc.gov/tr/hispanic/1898/jonesact.html> (last visited Feb. 14, 2010); H.R. REP. 64-77, at 3 (1916)

⁴⁵ Jose A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 403-04 (1978).

⁴⁶ *Id.* at 403.

⁴⁷ CESAR J. AYALA & RAFAEL BERNABE, *PUERTO RICO IN THE AMERICAN CENTURY: A HISTORY SINCE 1898* 57 (University of North Carolina Press 2007).

⁴⁸ *Id.*

⁴⁹ NOVAS, *supra* note 2, at 144.

⁵⁰ *Id.*

⁵¹ AYALA & BERNABE, *supra* note 47, at 57-58.

⁵² Cabranes, *supra* note 45, at 403-04.

⁵³ AYALA & BERNABE, *supra* note 47, at 58.

However, this offer of citizenship through the Jones Act, was not a full and incorporating gesture; Puerto Ricans gained only *some* of the rights, but many of the obligations of U.S. citizenship, including eligibility for military draft. In *Balzac v. People of Porto Rico*, the last of the Insular cases, the Supreme Court held that Puerto Ricans were not granted full citizenship.⁵⁴ Instead, their status as second-class citizens—who were not entitled to all the rights granted under the Constitution—was cemented by the majority opinion:

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.⁵⁵

In *Balzac*, Jesus M. Balzac, a citizen living in Puerto Rico, claimed that his Sixth Amendment rights had been violated after he was denied a trial by jury on criminal libel charges.⁵⁶ Although a U.S. citizen, Balzac's right to trial by jury was not viewed by the court as an "essential right."⁵⁷ The Court held that the Sixth Amendment right to a trial by jury did not extend to Puerto Rico, and further stated that the Jones Act's grant of citizenship aimed to extend the same level of citizenship enjoyed by residents of the mainland, "should they [Puerto Ricans] desire to move into the United States proper."⁵⁸

The *Balzac* opinion is rather clear in its creation of an uneven dichotomy between citizenship as a resident of Puerto Rico and citizenship within the continental United States. The Court makes this distinction by simply stating that "[i]t is locality that is determinative of the application of the Constitution . . . and not the status of the people who live within it."⁵⁹ It is interesting to note that this doctrine was not applied evenly to all U.S. territories, just those that were deemed to be "unincorporated."⁶⁰ Fifteen years prior, *Rasmussen v. United States* decided

⁵⁴ *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).

⁵⁵ *Id.* at 305.

⁵⁶ *Id.* at 300.

⁵⁷ U.S. CONST. art. VI.

⁵⁸ *Balzac*, 258 U.S. at 311.

⁵⁹ *Id.* at 309.

⁶⁰ Several other Insular cases shed light on the Supreme Court's distinction between the rights afforded to American citizens residing in incorporated territories and unincorporated territories. See *Dorr v. United States*, 195 U.S. 138 (1904) ("Until Congress shall see fit to incorporate territory . . . into the United States, we regard it as settled that the territory is to be governed under the power existing in Congress . . . and subject to such constitutional restrictions as are applicable."). See also *Hawaii v. Mankichi*, 190 U.S. 197 (1903) ("In the absence of congressional action, only those rights that were 'fundamental in nature' would apply."); *Dowdell v. United States*, 221 U.S. 325 (1911) ("In the absence of congressional legislation . . . there is no right to demand trial by jury in criminal cases in the Philippine Islands.").

the question of whether an individual accused of a crime in the territory of Alaska was guaranteed a right to trial by jury as afforded by the Sixth Amendment of the U.S. Constitution.⁶¹ The Court deemed Alaska to be an incorporated territory—both as a result of the treaty ceding Alaska to the United States and because of a Congressional act that extended U.S. customs and commerce law to the territory—and thus the U.S. Constitution applied within Alaskan borders.⁶² The *Balzac* court distinguished *Rassmussen* by noting that although Congress had also enacted legislation that extended political and civil rights as American citizens to Puerto Rico, Alaska did not present the same incorporation issues that Puerto Rico did.⁶³ Specifically, Alaska was “an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens.”⁶⁴

These reasons distinguishing *Balzac* and *Rassmussen* seem to indicate that the only territories worth extending the full rights of the American flag were those where there were no people to assimilate, and which could be made “American” by simply settling Americans from the continental United States. By allowing unincorporated territories to exist, the Supreme Court sent a message that the people residing in annexed territories who became American citizens subsequently were only second-class citizens who did not deserve the full rights enjoyed on the U.S. mainland *unless* they moved to the mainland—where presumably they could be assimilated more easily into mainstream American culture.

II. PUERTO RICAN MILITARY HISTORY

The United States citizens of Puerto Rico have served in every conflict this nation has fought since 1917, and the Island has the second highest rate of military service of any state or territory. It is poignant, to say the least, that Puerto Ricans ‘served with such devotion even while denied a vote for the president and members of Congress who determine when, where and how they are asked to defend our freedoms.’⁶⁵

Puerto Ricans have a very long and decorated history of military service within the United States. The Jones Act, passed in 1917, allowed men residing in Puerto Rico to serve in the armed forces if conscripted.⁶⁶ Very soon after the Act was passed, the United States entered World War I.⁶⁷ Eighteen-thousand Puerto Rican men were inducted and drafted to serve their new country.⁶⁸ Up to 75,000

⁶¹ *Rassmussen v. United States*, 197 U.S. 516 (1905).

⁶² *Id.* at 516.

⁶³ *Balzac v. People of Porto Rico*, 258 U.S. 298, 309 (1922).

⁶⁴ *Id.*

⁶⁵ Luis G. Fortuño, Letter to the Editor, *Puerto Rico's Status*, N.Y. TIMES, May 22, 2008, at 24 (quoting former President George H.W. Bush).

⁶⁶ NOVAS, *supra* note 2, at 145.

⁶⁷ America's Library, U.S. Entered World War I, http://www.americaslibrary.gov/jb/jazz/jb_jazz_wwi_1.html (last visited Feb. 14, 2010).

⁶⁸ Gilberto Villahermosa, *America's Hispanics in America's Wars*, ARMY MAG., Sept. 1, 2002,

men who did not serve in the military itself supported the war effort by working in labor camps on the mainland that serviced U.S. military bases and defense plants.⁶⁹ In 1919, the regiments from Puerto Rico returned to the Island, and were reorganized as the Sixty-Fifth Regiment Unit of Puerto Rico.⁷⁰

Further, throughout the course of World War II, more than 53,000 Puerto Rican men served their country in the war efforts, fighting in Europe, particularly Germany and Central Europe.⁷¹ Women also participated in World War II. They were accepted to work for the Women's Army Corps, particularly due to their ability to overcome the language barrier and translate between English speaking officers and Spanish speaking soldiers. During the course of World War II around 200 Puerto Rican women served.⁷²

The Korean American War is another example of Puerto Ricans' service to the United States military. Throughout the conflict, approximately 60,000 Puerto Ricans fought for the United States.⁷³ The Sixty-Fifth Regiment was well-respected and received numerous commendations, including two Presidential Unit Citations, a Meritorious Unit Commendation, and two Republic of Korea Presidential Unit Citations.⁷⁴ Over 120 Silver Stars and four Distinguished Service Crosses were awarded to individual soldiers.⁷⁵

Puerto Ricans continued to serve during the Vietnam War, the Gulf War and the current war on terror in Afghanistan and Iraq. Indeed, Puerto Ricans have a long history of military involvement, and this tradition continues with recruitment. A look at the number of military recruits from Puerto Rico comparatively shows that the 18-24 age group comprises 1.6% percent of the population.⁷⁶ Of that number, 0.8% were recruited in 1999, and 0.6% were recruited in 2003.⁷⁷ The respective recruit to population ratios were 0.51 and 0.40.⁷⁸ This is a rather

available at <http://www3.ausa.org/webint/DeptArmyMagazine.nsf/byid/CCRN-6CCS5U>.

⁶⁹ Puerto Rican Laborers During World War I: The Deposition of Rafael Marchan, <http://historymatters.gmu.edu/d/5064> (last visited Feb. 14, 2010). On October 24, 1918, Mr. Marchan testified about how 1,700 laborers were brought to the mainland and about the conditions they encountered in the labor camps. It is not clear exactly how many men worked in labor camps on the mainland, but a U.S. Employment bulletin at the time stated that 75,000 Puerto Rican men were available to work in the mainland. *Id.*

⁷⁰ Puerto Rico's Sixty-Fifth Regiment U.S. Army, <http://www.valerosos.com/65thpg1.htm> (last visited Feb. 14, 2010). The regiment was organized by the Reorganization Act of June 4, 1920. *Id.*

⁷¹ William Luna, Department of Defense, *Hispanics in the Defense of America*, <http://www.neta.com/~1stbooks/unit1.htm> (last visited Feb. 14, 2010).

⁷² *Id.*

⁷³ Hispanics in the Defense of America, Hispanic-Americans and the U.S. Military in the Korean War Fact Sheet, <http://www.neta.com/~1stbooks/korea6.htm> (last visited Feb. 14, 2010).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ TIM KANE, CTR. FOR DATA ANALYSIS, WHO BEARS THE BURDEN? DEMOGRAPHIC CHARACTERISTICS OF U.S. MILITARY RECRUITS BEFORE AND AFTER 9/11 14 (2005), http://www.heritage.org/Research/NationalSecurity/upload/95512_1.pdf.

⁷⁷ *Id.*

⁷⁸ *Id.*

significant portion of the population, seeing as the Island is home to only around 3.9 million residents.⁷⁹ Puerto Rico also ranks fifteenth among the states and territories for the number of National Guard and reserve deployments.⁸⁰ Since 9/11, more than ninety percent of Puerto Rico's National Guard has been deployed to Iraq, and many on more than one tour of duty.⁸¹

III. TRICARE

All individuals who serve in the armed forces are eligible for certain benefits, such as health care.⁸² These individuals are entitled to retain their benefits once they retire, and the benefits extend to their families. Puerto Ricans, however are at a disadvantage solely due to their place of residence. Despite Puerto Rico's long standing military tradition and dedicated service in all of the United States' conflicts since 1917, the notion of second-class citizenry is particularly visible regarding military healthcare benefits under the TRICARE HMO program. Individuals who are no longer classified as being on active duty—and their qualifying family members—are unable to receive coverage under TRICARE's full coverage plan because they reside in Puerto Rico.

TRICARE is a Department of Defense funded insurance program that works with the private sector in order to provide healthcare services for the military and their families.⁸³ It functions as an HMO, allowing individuals who are eligible for coverage to seek treatment with civilian doctors, and these doctors in turn bill TRICARE for their services.⁸⁴ There are several programs within the TRICARE umbrella, each governed by categories for eligibility. This Note will specifically explore two types of TRICARE insurance: TRICARE Prime and TRICARE Standard.

TRICARE originally began as a program called Civilian Health and Medical Program for Uniformed Services ("CHAMPUS"). CHAMPUS was enacted in 1966 in response to the fact that at that time, an individual who was unable to get treatment at a military facility had to arrange and pay for his medical treatment in the private sector himself.⁸⁵ CHAMPUS was a fee-for-service program that served active duty members and their dependents, survivors of deceased service members

⁷⁹ CIA World Factbook, Puerto Rico, <https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html> (follow "People" hyperlink) (last visited Feb. 14, 2010).

⁸⁰ Friedman, *supra* note 3.

⁸¹ Julia Bencomo Lobaco, *Battles on the Home Front*, AARP SEGUNDA JUVENTUD, May 2008, available at http://aarpsegundajuventud.org/english/issues/2008-SUM/08sum_battlespuertorico.html.

⁸² Military Health System for Service Members and Families, <http://www.health.mil/MHSFor/ServiceMembersandFamilies.aspx> (last visited Mar. 5, 2010).

⁸³ National Military Family Association, Fact Sheet, http://www.tricare.mil/mybenefit/Download/Forms/Wounded_servicemember12-05.pdf (last visited Feb. 14, 2010).

⁸⁴ *Id.*

⁸⁵ Suzann Chapman, *Sizing up TRICARE*, AIRFORCE MAG., Aug. 1995, <http://www.airforce-magazine.com/MagazineArchive/Pages/1995/August%201995/0895tricare.aspx>.

and retirees and their dependents under the age of sixty-five.⁸⁶ Enrolled individuals did not pay premiums but shared in the cost of coverage.⁸⁷ Within the next two decades, the cost of military care rose substantially, as well as the cost for the CHAMPUS plan within the Department of Defense's annual budget.⁸⁸

TRICARE, which stands for the Triple Option Benefit Plan for military families, replaced CHAMPUS.⁸⁹ At the time of TRICARE's inception in 1994, there were three options available, TRICARE Prime, TRICARE Standard and TRICARE Extra.⁹⁰ TRICARE Prime was the major plan that replaced CHAMPUS. Active duty members and their families, retirees under sixty-five and their families, and survivors of soldiers killed in combat are eligible for enrollment in TRICARE Prime.⁹¹ For active duty members and their families, there is no enrollment fee, no annual deductible and no cost for civilian outpatient visits, civilian inpatient admissions or civilian inpatient mental health.⁹² For retirees under sixty-five, their families, and surviving family members of a deceased soldier⁹³—who reside within the fifty states—the cost is slightly higher but still is the most affordable of all the TRICARE plans. For example, there is an annual enrollment fee of \$230 per individual or \$460 per family, no civilian co-pays or annual deductibles, a cost of no more than \$30 for outpatient civilian mental health emergency care, \$11 a day for civilian inpatient cost share and civilian inpatient skilled nursing facility care, and finally a cost of \$40 a day for civilian inpatient mental health.⁹⁴ Independent of the costs for those enrolled in Prime, each individual is also entitled to guaranteed appointments, a Point of Service (“POS”) option and a primary care manager.⁹⁵ While there are disadvantages, such as limited providers and required referrals to see a specialist,⁹⁶ the full coverage and price is what makes this option the most attractive of all the TRICARE programs.

TRICARE Standard (“Standard”) is a quite different program from Prime. Standard is actually the old CHAMPUS program, packaged with a new name and a

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ TRICARE Management Authority, Frequently Asked Questions: What Does TRICARE stand for?, [http://www.tricare.mil/fraud/index.cfm?fuseaction=FAQ.showAll&FAQGroupID=0&searchWords=\(follow “What does the term TRICARE stand for?”\)](http://www.tricare.mil/fraud/index.cfm?fuseaction=FAQ.showAll&FAQGroupID=0&searchWords=(follow+\).

⁹⁰ Chapman, *supra* note 85.

⁹¹ Military.com Benefits, TRICARE Prime Overview, <http://www.military.com/benefits/tricare/tricare-prime/tricare-prime-overview> (last visited Feb. 14, 2010).

⁹² *Id.* Civilian treatment is that which is not provided by a military treatment facility, but with a private civilian practitioner who accepts TRICARE insurance. *Id.*

⁹³ Surviving family members are switched to TRICARE Prime for retirees three years after the death of the enlisted soldier. See TRICARE Benefits Continue When Military Sponsor Dies, http://www.calguard.ca.gov/j1/Documents/tricare_benefits_continue_when_m.htm (last visited Feb. 14, 2010).

⁹⁴ TRICARE Prime Overview, *supra* note 91.

⁹⁵ *Id.*

⁹⁶ *Id.*

few tweaks.⁹⁷ First, it is not available to active duty members unless they live in an area where TRICARE Prime is not available.⁹⁸ Standard does allow for greater provider choice as opposed to Prime,⁹⁹ but the costs are substantially higher. For example, the patient pays both a deductible of \$150 per individual or \$300 per family, and a co-pay depending on the type of service.¹⁰⁰ Co-pays—labeled “cost shares”—are 25% of allowable charges for outpatient visits, emergency care and mental health visits.¹⁰¹ Additional cost shares for civilian inpatient care total the “lesser of \$512 per day or 25% of billed charges plus 25% of allowed separately billed professional fees,”¹⁰² and for civilian inpatient mental health care, it is the “lesser of \$169 or 25% of billed charges plus 25% of allowed separately billed professional fees.”¹⁰³ If an individual chooses to seek treatment from a non-network civilian doctor, the doctor has the discretion of charging up to 15% more than the TRICARE payment rate, which the beneficiary must then pay in addition to their co-pay.¹⁰⁴ Additionally, if an individual sees a non-TRICARE civilian provider, they will have to file the paperwork themselves in order to receive coverage.¹⁰⁵

TRICARE Standard is touted as the most flexible of the TRICARE plans because it allows the greatest freedom in selecting civilian healthcare providers.¹⁰⁶ For years however, TRICARE Standard beneficiaries have complained about access to providers due to the fact that some providers will not accept TRICARE.¹⁰⁷ One suspected reason for provider reluctance to accept TRICARE is that the provider reimbursement rates are not on par with other insurance plans, and have until recently been below reimbursement levels for Medicare and Medicaid.¹⁰⁸ Any cuts in these reimbursement rates could translate to some doctors refusing to see TRICARE patients.¹⁰⁹

⁹⁷ Chapman, *supra* note 85.

⁹⁸ *Id.*

⁹⁹ Military.com Benefits, TRICARE Standard Overview, <http://www.military.com/benefits/tricare/tricare-standard/tricare-standard-overview> (last visited Feb. 14, 2010).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, TRICARE: CHANGES TO ACCESS POLICIES AND PAYMENT RATES FOR SERVICES PROVIDED BY CIVILIAN OBSTETRICIANS (2007), <http://www.gao.gov/new.items/d07941r.pdf>.

¹⁰⁵ Chapman, *supra* note 85.

¹⁰⁶ Tricare Standard Overview, *supra* note 99.

¹⁰⁷ Statement of Kathleen B. Moakler, Deputy Dir., Gov't Relations, The Nat'l Military Family Ass'n, Before the Subcomm. on Def. of the Senate Appropriations Comm. (May 18, 2005), *available at* http://www.nmfa.org/site/DocServer/20050518_Quality-of-Life_Issues.pdf?docID=2521.

¹⁰⁸ Testimony of Kimberly Ann Stanish, Health Care Comm. Co-Chair, Nat'l Military Veterans Alliance & Benjamin Butler, Nat'l Ass'n for Uniformed Serv., Dir. of Litig., Before the Subcomm. on Total Force, House Armed Serv. Comm. Regarding Def. Health Programs (Mar. 18, 2004), *available at* http://www.globalsecurity.org/military/library/congress/2004_hr/04-03-18butler.htm. *See also* VOICES FOR ACTION, A FOCUS ON THE CHANGING NEEDS OF AMERICA'S VETERANS (2006),

In sum, the principle differences between the TRICARE Prime and TRICARE Standard programs are cost and management. In Prime, there are no deductibles or co-pays for active duty members, and only minimal fees—an annual deductible of \$230 to \$460, no civilian co-pays for outpatient service and fees from \$11 to \$40 per day for select inpatient services—for retired military personnel under the age of sixty-five.¹¹⁰ Standard, on the other hand, with its annual deductible, cost-shares and the possibility of cost markup by non-network civilian doctors, can result in significantly higher healthcare costs.¹¹¹ Additionally, individuals under TRICARE Prime are guaranteed appointments and have a primary care manager who is their point of contact in navigating the insurance system.¹¹² TRICARE Standard has neither of these features, and if an insured under Standard sees a non-TRICARE provider—for example, because they are unable to get appointments with TRICARE providers—they must complete their own paperwork for claims in order to be reimbursed.¹¹³

IV. PUERTO RICANS ARE NOT RECEIVING EQUAL BENEFITS

Although Puerto Ricans are full citizens, they do not receive the same benefits as those who reside on the mainland.¹¹⁴ Once an individual in Puerto Rico is no longer classified as being on active duty—either due to retiring, being wounded and discharged, or killed in combat—the soldier and their surviving family members are no longer eligible for TRICARE Prime.¹¹⁵ Instead, they must switch to TRICARE Standard because they choose to reside in Puerto Rico. If the soldier and his family live within the fifty states, however, they are allowed to keep TRICARE Prime.¹¹⁶ The reason for this seemingly illogical policy is that the Pentagon classifies Puerto Rico as an overseas location.¹¹⁷ The statutory authority for TRICARE makes it clear that Puerto Rico is not considered part of the United

<http://www.veteransnationalsymposium.org/Assets/PDFs/Healthcare1.pdf>. TRICARE reimbursement rates are now tied to Medicare rates by statute. See TRICARE Management Activity, <http://www.tricare.mil/tma/Rates.aspx> (last visited Feb. 5, 2010).

¹⁰⁹ A 21% cut may occur at the end of February 2010 if Congress cannot work out an alternative solution. The Military Officers Association of America estimates that such a cut would result in thousands of doctors who will no longer be able to see their TRICARE and Medicare patients. See Military Officers Association of America, Medicare/TRICARE Cuts Delayed for 60 Days, http://www.moaa.org/lac/lac_issues/lac_issues_update/lac_issues_update_091218.htm (last visited Feb. 14, 2010).

¹¹⁰ TRICARE Prime Overview, *supra* note 91.

¹¹¹ TRICARE Standard Overview, *supra* note 99.

¹¹² TRICARE Prime Overview, *supra* note 91.

¹¹³ TRICARE Standard Overview, *supra* note 99.

¹¹⁴ *Id.*

¹¹⁵ A surviving spouse is eligible to remain on Prime for three years, but then must switch to Standard, while surviving spouses residing within the fifty states are eligible for Prime permanently. See NATIONAL PUERTO RICAN COALITION, INC., 2009 HEALTH CARE DISPARITIES FACT SHEET (2009), www.healthlaw.org/images/stories/healthdisp/PR_Fact-Sheet-Final.pdf.

¹¹⁶ *Id.*

¹¹⁷ Friedman, *supra* note 3.

States. 10 U.S.C. § 1099(a) states that “The Secretary of Defense . . . shall establish a system of health care enrollment for covered beneficiaries who reside in the United States.”¹¹⁸ Furthermore, 32 C.F.R. § 199.17(a)(3) states “The TRICARE program[‘s] . . . geographical applicability is all fifty states and the District of Columbia”¹¹⁹ Although it is uncertain why Congress chose to write the TRICARE statutes to specifically pertain only to the fifty states,¹²⁰ the decision seems to hint at a continued adherence to the dichotomy of domestic versus foreign—later becoming unincorporated vs. incorporated—that was created during the United States’ expansionist period almost 100 years ago.

Since Puerto Rico has not been fully incorporated in the United States either as a state or an “incorporated territory,” Puerto Rico is still under the authority of Congress, which decides what rights or privileges are extended to Puerto Ricans based not on their citizenship, but their location. This distinction of unequal rights does not seem to make any sense in contemporary times, as residents of the Island have been extended many of the rights and privileges that their counterparts on the mainland enjoy. There are 4.1 million Puerto Ricans living in the Continental United States, and there is frequent movement between the two locations given the free right of travel between Puerto Rico and the fifty states. American culture has penetrated the Island for decades and many of the Island’s men serve in the U.S. armed forces. Puerto Ricans should no longer be treated as domestic foreigners, but as equal citizens. A federal statute that denies equal healthcare coverage based on the technical status of Puerto Rico being an unincorporated territory only perpetuates the *Balzac* court’s domestic and foreign dichotomy, as well as the notion of a second-class citizenship.

V. NEGATIVE IMPACT ON PUERTO RICAN FAMILIES

In Puerto Rico, there are currently 22,000 retirees under the age of sixty-five and their families, as well as the survivors of seventy or more servicemen killed in action in Iraq.¹²¹ Aside from the obvious unequal citizenship status that the residents of Puerto Rico have due solely to their choice of residence, the negative implications of this policy extend past the soldiers who risk their lives for their country to the families who support them. When an individual joins the armed forces, there is an unspoken expectation that in exchange for the soldier’s service and commitment, the military will provide and “take care of their own.” Instead, in

¹¹⁸ Health Care Enrollment System, 10 U.S.C. § 1099(a) (2010).

¹¹⁹ TRICARE Program: Scope of the Program, 32 C.F.R. § 199.17(a)(3) (2010) (2007).

¹²⁰ A search of legislative history did not reveal any insight into the reasoning behind this decision.

¹²¹ Friedman, *supra* note 3. This figure breaks down to 14,000 retirees and 8,000 dependents. See Pedro Pierluisi, *Ensuring Fair Treatment for Puerto Rico’s Soldiers and Veterans*, <http://pierluisi.house.gov/NEWS/11-11-09-VETERANS.html> (last visited Feb. 14, 2010). These 14,000 comprise 11% of the 119,000 veterans residing in Puerto Rico. U.S. DEP’T OF VETERAN AFFAIRS, STATE SUMMARY: COMMONWEALTH OF PUERTO RICO (2009) <http://www1.va.gov/opa/fact/StateSum/prss.asp>.

Puerto Rico, it is the retiree or the survivor's family that has to fill in the gaps and take care of themselves in ways that their fellow military families on the mainland may not have to.

As mentioned *supra* in Part V, individuals and their families who reside within the fifty states are eligible to participate in the TRICARE Prime health plan, while individuals and their family members residing in Puerto Rico must enroll in TRICARE Standard once the serviceman is no longer on active duty.¹²² The differences between the two programs result in a significant disparity in the price of healthcare.¹²³ For example, a former soldier with Post-Traumatic Stress Disorder ("PTSD") may require frequent visits with a psychologist, or admittance to the hospital for in-patient mental healthcare. Under Prime, at a rate of \$40.00 per day, a stay of three days in the hospital will cost \$120.00.¹²⁴ A stay under Standard, in contrast, costs the lesser of \$169.00 or 25% of billed charges plus 25% of allowed separately billed professional fees per day. For three days, the costs can reach \$507.00 if the rate of \$169.00 is applied.¹²⁵ This cost does not include any additional separately billed professional fees, which may be added to the cost of services.¹²⁶ Additionally, since individuals under Standard are not guaranteed appointments, they may have to wait several months for an appointment if they wish to see a TRICARE provider.¹²⁷ Otherwise, they must then visit a non-TRICARE provider and file their own claims.¹²⁸ Any confusion over filling out the paperwork correctly could then result in erroneous denials or delays in reimbursement.¹²⁹

For some in Puerto Rico, TRICARE Standard may be a hard pill to swallow, especially as the costs of medical care continue to rise. At present, the economic situation in Puerto Rico is difficult: unemployment is at 15.9%,¹³⁰ minimum wage is \$4.10 per hour¹³¹ and the median family income is \$20,425.¹³² Furthermore,

¹²² Tricare Standard Overview, *supra* note 99.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Bencomo Lobaco, *supra* note 81.

¹²⁸ Tricare Standard Overview, *supra* note 99.

¹²⁹ *See id.*

¹³⁰ The unemployment rate in Puerto Rico for the month of November 2009 was 15.6%. *See* Bureau of Labor Statistics, Local Area Unemployment Statistics – Puerto Rico, <http://data.bls.gov/> (search "Puerto Rico Unemployment;" then follow "Puerto Rico-Bureau of Labor Statistics Data") (last visited Feb. 14, 2010).

¹³¹ The federal minimum wage is \$7.25 as compared with Puerto Rico's minimum wage of \$4.10, as of July 2009. *See* U.S. DEPT. OF LABOR, MINIMUM WAGE LAWS IN THE U.S. (2010), <http://www.dol.gov/esa/minwage/america.htm>.

¹³² The median family income as of 2006 was \$20,425, as compared with the U.S.'s poorest state, Mississippi, with a median family income of \$42,805. *See* Shelley Lowe, *Puerto Rico Has Higher Homeownership, Larger Households*, U.S. CENSUS BUREAU NEWS, Apr. 2, 2008, http://www.census.gov/Press-Release/www/releases/archives/american_community_survey_acs/011755.html.

45.4% of the population lives at or below the poverty line.¹³³ These factors, coupled with the fact that military beneficiaries use health care services almost 50% more than civilians do when they have fee for services health plans,¹³⁴ can put an economic and emotional strain on families, especially those that have lost a source of income from the death or disability of the serviceman or servicewoman.

For families that cannot afford all the costs associated with TRICARE Standard, Medicaid enrollment is an option for a supplemental insurance. This has limitations as a supplemental insurance plan, however. Medicaid is administered differently in Puerto Rico than in the fifty states.

Medicaid, an insurance program for low-income individuals or those with certain disabilities, is subject to a cap on federal aid that is substantially lower than the federal aid given to the fifty states.¹³⁵ In 2005, then Governor of Puerto Rico Anibal Acevedo-Vila sent a letter to the Honorable David Sundquist, the Chairman of the Medicaid Commission in Washington, D.C., requesting that the administration of Medicaid in Puerto Rico be made more equal to that of the fifty states.¹³⁶ At the time, federal Medicaid support to Puerto Rico was capped at \$219 million. Acevedo-Vila reported that the amount of federal Medicaid support for Puerto Rico would have totaled \$1.7 billion per year had no cap been in place.¹³⁷ At a cap of \$219 million, this figure amounted to a little less than \$20 per Medicaid recipient in Puerto Rico.¹³⁸ Currently, almost five years later, the cap is \$250 million per year, and still amounts to about \$20 per recipient.¹³⁹ Clearly, the cap is not growing at a rate equal to the growth Medicaid program. As a result, the eligibility criteria for Medicaid are more restrictive than other states,¹⁴⁰ meaning not all TRICARE beneficiaries may be eligible. The funding limits prevent Puerto Rico from covering thousands of people who would be covered in the States.¹⁴¹ For those people who do qualify for the program, not all mandatory services are covered.¹⁴² Puerto Rico's Medicaid program spends \$1.7 billion a year providing health services to men, women, children, the elderly and the disabled.¹⁴³ Puerto Rico, with 4.5% of the United States' population below the poverty level, has only 2.2% of the nation's Medicaid population and only receives 0.14% of Medicaid

¹³³ *Id.*

¹³⁴ Chapman, *supra* note 85.

¹³⁵ Letter from Anibal Acevedo-Vila, Governor, P.R., to Hon. David Sundquist, Chairman, Medicaid Comm'n, (Aug. 17, 2005), *available at* http://aspe.hhs.gov/medicaid/oct/Puerto_Rico_081705.pdf.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ BARACK OBAMA, IMPROVING HEALTH CARE IN PUERTO RICO (2008), http://obama.3cdn.net/a4d25897d9b8a6f03c_8raimvfo5.pdf.

¹⁴⁰ *Id.*

¹⁴¹ NATIONAL PUERTO RICAN COALITION, *supra* note 115.

¹⁴² *Id.*

¹⁴³ Obama, *supra* note 139.

funding.¹⁴⁴ As a result, there are at least 500,000 Puerto Ricans without insurance or who are underinsured¹⁴⁵ because of the rising costs of healthcare and Puerto Rico's limited budget.

It is unfortunate that military families, who are supposed to be taken care of in exchange for a soldier's service, may have to consider this overburdened and underfunded program in order to meet their insurance needs—should they qualify. What is more, if military families were adequately provided for, there perhaps might be at least a small reduction of the burden on Medicaid in Puerto Rico.

Aside from the discrepancy in cost, there are additional negative effects that flow from the unequal implementation of TRICARE which impacts both soldiers and their families. When a soldier becomes disabled either from wounds sustained in combat or due to mental health conditions, such as PTSD, additional problems result in securing necessary appointments and care. Too few military healthcare facilities on the Island and high numbers of individuals seeking treatment result in overcrowding and long wait times.¹⁴⁶ For example, Puerto Rican veterans tend to suffer from PTSD in higher rates than their Caucasian, non-Puerto Rican counterparts.¹⁴⁷ PTSD in Puerto Rico has at times been reported to cause total disability in up to 22% of the individuals it afflicts.¹⁴⁸ In addition, a 2007 tour of the Veteran Affairs Medical Center by Mr. John Rowan, the president of the Vietnam Veterans' Association, found that there appeared to be very few resources for soldiers suffering from PTSD in Puerto Rico.¹⁴⁹ These conditions are detrimental to families that rely on treatment to rehabilitate a serviceman so that the individual can once more provide a source of income for the family or become a primary caregiver.

In San Juan's Veteran Affairs Medical Center—the only one on the Island—there were 10,565 in-patient admissions and 5528 veterans from the Iraq and Afghanistan wars seeking post-conflict treatment in 2008.¹⁵⁰ Twenty-one thousand, three-hundred-and-thirty-five veterans receive monthly disability compensation from the Department of Veteran Affairs.¹⁵¹ Given the demand for services, there can be wait times of up to three months for medical care

¹⁴⁴ NATIONAL PUERTO RICAN COALITION, *supra* note 115.

¹⁴⁵ Obama, *supra* note 139.

¹⁴⁶ Bencomo Lobaco, *supra* note 81.

¹⁴⁷ *Giusti Bravo v. Dep't of Veteran Affairs*, Civ. No. 87-0590 (D.P.R. Oct. 15, 1993); *Court Approves Class Action Settlement Providing up to \$30 Million in Retroactive VA Benefits to Puerto Rican Veterans*, National Veterans Legal Services Project, 28 CLEARINGHOUSE REV. 38 (1994-1995).

¹⁴⁸ *Id.* at 28.

¹⁴⁹ See JOHN ROWAN, VIETNAM VETERANS ASSOCIATION, REPORT FROM PUERTO RICO: PRIDE, PROBLEMS & PROMISES (2007), available at <http://www.vva.org/testimony/2007/PRreport.pdf>. A 1999 report issued by the Veteran Affairs' Advisory Committee on Minority Veterans also noted that the Veteran Affairs Medical Center lacked sufficient capacity for in-patient Post Traumatic Stress Disorder treatment. *Id.* at 6.

¹⁵⁰ DEP'T OF VETERAN AFFAIRS, STATE SUMMARY – PUERTO RICO (2009), <http://www1.va.gov/opa/fact/StateSum/docs/prss.pdf>.

¹⁵¹ *Id.*

appointments.¹⁵² Those on TRICARE Standard who are not guaranteed appointments may find wait times to be even longer. During the long periods between appointments, soldiers suffering from PTSD, for example, may find themselves unable to work in full or part-time employment. This can reduce household earnings in an area where poverty rates and unemployment are already high.

Additionally, family structures may have to adapt to care for soldiers who need supervision and cannot be left alone in their current mental conditions. Wives—or husbands if they are the civilian spouses—may find themselves caring for their children and husbands or wives, or grandparents may have to become caretakers while wives become the family breadwinner.¹⁵³ In a culture where men are the traditional heads of households, such changes can add strain to marriages, leading to divorce. Indeed, it has been noted that Puerto Rican soldiers have high rates of divorce.¹⁵⁴ The overall divorce rate in Puerto Rico, both civilian and military, has grown from 14,222 in 2003—i.e., the beginning of the war with Iraq—to 18,376 in 2005,¹⁵⁵ and this increase may very well be a result of increased adjustment and mental health issues families face upon the return home of a soldier.

The effects of mandated TRICARE Standard for those individuals who choose to live in Puerto Rico have substantial meaning for those affected. At the very least, a family will have to pay more than their counterparts on the mainland. Coupled with lower wages, high costs of medical care and high rates of unemployment, higher insurance costs can be a substantial economic burden on families. Without guaranteed appointments and long appointment wait times, families suffer from prolonged periods of soldier disability and rehabilitation, which may ultimately lead to divorce and/or the loss of the traditional family structure as parents of soldiers and their spouses have to provide care for the soldier and support the family.

The policy regarding TRICARE Prime should be changed, and healthcare benefits should be equalized for soldiers in Puerto Rico in order to match benefits received within the fifty states. Both types of soldiers are American citizens and provide the same sacrifices for their country. Puerto Rican soldiers should not be treated differently and less equally solely because they choose to reside in Puerto Rico. This distinction between full and partial benefits perpetuates Puerto Ricans' status as second class citizens by sending the message that they only become "equal" Americans when they move away from Puerto Rico to an area where they

¹⁵² See Bencomo Lobaco, *supra* note 81.

¹⁵³ *Id.* Bencomo Lobaco interviews several families who struggled to readjust in the wake of the return of their soldier family member. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

can better assimilate as an American, and punishes those who choose to live on the Island.

VI. GOVERNMENTAL RESPONSES AND COUNTERARGUMENTS

The Department of Defense has the statutory authority to change the regulations that define the scope of TRICARE as pertaining to the fifty states, the District of Columbia *and* Puerto Rico.¹⁵⁶ Pedro Pierluisi, Puerto Rico's Resident Commissioner to Washington, D.C. is Puerto Rico's non-voting delegate to Congress.¹⁵⁷ His predecessor, Luis Fortuño, served in this position from 2005 until 2009.¹⁵⁸ Since 2006, Mr. Fortuño sent three letters to the Department of Defense and the Pentagon asking that the relevant statutes be changed to extend TRICARE Prime to non-active duty members and their families in Puerto Rico.¹⁵⁹ He sent his first letter to Dr. David Chu, the Department of Defense's Undersecretary of Personnel and Readiness. A response from Pentagon official Dr. William Winkenwerder explained that, among various reasons, there are too few military treatment facilities on Puerto Rico, and it would be unfair to extend TRICARE Prime coverage to Puerto Rico while other U.S. territories have lodged similar requests.¹⁶⁰

The reasons given for the Department of Defense's refusal to extend TRICARE Prime in Puerto Rico are weak arguments that do not address a very real problem. Currently in Puerto Rico, there is one Veteran Affairs Medical Center, two outpatient clinics and two community based outpatient clinics¹⁶¹ for 119,000 veterans.¹⁶² The fact that there are too few facilities however, should not be used as a reason for not extending TRICARE Prime. Instead, it only appears to demonstrate a disregard for the health of American servicemen and their families who reside in Puerto Rico. The number of healthcare facilities in a given state or territory should be proportionate to both the number of veterans residing and the number of soldiers being deployed from there. As mentioned *supra* in Part III, Puerto Rico ranks fifteenth amongst the fifty states for reserve and National Guard deployment,¹⁶³ and over 90% of Puerto Rico's National Guard has deployed to

¹⁵⁶ 32 C.F.R. § 199.17(a)(3) (2010).

¹⁵⁷ Pedro Pierluisi, <http://pierluisi.house.gov/> (last visited Jan. 12, 2010).

¹⁵⁸ Luis Fortuño, Former Resident Commissioner of Puerto Rico, <http://www.govtrack.us/congress/person.xpd?id=400662> (last visited Feb. 14, 2010).

¹⁵⁹ Robert Friedman, *Benefits Lower for Island War Widows – Health Benefits for Retirees Under Age 65 Also Less Than in States*, SAN JUAN STAR, July 7, 2008. Two additional letters—one sent in 2007 to Dr. Ward Casscells, Assistant Secretary of Defense for Health Affairs and another sent on August 1, 2008 to Defense Secretary William Gates—have gone unanswered. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ U.S. Dep't of Veteran Affairs, VA Caribbean Healthcare System, <http://www2.va.gov/directory/guide/facility.asp?ID=714> (last visited Mar. 5, 2010).

¹⁶² United States of Department of Veteran Affairs, <http://www1.va.gov/opa/fact/StateSum/prss.asp> (last visited Jan. 26, 2010).

¹⁶³ See Friedman, *supra* note 3. Over 90% of Puerto Rico's National Guard has been deployed to

Iraq and Afghanistan since 9/11.¹⁶⁴ While soldiers in other states can simply travel to a neighboring state if they are unable to receive medical treatment where they reside, Puerto Ricans would have to take planes to the mainland. The cost of a plane ticket and a hotel room is not the price Puerto Ricans should be paying in exchange for their military service. The expansion of healthcare facilities in Puerto Rico should serve a dual purpose, i.e., to treat veterans and to reduce a stated impediment to the extension of TRICARE Prime.

Congress is currently in the process of appropriating \$42 million dollars to Puerto Rico to improve and expand the Veteran Affairs hospital in Puerto Rico,¹⁶⁵ as part of a larger \$300 million authorization to renovate the hospital and expand the outpatient clinic.¹⁶⁶ By Congress appropriating such a large amount of funds to benefit the military healthcare infrastructure in Puerto Rico, the Department of Defense loses strength in its argument that the current infrastructure is inadequate. These improvements and expansions, irrespective of their size, demonstrate that a more adequate infrastructure can be a reality, and not a looming impediment towards expansion of TRICARE Prime in Puerto Rico.

If cost were cited as an obstacle¹⁶⁷ due to the fact that TRICARE is an entitlement and would increase mandatory spending not subject to annual appropriations,¹⁶⁸ the Department of Defense should instead consider the importance of healthcare and access to quality healthcare when compared to other budget allocations. The health of American veterans justifies revised budget allocations or a budget increase given the fact that these men and women, as well as their families, have served their country and deserve to be honored for the sacrifices they have made. Additionally, these mandatory costs might be lower if an adequate health infrastructure were created and maintained within each territory. At minimum, this would reduce the need for costly transportation of soldiers to the mainland for medical care they may currently be unable to receive within their respective territories.

Finally, to give credence to the argument that the Department of Defense is unable to extend TRICARE benefits to Puerto Rico because it is unfair to other territories would mean that no U.S. territory could ever receive healthcare benefits equal to those of the mainland, unless every territory received these benefits at the same time. What results are arguments that preclude change: even if the cost were

Iraq and Afghanistan since 2003.

¹⁶⁴ See Bencomo Lobaco, *supra* note 81.

¹⁶⁵ This includes seismic corrections and the construction of a multi-level parking garage. See Pierluisi, *supra* note 121. See also H.R. 188, 110th Cong. (2007).

¹⁶⁶ Pedro Pierluisi, \$56 Million for Veterans Hospital and National Guard, <http://pierluisi.house.gov/NEWS/07-13-09-VETERANS.html> (last visited Feb. 14, 2010).

¹⁶⁷ Increasing cost to the federal budget has been a concern for the previous administration when faced with requests to expand TRICARE Prime to the territories, albeit this reasoning may not have been raised publicly. Jan. 11, 2010 Email with Matthew Herrmann, Legislative Dir. for Hon. Madeleine Bordallo, Rep., Guam, to author (Jan. 11, 2010) (on file with author).

¹⁶⁸ *Id.*

not prohibitive in a particular territory, TRICARE cannot be extended to all because of “unfairness.” Further, the solution to the unfairness argument—extending coverage to all—runs into concerns over cost and inadequate facilities. What is more unfair is denying healthcare to a group of individuals—and their families—who have dedicated a portion of their lives to protecting the security of the United States, and have paid the price—be it through injury, physical or mental disability, or death. Equal healthcare benefits should be extended to all U.S. territories where U.S. veterans reside.

As opposed to denying the extension of benefits to all, Prime can be extended to territories, individually or in groups, over time based on a hierarchy of need or percentage of soldiers. In order to combat the unfairness argument—which potentially could follow if Prime was rolled out on an individual basis to each territory over time—this process could be started by extending Prime to more than one territory initially, and Puerto Rico and Guam could be the first group. Both are excellent candidates as each sends a disproportionately large number of its residents to the armed forces.¹⁶⁹ Furthermore, Puerto Rico and Guam are U.S. territories—as opposed to some other overseas locations that have also requested TRICARE Prime for its retirees—and are integral parts of the United States, culturally, historically and strategically. Lastly, the healthcare facilities on both islands are receiving large amounts of appropriations for improvements and expansions.¹⁷⁰ The number of soldiers, need for military healthcare, and the territories’ relationships with the United States, in addition to the recently authorized funds for improvements and expansions to the existing healthcare facilities, make Puerto Rico and Guam excellent candidates for the extension of TRICARE Prime.

Puerto Ricans are full American citizens who make valuable contributions to the United States. They deserve to have the same benefits and treatment as their counterparts residing within the fifty states. Furthermore, they are individuals who should not be penalized with second-class citizenship because they choose to reside in Puerto Rico. This problem cannot be remedied until the pertinent statutes are changed; people in Puerto Rico are able to remain on TRICARE Prime; and Puerto

¹⁶⁹ Puerto Rico currently sends a greater percentage of its residents to the U.S. military than any other state with the exception of one. Guam residents also serve in disproportionate numbers. See Email from Eduardo Hilera, Legislative Correspondent to Hon. Pedro Pierluisi, Rep., P.R., to author (Jan. 12, 2010) (on file with author).

¹⁷⁰ Congress is currently appropriating \$42 million dollars to Puerto Rico’s VA facility. See Pierluisi, *supra* note 121. Guam currently has one Naval Hospital and one Community Based Outpatient Clinic. The FY10 National Defense Authorization Act, signed into law on October 28, 2009, authorized \$446 million for a replacement Naval Hospital in Guam in order to better meet the current and future health needs on the Island, particularly in the face of the expected military buildup in the next five years. See Herrmann Email, *supra* note 167. Within the next six years 25,000 U.S. Marines, soldiers, family members, and civilian Defense Department employees will take up residence on Guam, and the current infrastructure is being expanded to handle the upcoming population growth. See Eric Talmadge, *U.S. Plans for Military Buildup Leave Guam Wary*, COMMONDREAMS.ORG, Jan. 4, 2010, <http://www.commondreams.org/headline/2009/01/04>.

Rico is viewed and treated as part of the United States, as opposed to a territory to which full constitutional rights do not extend. With these changes, retirees, widows and their dependents will garner the full freedoms that they are owed. They will have the freedom to settle down or remain in Puerto Rico without having to worry about losing benefits or being unable to afford necessary healthcare.

Resident Commissioner Pierluisi (D-PR) and Congresswoman Bordallo (D-Gu) co-sponsored House Bill 1809 on March 31, 2009 in order to extend TRICARE Prime to both Puerto Rico and Guam.¹⁷¹ The legislation was assigned to the Subcommittee on Military Personnel on April 27, 2009, where it currently remains.¹⁷² On June 26, 2009, the House of Representatives approved House Bill 2647, the National Defense Authorization Act for Fiscal Year 2010.¹⁷³ Section 712 of the bill requires the Office of the Secretary of Defense to submit a report to Congress within 180 days of the bill's passage that examines the feasibility of extending Prime to Puerto Rico and other territories.¹⁷⁴ Only time will tell whether the report will provide a favorable response and ultimately if House Bill 1809 will be passed into law. If not, Mr. Pierluisi and other groups should continue to lobby Congress for change by writing letters, getting the support of other Congressmen, and perhaps re-proposing legislation at a later date.

Ultimately, Puerto Ricans—and all servicemen and women presently in U.S. territories—should receive equal healthcare benefits regardless of whether they reside in a territory. They do not reside in a foreign country, and are U.S. citizens within U.S. borders. They deserve to be treated as first-class citizens.

¹⁷¹ Govtrack.us, H.R. 1809: To Amend Title 10, United States Code, to Expand the Geographical Coverage of TRICARE Prime to Include Puerto Rico and Guam, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1809> (last visited Jan. 22, 2010).

¹⁷² *Id.*

¹⁷³ See Hilera, *supra* note 169.

¹⁷⁴ *Id.*

